

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-0045V

Filed: September 21, 2012

(Not to be Published)

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MELISSA BUTLER, \*  
on behalf of her son, \*  
ELIAS CHRISTIAN BUTLER, a minor, \*

Petitioner, \*  
v. \*

Autism; Statute of Limitations;  
Untimely Filing

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

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## DECISION<sup>1</sup>

On January 18, 2008, Melissa Butler (“petitioner”) filed a Complaint (hereafter referred to as “Petition”) for Vaccine Compensation under the National Childhood Vaccine Injury Act<sup>2</sup> (“Vaccine Act” or the “Act”) on behalf of her son Elias Christian Butler (“Christian”).

Petitioner has the burden to demonstrate that her case was properly and timely filed under the Vaccine Act’s statute of limitations. §16(a)(2). Based on the

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<sup>1</sup> Because this Decision contains a reasoned explanation for the action in this case, the undersigned intends to post this Decision 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)). 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.

<sup>2</sup> The National Vaccine Injury Compensation 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.A. §§ 300aa-10 et seq. (2006). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

undersigned's analysis of the evidence, petitioner has not met her burden, and thus **this case is dismissed as untimely filed.**

## I. Procedural History

No medical records were filed with this Petition. Therefore, petitioner was ordered to file all medical records required by Section 11(c)(2) of the Vaccine Act, as well as a "Statement Regarding Onset" and a "Statement of Completion." Order filed Feb. 4, 2008 at 2, 3 n.3. Petitioner failed to respond to that Order. On August 22, 2008, petitioner was again ordered to file all required medical records and a "Statement Regarding Onset." Petitioner failed to respond to that Order.

An Order to Show Cause was filed on June 10, 2011, in order to compel petitioner to file the required medical records. Petitioner filed some medical records on June 28, 2011. Therefore, the undersigned ordered respondent to file a "Statement Regarding whether the Claim should proceed in the OAP."<sup>3</sup> In response, respondent filed a Motion to Dismiss on August 1, 2011, alleging that the petition was untimely filed. See § 16(a)(2). Petitioner failed to respond to the motion. The undersigned deferred any action on the issue of timeliness of this case pending the Federal Circuit's en banc decision in *Cloer v. Secretary of Health & Human Services*, 654 F.3d. 1322 (Fed. Cir. 2011).

Subsequent to the Federal Circuit's Decision in *Cloer*, the undersigned ordered petitioner to show cause why this claim should not be dismissed as untimely filed. Order to Show Cause filed July 13, 2012. Petitioner has failed to respond to that Order.

## II. Facts.

Christian was born on October 26, 2000. Pet. Ex. at 2. Christian was delivered by "C-section after 36 hours of labor." *Id.* at 141. His growth was normal. *Id.* at 158-62. Christian received routine childhood vaccines between October 27, 2000, and February 9, 2007. *Id.* at 2-4.

On October 27, 2004, during Christian's four<sup>4</sup> year old well child visit with his primary care physician, Dr. William Wear, Christian's parents raised concerns about his

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<sup>3</sup> The Omnibus Autism Proceeding ("OAP") consists of a large group of petitions alleging that certain childhood vaccinations cause or contribute to the development of a serious neurodevelopmental disorder known as autism spectrum disorder ("ASD") or autism. The Petitioners' Steering Committee ("PSC"), an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of autism. The OAP test case decisions can be found at <http://www.uscfc.uscourts.gov/node/5026>.

<sup>4</sup> The court's July 13, 2012 Order to Show Cause erroneously indicated that this visit was Christian's two year old well child visit but correctly noted the date of this visit and the information contained in the record from this visit. It is clear that this error was merely a "typo" and does not affect the relevant facts, reasoning, or outcome in this case.

behavior and lack of appropriate speech. *Id.* at 169. They indicated that Christian had “never been evaluated before.”<sup>5</sup> *Id.* Dr. Wear noted Christian’s poor eye contact and other symptoms which caused him to indicate that he was “very concerning for autism spectrum.” *Id.* Dr. Wear assessed Christian as being on the Autism Spectrum but directed his parents to obtain a full evaluation through the school system. *Id.*

On January 6, 2005, Christian’s parents took him to see Susannah Poe, an Assistant Professor and West Virginia (“WV”) Licensed Psychologist at the Klingberg Neurodevelopmental Center at the West Virginia University (“WVU”) Department of Pediatrics. *Id.* at 141-42. Susannah Poe confirmed Dr. Wear’s initial diagnosis and indicated that Christian “does meet criteria for the diagnosis of autism.” *Id.* at 142.

### III. Legal Standard.

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...

§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,

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<sup>5</sup> During a psychological evaluation conducted on April 9, 2010, Christian’s parents did report that they noticed “regression” in his abilities at 21 months which would have been in July 2002. *Id.* at 57.

or was the victim of fraud, or duress, *Cloer*, 654 F.3d at 1344-45; see also *Irwin*, 498 U.S. at 96.

#### IV. Analysis.

Christian's medical records establish that this claim was not timely filed. Christian was diagnosed with an autism spectrum disorder by Dr. Wear on October 27, 2004. Utilizing even the date of diagnosis, recognizing that the first symptom or manifestation of onset of Christian's autism spectrum disorder necessarily occurred earlier, this claim must have been filed by October 27, 2007. The petition was not filed until January 18, 2008, more than two months too late.

Additionally, petitioner has not presented any arguments that would support the application of equitable tolling to this claim, and the undersigned's examination of the record does not disclose any basis for applying equitable tolling to this case.

#### V. Conclusion.

Petitioner has the burden to show timely filing. She has 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. §16(a)(2).

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

**IT IS SO ORDERED.**

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Gary. J. Golkiewicz  
Special Master

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<sup>6</sup> 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).