In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
No. 07-633V
Filed: May 31, 2012

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MATTHEW C. WETZ, a minor, by his parents and natural guardians, CHRISTOPHER S. WETZ and HOLLY A. WETZ	*	UNPUBLISHED
	*	Autism; Dismissal of Claim as Untimely
Petitioners,	*	
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES	*	
Respondent.	*	
* * * * * * * * * * * * * * * * * * * *		

Christopher S. Wetz and Holly A. Wetz, Riverview, FL, for petitioners.

Voris E. Johnson, United States Department of Justice, Washington, DC, for respondent.

DECISION[1]

On August 27, 2007 petitioners filed a Short-Form Autism Petition for compensation under the National Vaccine Injury Compensation Program ("the

[1] Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this ruling 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.

Program"),[2] alleging that their son Matthew developed an Autism Spectrum Disorder (ASD) as a result of the vaccines he received.

Procedural History and Current Posture of the Case

On November 28, 2007, respondent moved to dismiss this case as untimely. The filed medical records indicate that petitioners became concerned about Matthew's speech delay when he was sixteen months old (about January of 2004). Pet'rs' Ex. 15.2. Matthew was diagnosed with a mild form of "pervasive developmental disorder" nearly fifteen months later, on March 8, 2005. Pet'rs' Ex. 12.14. Petitioners filed their vaccine claim in August of 2007, more than three years after the initial medical record note of Matthew's speech delay (a sign that is medically recognized to be among the earliest indications of an ASD). Respondent asserted that petitioners must have filed their claim within 36 months of the first symptom or manifestation of Matthew's Autism Spectrum Disorder (ASD) for the petition to have been timely filed. Respondent's Motion to Dismiss (R's Mot.) at 4.

Petitioners filed a response to the Motion to Dismiss on January 24, 2008, asserting that they had not noticed Matthew's speech delay until a month before his ASD diagnosis in March 2005. Pet'rs' Br. of 01/24/08 at 1. Based on this representation, petitioners contend that their claim was filed timely. Id.

The then-presiding special master, Richard Abell, held a status conference on April 15, 2008 to address petitioners' claim.[3] He drew the issue of untimely filing to petitioners' attention and requested a detailed affidavit from petitioners regarding the first sign or symptom of Matthew's condition. See Order of 04/23/08 at 1. Petitioners filed their affidavit on June 12, 2008.

Special Master Abell conducted a fact hearing on December 11, 2008, to evaluate respondent's motion to dismiss for untimely filing. The hearing focused on eliciting testimony regarding the timing of Matthew's symptom onset; it did not involve a

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[2] By filing a Short-Form Autism Petition, petitioners elected to opt into the Omnibus Autism Proceeding (OAP), and consistent with the requirements set forth in § 11(c)(1) of the Act, alleged the following: (1) that the vaccinee suffered a vaccine-related injury, specifically a neurodevelopmental disorder caused by a received MMR vaccine and/or a thimerosal-containing vaccine; (2) petitioners have no pending civil action against a vaccine manufacturer or administrator; (3) the vaccinations in question were received in the United States, (4) the petition is being filed within three years after the first symptom of the disorder, and (5) the vaccine-related injury has persisted for more than six months.

[3] Special Master Abell retired in October of 2010.

determination of causation. Special Master Abell declined to find that Matthew's speech delay was an early symptom of his autism. Findings of Fact at 7. Based on the evidence presented, the special master determined that petitioners could go forward with their claim, and he issued a ruling on March 29, 2010 denying respondent's Motion to Dismiss. Id.

Pursuant to Vaccine Rule 3(c), the case was reassigned to the undersigned on March 30, 2010. A status conference was held in July of 2010, to address the posture of the case and the impact of the decisions issued in the OAP test cases finding no vaccine-related causation. The undersigned noted that the outcome in the OAP test cases significantly diminished the likelihood that petitioners would prevail on the merits of their similarly situated autism claim on Matthew's behalf. See Order of 07/26/10 at 1-2. Informed about the outcome of the test cases, the difficulty with their existing theory of causation, and the need to provide new or previously unconsidered evidence to move forward with their claim, petitioners expressed their desire to proceed with their claim. Order of 07/26/10 at 2.

Based on petitioners' intention to proceed with their claim, the undersigned informed petitioners of the Federal Circuit's then-pending consideration in Cloer of a non-autism claim involving the issue of untimely filed Program petitions. [4] Cloer v. Sec'y of Health & Human Servs., 603 F.3d 1341 (Fed. Cir. 2010), reh'g en banc granted, opinion vacated, 399 F. App'x 577 (Fed. Cir. 2010), and aff'd on reh'g en banc, 654 F.3d 1322 (Fed. Cir. 2011). The undersigned also advised petitioners that the Carson case (then-pending before the Federal Circuit and still undecided) involved the issue of an untimely filing in an autism case involving an initial symptom presentation of speech delay. Carson v. Sec'y of Health & Human Servs., 2009 WL 2957312 (Fed. Cl. Aug 26, 2009). At petitioners' request, the undersigned agreed to stay proceedings to allow the Federal Circuit to address the issue of untimely filed vaccine claims. Order of 07/26/10 at 2.

On August 5, 2011, the Federal Circuit issued an en banc decision in Cloer. On October 24, 2011, the undersigned offered the parties an opportunity to brief the impact of Cloer on the statute of limitations issue in this case. Order of 10/24/11 at 1.

In response, respondent filed a brief on November 10, 2011, reiterating her position that the petition was not timely filed and noting Cloer's reaffirmation of the timeliness standard set forth in Markovich v. Secretary of Health & Human Services, 477 F.3d 1353, 1357 (Fed. Cir. 2007). Resp't's Br. of 11/10/11 at 2. Pointing to Special

[4] The undersigned notes that opinions of the United States Court of Appeals for the Federal Circuit are binding on the Office of Special Masters. See Snyder ex. rel. Snyder v. Sec'y, HHS, 88 Fed. Cl. 706, 719 n.23 (Fed. Cl. 2009).

Master Abell's earlier finding of insufficient evidence to link Matthew's ASD to the speech delay he exhibited in or around January 2004, respondent urged petitioners to submit an expert report outlining their theory of causation and addressing the timing of Matthew's ASD onset. Id.

Petitioners responded to the undersigned's order on January 11, 2012. In their response, petitioners put forth a new theory of causation involving mitochondrial disorders. Pet'rs' Br. of 01/11/12 at 1. Petitioners argued that this new theory properly distinguished their case from the earlier omnibus proceedings. Id. Relying on Special Master Abell's findings of fact, petitioners argued their petition was timely filed. Id. Petitioners inquired as to whether the undersigned would pay attorneys' fees should petitioners need to re-argue the timeliness issue. Id. at 2.

Respondent replied to petitioners' filing citing to medical literature and expert testimony from the prior omnibus proceedings that supported her position that Matthew's 2004 symptoms of delayed speech were early signs of his ASD. Resp't's Br. of 02/02/12 at 2-3. Based on this evidence, respondent urged the undersigned to find that Matthew's 2004 symptom onset rendered the petition untimely filed. Id. at 1. Respondent further indicated that she would oppose any request for attorneys' fees for the prosecution of a theory of causation that was not distinguishable from the theories previously considered and rejected in the omnibus proceedings. Id.

On February 9, 2012, the undersigned issued an order affording petitioners an opportunity to reply to the arguments respondent advanced in the February 2, 2012 filing. The undersigned directed petitioners to present evidence demonstrating that Matthew's first symptoms of his vaccine-related injury occurred within 36 months of the filing of petitioners' vaccine claim. Order of 02/09/12 at 2.

Following a status conference with Mr. Wetz and respondent's counsel on February 15, 2012, the undersigned issued an order further clarifying what evidence petitioners would need to present to show their claim was timely filed. Order of 02/16/12. The undersigned encouraged Mr. Wetz to address the factual and medical issues set forth in respondent's filing after conferring with a medical professional. Id. at 2-3. The undersigned advised petitioners that no assurance regarding prospective attorneys' fees could be made because the undersigned had not yet determined whether there was a reasonable basis for petitioners to continue pursuing their claim, but as then-advised, the basis for moving forward did not appear to be reasonable. Id. at 3.

Petitioners filed a reply brief on April 2, 2012, reiterating their position that the petition was timely filed because the first symptom associated with Matthew's ASD, and thus the start of the 36-month statute of limitations, occurred one month prior to his ASD diagnosis on March 8, 2005. Pet'rs' Br. of 04/02/12 at 3. Petitioners argued that Matthew's prior difficulties with speech were related to his chronic ear infections and not

his ASD. Id. at 2. Petitioners further argued that their expressed concern about speech delay in January 2004 was not reliable because neither petitioners nor their pediatrician have expertise in speech pathology. Id. Petitioners asserted that speech delay is an unreliable indicator of ASD, pointing to references that recognize speech delay as a sign of various medical conditions, not only an ASD. Id. at 2-3.

Applicable Legal Standard

The Vaccine Act provides that in the case of:

> 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…."

42 U.S.C. § 300aa-16(a)(2) (emphasis added).

As written, the statute requires that petitioners file their claim under the Vaccine Program within 36 months of the onset of the earliest symptom of injury. See Markovich, 477 F.3d at 1357 (holding that "either a 'symptom' or a 'manifestation of onset' can trigger the running of the statute [of limitations], whichever is first'). As explained in the Markovich case, a symptom may be a sign "of a variety of conditions or ailments," while a manifestation of onset "is more self-evident of an injury and may include significant symptoms that clearly evidence an injury." Id. The Federal Circuit has held that the first symptom or manifestation of onset of a vaccine-related injury is "the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Markovich, 477 F.3d at 1360; see also Cloer, 654 F.3d at 1322. Identification of either the first symptom or manifestation of onset, however, does not require a doctor's diagnosis. Id. at 1358 (quoting Brice v. Sec'y, HHS, 36 Fed. Cl. 474, 477 (1996)). Nor does the identification of signs of an injury turn on the subjective knowledge of petitioner.[5] Markovich, 477 F.3d at 1360 (reasoning that "a subjective standard that focuses on the parent's view would result in an uneven and perhaps overly

[5] As the Federal Circuit has recognized, "a petitioner typically will recognize that a particular symptom constitutes the first symptom . . . only with the benefit of hindsight" because the statute of limitations begins to run on a date that is independent of petitioner's knowledge. Markovich, 477 F.3d at 1358. Recognizing the difficulties that petitioners might face, the Federal Circuit nonetheless adopted an objective standard because a subjective approach would be, "antithetical to the simple, symptom-keyed test expressly required by the Vaccine Act's text." Cloer, 654 F.3d at 1340.

broad application of the statute of limitations dependent entirely on the subjective perceptions of lay persons having widely varying degrees of medical awareness or training"). Accordingly, the language in the statute, that "no petition may be filed," prohibits the filing of a vaccine claim, as a matter of law, if it does not meet the threshold 36-month requirement. § 300aa-16(a)(2).

Determining whether petitioners timely filed their claim necessarily requires an examination of Matthew's medical history.

Factual Background

Matthew was born on September 25, 2002. Pet'rs' Ex. 3.2. At several pediatric visits between 2002 and January of 2004, Matthew was found to be generally well. Pet'rs' Ex. 5.1-5.22.

At a pediatric office visit on January 30, 2004, the examining doctor identified some issues with redness and fluid in Matthew's right ear. Pet'rs' Ex. 5.23. Matthew was sixteen months old. Three months later, in April of 2004, the pediatrician prescribed antibiotics for Matthew's ear infection and noted some regression in Matthew's development. Pet'rs' Ex. 6.19.

On May 24, 2004, Matthew was seen by Wade R. Cressman, M.D., a pediatric ear, nose, and throat specialist, for an evaluation of his recurrent ear infections. Pet'rs' Ex. 9.1. At that visit, Dr. Cressman noted that Matthew's mother was concerned about speech delay. Dr. Cressman recommended ear tube placement (PET) surgery. Pet'rs' Ex. 9.2.

Matthew's issues with ear infections persisted. In September of 2004, Dr. Orobello, another ear, nose, and throat specialist, again recommended PET surgery. Pet'rs' Ex. 9.4. Dr. Orobello wrote that Matthew's mother was "now anxious to proceed with surgery," having noticed changes in Matthew's speech during his episodic ear infections -- notwithstanding his normal hearing. Id.

Matthew visited a speech therapist in September of 2004. Pet'rs' Ex. 14.4. The therapy records reflected the family's concern that Matthew was not "saying words or sentences." Id. The family reported that Matthew first spoke words at the age of 13 months and then combined words into short sentences at 20 months. Id. Mrs. Wetz expressed particular concern that Matthew's speech and language skills had regressed because he stopped saying "Daddy" and "Mommy." Id.

Matthew underwent PET surgery on October 14, 2004. Pet'rs' Ex. 9.5. At a post-operative visit on November 10, 2004, Dr. Pine, another ear, nose, and throat specialist, observed that Matthew had fared "really well" since his operation, and he was "speaking

more." Id. Follow-up visits with ear, nose, and throat specialists between January of 2005 and July of 2006 identified no further issues with Matthew's ears, nose, or throat. Pet'rs' Ex. 9.6-9.9. In January of 2005, an ear, nose, and throat specialist noted concern that Matthew had apraxic speech[6] and indicated that Matthew was being evaluated for early intervention services. Pet'rs' Ex. 9.6.

On March 8, 2005, Matthew saw Joseph A. Casadonte, M.D., a pediatric neurologist. Pet'rs' Ex. 12.13. Noting that Matthew had a "history of speech regression," Dr. Casadonte "suspected that Matthew ha[d] a mild form of pervasive developmental disorder (PDD)."[7] Pet'rs' Ex. 12.13-12.14. Dr. Casadonte expected that Matthew's condition would improve over time but noted that he might require special education in the interim. Pet'rs' Ex. 12.14.

Matthew received a speech and language assessment at Jonas Therapy Associates, Inc., on April 7, 2005. Pet'rs' Ex. 14.8. The records show that Matthew began to speak at 13 months, but that his speech had regressed by the age of 16 months. Id.

Two weeks later, on April 25, 2005, Matthew visited Pediatric Therapy Services, Inc. Pet'rs' Ex. 15.2. The records from that visit confirm the history recorded in the notes from Jonas Therapy. Matthew was speaking at 13 months of age but had lost some speech at 16 months of age. Id.

Matthew visited Therakids Plus, Inc. on October 10, 2005. Pet'rs' Ex. 14.12. The records from that visit indicate that Matthew had been receiving speech therapy since February of 2004. Id.

Analysis and Discussion

The medical community recognizes speech delay as a common, early sign of ASD. See Resp't's Ex. A at 1, B at 2. In this case, concern about Matthew's speech delay is first documented to have occurred in January of 2004. Matthew began receiving speech therapy in February 2004. As of March 2005, Matthew was suspected to have mild PDD. The record supports a finding that Matthew first exhibited a medically recognized symptom of ASD between January and February of 2004. This symptom onset triggered the running of the statute of limitations. Thus, for petitioners' vaccine claim to be filed

[6] Apraxic speech is a speech disorder characterized by difficulty in saying correctly or consistently what the speaker desires. Apraxia of Speech, NIH, http://www.nidcd.nih.gov/health/voice/pages/apraxia.aspx (last visited May 31, 2012). Notably, this speech disorder is not caused by speech muscle weakness. Id.

[7] PDD is a condition on the spectrum of autism disorders.

timely, petitioners had to file their petition no later than February of 2007. Petitioners did not file their claim, however, until August 27, 2007.

(1) Petitioners argue that speech delay is an unreliable symptom for ASD.

Petitioners suggest that speech delay cannot be considered a first sign of ASD because speech delay is not a symptom of ASD exclusively and could be indicative of other diseases or conditions. Pet'rs' Br. of 04/02/12 at 2-3. The requirement that a first symptom must exclusively point to a vaccine-related injury, however, has been considered and rejected in the Markovich case issued by the Federal Circuit in 2007, and the decisions issued by that appellate court are binding in vaccine cases.

In Markovich, the Federal Circuit clarified the distinction between a symptom and a manifestation. Markovich, 477 F.3d at 1357. The appellate court recognized that a symptom could signal the presence of one of many different conditions or ailments, whereas a manifestation involves symptoms that more "clearly evidence an injury" of a particular nature. Id. The court held, however, that either a symptom or a manifestation could signal the onset of an injury. Id. Thus, the Federal Circuit has determined that although a symptom might be indicative of one of any number of conditions, it is nonetheless a sufficient first sign of a vaccine-related injury. Based on the Federal Circuit's holding in Markovich, petitioners' argument that Matthew's speech delay cannot be considered the first sign of his ASD -- because speech delay could be indicative of other non-ASD conditions or ailments -- is unpersuasive.

(2) Petitioners argue that the reported appearance of speech delay in January 2004 is unreliable evidence because the observation was not made by experts in the field of speech pathology.

Petitioners suggest that Matthew's speech delay in January 2004 is not evidence on which the undersigned can rely because neither petitioners nor their pediatrician have expertise in speech pathology. Pet'rs' Br. of 04/02/12 at 2. However, an exhibit attached to one of petitioners' own filings contradicts this argument. The exhibit specifically outlines a series of speech and language milestones that parents are expected to observe in their child's development. Pet'rs' Ex. III at 2-3. The exhibit states that "[p]arents are usually the first ones to think that there is a problem with their child's speech development . . . and this parental concern should be enough to initiate further evaluation." Pet'rs' Ex. III at 4(emphasis added). Thus, petitioners' own submission indicates that the medical community believes parents can credibly observe signs of speech delay in their children, and such identification is sufficient to trigger further medical testing.

Absent evidence -- other than petitioners' own assertions -- that parental identification of speech delay in children is unreliable, petitioners' argument is not persuasive.

(3) Petitioners argue that Matthew's speech delay was due to an ear condition unrelated to Matthew's ASD.

Petitioners assert that the speech delay detected in January 2004 was attributed to chronic ear infections and was unrelated to Matthew's ASD. Pet'rs' Br. of 04/02/12 at 2. But, petitioners have failed to provide any evidence other than their own assertions to support this proposition. Contrary to petitioners' assertions, the medical community at large recognizes speech delay as an early sign of ASD. See supra p. 7. That Matthew's speech delay could have been due to both his ear infections and early stages of ASD is not in dispute because, as petitioners have acknowledged, speech delay can be a sign of a number of conditions. Pet'rs' Br. of 04/02/12 at 2-3. Moreover, a showing of the former does not negate the latter and, for the purposes of the Vaccine Act's statute of limitations, it is sufficient that this symptom is objectively recognized by the medical community at large to be an early indication of an ASD.[8]

Petitioners' case does not involve the type of circumstances in which equitable tolling might apply.

The Federal Circuit's recent decision in Cloer now permits petitioners, in limited circumstances, to seek equitable tolling of the statute of limitations. Although petitioners have made no such equitable tolling argument here, the undersigned finds that any effort by petitioners to invoke equitable tolling would be highly unlikely to succeed on the facts of the case.

[8] The undersigned recognizes that her position is not consistent with Special Master Abell's prior finding of timeliness due to the former special master's unwillingness to find Matthew's speech delay to be associated with his ASD, absent evidence in favor of such an association. As one of the special masters who heard the testimony in the OAP, the undersigned is aware of the medical community's recognition that speech delay is one of the earliest and among the most common first indicators of ASDs. See Hazelhurst v. Sec'y of HHS, 2009 WL 332306, at *20-2 (Fed. Cl. Feb. 12, 2009), aff'd, 88 Fed. Cl. 473 (2009), aff'd, 604 F.3d 1343 (Fed. Cir. 2010). As the undersigned informed petitioners, the medical significance of Matthew's speech delay is not a pure fact question because it requires interpretation by a medical professional. Special Master Abell noted that absent contrary evidence, he would attribute Matthew's speech delay to his ear infections and determine that the case was timely filed. Because the undersigned is aware of evidence that undercuts this aspect of Special Master Abell's fact finding, no deference is given to this pivotal aspect of Special Master Abell's earlier fact finding.

The Federal Circuit made clear in Cloer that equitable tolling should not be invoked based solely on a claimant's belief that she is being treated unfairly due to the statute of limitations. Cloer, 654 F.3d at 1344. As the Supreme Court has instructed, the doctrine is to be used "sparingly." Irwin v. Dept. of Veterans Aff., 498 U.S. 89, 96 (1990). In certain circumstances, courts have recognized the doctrine of equitable tolling may apply to allow the filing of an otherwise untimely claim. For example, when a litigant has been "pursuing his rights diligently" but "some extraordinary circumstance" beyond his control has prevented him from filing his claim within the statute of limitations, the doctrine of equitable tolling may apply. Pace v. DiGuglielmo, 544 U.S. 408 (2005). Other cases in which equitable tolling may be appropriate are those involving fraud or duress. See, e.g., Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (stating that if "a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part," the statute of limitations does not begin to run until the fraud is discovered).

There is no evidence here of any extraordinary circumstance beyond petitioners' control that would have prevented them from making a timely filing. Petitioners' own lack of knowledge, without more, does not warrant equitable tolling under the current law. Nor does the record reveal any evidence of fraud or bad acts committed by a third party that would have prevented petitioners from filing their claim for Matthew within the pertinent 36-month period. Therefore, the facts of this case are not of the sort that would support a successful claim for equitable tolling.

Conclusion

The Vaccine Act clearly states that claims must be filed within 36 months of the "occurrence of the first symptom or manifestation of onset." Petitioners failed to do so. Thus, their filed claim is untimely as a matter of law.[9]

For the reasons set for above, **this case is DISMISSED. The Clerk of the Court is directed to enter judgment accordingly.**

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Chief Special Master

[9] Because the focus of the proceedings to date has been on timeliness, petitioners' theory of causation has not been further developed, and the merits of Matthew's claim cannot be reached.