

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-293V

Filed: September 27, 2012

(Not to be Published)

BRAD ATTAWAY AND CHRISTY *
ATTAWAY, as legal representatives of *
a minor child, BRAD ATTAWAY, JR. *

Petitioners, *
v. *

Autism; Statute of Limitations;
Untimely Filing; Equitable Tolling

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

DECISION¹

On April 18, 2008, petitioners, Brad and Christy Attaway, on behalf of their son, Brad Attaway, Jr. (“Brad”), filed a claim for compensation pursuant to the National Vaccine Injury Compensation Program (“Vaccine Program” or “the Program”).² 42

¹ Because this decision contains a reasoned explanation for the action in this case, the undersigned intends to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, the undersigned agrees that the identified material fits within the requirements of that provision, the undersigned will delete such material from public access.

² The National Vaccine Injury Compensation Program (“Vaccine Program” or “the Program”) is set forth in 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. (2006) (“Vaccine Act” or “the Act”). All citations in this Decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

U.S.C. §§ 300aa-1 to -34 (2006). Petitioners allege that Brad suffers from autism which was “caused-in-fact” by a measles, mumps, rubeola vaccine (“MMR”) he received on April 15, 2002. Petition at 1.

Petitioners have the burden to demonstrate that their case was properly and timely filed under the Vaccine Act’s statute of limitations. § 300aa-16(a)(2). Based on the undersigned’s analysis of the evidence, petitioners have not met their burden, and thus **this case is dismissed as untimely filed.**

I. Procedural History

The petition was filed by petitioners on April 18, 2008. Like most other cases in the OAP,³ the case remained on hold until discovery in the OAP was concluded, causation hearings in the test cases were held, and entitlement decisions were issued in the test cases.⁴

During the period between the test case hearings and the final appellate action on the test case decisions, petitioners, like others in the OAP, were ordered to file medical records. Petitioners filed the required records on July 22, 2008. See Petitioners’ Exhibits (“Pets. Ex.”) 1-12 filed July 22, 2008. In response to the medical records on September 8, 2008, respondent filed a Motion to Dismiss alleging that the petition was untimely filed based on the Vaccine Act’s statute of limitations, §300aa-16(a)(2). Petitioners filed a response to the motion on October 31, 2008, arguing the case should proceed because all medical records were filed in a “timely manner.” Petitioners’ Response at 1.

After the final test case appeal was decided, the undersigned ordered petitioners on September 23, 2010 to inform the court if they wished to pursue their claim. Petitioners responded that they wished to continue with the claim on October 25, 2010.

³ A detailed discussion of the OAP can be found at *Dwyer v. Sec’y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

⁴ The Theory 1 cases are *Cedillo v. Sec’y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 89 Fed. Cl. 158 (2009), *aff’d*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec’y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 473 (2009), *aff’d*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec’y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 706 (2009). Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims. The Theory 2 cases are *Dwyer v. Sec’y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec’y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec’y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The petitioners in each of the three Theory 2 cases chose not to appeal.

By Order filed March 1, 2011, the undersigned asked petitioners to provide the court with a statement identifying how Brad's vaccines caused his injury. Petitioners filed no response to that Order. The undersigned deferred any additional action on this claim pending the Federal Circuit's en banc decision in *Cloer v. Secretary of Health & Human Services*, 654 F.3d. 1322 (Fed. Cir. 2011), addressing the Vaccine Act's statute of limitations.

Subsequent to the Federal Circuit's en banc decision in *Cloer*, an Order to Show Cause was filed on July 26, 2012,⁵ directing petitioners to show cause why this claim should not be dismissed as untimely filed. Petitioner's responded to that Order on August 21, 2012.

II. Facts.

Brad was born on April 6, 2001. Pet. Ex. 1. He received his first administration of the MMR vaccine on April 15, 2002. Pet. Ex. 3 at 13. Petitioners allege that soon after the vaccination, he began to "regress socially, verbally, and generally developmentally." Petition at 1.

On August 14, 2003, Brad was seen by Dr. Dick Barlow due to an absence of speech. Pet. Ex. 4 at 16. Dr. Barlow's examination indicated that Brad had "essentially normal hearing." *Id.* Thereafter, Brad was referred for outpatient therapy at home from Early Childhood Intervention. Pet. Ex. 5 at 20-21. Petitioners note that Brad was "suspected of having Autism" during these therapy sessions. Petition at 2.

Brad's Pediatrician, Dr. Michael McMahon, referred him to Texas Children's Hospital's Blue Bird Clinic to be evaluated by Dr. Timothy Lotze on November 18, 2003. Pet. Ex. 6 at 22. Brad was diagnosed with a pervasive developmental disorder on April 14, 2004. *Id.* at 25.

⁵ The order to show cause was originally sent to petitioners at their address of record on June 22, 2012. The post office returned the order as undeliverable. The court endeavored to locate a new address for petitioners and sent the order to that address as well as the address of record. **The clerk is instructed to send copies of this Decision to the address of record for petitioners and to the following address:**

Brad and Christy Attaway
1736 Bay Pine Circle
Gulf Breeze, FL 32563-9421

III. Analysis.

The Vaccine Act provides that:

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...

§ 300aa-16(a)(2) (emphasis added). In *Cloer*, the Court of Appeals for the Federal Circuit 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.” 654 F.3d at 1340. The date of the occurrence of the first symptom or manifestation of onset “does not depend on when a petitioner knew or reasonably should have known” about the injury. *Id.* at 1339. Nor does it depend on the knowledge of a petitioner as to the cause of the injury. *Id.* at 1338.

The Federal Circuit also held that equitable tolling of the Vaccine Act’s statute of limitations is permitted. *Id.* at 1340. However, citing to *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990), the Circuit noted that equitable tolling is to be used “sparingly,” and not applied simply because the application of the statute of limitations would otherwise deprive a petitioner the opportunity to bring a claim. See *Cloer*, 654 F.3d at 1344-45. Citing to *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), the Circuit also noted that equitable tolling should be applied only in “extraordinary circumstance[s],” such as when petitioner timely filed a procedurally defective pleading, or was the victim of fraud, or duress, *Cloer*, 654 F.3d at 1344-45; see also *Irwin*, 498 U.S. at 96.

Brad’s medical records establish that this claim was not timely filed. Brad was diagnosed with a pervasive developmental disorder on April 14, 2004. Utilizing even the date of diagnosis, recognizing that the first symptom or manifestation of onset of Brad’s autism necessarily occurred earlier, this claim must have been filed by April 14, 2007. The petition was not filed until April 18, 2008, more than a year too late.

The undersigned’s Order to Show Cause, July 26, 2012, required petitioners to assert any “extraordinary circumstances” that would merit equitable tolling of the Vaccine Act’s statute of limitations in this case. In response petitioners assert that they have “provided all records requested ... [and] initially submitted [the petition] in a timely manner.” Petitioner’s Response filed August 21, 2012 at 1. Petitioners continue to urge that they have “complied with all dates and deadlines.” *Id.* at 2. While petitioners have

promptly responded to Orders from this Court and shown great initiative, this is not the timeliness or compliance that was addressed in the undersigned's Order to Show Cause.

The Vaccine Act's statute of limitations requires that "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." § 300aa-16(a)(2) (emphasis added). Petitioners have evidenced an understanding of this requirement by acknowledging that "this case was filed four years after ... Brad's autism diagnosis ... [due to] no knowledge of the VICP program." Petitioners Response filed August 21, 2012 at 2.

Unfortunately for petitioners, the fact that petitioners were not aware of the Vaccine Program prior to filing their claim is not a legally sufficient justification to toll the statute of limitations. See *Cloer*, 654 F.3d at 1344-45. Citing to *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), the Circuit also noted that equitable tolling should be applied only in "extraordinary circumstance[s]," such as when petitioner timely filed a procedurally defective pleading, or was the victim of fraud, or duress, *Cloer*, 654 F.3d at 1344-45; see also *Irwin*, 498 U.S. at 96. The undersigned finds that no allegations of filing a procedurally defective pleading, being a victim of fraud, or duress are apparent here. Accordingly, petitioners claim must be dismissed as it was filed more than a year too late and petitioners have failed to demonstrate any "extraordinary circumstances" that would merit equitable tolling of the Vaccine Act's statute of limitations in this case.

IV. Conclusion.

Petitioners have the burden to show timely filing. They have failed to establish that this case was 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. § 300aa-16(a)(2).

For the reasons set forth above, **this case is dismissed as untimely filed. The clerk is directed to enter judgment accordingly.**⁶

IT IS SO ORDERED.

Gary. J. Golkiewicz
Special Master

⁶ This document constitutes the undersigned's final "Decision" in this case, pursuant to § 12(d)(3)(A). If petitioners wish to have this case reviewed by a Judge of the United States Court of Federal Claims, a motion for review of this decision must be filed within 30 days. After 30 days the Clerk of this Court shall enter judgment in accord with this decision. If petitioners wish to preserve whatever right petitioners may **have to file a civil suit (that is a law suit in another court) petitioners must file an "election to reject judgment** in this case and file a civil action" within 90 days of the filing of the judgment. § 21(a).