

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No.03-1831

Filed: September 13, 2011

**VIRGINIA MCKINLEY, Parent of
SETH HOLLIS MCKINLEY,**

Petitioner,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

UNPUBLISHED DECISION

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

DECISION¹

On August 4, 2003, Ms. McKinley filed a Short-Form Autism Petition For Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”), on behalf of her minor child Seth.² 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 Seth.

A digitally recorded status conference was conducted on June 10, 2011, to address

¹ 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.

² 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.

Ms. McKinley’s claim for compensation under the Vaccine Act. As the undersigned pointed out in the June 10, 2011 status conference and in the subsequent order that issued on June 13, 2011, petitioner’s claim on Seth’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 June 13, 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.

Seth was born on February 19, 1992, and Ms. McKinley informed the undersigned during the June 10, 2011 status conference that Seth was diagnosed with autism in 1994. Ms. McKinley did not file the vaccine claim on Seth’s behalf until 2003, nearly nine years after Seth’s autism spectrum disorder diagnosis. Because petitioner’s 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 petitioner’s representation during the June 2011 recorded status conference, petitioner 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