

injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

By Order dated July 3, 2012, petitioner was ordered to file Eric's medical records on or before September 24, 2012, in support of his claim. Order at 4. Petitioners failed to respond to that Order.

An order to show cause issued on October 3, 2012, wherein petitioner was advised that the failure to file a timely response would be interpreted as either a failure to prosecute his claim or as an inability to provide supporting documentation. In either event, a failure to respond would lead to the dismissal of petitioner's claim. Order to Show Cause at 1. In that same order, petitioner was ordered to inform the court whether he intended to proceed with this case or otherwise show cause, within thirty days, why this case should not be dismissed for failure to prosecute. Petitioner filed a response to the show cause order on November 5, 2012. Along with his response petitioner also filed medical records for Eric.³

Based on the medical records filed by petitioner, respondent filed a motion to dismiss on December 3, 2012, claiming that petitioner's case was untimely filed. Motion to Dismiss at 1. The undersigned did not provide a specific date by which petitioner had to respond to respondent's motion to dismiss, therefore, under Vaccine Rule 20(b)(1), petitioner was to file a response within fourteen days after the service of respondent's motion. Petitioner did not respond.

I. The Omnibus Autism Proceeding

Because petitioner has alleged that his son's autism was caused by certain administered vaccines, this claim appropriately would have been included in the Omnibus Autism Program ["OAP"]. The OAP consisted 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

seq. (hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

³ Petitioner submitted approximately 275 pages of records with no clear pagination scheme. Since respondent's counsel, in his motion to dismiss, cited to these documents by the page numbers automatically assigned these documents by the CM/ECF system, the undersigned will do the same for the purposes of uniformity.

not be repeated here.⁴

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 second theory alleged that the mercury content in thimerosal-containing vaccines could directly affect an infant's brain and thereby, substantially contribute to the development of an 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 (Fed. Cir. 2010); Snyder, 2009 WL 332044, aff'd, 88 Fed. Cl. 706 (2009).⁵ 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. By failing to respond to respondent's motion for dismissal petitioner in this case has failed to adequately pursue his claim.

II. Failure to Prosecute

It is petitioners' duty to comply with the Vaccine Rules and to respond to court orders. Failure to do either will be deemed noncompliance and noncompliance cannot

⁴ 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); Hazlehurst v. Sec'y of Health & Human Servs., No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Snyder v. Sec'y of Health & Human Servs., No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are Dwyer v. Sec'y of Health & Human Servs., No. 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).

⁵ Petitioners in Snyder did not appeal the decision of the U.S. Court of Federal Claims.

stand. As the undersigned reminded petitioner in her October 3, 2012 order, failure to respond in a timely manner, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioner's claim. Tsekouras v. Sec'y of Health & Human Servs., 26 Cl. Ct. 439 (1992), aff'd per curiam, 991 F.2d 810 (Fed. Cir. 1993); Sapharas v. Sec'y, of Health & Human Servs., 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b).

III. Causation In Fact

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

IV. Untimeliness of Filing

In his motion to dismiss, respondent's counsel argues that petitioner's claim was untimely filed under the Vaccine Act's statute of limitations. Motion to Dismiss at 1. Based on a careful review of the medical records in this case, the undersigned concurs with respondent's position.

The Vaccine Act provides that:

[for] 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 v. Secretary of Health & Human Services, 654 F.3d 1322 (Fed. Cir. 2011), the Court of Appeals for 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. As binding case law, the Cloer decision emphasized that the timing of the first symptom or manifestation of onset “does not depend on when petitioner knew or reasonably should have known anything adverse about her condition.” Id. at 1339. What the medical community, in general, would recognize as the first symptom or manifestation of a condition is controlling for timing purposes.

Petitioner’s filed medical records establish that this claim is untimely filed. The petition was filed on November 10, 2004.⁶ To be considered timely filed under the Vaccine Act’s statute of limitations, the first medically recognized sign or symptom of Eric’s ASD must have occurred no earlier than November 10, 2001. However, petitioner’s medical records demonstrate that Eric was diagnosed with pervasive developmental disorder [“PDD”]⁷ sometime before August 12, 1999, more than three years before the claim was filed. Pet’r’s Exs. at 13.⁸ Even if the diagnosis was within the three-year statutory period, the records indicate that Eric experienced symptoms of his ASD, such as poor speech, prior to January 15, 1999. Id. at 26, 192.

Cloer also established that equitable tolling of the statute of limitations may occasionally occur, but only in “extraordinary circumstances,” such as when a petitioner files an improper tort claim or is the victim of fraud or duress. Id. at 1344-45 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). See also Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990). Equitable tolling may not apply simply because the statute of limitations deprives a petitioner of his or her claim. Cloer, 654 F.3d at 1344. In this case, petitioner has not presented any arguments that would support the application of equitable tolling to his claim, and the undersigned’s examination of the record does not

⁶ Petitioner in the current case filed his claim with the Office of Special Masters on March 28, 2012. However, before that, on November 10, 2004, petitioner had filed a substantially similar claim in civil court. Therefore, for the purposes of the Vaccine Act’s § 16(a)(2), petitioner’s claim was filed on November 10, 2004.

⁷ PDD is the umbrella term used in the DSM-IV-TR at 69. The undersigned uses the term ASD rather than PDD because of the possible confusion between “PDD” (the umbrella term referring to the general diagnostic category) and “PDD-NOS,” which is a specific diagnosis within the general diagnostic category of PDD or ASD. See Dwyer v Sec’y of Health & Human Servs., No. 03–1202V, 2010 WL 892250 (Fed.Cl.Spec.Mstr. Mar. 12, 2010), at *1 FN. 4 & *29 FN. 108.

⁸ Copies of this document also appear as Pet’r’s Ex. 183 and 275.

disclose any basis for applying equitable tolling to this case.

Accordingly, for the reasons discussed herein, this case is dismissed for insufficient proof, for failure to prosecute, and for untimely filing. The clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Patricia E. Campbell- Smith
Chief Special Master