

OFFICE OF SPECIAL MASTERS

No. 02-996V

(Filed: July 23, 2003)

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BRANDON HILTON KUEHN, by His	*	
Parents and Natural Guardians, NORMAN	*	
KUEHN and MELISSA KUEHN,	*	
	*	
	*	
Petitioners,	*	
	*	To be Published
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF	*	
HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

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Keith B. Cummiskey, Esq., Houston, Texas, for Petitioner,

Traci R. Manning, Esq., United States Depart of Justice, Washington, D.C., for Respondent.

DISMISSAL ORDER

On 16 August 2002, Petitioners filed a petition for compensation under the National Childhood Vaccine Act of 1986, as amended ("Vaccine Act"). 42 U.S.C. § 300aa-1 et seq. However, the effective date of Petitioners' petition is 15 March 2002.<sup>1</sup> Petitioners allege that Brandon Hilton Kuehn ("Brandon") was injured by a series of thimerosal-containing vaccines covered by the National Vaccine Compensation Program ("Program), such vaccines were

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<sup>1</sup> Prior to filing their Vaccine Act petition, Petitioners, on 15 March 2002, filed in another forum a civil action for damages arising from Brandon's alleged vaccine-related injuries. Stipulation of Fact. In Vaccine Act cases, the Vaccine Act petition shall be "considered filed" for statute of limitations purposes on the date that the underlying civil action was initially filed in its original forum, provided that (1) the civil action was dismissed from its original forum pursuant to 42 U.S.C. § 300aa-11(a)(2)(B); and (2) the Vaccine Act petition was filed within one year of that dismissal. See 42 U.S.C. § 300aa-11(a)(2)(B). Petitioners filed their petition in the underlying forum on 15 March 2002, had it dismissed on 7 May 2002, and filed with this Court on 16 August 2002. Stipulation of Fact. Thus, the filing with this Court was within in the one year of the underlying Court's dismissal.

administered between 21 January 1997 and 24 November 1998.<sup>2</sup> Petitioners' Exhibit ("Pet. Ex.") 2 at 2. The first sign and symptom of onset of Brandon's autism occurred 1 February 1998. Stipulation of Fact. Brandon was diagnosed with autism on 27 July 1998. Pet. at 2.

On 30 October 2002, Respondent moved to dismiss this case stating that the "petition was filed after the expiration of the statutorily prescribed limitation period" as set forth in 42 U.S.C. § 300aa-16(a)(2).<sup>3</sup> Respondent's Motion to Dismiss ("Res. Dis.") at 1. Petitioners answered to Respondent's motion to dismiss by citing alleged constitutional deficiencies in the construction of the Vaccine Act's statute of limitation prescriptions and the strict adherence to such. First, Petitioners argue that a strict application of § 300aa-16(a)(2) would violate Petitioners' due process rights inherent in their protected property right (their cause of action) and that this Court should apply the doctrine of equitable tolling to protect Petitioners' property right. Response to Motion to Dismiss ("Res. Dis.") at 4-11. Secondly, Petitioners state that § 300aa-16(a)(2) violates Petitioners', and other children's alleged vaccine induced autism, equal protection rights. *Id.* at 11. Petitioners make such claim, *inter alia*, due to the insidious nature of the onset of autism compared to the more clear or dramatic onset of other vaccine related injuries. *Id.* at 11-16. Finally, Petitioners argue that the strict interpretation of § 300aa-16(a)(2) is violative of "Petitioner's right to have a jury resolve their state common law claims" as protected by the Seventh Amendment.<sup>4</sup> *Id.* at 16-18.

On 17 April 2003, this Court issued a 240 Day Notice informing Petitioners that they may withdraw their petition pursuant 42 U.S.C. § 300aa-21(b) or may choose to have the petition remain before the court.<sup>5</sup> On 24 April 2003, Respondent objected to this Court's 240 Day Notice stating, *inter alia*, that "[t]he notice should not have been issued because, in the case of a time-barred petition, the action that triggers the running of the 240 day period cannot occur." Respondent's Motion to Retract 240 Day Notice ("Res. Mot. Retract") at 1. Respondent argued that the 240 day period referenced in § 300aa-12(g) begins running the day a petition is filed and, in this case, due to Petitioners filing outside the time limits established by § 300aa-16(a)(2), no petition has been filed. *Id.* In summary, Respondent argues that the Court has no jurisdiction over Petitioners' claim

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<sup>2</sup> Petitioners allege that Brandon "has developed a neural development disorder of an autism spectrum disorder or a similar disorder." Petition ("Pet.") at 1.

<sup>3</sup> "[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) (emphasis added).

<sup>4</sup> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. Const. amend. VII.

<sup>5</sup> If a decision is not issued within that time frame, the special master shall, under 42 U.S.C. § 300aa-12(g)(1): "notify the petitioner under such petition that the petitioner may withdraw the petition under section 300aa-21(b) of this title or the petitioner may choose under section 300aa-21(b) of this title to have the petition remain before the special master or court, as the case may be."

and, thus, the Court's only recourse is to dismiss. *Id.* at 3. In Petitioners' 15 May 2003 response, Petitioners counter, *inter alia*, that the alleged staleness of a claim does not deny a court jurisdiction, Petitioners' Response to Motion to Retract 240 Day Notice ("Pet. Resp. Mot. Retract") at 2, and Petitioners still have the right to withdraw their petition regardless of any notice issued by the Court.<sup>6</sup> *Id.* at 13.

## DISCUSSION

The Court has determined that there are four issues that must be addressed based on the motions and responses filed in this matter. First, whether equitable tolling is applicable to the Vaccine Act's statute of limitation prescriptions. Second, whether this statutorily created Court has within its jurisdiction the authority to resolve Constitutional questions. Third, the Court's authority to issue a 240 Day Notice and Petitioners' right to withdraw regardless of such notice when Petitioners' petition was not timely filed. Finally, the effect of a recent U.S. Court of Federal Claims decision distinguishing between the meaning of § 300aa-16(a)(2)'s "occurrence of the first symptom" and "manifestation of onset" in triggering the ticking of the statute of limitations.

### 1. The Federal Circuit refused to apply equitable tolling to Vaccine Act cases

This Court is bound by the Federal Circuit's decisions. *Setnes v. Sec. of Health and Human Services*, No. 02-791V, slip op. at 5 (Fed. Cl. 2003). In *Brice v. Sec'y of HHS*, 240 F.3d 1367 (Fed. Cir. 2001), the court held that equitable tolling is not available for claims arising under the Vaccine Act. *Id.* at 1370-75. In arriving at its decision, the Federal Circuit determined that "[E]quitable tolling is not consistent with the existing statutory scheme" and intent of the Vaccine Act. *Id.* at 1374. The Federal Circuit started its analysis by stating that a "statute of limitations is a condition on the waiver of sovereign immunity by the United States," and courts should be "careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended." *Id.* at 1370. In determining Congress' intent, the Federal Circuit noted that the Vaccine Act "includes specific exceptions to a limitations period" and that the Federal Circuit "[was] not inclined to create other exceptions not specified by Congress." *Id.* at 1373. Additionally, the Federal Circuit observed that the limitations period set out in the Vaccine Act "is part of a detailed statutory scheme which includes other strict deadlines." *Id.* Further, the Vaccine Act's legislative history greatly emphasizes Congress' intent to have quick resolution to claims. *Id.* The Federal Circuit concluded that to allow equitable tolling would conflict with the detailed statutory scheme and Congress' emphasis on quick resolution. *Id.*

As stated *supra*, this Court is bound by the Federal Circuit's decisions. The Federal Circuit holds that equitable tolling does not apply to the statute of limitation provisions of the Vaccine Act. Thus, this Court must hold accordingly.

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<sup>6</sup> "According to 42 U.S.C. § 300aa-12(b)(1), a petitioner may withdraw his petition if 'a special master fails to make a decision on such petition within the 240 days prescribed by § 300aa-12(d)(3)(A)(ii) of this Title . . . ." Pet. Resp. Mot. Retract at 3.

## **2. This Court Does Not Have the Authority to Resolve Constitutional Questions**

The Vaccine Act confers important jurisdiction over the Office of the Special Masters. Authority conferred upon the special master includes; the authority to issue a decision on a petition as to whether compensation is to be awarded, § 300aa-12(d)(3)(A); conduct a proceeding on a petition, § 300aa-12(d)(3)(B); and, the authority to grant certain suspensions when conducting a proceeding on a petition, § 300aa-12(d)(3)(C). Since the Vaccine Act is the source of the special masters' authority, this Court may not entertain claims outside its statutorily created jurisdictional authority. *See Adams v. U.S.*, 20 Cl. Ct. 132, 140 (1990). As a “creature of statute ... [a]ny and all authority pursuant to which [a special master] may act ultimately must be grounded in an express grant from Congress.” *Patton v. Sec’y of Dept. of Health and Human Services*, 25 F.3d 1021, 1027 (Fed. Cir. 1994) (quoting *Killip v. Office of Pers. Mgmt.*, 991 F.2d 1564, 1569 (Fed. Cir. 1993)). Additionally, the Office of the Special Masters “has no jurisdiction to hear claims based on the due process or equal protection guarantees of the Fifth Amendment, as these Constitutional provisions do not obligate the federal government to pay money damage.” *See Greider v. Sec’y of Dept. of Health and Human Services*, 23 Cl.Ct. 348, 350 (1991); *Carruth v. U.S.*, 224 Cl. Ct. 422, 445 (1980).

As specified *supra*, this Court has authority to act on a petition filed under the auspices of the Vaccine Act. § 300aa-12(d)(3). Because Petitioners have filed their claim outside the strictures of the Vaccine Act’s statute of limitation provisions, in effect, the Court has no petition upon which to act. *See* § 300aa-16(a)(2). Additionally, the Vaccine Act does not provide any textual authority to the special masters to determine the Constitutionality of its provisions. With no textual authority, the undersigned refuses to create any extra textual authority. Finally, as noted above, this Court has no authority to hear due process and equal protection claims in that “these Constitutional provisions do not obligate the federal government to pay damages.” *See Greider*, 23 Cl. Ct. 350.

Before leaving this section of the undersigned’s discussion, the Court would like to address the validity of having this Court address the constitutionality of any provision of the Vaccine Act. In effect, Petitioners are asking the undersigned to rule on the constitutionality of the congressional act that brought this Court into existence. *Arguendo*, if the Court were to rule for Petitioners and find that the statute of limitations provision at issue here is unconstitutional (for whatever reason), the Court may call into question its very existence. In endeavoring to make such a decision, the undersigned could hardly be called detached and disinterested. Thus, this question must be posed in another venue.

## **3. Petitioners Cannot Withdraw Because the 240 Day Period Has not Been Triggered**

As stated above, this Court was created and gets its authority from the Vaccine Act. As such, section 300aa-12 promulgates the jurisdiction of the Court and the functions and authority of the special masters. Such jurisdiction is initiated with the filing of a petition. *See* § 300aa-11(a)(1) (stating that “[a] preceding for compensation under the Program . . . shall be initiated by . . . the filing of a petition.”); § 300aa-12(b)(1) (stating “proceedings brought by the filing of a petition . . .

.”); § 300aa-12(d)(1) (stating that a special master shall be designated “[f]ollowing the . . . filing of a petition.”); § 300aa-12(d)(3)(A) (stating “[a] special master . . . shall issue a decision on [a] petition.”). Section 300aa-16 places a limitation on actions under the Program and specifically states that “*no petition may be filed* for compensation under the Program for [a vaccine-related] injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation . . . of such injury.” § 300aa-16(a)(2) (emphasis added). Thus, when filed outside the thirty six month time frame, the petition must be deemed not filed.

Section 300aa-21(b) allows for a petitioner to withdraw a “petition filed under section 300aa-11 . . . if a special master fails to make a decision on such petition within 240 days.” Here, Petitioners’ petition has not been filed in accordance with § 300aa-11. Brandon was diagnosed with autism on 27 July 1998, almost forty four months prior to the 15 March 2002 effective petition date. Thus, Petitioners filed their petition outside the thirty six month period prescribed in § 300aa-16(a)(2). Accordingly, Petitioners’ petition is not filed in accordance with § 300aa-11 because a successful filing under § 300aa-11 is conditioned upon the petition meeting the statute of limitations requirements as set forth in § 300aa-16. Because a petition has not been filed in accordance with § 300aa-11, the 240 day count has not been triggered and Petitioners’ option to withdraw under § 300aa-21(b) is not available.

#### **4. The U.S. Court of Federal Claims’ Recent Decision Has No Impact on this Case**

In *Setnes v. Sec. of Health and Human Services*, No. 02-791V, slip op.(Fed. Cl. 2003), the U.S. Court of Federal Claims, in a recent appeal of an autism related case, remanded such case based on the interpretation of Congress’s meaning of “manifestation of onset.” In its decision, the court distinguished § 300aa-16(a)(2)’s “occurrence of the first symptom” and “or manifestation of onset,” the statutory markers commencing the ticking of the statute of limitations in vaccine cases. The court held that Congress intended that the “occurrence of the first symptom” and “manifestation of onset” to have separate and distinct meanings. *Id.* at 8-9. The court arrived at its holding, *inter alia*, due to the fact that autism develops “insidiously over time” and that the “first symptom” of autism may be so vague or innocuous that, at the time such symptom occurs, even highly qualified medical personnel could not readily connect it to autism. *Id.* at 9. The court stated that where the first symptom of an injury is not a clear marker of such injury’s onset, the special master must “ascertain when the onset is evident” and must do so by looking at the symptomology contained in the contemporaneous medical records and not by a “retroactive evaluation [using] the benefit of hindsight.” *Id.* at 9. At the point that onset is evident, section 16(a)(2)’s statute of limitations begins to run. The court was careful to state that it did not hold that “manifestation of onset” meant an actual diagnosis, only that from a fair reading of the contemporaneous medical records, onset was evident. *Id.*

Here, Brandon was diagnosed with autism on 27 July 1998. Such diagnosis is a clear indication that onset of his autism was evident well outside the thirty six month period prescribed by § 300aa-16(a)(2).

## **CONCLUSION**

This Court hereby orders the immediate **DISMISSAL** of this case for the reasons contained in this decision. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.

**IT IS SO ORDERED.**

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**Richard B. Abell**  
Special Master