

**In the United States Court of Federal Claims**

**OFFICE OF SPECIAL MASTERS**

**No.05-480V**

**Filed: December 21, 2011**

**LILY CHAU, parent of DARIAN CHAU,  
a minor,**

**Petitioner,**

**v.**

**SECRETARY OF HEALTH AND  
HUMAN SERVICES**

**Respondent.**

UNPUBLISHED DECISION

Autism; Failure to Prosecute; Untimely  
Filed;  
Failure to Follow Court  
Orders; Dismissal

**DECISION**<sup>1</sup>

On April 18, 2005, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program [“the Program”],<sup>2</sup> on behalf of Darian. In effect, the petition alleges that various vaccinations injured Darian.

On November 22, 2009, respondent moved to dismiss this claim based on the Vaccine Act’s statute of limitations, 42 U.S.C. § 300aa-16(a)(2). The undersigned deferred any action on the motion to dismiss, pending appellate review of several cases interpreting the statute of limitations. In the interim, the undersigned ordered petitioner

<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

<sup>2</sup> National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

to indicate whether she intended to continue to pursue her claim. On October 21, 2010, petitioner filed a response indicating that she wished for her claim to remain in the Program.

On October 25, 2011, petitioner was directed to address respondent's motion to dismiss in light of an en banc decision from the Federal Circuit interpreting the Vaccine Act's statute of limitations. Cloer v. Sec'y, HHS, 654 F.3d 1322 (Fed. Cir. 2011). This decision reiterates that the "statute of limitations begins to run on a specific statutory date: the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury recognized as such by the medical profession at large." See id. at 1335. The Cloer decision pronounces binding law.

Based on the records filed to date, the petition in this case should have been filed no later than September 15, 2003. Petitioner was put on notice that a failure to respond to the October 25, 2011 order would be interpreted as either a failure to prosecute this claim or as an inability to provide supporting documents for this claim. Oct. 25, 2011 Order at 2.

#### I. The Omnibus Autism Proceeding

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as "autism" or "autism spectrum disorders" ["ASD"] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP, was set forth in the six entitlement decisions issued by three special masters as "test cases" for two theories of causation litigated in the OAP and will not be repeated here.<sup>3</sup>

Ultimately, the Petitioners' Steering Committee ["PSC"], an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of ASDs. The first theory alleged that the measles portion of the measles, mumps, rubella vaccine could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The

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<sup>3</sup> The Theory 1 cases are Cedillo v. Sec'y, HHS, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Hazlehurst v. Sec'y, HHS, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Snyder v. Sec'y, HHS, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are Dwyer v. Sec'y, HHS, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); King v. Sec'y, HHS, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); Mead v. Sec'y, HHS, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant's brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional test cases during several weeks of trial in 2008.

Decisions in each of the three test cases pertaining to the PSC's first theory rejected the petitioners' causation theories. Cedillo, 2009 WL 331968, aff'd, 89 Fed. Cl. 158 (2009), aff'd, 617 F.3d 1328 (Fed. Cir. 2010); Hazlehurst, 2009 WL 332306, aff'd, 88 Fed. Cl. 473 (2009), aff'd, 604 F.3d 1343 (2010); Snyder, 2009 WL 332044, aff'd, 88 Fed. Cl. 706 (2009).<sup>4</sup> Decisions in each of the three "test cases" pertaining to the PSC's second theory also rejected the petitioners' causation theories, and petitioners in each of the three cases chose not to appeal. Dwyer, 2010 WL 892250; King, 2010 WL 892296; Mead, 2010 WL 892248. Thus, the proceedings in these six test cases are concluded. Petitioners remaining in the OAP must now decide whether to pursue their cases, and submit new evidence on causation, or take other action to exit the Program. Petitioner in this case has failed to rebut respondent's claim that this case was filed outside the statute of limitations and has also failed to respond to a court order. Moreover, a review of the medical records filed to date for Darian do not support a finding of entitlement to Program Compensation.

## II. Untimely Filing

The Vaccine Act prohibits the filing of a petition for compensation for an alleged vaccine related injury which occurred more than "36 months after the date of the occurrence of the first symptom or manifestation of onset ... of such injury." §16(a)(2) [emphasis added]. The Court of Appeals for the Federal Circuit in Cloer affirmed the earlier determination in the Markovich<sup>5</sup> case that the "statute of limitations in the Vaccine Act begins to run on the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury for which compensation is sought, and the symptom or manifestation of onset must be recognized as such by the medical profession at large." Cloer at 1335. The term "vaccine-related injury" is defined as an "injury which the petitioner avers is caused by the vaccine." Id. at 1334.

The appellate court in Cloer made clear that the "Vaccine Act does not itself contain a discovery rule" and that a "discovery rule cannot be read by implication into the

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<sup>4</sup> Petitioners in Snyder did not appeal the decision of the United States Court of Federal Claims.

<sup>5</sup> Markovich v. Secretary of Health and Human Services, 477 F.3d 1353 (Fed. Cir. 2007)

Vaccine Act's statute of limitations." Id. at 1337. This means that the first symptom or manifestation of onset is "a statutory date that does not depend on when a petitioner knew or reasonably should have known anything adverse about her condition." Id. at 1339.

Petitioner claims that Darian's autism is the "vaccine-related injury." This means that petitioner had to file her claim on her son's behalf 36 months after the first symptom or manifestation of autism displayed by Darian. This first symptom or manifestation is an objectively recognizable event that the medical profession at large must see as being indicative of autism. Id. at 1335. It does not matter that at the time of this first symptom or manifestation, petitioner did not know that the symptom was indicative of autism.

Petitioner filed her petition for Darian on December 15, 2005, which means that for the petition to be timely, the case should have been filed no later than September 15, 2003. Respondent, in asserting that petitioners' filing was untimely, points to the medical records from September 15, 2000, the date which it appears Darian was first assessed by a speech pathologist for his language development. P's Ex. 2 at 4. The pathologist assessed Darian with severe delays in auditory comprehension and expressive communication. Id. at 6.<sup>6</sup> At that time, Darian was four years and seven months old.<sup>7</sup>

Respondent on November 17, 2011 filed a Submission of Evidence (R's Ev.), demonstrating that speech delay is considered a symptom or manifestation of autism by the medical profession at large even if by itself it is not enough for a diagnosis of autism. R's Ev. A at 1-2, B at 1-2, C at 1264A-1266A, D at 1590 and E at 3251. Under Cloer, it is not necessary for the symptom or manifestation of autism to be severe enough that it leads to a diagnosis of autism. Cloer at 1339. The symptom or manifestation must simply be the first. Petitioners have failed to file any evidence or refute respondent's claim.

Darian was diagnosed with autistic disorder on July 27, 2001. P's Ex. 3 at 7-11. Therefore, his earlier speech delay appears to have been a symptom of his autism. Petitioner has failed to file any evidence to the contrary. Thus, the note of severe delays in auditory comprehension and expressive communication in the September 15, 2000 medical record is enough to start the clock running on the Vaccine Act's statute of limitations.

Under the relevant statutory limitations period, this petition was required to be

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<sup>6</sup> The undersigned notes that petitioner has not filed many of the records required by Section 11(c)(2) of the Vaccine Act and the Order dated January 15, 2009.

<sup>7</sup> Darian was born on February 22, 1996. P's Ex. 1.

filed prior to the expiration of thirty-six months after the first symptom or manifestation of onset of Darian's alleged vaccine injury. 42 U.S.C. § 300aa-16(a)(2). Based on the records filed to date, the petition in this case should have been filed no later than September 15, 2003. However, this petition was not filed until April 18, 2005, nineteen months after the relevant limitations period had expired.

The Court of Appeals held in Cloer that equitable tolling of the Vaccine Act's statute of limitations is permitted. Cloer at 1340. However, the court made it clear that equitable tolling is to be used "sparingly" and shall not be applied simply because the application of the statute of limitations would otherwise deprive a petitioner from bringing a claim. Id. at 1345. It should be applied only in "extraordinary circumstance[s]," such as when a petitioner timely filed a procedurally defective pleading, or was the victim of fraud, or duress. Id. Since none of these "extraordinary circumstances" apply in the present case, equitable tolling is not available.

### III. Failure to Prosecute

It is petitioner's duty in a proceeding to respond to court orders. Failure to follow court orders, as well as failure to file medical records or an expert medical opinion, may result in dismissal of petitioner's claim. Tsekouras v. Sec'y, HHS, 26 Cl. Ct. 439 (1992), aff'd per curiam, 991 F.2d 810 (Fed. Cir. 1993); Sapharas v. Sec'y, HHS, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b). Here, petitioner has failed to respond to the court's order issued on October 25, 2011, directing the parties to address the impact of the Cloer decision on this case. Petitioner's responsive filing was due to be filed on or before November 21, 2011. To date, petitioner has not responded.

### IV. Causation In Fact

To receive compensation under the Vaccine Program, petitioner must prove either 1) that Darian suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) that Darian suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). Under the Vaccine Act, a special master cannot find a petitioner has proven her case by a preponderance of the evidence based upon "the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." 42 U.S.C. § 300aa-13(a) (2006). Petitioner has failed to file sufficient evidence in this case. An examination of the record does not uncover any evidence that Darian suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Darian's autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioner has failed to

demonstrate either that Darian suffered a “Table Injury” or that his injuries were “actually caused” by a vaccination. In addition, the evidence that does exist in the record indicates that that this case was untimely filed. **This case is dismissed for untimely filing, insufficient proof, and for failure to prosecute. The clerk shall enter judgment accordingly.**<sup>8</sup>

**IT IS SO ORDERED.**

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Patricia E. Campbell-Smith  
Chief Special Master

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<sup>8</sup> This document constitutes my final “Decision” in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). If petitioner wishes to have this case reviewed by a Judge of the United States Court of Federal Claims, a motion for review of this decision must be filed within 30 days. After 30 days the Clerk of this Court shall enter judgment in accord with this decision. If petitioner wishes to preserve whatever right petitioner may have to file a civil suit (that is a law suit in another court) petitioner must file an "election to reject judgment in this case and file a civil action" within 90 days of the filing of the judgment. 42 U.S.C. § 300aa-21(a).