

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 04-0567V

Filed: March 4, 2013

\*\*\*\*\*

SUSAN FOX and RONALD FOX, \*  
Individually and as Next Friends of \*  
JOSHUA PETER FOX, a minor \*

Petitioners, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

Autism; Statute of Limitations;  
Untimely Filed

### DECISION<sup>1</sup>

On April 5, 2004, petitioners, on behalf of their son, Joshua Peter Fox (“Joshua”), filed a claim for compensation pursuant to the National Vaccine Injury Compensation Program (“Vaccine Program” or “the Program”).<sup>2</sup>

---

<sup>1</sup> Because this decision contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends 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, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. Id.

<sup>2</sup> The National Vaccine Injury Compensation Program (“Vaccine Program” or “the Program”) is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. § 300aa-10 et seq.

Petitioners have the burden to demonstrate that their case was properly and timely filed under the Vaccine Act's statute of limitations. § 16(a)(2). Based on the undersigned's analysis of the evidence, petitioners have not met their burden, and thus **this case is dismissed as untimely filed.**

### I. Procedural History.

Petitioners filed the Short-Form Petition authorized by Autism General Order #1,<sup>3</sup> thereby joining the Omnibus Autism Proceeding ("OAP").<sup>4</sup> Like most other cases in the OAP, the case remained on hold while causation hearings in the test cases were held and entitlement decisions were issued.<sup>5</sup>

---

(2006) ("Vaccine Act" or "the Act"). All citations in this Decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

<sup>3</sup> Autism General Order #1 adopted the Master Autism Petition for Vaccine Compensation for use by petitioners filing claims intended to be part of the OAP. By electing to file a Short-Form Autism Petition for Vaccine Compensation petitioners alleged that:

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the "thimerosal" ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B(HIB) vaccinations; or by some combination of the two . . . .

Autism General Order # 1 filed July 3, 2002, Exhibit A, Master Autism Petition for Vaccine Compensation at 2.

<sup>4</sup> A detailed discussion of the OAP can be found at Dwyer v. Sec'y of Health & Human Servs., No. 03-1202V, 2010 WL 892250, at \*3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

<sup>5</sup> The Theory 1 cases are Cedillo v. Sec'y of Health & Human Servs., No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 89 Fed. Cl. 158 (2009), aff'd, 617 F.3d 1328 (Fed. Cir. 2010); Hazlehurst v. Sec'y of Health & Human Servs., No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 88 Fed. Cl. 473 (2009), aff'd, 604 F.3d 1343 (Fed. Cir. 2010); Snyder v. Sec'y of Health & Human Servs., No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 88 Fed. Cl. 706 (2009). Petitioners in Snyder did not appeal the decision of the U.S. Court of Federal Claims. The Theory 2 cases are Dwyer v. Sec'y of Health & Human Servs., No.

During the period between the test case hearings and the final appellate action on the test case decisions, the undersigned ordered petitioners, like others in the OAP, to file the medical records necessary to establish that the claim was timely filed. Order, filed May 15, 2009, at 1, 5. The undersigned ordered respondent to file a statement, subsequent to petitioners' filing, indicating if she believed petitioners' claim to be timely filed. Id. at 5-6.

Petitioners filed the required records on August 11, 2009. Petitioners' Exhibits ("Pet'rs' Exs.") 1-7. On August 21, 2009, respondent filed a motion to dismiss, asserting that petitioners' claim was filed more than three and one-half years after the Vaccine Act's statute of limitations expired. Motion at 1; see also § 16(a)(2) (Vaccine Act's statute of limitations). Petitioners filed their response on September 8, 2009, arguing that "equitable tolling principles" should apply to their claim. Response at 5.

After the final test case appeal was decided, the undersigned ordered petitioners to inform the court if they wished to pursue their claim. Order, filed Nov. 8, 2012, at 2-3. If petitioners intended to proceed with their claim they were ordered to file an amended petition. Id. at 3.

On December 7, 2012, petitioners filed their amended petition, alleging that Joshua suffered brain injury caused by the vaccines he received on March 1, 1996. Amended Petition at 1. Additionally, petitioners maintain that their claim was timely filed. Id. In the alternative, they contend that equitable tolling should apply since petitioners "did not and could not have known of [the] factual basis" of their claim. Id.

Because petitioners had not addressed the United States Court of Appeals for the Federal Circuit's ("Federal Circuit's" or "Circuit's") decision in Cloer,<sup>6</sup> the undersigned discussed that decision and afforded petitioners a final chance to show cause why their claim should not be dismissed as untimely filed. Order to Show Cause, filed Jan. 30, 2013, at 3-4. Petitioners filed their response on March 1, 2013.

Petitioners correctly assert that "[i]n Cloer, . . . the Federal Circuit overruled Brice and held that equitable tolling of the Vaccine Act's Statute of Limitations is permitted." Response at 3 (referencing Cloer, 654 F.3d. at 1340 and Brice v. Sec'y of Health & Human Servs., 240 F.3d 1367 (Fed. Cir. 2001)). Yet, petitioners failed to discuss any circumstances which would warrant the application of equitable tolling in their case.

---

03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); King v. Sec'y of Health & Human Servs., No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); Mead v. Sec'y of Health & Human Servs., No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The petitioners in each of the three Theory 2 cases chose not to appeal.

<sup>6</sup> Cloer v. Sec'y of Health & Human Servs., 654 F.3d 1322 (Fed. Cir. 2011).

## II. Statute of Limitations.

The Vaccine Act provides that:

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 . . . .

§ 16(a)(2) (emphasis added). In Cloer, the Federal Circuit affirmed that the statute of limitations begins to run on “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.” 654 F.3d at 1325. The Circuit explained that this date 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. The date is dependent on when the first sign or symptom of injury appears, not when a petitioner discovers a causal relationship between the vaccine and the injury. Id.

Although the Federal Circuit held that the doctrine of equitable tolling applies to Vaccine Act claims, the Circuit explained that it is only available in “extraordinary circumstances,” such as when a petitioner is the victim of fraud or duress. Id. at 1344-45 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). In the Cloer case, the Circuit declined to apply equitable tolling because the petitioner did not know of a causal link between her injury and vaccination until 2004. 654 F.3d at 1344-45. The Circuit specifically held “that equitable tolling under the Vaccine Act due to unawareness of a causal link between an injury and administration of a vaccine is unavailable.” Id. at 1345.

## III. Analysis.

Respondent notes that Joshua was diagnosed with autism on July 5, 2000, but argues that his first symptom or manifestation of autism “occurred much earlier.” Motion to Dismiss, filed Aug. 21, 2009, at 3 (citing Pet’rs’ Ex. 3(b) at 10). Even using the date of diagnosis, to be timely filed, petitioners must have filed their claim by July 5, 2003. Instead, petitioners filed their claim nine months later on April 5, 2004.

Petitioners, themselves, indicate that Joshua was showing symptoms of autism “at his 9-month check-up on October 15, 1996.” Amended Petition, filed Dec. 7, 2012, at 2 (citing Pet’rs’ Ex. 1 at 150). Using that date as the date of Joshua’s first symptom,

petitioners were required to file their claim by October 15, 1999. According to the facts as presented by petitioners, their claim was filed more than four and one-half years after the expiration of the Vaccine Act's statute of limitations. It is clear that the petition in this case was not filed within thirty six months of the first symptom or manifestation of Joshua's injury.

Petitioners have consistently argued that the doctrine of equitable tolling should apply to Vaccine Act claims. See, e.g., Response, filed Sept. 9, 2008, at 5. As discussed, petitioners are correct. Cloer, 654 F.3d at 1344; see also supra Parts I and II. However, petitioners have failed to show why the doctrine of equitable tolling should apply in their particular case.

In their amended petition, petitioners argued that equitable tolling is applicable because they "did not and could not have known of [the] factual basis" of their claim. Amended Petition at 1. As previously noted, the Federal Circuit in Cloer, specifically held that a lack of knowledge concerning a causal link between an injury and vaccination does not warrant the application of equitable tolling. Cloer, 654 F.3d at 1345; see also supra at Part II. Petitioners have not presented any other arguments that would support the application of equitable tolling to this claim, and the undersigned's examination of the record does not disclose any basis for applying equitable tolling to this case.

#### **IV. Conclusion.**

Petitioners have the burden to show timely filing. Petitioners have failed to do so. There is preponderant evidence that this case was not filed within "36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury" as required by the Vaccine Act. § 16(a)(2). Petitioners have not demonstrated any extraordinary circumstances warranting equitable tolling. **Therefore, this claim is dismissed as untimely filed under the Vaccine Act's statute of limitations. §16(a)(2). The clerk is directed to enter judgment accordingly.**

**IT IS SO ORDERED.**

s/Patricia E. Campbell-Smith  
Patricia E. Campbell-Smith  
Chief Special Master