In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-0383V

Filed: 4 January 2010

CHAD HOWARD and KRISTIN HOWARD, Parents of ASHLEIGH HOWARD, a Minor,	*	
Petitioners,	*	
v.	*	**UNPUBLISHED**
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Joseph L. Bauer , Jr., Esq., Baur & Baebler, P.C., St. Louis, Missouri, for Petitioner;
Voris Johnson, Esq., U.S. Department of Justice, Washington, District of Columbia, for Respondent.

ORDER GRANTING MOTION TO DISMISS AND DECISION[1]

The Court here rules on Respondent's Motion to Dismiss. Following the filing of the Motion were filed: Petitioners' Response in Opposition, Petitioners' fact witness affidavits, Petitioners' Amended Petition, Respondent's Reply in Support, Petitioners' Surreply in Opposition, and Respondent's Surresponsive-Surreply in Support. The Court considers the issue–that of timely filing–to have been given adequate airing on this essentially legal issue.

Petitioners' daughter Ashleigh was born on 5 April 2002, and, according to her parents, was given her first Hepatitis B vaccine the day she was born. Affidavits of Kristin and Chad Howard (Affidavits) at 1. The medical records filed do not record that vaccination among the routine vaccinations given. Petitioners' Exhibit (Pet. Ex.) 23 at 62-63. By July 2003, at 18 months old, Petitioners recount that Ashleigh spoke several words. Affidavits at 2. However, in August 2003,

[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).

after a few days spent apart from her parents, she seemed not to know her parents, walked on her tip-toes, did not make eye contact, stopped talking, ran without ceasing, jumped frequently, and did not follow parental instructions. *Id*. In February 2004, Petitioners noticed a lack of speech development, and slowed social development. *Id*. at 2-3.

In a letter dated 27 February 2004, Ashleigh's mother wrote to primary care physician Dr. Herbert McCowan in concern of Ashleigh's development, noting that Ashleigh did not respond to her own name when called, had lost words from her vocabulary, jumped and flapped her hands, did not make eye contact with others, and seemed removed unto her own "world" often. Pet. Ex. 23 at 17. On 1 March 2004, Petitioners took Ashleigh to Dr. McCowan. Id. at 16. Dr. McCowan noted that Ashleigh had speech and social delays at that time, but explained the symptoms as non-autistic, instead relating the delays to environmental factors and life events, adding, "I see nothing here that looks like autism." *Id*.; Affidavits at 3.

After that visit, Petitioners decided to enroll Ashleigh in a regimen of occupational, speech, and developmental therapy. Affidavits at 4. From that therapy, Petitioners were referred to a neurologist to evaluate Ashleigh, after a therapist's evaluation on 10 May 2004 rated Ashleigh as "Mild-Moderately Autistic." Pet. Ex. 13 at 59. On 20 May 2004, at a hearing and speech evaluation at Children's Mercy Hospital, Ashleigh was noted to have severe deficits in language and verbal skills. At a visit on 16 June 2004, Psychologist Dr. Michael Shanker diagnosed Ashleigh with "Pervasive Developmental Disorder" (which may sometimes share symptoms and be grouped with disorders on the autism spectrum), and ordered testing and assessments to determine if Ashleigh qualified for a diagnosis of autism. Affidavits at 4.

Petitioners also amended their Petition additionally to allege that Respondent did not make "reasonable efforts" to inform the public about the existence and availability of the Program, and that such lack allowed Petitioners to be unaware of the Program.

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.[2]

Two particular subsections of the Vaccine Act control the issue of timely filing:

> 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

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[2] 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.

> occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.
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> 42 U.S.C. § 300aa-16(a)(2).[3]
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> 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,[4] generally the petitioner must file the petition pertaining thereto before 36 months pass from the date of "onset" of the injury alleged, 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, but may only do so if the vaccine at issue was received eight years or less before that addition.

In this case, the relevant statute of limitation is 16(a)(2). The Hepatitis B vaccine was added to the vaccine table in 1997. Following 16(a)(2), the question is 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." Petitioners would have had three years from onset of injury symptoms to file, which means any onset of injury having occurred prior to 15 June 2004 would render the Petition untimely under that provision.

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 (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 Petitioners.

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[3] 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.

[4] 42 C.F.R. § 100.3(a), hereinafter referred to as "the Table."

Respondent's motion and briefs in support argue essentially that the autistic or autistic-like symptoms noted by Petitioners in Ashleigh, recorded in the medical records and recapitulated by Petitioners' affidavits, constituted a clear symptomalogical manifestation of onset, and, regardless of the exact moment of onset, it was indubitably prior to 15 June 2004. Respondent argues that the onset is an objective event, and is not mutable, depending upon the knowledge or subjective notice of Petitioners or others, even medical professionals.

Petitioners' opposition argues that the *manifestation* of onset, at least for purposes of determining timely filing, only occurred at the date of diagnosis of pervasive developmental delay, and the prognosis of autism, by a psychologist. Petitioners' argument is moored in the non-mandatory[5] authority of *Setnes v. Sec'y of HHS*, 57 Fed. Cl. 175 (2003). Petitioners argue that, following *Setnes*, "cases of autism should be reviewed under the 'manifestation of onset prong" within section 16(a)(2). Petitioners' Surreply in Opposition at 4.

Petitioners argue that "Ashleigh's first symptom occurred after the visit" to Dr. McCowan in February 2004 when he said Ashleigh was not autistic. Petitioners' Surreply in Opposition at 6. Going even further, Petitioners aver the dubious statement that "at its absolute earliest, the 'manifestation of onset' occurred on June 16, 2004 and likely occurred much later" without justifying such a far-fetched assertion from the record. Petitioners' Response in Opposition at 7. Elsewhere, Petitioners concede that by at least the diagnosis date of 16 June 2004 Ashleigh's autism had manifested. Petitioners' Surreply in Opposition at 7. Yet, for Petitioners to prevail on this issue of timeliness, onset of autistic symptoms had to have occurred no more than 24 hours before they were diagnosed, which strains credulity in light of the medical record, and Petitioners' own recorded recollections.

From the facts in the medical records filed with the Petition, and as conceded by Petitioners' Affidavits, it is clear that not one, but several tell-tale autistic symptoms were noted by both Petitioners and treating physicians, including loss of vocabulary and other milestones, walking on tip-toes, loss of eye-contact with others, and hand-flapping. Autistic symptoms, even if not yet medically diagnosed, were noted in Ashleigh in early May 2004, when Ashleigh was described as "Mild-Moderately Autistic." Pet. Ex. 13 at 59. Even if this was not a medical diagnosis or was a disputed diagnosis, it illustrates the point that Ashleigh plainly exhibited symptoms of autism at that time, and thus that the onset of autistic symptoms had preceded that point. This was certainly prior to 15 June 2004, and makes plain to the Court that the Petition was filed more than 36 months following the onset of symptoms of the injury for which the Petition claims entitlement to compensation.

Reading separate, elemental prongs into section 16(a)(2) abuses the plain disjunctive wording of that statutory language, and was firmly dispelled by *Markovich v. Sec'y of HHS*, 477 F. 3d 1353, 1360 (Fed. Cir. 2007). Petitioners' argument to that effect is unpersuasive and runs contrary to a plain reading of an unambiguous statutory provision.

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[5] "Special masters are neither bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on remand." *Hanlon v. Sec'y of HHS*, 40 Fed. Cl. 625, 630 (1998).

Any failure of Respondent to give notice to the public does not defeat the operation of the statutes of limitation for vaccine injury claims, and, if there is a legal remedy for such alleged failure, such a failure is certainly not actionable in the narrow jurisdictional vein of the Vaccine Program. *See* § 12. Accordingly, neither is authority given by the Vaccine Act to permit discovery for such an ancillary claim. General arguments alluding to "fundamental fairness" do not grant subject matter jurisdiction to the Court to provide such a remedy. Therefore, Petitioners' argument that they should be allowed to pursue discovery of Respondent's efforts to give notice of the Program is **DENIED**.

In any event, the Court **RULES** that the Petition may not proceed further because it is patently untimely, and shall be **DISMISSED**.[6] Respondent's Motion to Dismiss is **GRANTED**.

Therefore, 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.

s/ Richard B. Abell
Richard B. Abell
Special Master

[6] The Court reminds Petitioner of Respondent's position that a lack of timely filing is a jurisdictional defect, and takes the opportunity to restate the clear decisional law that attorneys' fees may only be recovered where the Court held jurisdiction over the underlying petition. *See Brice v. Secretary of HHS*, 358 F.3d 865, 869 (Fed. Cir. 2004). Also, recovery of attorneys' fees and costs in cases that do not prevail on entitlement is contingent upon a factual showing that the petition was filed upon an objective reasonable basis with good faith. § 15(e)(1).