

OFFICE OF SPECIAL MASTERS

No. 02-867V

(Filed: August 7, 2003)

JEFFREY WILLINGHAM and SHARI,	*	
WILLINGHAM, as Legal Guardians for,	*	
ZACHARY WILLINGHAM	*	
	*	
	*	
Petitioners,	*	
	*	To be Published
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF	*	
HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Akim A. Anastopoulos, Esq., Charleston, South Carolina, for Petitioner,
Traci R. Manning, Esq., United States Depart of Justice, Washington, D.C., for Respondent.

DISMISSAL ORDER

On 22 July 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.* Petitioners allege that Zachary Willingham (“Zachary”) was injured by a series of eleven vaccines covered by the National Vaccine Compensation Program (“Program), such vaccines were allegedly administered between 1 August 1995 and 20 November 1996.¹ Petitioners’ Exhibit (“Pet. Ex.”) 2. Zachary was diagnosed with Autism on 3 April 1998. Pet. Ex. 3 at 4 (summary of evaluation by Jacqueline H. Barclay, M.D.).

¹ Petitioners allege that Zachary has “suffered mercury poisoning and neurological injuries, including severe developmental delays within the Autistic spectrum, which were ‘caused-in-fact’ by the vaccines.” Petition (“Pet.”) at 1.

On 12 September 2002, Respondent moved to dismiss this case stating that the “petition was filed over 2 years after the relevant limitations period had expired” as set forth in 42 U.S.C. § 300aa-16(a)(2).² Respondent’s Motion to Dismiss (“Res. Dis.”) at 2. Petitioners answered to Respondent’s motion to dismiss by stating that “[t]he statute of limitations applicable to the actual claim of the injured child . . . should be tolled during the infancy of the child.” Response to Motion to Dismiss (“Res. Dis.”) at 4. Petitioners argued, *inter alia*, that “[i]t is black letter law that any applicable statute of limitations is tolled during a period of disability, and that infancy is such a disability.” *Id.* at 2. Petitioners endeavored to bolster their argument by bringing to the Court’s attention that the statute of limitations applicable to the U.S. Court of Federal Claims includes a provision that expressly provides for tolling due to disability.³ *Id.* Finally, Petitioners concluded that Zachary’s claim for injury is separate and distinct from any claim brought in a representative capacity by his parents and that subsuming Zachary’s independent claim into the claims of his parents would forever ensure that he would not be able to bring a claim for the injuries he has allegedly suffered as a result of his vaccinations. *Id.* at 4,5. Respondent replied that the controlling case on the issuing of tolling in the Vaccine Court, *Brice v. Sec’y of Health and Human Services*, 240 F.3d 1367 (Fed. Cir. 2001), addressed the issue of the disability of infancy and its tolling effects because the *Brice* case involved the claim of parents on behalf of their child and the Federal Circuit held that tolling was not available. Reply to Petitioners’ Memorandum in Opposition to Respondent’s Motion to Dismiss (“Res. Reply”) at 1,2.

On 22 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.⁴ 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

² “[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).

³ “Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. *A petition on the claim of a person under legal disability . . . at the time the claim accrues may be filed within three years after the disability ceases . . .*” 28 U.S.C. § 2501 (emphasis added).

⁴ 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' 9 May 2003 response, Petitioners argue that the 240 Day Notice was properly issued by the Court and put forth the same arguments that they had made in their 26 September 2002 Petitioners' Memorandum in Opposition to Defendant's Motion to Dismiss. Petitioners' Memorandum Opposition to Respondent's Motion to Retract 240 Day Notice.

DISCUSSION

The Court has determined that there are three 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, 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. *see 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. Although Petitioners argue that the Federal Circuit did not address the issues of tolling in conjunction with a disability or that the child's claim is separate and distinct from his parents, this Court finds that it did. The *Brice* case, which, as stated *supra*, is the Federal Court decision that addressed the doctrine of equitable tolling as it applies to the statute of limitations provisions of the Vaccine Act, was filed by the parents on behalf of their child for injuries allegedly resulting from a Measles, Mumps, and Rubella ("MMR") vaccination. *Brice*, 240 F.2d at 1369. Here, as in *Brice*, the parents are filing on behalf of their child. In *Brice*, the Federal Circuit held that equitable tolling did not apply to the statute of

limitation provisions of the Vaccine Act. Thus, this Court must hold accordingly.

2. Petitioners Cannot Withdraw Because the 240 Day Period Has not Been Triggered

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 as 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. Zachary was diagnosed with autism on 3 April 1998, approximately fifty one months prior to the 22 July 2002 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.

3. 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.*

This Court is not bound by the *Setnes* decision. However, *arguendo*, if this Court were to follow the holding, it would still have no option but to dismiss. Here, Zachary was diagnosed with autism on 3 April 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.

Richard B. Abell
Special Master