

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No.05-453V

Filed: September 13, 2011

**JEFFREY ITOV, a minor, by his parents  
and natural guardians, GENE and JANARA  
ITOV,**

**Petitioners,**

**v.**

**SECRETARY OF HEALTH AND HUMAN  
SERVICES**

**Respondent.**

UNPUBLISHED DECISION

Autism; Statute of Limitations;  
Vaccine Act Entitlement;  
Denial Without a Hearing

## DECISION<sup>1</sup>

On April 7, 2005, petitioners filed a Short-Form Autism Petition For Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”), on behalf of their minor child Jeffrey.<sup>2</sup> By use of the special “Short-Form” developed for use in the context of the Omnibus Autism Proceeding (OAP), the petition alleges that various vaccinations injured Jeffrey.

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<sup>1</sup> The undersigned intends to post this decision on the United States Court of Federal Claims’s 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 file a motion for 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). In the absence of such motion, “the entire” decision will be available to the public. Id.

<sup>2</sup> The Program comprises 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.* ( hereinafter “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

A digitally recorded status conference was conducted on March 25, 2011, to address petitioners' claim for compensation under the Vaccine Act. As the undersigned pointed out in the March 25, 2011 status conference and in the subsequent order that issued on March 30, 2011, petitioners' claim on Jeffrey's behalf was not timely filed under the governing law at the time that suit was brought. However, the undersigned declined to dismiss the claim because a challenge to the governing law regarding the timeliness of a filed vaccine claim was being considered by the appellate court.

On March 30, 2011, the undersigned suspended further proceedings in this case, pending the en banc decision of the U.S. Court of Appeals for the Federal Circuit in Cloer v. Secretary of Health and Human Services, a decision which was expected to address the Vaccine Act's statute of limitations. The Cloer decision issued on August 5, 2011, reiterating when the statute of limitations starts to run. The decision affirmed 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 Cloer v. Secretary of Health & Human Services, --- F.3d ---, 2011 WL 3374302 at \*15 (Fed. Cir. Aug 5, 2011).

The Federal Circuit's decision in Cloer is consistent with the statutory deadline set forth in the Vaccine Act for filing program petitions. In relevant part, the Vaccine Act provides:

[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).

The decision in Cloer affirms that the statute of limitations starts on the date that "the first event objectively recognizable as a sign of vaccine injury by the medical profession at large" occurs. Cloer at \*15 (Fed. Cir. Aug 5, 2011) (citing Markovich v. Sec'y of Health and Human Servs., 477 F.3d 1353, 1360). Accordingly, a petitioner has 36 months from the first recognizable sign of the alleged injury to file a vaccine claim.

Jeffrey was born on April 14, 1997, and he was diagnosed with Asperger's syndrome on June 25, 2001. However, multiple documents reference behavioral abnormalities, including toe walking, extreme fear of strangers in new situations, and ritualistic behavior between twelve months and two years of age. See, e.g., Pet'rs' Ex. 3 at 3; Pet'rs' Ex. 7 at 2; Pet'rs' Ex. 8 at 1; Pet'rs' Ex. 11 at 1. Furthermore, Mr. Itov's affidavit states that he was concerned about Jeffrey's development by the age of two, if not sooner. Pet'rs' Ex. 15 at 1-2. Based on the current record, in order to be timely filed,

the petition in this case would have to have been filed by April 14, 2002 at the latest. Petitioners did not file the vaccine claim on Jeffrey's behalf until 2005, nearly three years after the relevant statute of limitations had expired. Because petitioners' case was not timely filed, it must be dismissed.

The Vaccine Act requires the dismissal of a claim not shown, by a preponderance of the evidence, to have been 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). Based on the evidence in the filed medical records, petitioners cannot demonstrate that this claim was timely filed. **Thus, the claim is DISMISSED and the Clerk shall enter judgment accordingly.**

**IT IS SO ORDERED.**

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