

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 02-0873V

Filed: August 26, 2009

TO BE PUBLISHED

STACY CARSON and AMY CARSON, as legal guardians for KIT CARSON *

Petitioner, *

Autism; Statute of Limitations; Markovich; Dismissal; Vaccine Injury; Diagnostic and Statistical Manual of Mental Disorders

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

David P. Matthews, Houston, TX, for petitioners.

Heather Lynn Pearlman, United States Department of Justice, Washington, DC, for respondent.

DECISION¹

GOLKIEWICZ, Chief Special Master.

On July 22, 2002, petitioners Stacy and Amy Carson filed a Petition for Vaccine

¹ Because this decision contains a reasoned explanation for the undersigned’s 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, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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.

Compensation under the National Childhood Vaccine Injury Act² (hereinafter “Vaccine Act”) on behalf of their son Kit. Petitioners’ allege that Kit “suffered mercury poisoning and neurological injuries, including severe developmental delays within the Autistic spectrum, which were ‘caused-in-fact’ . . . by his exposure to toxic ethyl mercury in the form of Thimerosal used as a preservative in some of the vaccines administered to him.” Petition at 1. On September 10, 2002 petitioner filed a Notice to Defer Proceedings in [an] Autism Case pursuant to General Autism General Order # 1. Given that many of the autism cases present the question of whether the Petition was timely filed in accordance with §16(a)(2), on February 15, 2008 petitioners were ordered to file all medical records “from the period of the vaccinee’s birth through either, whichever date is later, (1) the date of petition filing, or (2) the date of the vaccinee’s initial diagnosis of autism, autism spectrum disorder, a speech or language delay related to an autism diagnosis, or any similar neurological disorder related to an autism diagnosis.” Order filed February 15, 2008. On April 3, 2008, November 7, 2008 and December 15, 2008 petitioners filed the required medical records. On May 14, 2008, respondent filed a Motion to Dismiss (hereinafter Respondent’s Motion) alleging that the Petition was filed outside the statutorily prescribed limitations period. See §16(a)(2) Respondent’s Motion to Dismiss (hereinafter R Mot.) at 1. On June 30, 2008, petitioners filed a Response (hereinafter Petitioners’ Response) contesting Respondent’s Motion to Dismiss. Petitioners’ Response (hereinafter P Resp.) at 1. To support their case, petitioners submitted an expert report from Dr. Elizabeth Mumper on January 13, 2009 Petitioners’ Exhibit (hereinafter P Ex.) 31 at 3-4. Dr. Mumper filed an addendum to her aforementioned expert report on February 17, 2009.³ P. Ex. 32 at 1. On June 2, 2009, a Hearing was held to take Dr. Mumper’s testimony regarding the first symptom of Kit’s autism. Following the Hearing, a status conference was held on June 24, 2009 during which both parties were offered the opportunity to file any post-hearing briefs or introduce any further arguments into the record. Both parties indicated they had nothing further to add to the record. The singular issue to be decided is whether petitioners’ claim was timely filed. This issue is ripe for resolution.

² 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. §§ 300aa-10 et seq. (2006) (“Vaccine Act” or the “Act”). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

³ In neither report did Dr. Mumper answer the following specific questions the undersigned set forth in an Order filed February 9, 2009.

- 1) Utilizing all of the current medical information for Kit, retrospectively, or looking back, what was the first symptom of Kit’s autism disorder?
- 2) Again, utilizing all of the current medical information, looking back or looking retrospectively, was Kit’s noted speech/language and gross motor delay in May of 1999 the first symptom of his autism disorder?

Facts

The facts presented in this case are not at issue. Kit was born on May 22, 1996 in Asheville, NC. P Ex.1 at 1. Kit received a number of childhood vaccinations between the date of his birth and June 4, 1997. P Ex. 2 at 1-7; Petition at 1. Kit was noted by his pediatrician to be “[b]ehind in speech” at his 18 month check-up and again noted to be “speech delayed” at his 24 month check-up. P Ex. 18 at 4; June 2, 2009 Hearing Transcript filed on July 2, 2009 (hereinafter “Tr. at _”) at 9. On May 25 1999, Kit was noted by his pediatrician Dr. Page to have “severe language delay” and was referred to the Developmental Evaluation Center (DEC) in Asheville, NC by Dr. Page for an evaluation. P Ex. 30 at 2; P Ex. 21 at 5. However, Kit’s parents chose not to pursue an evaluation from DEC at that time. P Ex. 21 at 5. On September 13, 1999, Kit was evaluated by Luanne Pate, M.A., C.A.S., a Nationally Certified School Psychologist, as part of his IEP assessments done by his school district to determine “his need and eligibility for preschool services through the Exceptional Children’s Program at Buncombe County Schools.” P Ex. 6 at 28-29. Ms. Pate noted in her evaluation Kit’s “[l]anguage is quite delayed, particularly expressive language, with Kit being basically nonverbal.” *Id.* On July 21, 2000, Kit was evaluated by DEC for speech/language and gross motor delays. P Ex. 21 at 5. Kit was not diagnosed with an autism spectrum disorder at this time, however, it was noted that “Kit demonstrated a number of behaviors often observed in children with autism spectrum disorder.” *Id.* at 15. Dr. William Huffstutter in a letter to Dr. Page On September 26, 2000 noted that Kit “certainly demonstrates evidence of a static form of encephalopathy exemplified in delays in all areas of development but more so in speech and socialization.” P Ex. 19 at 2-3. Kit was diagnosed with autism on April 26, 2001 by clinical supervisor Anne McGuire at the at the University of North Carolina at Chapel Hill’s TEACCH Center in Asheville, NC. P Ex. 4 at 1, P Ex. 24 at 13.

Legal Standard

Pursuant to the Vaccine Act, eligible petitioners may be compensated for injuries caused by certain vaccines. See generally §§ 10 - 34. In order to become eligible for any compensation, the Vaccine Act provides statutory deadlines for filing program petitions at § 16. In relevant part, the Vaccine Act provides:

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).

The Vaccine Act is a waiver of the United States’ sovereign immunity and accordingly

“must be strictly and narrowly construed.” Markovich v. Sec’y of HHS, 477 F.3d 1353, 1360 (Fed. Cir. 2007). The Federal Circuit has instructed that “courts should be careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended.” Id. (citing Brice v. Sec’y of HHS, 240 F.3d 1367, 1370 (Fed. Cir. 2001)). The Circuit’s decision in Markovich directly addressed the question of “what standard should be applied in determining the date of ‘the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury,’” Markovich, 477 F.3d at 1356, by holding “‘the first symptom or manifestation of onset,’ for purposes of §300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.” Id. at 1360.⁴ Accordingly, petitioners have 36 months from the first objectively recognizable sign of their alleged vaccine injury to file their claim.

The Circuit explained in Markovich that “the terms of the Vaccine Act demonstrate that Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act.” Markovich, 477 F.3d at 1358 (quoting Brice v. Sec’y of HHS, 36 Fed. Cl. 474, 477 (1996) (Andewelt, J) aff’d on other grounds, 240 F.3d 1367 (Fed. Cir. 2001)). The Circuit elaborated that by choosing to start “the running of the limitations period on the date the first symptom or manifestation of the onset occurs, Congress chose to start the running of the statute before many petitioners would be able to identify, with reasonable certainty, the nature of the injury.” Id. at 1358 (quoting Brice, 36 Fed. Cl. at 477). The Court noted that the Act has “consistently been interpreted” to include “subtle symptoms or manifestations of onset” as triggers of the Act’s statute of limitations. Id. The Court stressed that the words “symptom” and “manifestation of onset” are in the disjunctive as used in the Act, and that the words have different

⁴ Although not directly stated, the Markovich decision appears to have found that Setnes v. Sec’y of HHS, 57 Fed. Cl. 175 (2003) (Futey, J.) was incorrectly decided. In Setnes, the Court of Federal Claims determined that “[w]here there is no clear start to the injury, such as in cases involving autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on the ‘occurrence of the first symptom.’” Setnes, 57 Fed. Cl. at 179. The Setnes court stated that because the symptoms of autism develop “‘insidiously over time’ and the child’s behavior cannot readily be connected to an injury or disorder, the court may rely on the child’s medical or psychological evaluations in ascertaining when the ‘manifestation of onset’ occurred.” Id. at 181. The Federal Circuit found a “significant problem with the rationale of Setnes” in that Setnes “effectively” required evidence of a “symptom *and* manifestation” whereas the Act requires either a symptom or manifestation of onset, whichever occurs first, to trigger the statute of limitations. Markovich, 477 F.3d at 1358; Cloer v. Sec’y of HHS, 85 Fed. Cl. at 148 (2008) (Block, J.), appeal docketed, No. 09-5052 (Fed. Cir. Mar. 9, 2009) (“[T]he validity of Setnes was made doubtful by the Federal Circuit in Markovich.”); see also Lemire v. Sec’y of HHS, No. 01-617V, slip. op. at 3 (Fed. Cl. 2008)(unpublished) (Baskir, J.) (In Markovich, “[t]he Federal Circuit criticized the rationale in Setnes and rejected its subjective standard as to the trigger date of the limitations period.”); Wilkerson v. Sec’y of HHS, 2009 WL 1583527, at * 2 (Fed. Cl. 2009) appeal docketed, No. 09-5090 (Fed. Cir. June 4, 2009) (“The Federal Circuit was aware of the Setnes decision and disagreed with it . . . [t]he Appeals Court rejected the Setnes’ court’s reasoning as being contrary to the language of the Vaccine Act.”)(Hodges, J.).

meanings. Markovich, 477 F.3d at 1357. Thus, **symptom** “may be indicative of a variety of conditions or ailments, and it may be difficult for lay persons to appreciate the medical significance of a symptom with regard to a particular injury,” whereas a **manifestation of onset** “is more self-evident of an injury and may include significant symptoms that clearly evidence an injury.” Id. (emphasis added). Accordingly, the Court found that the Act’s statutory standard of first symptom or manifestation of onset could include subtle symptoms that a petitioner would recognize “only with the **benefit of hindsight**, after a doctor makes a definitive diagnosis of the injury,” Markovich, 477 F.3d at 1358 (quoting Brice, 36 Fed. Cl. at 477), and would be “recognizable to the medical profession at large but not necessarily to the parent.” Markovich, 477 F.3d at 1360 (citing Goetz v. Sec’y of HHS, 45 Fed. Cl. 340, 342 (1999)) (emphasis added); see also Cloer, 85 Fed. Cl. at 149 (explaining Markovich holds “the limitations period begins to run at the first occurrence of a symptom even though an exact diagnosis may be impossible until some future date when more symptoms or medical data are forthcoming.”); Lemire, slip. op. at 6 (“Congress chose to start the running of the statute before many petitioners would be able to identify, with reasonable certainty, the nature of the injury.”); Wilkerson, 2009 WL 1583527, at *2 (“The Federal Circuit recognized in Markovich that the statute of limitations may begin running in some cases before petitioners would have been able to discern the nature of their injuries.”). Thus, the Circuit in interpreting the Act’s statute of limitations, rejected applying a “subjective standard that focuses on the parent’s view” of the timing of onset in favor of an “objective standard that focuses on the recognized standards of the medical profession at large.” Markovich 477 F.3d at 1360.

Summary of Parties’ Arguments

Petitioners argue that their petition was timely filed. P Resp. at 2. Petitioners citing to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Ed., American Psychiatric Association (2000), at 71-75 (hereinafter DSM-IV), aver that “delay in language and motor skills **alone** are not ‘symptoms or manifestation of onset’ of autism.” P Resp. at 4 (emphasis in original). Petitioners allege the first “objectively recognizable symptom[.]” of Kit’s autism was the “April 23, 2001 evaluation” when Kit was diagnosed by Anne McGuire at University of North Carolina at Chapel Hill’s TEACCH Center. Id. at 4. Thus, petitioners contend the statute of limitations did not expire in this matter until April 23, 2004 and therefore the Petition filed on July 22, 2002 was filed timely in accordance with the Vaccine Act.

Petitioners support their argument with the reports and testimony of Dr. Mumper. Dr. Mumper opined in her initial expert report that Kit did not meet the “criteria for the **diagnosis** of autism [as required by the DSM-IV] until the evaluation on April 23, 2001” and thus “April 23, 2001 is the time that should have ‘started the clock’ for the statute of limitations in vaccine court.” P Ex. 31 at 4 (emphasis added). However, Dr. Mumper added in an addendum to her expert report that when viewed retrospectively, Kit’s IEP assessments from “September and October of 1999 may have indicated the first symptoms of autism.” P Ex. 32 at 1.

Thus, petitioners argue that Kit did not exhibit objectively recognizable symptoms or manifestations of autism until his April 26, 2001 evaluation were he was diagnosed with autism, or at the very earliest using retrospective analysis the fall of 1999 based upon the symptoms documented in Kit's IEP reports. As the Petition was filed on July 22, 2002, either of these time frames would make the Petition timely filed.⁵

Respondent alleges petitioners filed their petition approximately two months after the requisite thirty-six month statute of limitations period had expired. R Mot. at 4. Respondent argues that the first symptom or manifestation of Kit's autism occurred in May of 1999 when Kit "was referred to the DEC by his pediatrician for an evaluation of speech/language and gross motor delays." R Mot. at 3. Thus, respondent alleges petitioners would have had to file their petition no later than May 2002 in order to be timely. However, petitioners' claim was not filed until July 22, 2002, almost two months after the thirty-six month period had expired.

Discussion

At issue in this case is whether petitioners' claim was filed within "36 months after the date of the occurrence of the first symptom or manifestation" of Kit's autism." §16(a)(2). After considering the entire record and each parties' respective arguments, the undersigned answers this question in the negative and must dismiss the Petition as untimely filed.

Petitioners attempted to make their case through the testimony of Dr. Mumper. However, through her reports and testimony Dr. Mumper was unhelpful to petitioners. In her initial report, Dr. Mumper focused on the incorrect legal standard - date of diagnosis. See P Ex. 31. The undersigned attempted to focus Dr. Mumper on the appropriate issues by asking specific questions. See Order filed February 9, 2009. Unfortunately, Dr. Mumper's opinion was still not entirely responsive as Dr. Mumper failed to completely address the undersigned's February 9, 2009 Order discussed infra at fn 3.. However, putting aside her reports, Dr. Mumper's testimony proved far more harmful to petitioners.

On cross examination and questioning by the court, Dr. Mumper essentially conceded that Kit's language delay, which was noted in May of 1999 by his treating pediatrician, was more

⁵ The undersigned notes Dr. Mumper in her reports and in her testimony repeatedly focused on when Kit could be diagnosed with autism. As repeatedly pointed out to petitioner at numerous conference calls, diagnosis is not appropriate legal standard for determining the start of the Act's statute of limitations. The appropriate issue here is when did Kit exhibit "the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Markovich, 477 F.3d at 1360. In fact, Dr. Mumper stated she misunderstood her charge, thinking that she was opining to the date of diagnosis, not the first symptom. Tr. at 28-9.

likely than not the first symptom or manifestation of his autism spectrum disorder.

Q: Would it be fair to say that it's your opinion that he [Kit] more likely than not has a disorder on the autism spectrum?

A: Yes.

. . .

Q: Would you . . . agree with me . . . that prior to July of 1999, Kit Carson was exhibiting speech delay?

A: He was exhibiting speech delay, that's correct.

Q: Okay. And I believe I heard you say that you would agree that the speech delay can be a symptom of autism; is that correct?

A: It can be one symptom of autism, that's true.

Q: And would you agree that this child, Kit Carson, one of the ways his autism manifested itself is in his difficulties with speech?

A: Correct.

Tr. at 24.

Continuing, Dr. Mumper made clear the significance of this testimony. When asked by the court whether she agreed with the court's statement that "it's a fair read of [Kit's] records that - - looking backwards that the expressive speech . . . that we see first indicated back in May of '99 . . . that's all part of the same problem that's ultimately part of Kit's diagnosis or what you're saying today is on the autism spectrum disorder." Tr. 29. Dr. Mumper replied "[y]es, those symptoms are all part of that constellation ultimately." Id. Based on her testimony, Dr. Mumper agreed that Kit's speech delay, noted as early as May of 1999, was the first symptom or manifestation of Kit's autism.

Based upon Dr. Mumper's testimony as measured against the Markovich standard, it is clear that the first symptoms of Kit's autism spectrum disorder are recorded in May of 1999. See P Ex. 30 at 2; P Ex. 21 at 5. Thus, the petition in this matter needed to be filed in May of 2002 to be timely filed in accordance with §16(a)(2). The petition was filed on July 22, 2002, and thus was filed two months past the statutory deadline.

While Dr. Mumper's testimony clearly supports the finding of untimeliness, the undersigned will briefly address the arguments raised by petitioners in Petitioners' Response. Petitioners argue that language delay alone cannot be considered a first symptom or

manifestation of autism because “[a]utistic symptoms are recognized by a *combination* of three behavioral characteristics” outlined in the DSM-IV⁶. P Resp. at 4 (emphasis in original). Thus, the crux of petitioners’ argument is that language delay alone, while it may fit within one of the three DSM-IV categories, is not a symptom or manifestation of onset of autism, and thus cannot be the first event that is an objectively recognizable sign of autism/developmental delay. Id.

This argument is tantamount to measuring the Act’s statute of limitations from the date of diagnosis. In fact, at the June 2, 2009 Hearing, Dr. Mumper gave testimony supporting the notion that the requirements described in the DSM-IV are connected more to arriving at a diagnosis of autism than to determining the first symptom or manifestation of onset of autism.

Q: Okay. I want to talk to you a little more specifically as to autism and the DSM. What is the DSM?

A: The Diagnostic and Statistical Manual. It's the handbook by which psychiatric and behavioral diagnoses are made.

Q: Is that how the diagnosis of autism is made, through the DSM?

A: There are a number of ways to get to that diagnosis. The DSM is the gold standard. And it's kind of like a Chinese menu where you have to meet a certain number of criteria in order to be diagnosed with autism.

Tr. at 14.

The DSM-IV, as Dr. Mumper noted, is a mechanism used to diagnose autism, and to determine the date of the first symptom or manifestation of autism. However, the date of diagnosis of autism is not the correct legal standard to apply. This is true despite the fact petitioners may be unaware they have a specific identifiable injury as of the date of the first symptom or manifestation of an injury. Cloer, 85 Fed. Cl. at 149 (explaining Markovich holds “the limitations period begins to run at the first occurrence of a symptom even though an exact diagnosis may be impossible until some future date when more symptoms or medical data are forthcoming.”); Wilkerson, 2009 WL at * 2. (“The Federal Circuit recognized in *Markovich* that the statute of limitations may begin running in some cases before petitioners would have been able to discern the nature of their injuries.”). The petitioner wrongly conflates the DSM-IV criteria used to diagnose autism with the first symptoms or manifestations of autism. This was particularly apparent when Dr. Mumper, referring to Kit’s language delay explained, “in order to have autism you can’t just have that one symptom [language delay].” Tr. at 16. Although Kit

⁶ “(1) qualitative impairment in reciprocal social interaction; (2) qualitative impairment in verbal and nonverbal communication; and (3) markedly restricted repertoire of activities and interests.” P Resp. at 4 citing DSM-IV.

may not have met the DSM-IV criteria necessary to be diagnosed with an autism spectrum disorder in May of 1999, he did, as conceded by Dr. Mumper, experience the first symptom or manifestation of his autism at that time.

Thus, based on the medical records and Dr. Mumper's testimony, the first objectively recognizable symptom or manifestation of onset of Kit's autism was exhibited no later than May 25, 1999 when Kit was noted by his pediatrician Dr. Page to have "severe language delay" and was referred to the DEC. As such, the petition must have been filed by May 25, 2002 to be filed within "36 months after the date of the occurrence of the first symptom or manifestation of onset" of Kit's injury. §16(a)(2). However, petitioners did not file their petition until July 22, 2002, approximately two months after the statutory deadline had expired. Therefore, the Petition in this matter is **dismissed** as untimely filed. Id. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/Gary J. Golkiewicz

Gary J. Golkiewicz

Chief Special Master