

In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 05-0798V

(Originally Filed November 7, 2005)

(Reissued November 22, 2005)

**DONNA L. HURD, as the parent *
and natural guardian of DUSTIN *
RILEY-MAX-HURD, a minor ***

Petitioner, *

v. *

**SECRETARY OF HEALTH *
AND HUMAN SERVICES ***

Respondent. *

Donna L. Hurd, pro se, Gaffney, South Carolina.

Althea Walker Davis, Department of Justice, Washington, D.C., with whom was *Assistant Attorney General Peter D. Keisler*, for respondent. *Timothy P. Garren*, Director and *Vincent J. Matanoski*, Acting Deputy Director.

OPINION & ORDER

Futey, Judge.

This vaccine case is before the court on petitioner’s motion for review of the special master’s dismissal of the Petition For An Award For Compensation as untimely. Dustin Riley-Max Hurd, on whose behalf petitioner, Donna L. Hurd, as parent and natural guardian, brings this action seeking compensation for alleged vaccine related injuries pursuant to the National Childhood Vaccine Injury Act of 1986 (Vaccine Act), 42 U.S.C. §§ 300aa-1 to -34 (2000). Based on the record before him, the special master determined that Dustin’s developmental delay and loss of hearing and eyesight due to nerve damage began to appear many years before July 26, 2002, and, therefore, the petition filed on July 27, 2005 was not within the statute of limitations. Petitioner maintains that the doctrine of equitable tolling should be applied in this case because she was misled by court-ordered tests that diagnosed her son as mildly retarded. Petitioner further claims that this court should toll the statute

of limitations because petitioner was unaware of the existence of the National Vaccine Injury Compensation Program (“Vaccine Program”). Petitioner also argues that the special master incorrectly denied her request for a conference. Respondent maintains that the petition is untimely and that the doctrine of equitable tolling is unavailable in vaccine injury cases. Respondent also avers that the special master’s denial of an additional status conference was appropriate.

Factual Background

Dustin was born on February 28, 1996. According to petitioner, Dustin was a normal baby until he received his scheduled vaccinations.¹ Soon after he was given the vaccinations at seven months, petitioner knew “that something was not right”² with Dustin. Early on, Dustin exhibited “uncontrollable behavior in public.”³ Petitioner further stated that “Dustin’s symptoms got worse with every vaccination”⁴ and that she consulted a number of doctors about Dustin’s condition. Dustin’s doctors were unsure of his exact diagnosis, but nearly all agreed that he suffered from attention deficit hyperactivity disorder (“ADHD”), among other physical and mental problems.

Petitioner claims that Dustin’s outbursts eventually led to her arrest for child abuse and neglect on July 26, 1999. As part of petitioner’s trial in “The United States Court’s [sic], of Tazewell[,], Virginia,”⁵ Dustin underwent psychological and physical evaluations and was diagnosed with developmental, behavioral, and emotional disorders, including ADHD, as well as certain hearing and vision impairments. The

¹ At three months, Dustin received a Tetramune, a Hepatitis B, and an oral polio vaccination (“OPV”). At four months, he had the same three vaccinations again. In September 1996, Dustin received doses of the Tetramune and Hepatitis B vaccination. In May 1997, Dustin was given a varicella vaccination, and in October 1997, his doctor once again administered the Tetramune vaccination and OPV, as well as a measles-mumps-rubella (“MMR”) immunization. Finally, in July 2000, Dustin received the Tetramune and inactivated polio vaccines and an MMR immunization.

² *See Hurd v. Sec’y of DHHS*, No. 05-798V, slip op. at 2 (Fed. Cl. Spec. Mastr. August 12, 2005) (citing petitioner’s exhibits).

³ Mot. for Review at 2.

⁴ *Id.* at 1.

⁵ *Id.*

trial concluded in August 2000.⁶ Between August 2000 and March 2005, Dustin visited a number of doctors, including specialists in ophthalmology and neurology as well as psychiatrists. In March 2005, Dustin's chiropractor informed petitioner that Dustin's condition may be due to an atypical reaction to his early vaccinations and advised her to contact the National Vaccine Center. Subsequently, petitioner filed the case at bar on July 27, 2005.

On August 11, 2005, Special Master John F. Edwards held a status conference and informed petitioner that her petition was untimely because Dustin's symptoms appeared well before July 2002. Later the same day, petitioner requested an additional status conference, but Special Master Edwards denied this request. Special Master Edwards issued a decision dismissing the case as untimely on August 12, 2005. *See Hurd v. Sec'y of DHHS*, No. 05-798V, slip op. at 5 (Fed. Cl. Spec. Mastr. August 12, 2005). Petitioner filed a motion to review with this court on August 30, 2005 and an amended motion on September 22, 2005. Respondent filed its response on September 29, 2005.

Discussion

When deciding a motion for review, the court proceeds in accordance with the rules set forth in the Vaccine Act. The Vaccine Act provides, in pertinent part:

(2) Upon the filing of a motion under paragraph (1) with respect to a petition, the United States Court of Federal Claims shall have jurisdiction to undertake a review of the record of the proceedings and may thereafter - -

(A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision,

(B) set aside any findings of fact or conclusions of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or

(C) remand the petition to the special master for further action in accordance with the court's direction.

42 U.S.C. § 300aa-12(e)(2).

Petitioner argues that the special master should have applied equitable tolling in this case. She claims that the doctors appointed by the Virginia court, that heard

⁶ Petitioner's filings do not make clear the result of the trial. In her petition, petitioner states that the child abuse claim was "unfound" at the conclusion of the trial. Petition ¶ 11(d). Presumably, she was found not guilty of the charges.

her child abuse case between July 1999 and August 2000, misdiagnosed her son's illnesses. The Virginia court accepted the incorrect diagnosis, and, according to petitioner, it became "court ordered."⁷ Petitioner maintains that because the misdiagnosis was "court ordered," other doctors she consulted relied on this incorrect diagnosis, and, consequently, she was unable to obtain a comprehensive diagnosis of her son's disorders or find him proper treatment before the statute of limitations expired. Petitioner argues that the Virginia court, therefore, "interfere[d]"⁸ with her ability to file a timely petition because it prevented her from understanding the nature of her son's condition and its cause until recently.⁹ Petitioner also notes that she did not know of the Vaccine Program until recently. Respondent avers that equitable tolling is unavailable in vaccine cases under *Brice v. Sec'y of DHHS*, 240 F.3d 1367 (Fed. Cir. 2001).

"The Federal Circuit, in *Brice*, held that equitable tolling is not available for claims arising under § 16(a)(2) of the Vaccine Act, which concerns vaccines administered after the Vaccine Act's effective date. *Brice*, 240 F.3d at 1370-75. The special master was, and the court is, bound by the Federal Circuit's decision." *Setnes v. U.S.*, 57 Fed. Cl. 175, 178 (2003). The only exception to this rule is where the petitioner files his or her case in the wrong court. *Brice*, 240 F.3d at 1373. The Federal Circuit provided no other situation that would warrant equitable tolling, and specifically noted that the statute of limitations can not be tolled even in a case where the petitioner reasonably did not know that a vaccine caused the injury. *Id.* Therefore, the special master's decision not to apply equitable tolling was correct.

Section 16(a)(2) of the Vaccine Act reads as follows:

[I]f a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation . . . for such injury after the expiration of 36 months after the date of the

⁷ Mot. for Review at 2.

⁸ *Id.* at 6.

⁹ During the August 11, 2005 status conference, petitioner explained that

the court[,] when I was charged with child abuse and neglect for my son's symptoms, they led me to believe that he was mentally retarded and because of that, you know, going to the doctors, the doctors did not consider all his symptoms and that pushed me past the statute of limitations, I feel.

Transcript of August 11, 2005 Status Conference at 7.

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). Therefore, for the petition to be within the statute of limitations, Dustin’s “first symptom or manifestation of onset” must have occurred after July 26, 2002. Petitioner argues that because Dustin’s diagnosis changed a number of times and his doctors were unsure what disorders he suffered from, the “manifestation of onset” only occurred when she became aware, in March 2005, that Dustin’s condition may be due to his reaction to his vaccinations. Respondent maintains that the petition was filed outside of the statute of limitations because Dustin’s symptoms began in September 1996, when he received his third vaccination. Respondent avers that in order for the petition to be timely, it must have been filed six years ago, in September 1999.

In *Setnes v. U.S.*, this court held that where a condition, such as autism, is a collection of symptoms that may develop “insidiously over time” the statute of limitations does not run from the very first symptom of the disease. 57 Fed. Cl. at 181 (quoting expert’s affidavit). Rather, the “manifestation of onset” occurs when, in the aggregate, the behaviors indicate a disorder. *Id.* This does not mean, however, that “a medical or psychological diagnosis or verification of the ‘occurrence of the first symptom or manifestation of onset’ begins the running of the statute of limitations.” *Id.* Instead, the statute of limitations runs from the date the aberrant behavior “clearly or obviously signal[s] the onset” of the condition, not the date of confirmed diagnosis. *Id.*

In the case at bar, even though Dustin’s diagnosis was uncertain, petitioner stated herself that Dustin’s condition started “years ago” and “got worse with every vaccination.”¹⁰ Although it is unclear from the petition when exactly Dustin began exhibiting symptoms and, notwithstanding respondent’s claim that the first symptom appeared in September 1996, it is apparent that petitioner knew her son’s behavior was abnormal in November 1999. At that time, she reported to Dustin’s physician that Dustin suffered from “balance problems, high pitch screaming in his sleep, shaking like seizures, and eyesight trouble . . . uncontrollable behaviors, excessive thirst, hearing and speech difficulties.”¹¹ Therefore, in order to be within the statute

¹⁰ Mot. for Review at 1.

¹¹ Petition ¶ 7.

of limitations, petitioner would have had to file her petition by November 2002, possibly even earlier. Instead, petitioner filed her petition on July 27, 2005, at least six years after Dustin's "first symptom or manifestation of onset." Thus, the special master's conclusion that the petition is untimely and must be dismissed is upheld.

Finally, petitioner argues that the special master improperly denied her request for a status conference. Respondent maintains that it is within the discretion of the special master to tailor the proceedings as needed and that because the petition was untimely, the special master did not have jurisdiction to hear the case. Under Vaccine Rule of the United States Court of Federal Claims 3(b), "[t]he Special Master shall determine the nature of the proceedings, with the goal of making the proceedings expeditious, flexible, and less adversarial, while at the same time affording each party a full and fair opportunity to present its case" A review of the August 11, 2005 status conference transcript shows that Special Master Edwards fulfilled, and even went beyond, the requirements of Vaccine Rule 3(b). Petitioner had ample opportunity to present her case during this conference, and the special master clearly gave petitioner all due deference and assistance required a *pro se* petitioner. Therefore, the special master's decision to deny the request for an additional conference is no reason to disturb his ruling.

Conclusion

For the above-stated reasons, petitioner's motion for review is denied on the basis that her petition was untimely. The Clerk of the Court is directed to DISMISS the complaint for lack of subject matter jurisdiction.

IT IS SO ORDERED.

BOHDAN A. FUTEY
Judge