

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 07-0604V

Filed: 4 February 2008

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FATMA NESLIHAN KREHER, a/k/a *
NESLIHAN KREHER, legal representative *
of a minor child, NESHE KREHER, *
*
Petitioner, *
*
v. *
*
SECRETARY OF HEALTH *
AND HUMAN SERVICES, *
*
Respondent. *
* * * * *

PUBLISHED DECISION¹

**ORDER GRANTING MOTION TO DISMISS
PURSUANT TO VACCINE RULE 8(d) AND RCFC 12**

Petitioner filed this Petition on 14 August 2007, alleging vaccine-related injuries (Autism, catatonic and/or myoclonic episodes, and flu- or allergy-like symptoms) resulting from a series of administrations of the Hepatitis B, DTaP or DTP, Polio, Hib, varicella, and MMR vaccines between 1 June 1999 and 24 November 2000. *See* Petition at 2-4. On 17 September 2007, the Court convened a status conference, pursuant to Vaccine Rule 4(a), at which Respondent gave notice that the Petition was filed after the statute of limitations had run out in this case. *See* the Court's Order, 18 September 2007. The Court ordered the parties to brief the issue following Respondent's written motion to dismiss for failure to file within statutory limitations period (Respondent's Motion). Respondent filed such Motion on 1 October 2007, and Petitioner did not contest the Motion in the response filed.²

¹ Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of this ruling within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

² Petitioner first filed a motion for voluntary dismissal to obviate the need for a ruling on Respondent's motion, but then, soon thereafter, withdrew that motion, and instead requested the Court to rule on Respondent's motion, so as to

In reviewing this case, the Undersigned Special Master reminds the parties that he “may decide a case on the basis of written filings without an evidentiary hearing.” Vaccine Rule 8(d), first part.³

Two particular subsections of the Vaccine Act control the issue raised by Respondent’s Motion:

In the case of ... a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

42 U.S.C. § 300aa-16(a)(2).⁴

If at any time the Vaccine Injury Table is revised and the effect of such revision is to permit an individual who was not, before such revision, eligible to seek compensation under the Program, or to significantly increase the likelihood of obtaining compensation, such person may ... file a petition for such compensation not later than 2 years after the effective date of the revision, except that no compensation may be provided under the Program with respect to a vaccine-related injury or death covered under the revision of the table if ... the vaccine-related injury occurred more than 8 years before the date of the revision of the table.

§ 16(b).

The essential rule that these statutory provisions set forth can be summated thusly: If a petitioner receives a vaccine that is already on the Vaccine Injury Table,⁵ generally the petitioner must file the petition pertaining thereto before 36 months pass from the date of “onset” or lose the right to file the petition; however, if the petitioner has received a vaccine that is subsequently added to the Table, the petitioner may file the petition pertaining thereto within two years of that addition,

obtain judgment on the Petition. *See* Petitioner’s filings dated 31 October 2007 and 19 November 2007.

³ The first part of Vaccine Rule 8(d) reads:

The special master may decide a case on the basis of written filings without an evidentiary hearing.

The language of the Rule continues as follows:

In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RCFC 56 modified to the needs of the case.

⁴ The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq.* (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

⁵ 42 C.F.R. § 100.3(a), hereinafter referred to as “the Table.”

but may only do so if the vaccine at issue was received eight years or less before that addition.

In this case, the general, 36-month rule applies, inasmuch as all of the vaccines administered to Neshe, as enumerated by the Petition, were added to the Table prior to the administrations of those vaccines to Neshe. See 42 C.F.R. § 100.3(c)(1)-(2). The issue then becomes whether the Petition was filed before 36 months had expired “from the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.” § 16(a)(2).

In ruling on a motion to dismiss based on the Petition and accompanying exhibits (*see* Vaccine Rule 2(e)(1)), brought pursuant to Vaccine Rule 8(d) and RCFC 12 (as with FRCP 12), the deciding court “must accept as true the allegations in the [petition] and must construe such facts in the light most favorable to the nonmoving party.” *Nelson Const. Co. v. United States*, 79 Fed. Cl. 81 (2007), citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir.1988). Therefore, in ruling on this Motion without the taking of evidence, the Court will view the date of onset for this Petition as the latest possible date, so as to construe the facts alleged therein in the light most favorable to Petitioner.

Neshe was diagnosed with “Autistic Disorder and Attention Deficit Hyperactivity Disorder, combined type,” on 15 July 2003 by Amaya Ramos, M.D. *See* Petitioner’s Exhibit (Pet. Ex.) 8 at 4. Even assuming that signs such as speech delays and other indicia of more generalized poor health were or were not signs of autism, a question the Court deliberately defers as unnecessary to the resolution of this case, and instead using the medical diagnosis of Neshe’s condition as the first manifestation of onset, that date of diagnosis was far greater than 36 months previous to the filing of this Petition.

Here, Petitioner filed the Petition on 14 August 2007. On matters such as this, deep contemplation is unnecessary. As the Petition was filed well outside of the statutory limitations period, the Petition is untimely.

Accordingly, there is no reasonable alternative but to **DISMISS** this Petition. In the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 within 30 days of this date, **the clerk shall forthwith enter judgment** in accordance herewith.

IT IS SO ORDERED.

Richard B. Abell
Special Master