

ORIGINAL

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-0608V

Filed: September 27, 2012



MAYBELLINE CASTILLO and
ROELITO CASTILLO, parents of
RAYMOND L. CASTILLO, a minor

Petitioners,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Autism; Dismissal of Claim
as Untimely Filed; Equitable
Tolling

DECISION¹

On August 28, 2008, petitioners, on behalf of their son, Raymond Castillo ("Raymond"), filed a claim for compensation pursuant to the National Vaccine Injury Compensation Program ("Vaccine Program" of "the Program").² 42 U.S.C. §§ 300aa-1 to -34 (2006). Petitioners filed the Short-Form Petition authorized by Autism General

¹ Because this decision contains a reasoned explanation for the action in this case, I intend 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, I agree that the identified material fits within the requirements of that provision, I 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.

Order # 1,³ thereby joining the Omnibus Autism Proceeding (“OAP”). Short-Form Autism Petition for Vaccine Compensation 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 August 28, 2008, as well as a statement (Pets’ Statement) and Raymond’s immunization records. Like most other cases in the OAP,⁴ the case remained on hold until discovery in the OAP was concluded, causation

³ Autism General Order #1 adopted the Master Autism Petition for Vaccine Compensation for use by petitioners filing claims intended to be part of the OAP. By electing to file a Short-Form Autism Petition for Vaccine Compensation, petitioners allege that:

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the “thimerosal” ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DtaP), Hepatitis B, and Hemophilus Influenza Type B (HIB) vaccinations; or by some combination of the two

The petition is being filed within three years after the first symptom of the disorder, or within three years after the first symptom of a vaccine-caused significant aggravation of the disorder. (If the vaccine-related death is alleged, the petition is being filed within two years after the date of death and no later than 48 months after onset of the injury from which death resulted.)

Autism General Order # 1 filed July 3, 2002, Exhibit A, Master Autism Petition for Vaccine Compensation at 2. Autism General Order #1 is published at 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). Documents filed into the Omnibus Autism Proceeding are maintained by the clerk of this court in the file known as the “Autism Master File.” An electronic version of the file is available on the court’s website. Accompanying the electronic version of the file is a docket sheet that identifies all of the documents contained in the file. The complete text of most of the documents in the file is electronically accessible, with the exception of those few documents that must be withheld from the court’s website due either to copyright considerations or to the privacy protection afforded under § 300aa-12(d)(4)(A) of the Act. To access the electronic version of the Autism Master File, visit this court’s website at www.uscfc.uscourts.gov. Select the “Vaccine Info” page, then the “Autism Proceeding” page.

⁴ 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).

hearings in the test cases were held, and entitlement decisions were issued in the test cases.⁵

During the period between the test case hearings and the final appellate action on the test case decision, petitioners, like others in the OAP, were ordered to file medical records. Petitioners initially filed with their Petition a Statement regarding their claim (Pets' Statement) and an immunization record. An Order was filed on September 29, 2008, discussing the OAP, the Act's statute of limitations, and requiring petitioners to file the required medical records. Petitioners failed to comply with that Order. On November 26, 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). On July 8, 2009 an Order was filed, requiring petitioners to show why this claim should not be dismissed as untimely filed. Petitioners failed to respond to that Order as well.

After the final test case appeal was decided, the undersigned ordered petitioners on September 27, 2010 to inform the court if they wished to pursue their claim. Petitioners responded that they wished to continue with the claim on October 28, 2010.

By Order filed March 1, 2011, the undersigned asked petitioners to provide the court with a statement identifying how Raymond's vaccines caused his injury. Petitioners filed a Response on March 28, 2011, alleging that Raymond's condition was caused by a reaction occurring two days after Raymond's October 1, 1993 vaccinations. Petitioners' Response ("Pets' Resp.") filed March 28, 2011. 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*, on June 19, 2012, the undersigned ordered petitioners to show cause, within thirty days, indicating why the petition should not be dismissed as untimely filed under the Vaccine Act's statute of limitations. § 300aa-16(a)(2). Petitioners filed a response on July 10, 2012.

⁵ 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.

II. Facts.⁶

Raymond was born on February 11, 1993. Pets' Immunization Record filed August 28, 2008. On October 1, 1993, Raymond received certain childhood vaccinations. Pets' Immunization Record filed August 28, 2008; Pets' Statement at 1; Pets' Response filed March 28, 2011. Two days subsequent to his October 1, 1993 vaccinations, petitioners report that he began staring off and was less responsive to physical stimuli. Pets' Statement at 1; Pets' Response filed March 28, 2011.

Petitioners report that Raymond was brought to his pediatrician within a week of his October 1, 1993 vaccinations. Pets' Statement at 1; Pets' Response filed March 28, 2011. The pediatrician did not believe that the vaccinations caused Raymond's increased staring into space and lack of responsiveness, but suggested that he be taken to an emergency room. Pets' Statement at 1. An emergency room EEG test found that the staring and unresponsiveness were caused by "baby spasm seizures." *Id.* Petitioners believe these seizures were caused by Raymond's immunizations. *Id.*

Petitioners report that in his first few years Raymond had decreased speech and motor skills that could not be improved by speech or occupational therapy. *Id.* In February 1996, petitioners indicate that Raymond's condition was diagnosed as autistic spectrum disorder. *Id.* at 2.

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

⁶ As petitioners have failed to file the required medical records the facts contained herein are based upon Petitioners' Statement accompanying the petition and the Response filed March 28, 2011.

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 an injury.” *Id.* at 1338.

Due to the lack of medical records, and relying on petitioners statements, the record establishes that this claim was not timely filed. Raymond was diagnosed with an autism spectrum disorder in February 1996. Pets’ Statement at 2. Utilizing even the date of diagnosis, recognizing that the first symptom or manifestation of onset of Raymond’s autism spectrum disorder necessarily occurred earlier, this claim must have been filed by February 1999. The petition was not filed until August 28, 2008, more than nine years too late.

The Federal Circuit also held that equitable tolling of the Vaccine Act’s statute of limitations is permitted. *Cloer*, 654 F.3d 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.

The undersigned’s Order to Show Cause, filed June 19, 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 were “not aware of a timeframe for filing this claim” and indicate that is why they failed to “get in touch with an attorney.” Pets’ Response filed July 10, 2012 at 1. To the extent that petitioners argue that the court failed to inform them of the Act’s statute of limitations, the undersigned notes that petitioners were put on notice multiple times by the court of the Vaccine Act’s statute of limitations. Petitioners were first notified by Order filed September 29, 2008 of the Vaccine Act’s three year statute of limitations. Petitioners were then put on notice that their claim appeared to be filed outside the Act’s statute of limitations by respondent’s Motion to Dismiss filed November 26, 2008, as well as by the court’s orders filed July 8, 2009, March 1, 2011, and June 19, 2012.

To the extent that petitioners argue they were not aware of the statute of limitations prior to filing their claim the undersigned notes this 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.

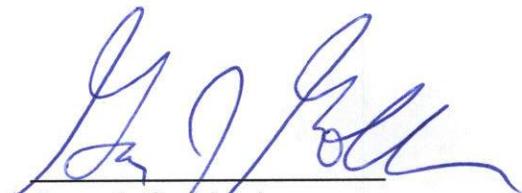
Petitioners also assert, apparently misreading the *Cloer* en banc decision, that equitable tolling should apply since "the medical community [cannot] conclusively know the link between the vaccine and autism." Pets' Response filed July 10, 2012 at 2. However the Federal Circuit's en banc decision in *Cloer* explicitly stated the opposite of petitioners' assertion, holding that equitable tolling is not available when there is an "unawareness of a causal link between an injury and a vaccine." *See Cloer*, 654 F.3d at 1345. Accordingly, petitioners claim must be dismissed as it was filed more than nine years 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. Petitioners have failed to do so. There is preponderant evidence that this case was not 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). Petitioners have not demonstrated any extraordinary circumstances warranting equitable tolling.

For the reasons set forth above, **this claim is dismissed as untimely filed. The clerk is directed to enter judgment accordingly.**⁷

IT IS SO ORDERED.


Gary J. Golkiewicz
Special Master

⁷ 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).