

OFFICE OF SPECIAL MASTERS

(Filed: August 31, 2007)

PUBLISH

JULIO ACEVEDO and YLUMINADA MOJICA,)	
as legal representatives of their son,)	
JOSHUA ACEVEDO,)	
)	
Petitioners,)	
)	
v.)	No. 07-0501V
)	Statute of Limitations; Doctrine
SECRETARY OF)	of Equitable Tolling; Special Master's
HEALTH AND HUMAN SERVICES,)	Authority; Dismissal
)	
Respondent.)	
)	

Mindy Michaels Roth, Esq., Glen Rock, New Jersey, for petitioners
Heather Pearlman, Esq., United States Department of Justice, Washington, D.C., for respondent

EDWARDS, Special Master

DECISION¹

Petitioners, Julio Acevedo and Yluminada Mojica (Mr. Acevedo and Ms. Mojica), as legal representatives of their son, Joshua Acevedo (Joshua), seek compensation under the National Vaccine Injury Compensation Program (Program).² *See generally* Petition (Pet.). Respondent

¹ 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 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). Otherwise, “the entire decision” will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa- (continued...)

moves to dismiss. *See generally* Respondent’s (Motion), filed July 31, 2007. Respondent contends that the statute of limitations contained in § 300aa-16(a)(2) bars the action. *See* Motion at 3-5.³

BACKGROUND

The parties do not dispute the relevant facts. Joshua was born on March 26, 2004. *See* Petitioners’ exhibit (Pet. ex.) 1 at 1. As part of a routine physical examination on June 28, 2004, Joshua received a diphtheria-tetanus-acellular pertussis (DTaP) vaccination and a pneumococcal conjugate (Prevnar) vaccination. *See* Pet. ex. 6 at 5, 18, 21. Joshua experienced “startling episodes through the night” on June 28, 2004. Pet. ex. 8 at 5. At approximately 5:00 a.m., on June 29, 2004, Joshua was “warm to touch.” *Id.* Mr. Acevedo and Ms. Mojica administered “Tylenol.” *Id.* At approximately 8:00 a.m., on June 29, 2004, Joshua exhibited “generalized stiffness with shaking of [his] upper extremities,” accompanied by “drooling,” that “lasted about 10 min[ute]s.” *Id.* During the event, Joshua’s “eyes deviated to [his] [left] side.” *Id.* Mr. Acevedo and Ms. Mojica summoned eventually an ambulance to transport Joshua to Trinitas Hospital in Elizabeth, New Jersey. *See* Pet. ex. 8 at 7. In the Trinitas Hospital Emergency Department, Joshua was “crying,” but “consolable.” Pet. ex. 8 at 6. He refused “to suck.” *Id.* He experienced “intermittent startling attacks.” *Id.* A “consulting physician” arranged a “TRANSFER TO ST. PETER[’]S HOSPITAL P[EDIATRIC]I[N]TENSIVE]C[ARE]U[NIT].” Pet. ex. 8 at 21. Joshua remained at St. Peter’s University Hospital in New Brunswick, New Jersey, until July 2, 2004. *See* Pet. ex. 9 at 1. Carlos Lastra, M.D. (Dr. Lastra), a pediatric neurologist who evaluated Joshua at St. Peter’s University Hospital, *see, e.g.*, Pet. ex. 9 at 20-21; Pet. ex. 6 at 22, concluded that Joshua had suffered “acute encephalitis,” either “infectious” or “post[-]vaccine.” Pet. ex. 6 at 12. By November 2004, Joshua displayed “increased muscle tone and some developmental delay.” Pet. ex. 6 at 13. Dr. Lastra recommended an “Early Intervention Program for physical therapy and occupational therapy.” *Id.*

²(...continued)

10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

³ Section 300aa-16(a)(2) provides:

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.

Mr. Acevedo and Ms. Mojica retained a lawyer. *See* June 25, 2007 Affidavit of Mindy Michaels Roth (6/25/07 Affidavit), filed July 3, 2007, ¶ 2. The lawyer referred Mr. Acevedo and Ms. Mojica to another attorney, Mindy Michaels Roth (Ms. Roth), who possesses substantial Program experience. *See* 6/25/07 Affidavit, ¶ 4. Understanding that the statute of limitations contained in § 300aa-16(a)(2) would lapse on June 28, 2007, Ms. Roth prepared a Program petition even though she lacked all documents required by § 300aa-11(c)(1) & (2) and by Vaccine Rule 2(e). *See* 6/25/07 Affidavit, ¶ 10; *see also* June 29, 2007 Affidavit of Mindy Michaels Roth (6/29/07 Affidavit), filed July 3, 2007 ¶ 3. Before the close of business on June 25, 2007, Ms. Roth tendered to FedEx Express a package addressed properly to the Clerk, United States Court of Federal Claims, that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a \$250.00 check for the filing fee. *See* 6/29/07 Affidavit, ¶ 2; 6/29/07 Affidavit, Exhibit A; 6/29/07 Affidavit, Exhibit B. On the airbill, Ms. Roth designated "FedEx Priority Overnight" for "[n]ext business morning" delivery. 6/29/07 Affidavit, Exhibit A at 1. As mandated by § 300aa-11(a)(1) and by Vaccine Rule 2(c), Ms. Roth served a copy of Mr. Acevedo's and Ms. Mojica's Program petition upon the Secretary. *See* Notice of Filing Documents (Notice), filed July 3, 2007, at 1-2; July 20, 2007 Affidavit of Mindy Michaels Roth (7/20/07 Affidavit), filed July 30, 2007, ¶¶ 3-4. Ms. Roth sent the service copy "via Certified Mail/RRR." Notice at 1; *see also* 7/20/07 Affidavit, ¶¶ 3-4; 7/20/07 Affidavit, Exhibit C.

Well-established and well-known, FedEx Express prides itself as being "the world's largest express transportation company" that "uses a global air-and-ground network to speed delivery of time-sensitive shipments, usually in one to two business days with the delivery time guaranteed." FedEx.com, FedEx Express Overview, <http://www.fedex.com/us/about/today/companies/express/index.html> (last visited August 24, 2007). Nevertheless, FedEx Express did not deliver the package that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a \$250.00 check for the filing fee to the United States Court of Federal Claims on June 26, 2007, on June 27, 2007, or on June 28, 2007. *See, e.g.*, 6/29/07 Affidavit, Exhibit B. Meanwhile, the United States Postal Service delivered the service copy to the Secretary on June 28, 2007. *See* 7/20/07 Affidavit, Exhibit C.

At some point on June 29, 2007, a FedEx Express Customer Relations agent informed Ms. Roth that although FedEx Express records indicated that the package that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a \$250.00 check for the filing fee had "arrived in [FedEx Express's] Newark, NJ, sorting facility on June 25[, 2007] at 8:59 p.m.," FedEx Express was "unable to locate" the package and considered the package "missing." 6/29/07 Affidavit, Exhibit B at 1. Also at some point on June 29, 2007, a "tracking" inquiry showed that the package that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a \$250.00 check for the filing fee had arrived at a FedEx Express "dest[ination] sort facility" in "Dulles, VA," at 5:15 a.m., on June 26, 2007. 7/20/07 Affidavit, Exhibit E at 1. The "tracking" inquiry showed too that the package that contained Mr. Acevedo's and Ms. Mojica's Program petition, associated documents and a \$250.00 check for the filing fee remained at the FedEx Express "dest[ination] sort facility." *Id.*

Immediately upon learning of FedEx Express's service failure, Ms. Roth prepared a second Program petition, as well as her affidavit explaining that her attempt to submit a timely petition had been thwarted by FedEx Express's errors. *See* 6/29/07 Affidavit. FedEx Express retrieved a package addressed properly to the Clerk, United States Court of Federal Claims, that contained the second petition from Ms. Roth's office during the late afternoon on June 29, 2007. *See* July 9, 2007 Affidavit of Mindy Michaels Roth (7/9/07 Affidavit), filed July 16, 2007, Exhibit A; *see also* 7/20/07 Affidavit, Exhibits F-G. On the shipping label, Ms. Roth designated "Priority Overnight," with delivery slated for Monday, July 2, 2007. 7/20/07 Affidavit, Exhibit F at 1.

FedEx Express did not deliver the package that contained the second petition to the United States Court of Federal Claims on July 2, 2007. *See, e.g.,* 7/9/07 Affidavit, Exhibit A. A FedEx Express Customer Relations agent explained to Ms. Roth that a "courier" had "encoded the destination station" of the package that contained the second petition "incorrectly," causing the package "to be sent to Moonachie, NJ, rather than Washington, DC." 7/9/07 Affidavit, Exhibit A at 1. However, the FedEx Customer Relations Agent assured Ms. Roth that FedEx Express delivered the package that contained the second petition to the United States Court of Federal Claims "on July 3[, 2007] at 10:17 a.m." *Id.*

Upon receipt of the package that contained the second petition, the clerk of court processed the petition as a new case, assigning the case a filing date of July 3, 2007, and assigning the case docket number 07-0501V.

On July 13, 2007, FedEx Express delivered finally to the United States Court of Federal Claims the package that Ms. Roth had tendered to FedEx Express on June 25, 2007, for delivery on June 26, 2007. The clerk of court processed the petition as a new case, assigning the case a filing date of July 13, 2007, and assigning the case docket number 07-0376V.⁴ On July 19, 2007, the special master dismissed the case filed under docket number 07-0376V as a duplicate of the case filed under docket number 07-0501V. *See Acevedo v. Secretary of HHS*, No. 07-0376V, Decision (Fed. Cl. Spec. Mstr. July 19, 2007). The clerk of court entered judgment in the case filed under docket number 07-0376V on August 21, 2007. *See Acevedo v. Secretary of HHS*, No. 07-0376V, Judgment (Fed. Cl. Aug. 21, 2007).

DISCUSSION

A petitioner initiates a Program action "by service upon the Secretary *and* the filing of a petition . . . with the United States Court of Federal Claims." § 300aa-11(a)(1) (emphasis added);

⁴ Given the dates that the clerk of court processed the cases, the docket numbers of the cases appear to be in reverse order. However, the clerk of court assigned docket number 07-0376V to the case filed on July 13, 2007, because docket number 07-0376V was the next available docket number—even though the docket number was out of sequence—based upon an earlier administrative error in the clerk's office that was unrelated to proceedings in this case.

see also Vaccine Rule 2(a). It is axiomatic in United States Court of Federal Claims practice that mailing is not filing. *See, e.g.,* Vaccine Rule 17(a). Rather, a petition “is filed when actually received and marked filed by the clerk.” Vaccine Rule 17(a); *see also* *Widdoss v. Secretary of HHS*, 989 F.2d 1170, 1176 n. 5 (Fed. Cir.1993).

As the name indicates, the National Vaccine Injury Compensation Program is nationwide in scope. Private attorneys from across the country represent petitioners who pursue Program compensation for vaccine-related injuries or deaths. However, the United States Court of Federal Claims and the Office of Special Masters are located in Washington, D.C. Vaccine Rules do not allow ever the facsimile transmission of pleadings for filing. Likewise, Vaccine Rules do not allow ever the electronic submission of a petition for filing in the Court’s Case Management/Electronic Case Filing (CM/ECF) system. Therefore, a petitioner’s attorney has limited options for delivering a petition to the Court. A petitioner’s attorney may travel to Washington, D.C., to file a petition in person. The option is obviously impractical and expensive. A petitioner’s attorney may retain local counsel to file a petition in person. The option—involving to an extent the duplication of effort—is also obviously impractical and expensive. Or, as with most practitioners, a petitioner’s attorney may entrust a petition to a recognized delivery agent, such as the United States Postal Service, FedEx, UPS or DHL.

Mr. Acevedo and Ms. Mojica acknowledge readily that neither petition that Ms. Roth dispatched to the United States Court of Federal Claims through FedEx Express arrived at the Court to be “marked filed by the clerk,” Vaccine Rule 17(a), by June 28, 2007, the expiration of the statute of limitations governing their case. *See, e.g.,* 6/29/07 Affidavit, ¶¶ 4-8; 7/9/07 Affidavit, ¶ 10; 7/20/07 Affidavit, ¶¶ 5-8. Nevertheless, Mr. Acevedo and Ms. Mojica contend that the special master must deem their petition to have been filed by June 28, 2007. *See, e.g.,* 6/29/07 Affidavit, ¶ 11; 7/9/07 Affidavit, ¶¶ 9-11; 7/20/07 Affidavit, ¶ 10; Opposition to Respondent’s Motion to Dismiss (Response), filed August 15, 2007; August 27, 2007 Affidavit of Mindy Michaels Roth (8/27/07 Affidavit), filed August 28, 2007, ¶ 9. They maintain that when Ms. Roth placed a package addressed properly to the Clerk, United States Court of Federal Claims, that contained Mr. Acevedo’s and Ms. Mojica’s Program petition, associated documents and a \$250.00 check for the filing fee with FedEx Express on June 25, 2007, for delivery on June 26, 2007—two days before the expiration of the statute of limitations governing their case—they believed reasonably that FedEx Express would fulfill its “guaranteed” contractual obligation. *See, e.g.,* 6/29/07 Affidavit, ¶ 11; 7/9/07 Affidavit, ¶¶ 9-11; 7/20/07 Affidavit, ¶ 10; Response; 8/27/07 Affidavit, ¶¶ 3-4. Yet, Mr. Acevedo and Ms. Mojica argue, the facts demonstrate that FedEx Express failed *twice* to deliver their petition to the United States Court of Federal Claims in accordance with FedEx Express’s “guarantees.” *See, e.g.,* 7/9/07 Affidavit, ¶¶ 4-7, 10; 7/20/07 Affidavit, ¶¶ 5, 8-9; Response. Thus, Mr. Acevedo and Ms. Mojica insist that they should not be held accountable for FedEx Express’s “negligence and incompetence.” 7/9/07 Affidavit, ¶ 11; *see also* 6/29/07 Affidavit, ¶ 11; 7/20/07 Affidavit, ¶ 10; Response; 8/27/07 Affidavit, ¶ 9. Besides, Mr. Acevedo and Ms. Mojica note, the Secretary received the service copy within the statute of limitations period. *See* 7/20/07 Affidavit, ¶ 4; 7/20/07 Affidavit, Exhibit C; Response. Therefore, Mr. Acevedo and Ms. Mojica advance that

the Secretary suffers no prejudice if the special master directs the clerk of court to revise the filing date of the petition to sometime between June 26, 2007, and June 28, 2007. *See* Response.

Mr. Acevedo and Ms. Mojica invoke necessarily the doctrine of equitable tolling. *See, e.g., Widdoss*, 989 F.2d at 1178-79 (Newman, J., dissenting).⁵ The doctrine of equitable tolling “permits a court to forgive a late filing where compelling circumstances indicate that such a result would be equitable.” *Lombardo v. Secretary of HHS*, 34 Fed. Cl. 21, 25 (1995). In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), the Supreme Court announced that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.” Indeed, in 1995, two judges of the United States Court of Federal Claims applied the doctrine of equitable tolling to allow a petitioner to proceed on motion for review of a special master’s decision when the United States Court of Federal Claims received the motion for review after the statutory 30-day period for bringing a motion for review. *See Raspberry v. Secretary of HHS*, 32 Fed. Cl. 777 (1995) (involving late delivery by established overnight courier); *Thornton v. Secretary of HHS*, 34 Fed. Cl. 72 (1995) (involving disrupted mail service due to recognized National holiday); *see also Taylor v. Secretary of HHS*, 34 Fed. Cl. 137 (1995) (discussing, but declining to apply, doctrine of equitable tolling where counsel erred in calculating statutory 30-day period).

However, in 2001, the United States Court of Appeals for the Federal Circuit (Federal Circuit) addressed specifically the doctrine of equitable tolling in Program cases. *See Brice*, 240 F.3d 1367. After parsing the Act that established the Program, the Federal Circuit determined that “equitable tolling is inconsistent with the existing statutory scheme” devised by Congress to foster “quick resolution of Vaccine Act claims.” *Brice*, 240 F.3d at 1374. Therefore, the Federal Circuit held as a matter of law that equitable tolling is not available for claims arising under § 300aa-16(a)(2). *See Brice*, 240 F.3d at 1372. The Federal Circuit’s prohibition of the doctrine of equitable tolling in Program cases appears complete and inflexible. *See, e.g., Brice*, 240 F.3d at 1374

⁵ The circumstances of the case suggest also the common law mailbox rule. The common law mailbox rule provides that “if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.” *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884). Congress can “abrogate a common law rule” specifically by addressing the issue posed by the common law, *Rios v. Secretary of Veterans Affairs*, 490 F.3d 928, 931 (Fed. Cir. 2007), citing *United States v. Texas*, 507 U.S. 529, 534 (1993), or “impliedly” by creating a scheme “where application of the common law rule would render an aspect of the statute superfluous or inoperative.” *Rios*, 490 F.3d at 931, citing *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 109 (1991). However, Mr. Acevedo and Ms. Mojica recognize that the Clerk, United States Court of Federal Claims, received both petitions, albeit late. Further, the common law mailbox rule does not appear to extend to private corporations, like FedEx Express. Moreover, the Vaccine Act’s elaborate structure signals that Congress intended to abrogate the common law mailbox rule for Program claims. *See, e.g., Brice v. Secretary of HHS*, 240 F.3d 1367 (Fed. Cir. 2001), *cert. denied sub nom.*, 534 U.S. 1040 (2001).

(Newman, J., dissenting) (“The panel majority today holds that the National Childhood Vaccine Injury Act *never* permits equitable tolling of the period for filing a claim, whether the claim arose before the statutory enactment or afterward, no matter how worthy the petitioner or how compelling the petition.”) (emphasis added); *Decker v. Secretary of HHS*, 51 Fed. Cl. 288, 292-97 (2001).

The Program represents a waiver of sovereign immunity. *See, e.g., Markovich v. Secretary of HHS*, 477 F.3d 1353, 1360 (Fed. Cir. 2007), citing *Brice*, 240 F.3d at 1370. Therefore, the special master must construe “strictly and narrowly” Program provisions. *Markovich*, 477 F.3d at 1360. Likewise, *Brice* represents Federal Circuit precedent. The special master and the United States Court of Federal Claims “may not deviate from” Federal Circuit precedent. *Crowley v. U.S.*, 398 F.3d 1329, 1335 (Fed. Cir. 2005). As the Federal Circuit iterated in *Althen v. Secretary of HHS*, 418 F.3d 1274 (Fed. Cir. 2005), a special master applies merely “the law” as announced by the Federal Circuit. *Id.* at 1280. Thus, a special master possesses absolutely no authority “to craft” any exceptions to the Federal Circuit’s proscription regarding equitable tolling in Program cases. *Id.* at 1281.

Mr. Acevedo and Ms. Mojica concede that they did not file a Program petition before “the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset” of Joshua’s alleged vaccine-related injury. § 300aa-16(a)(2). The special master is duty-bound to apply the law, despite the harsh–untenable, really–result. Federal Circuit precedent dictates that the special master rule that the statute of limitations contained § 300aa–16(a)(2) bars Mr. Acevedo’s and Ms. Mojica’s Program action.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Mr. Acevedo’s and Ms. Mojica’s copy of this decision to Mr. Acevedo and Ms. Mojica by overnight express delivery.

John F. Edwards
Special Master