

OFFICE OF SPECIAL MASTERS  
No. 07-0401V

Filed: January 11, 2008

To Be Published

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WILLIAM JACOB JANSSEN, \*  
by his father, \*  
RICHARD W. JANSSEN, JR. \*

Autism; Policy Arguments; Statute  
of Limitations; Untimely Filing

Petitioner, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES \*

Respondent. \*

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*Richard W. Janssen, Ronan, MT, pro se petitioner.*

*Traci R. Patton, United States Department of Justice, Washington, DC, for respondent.*

**DECISION<sup>1</sup>**

**GOLKIEWICZ, Chief Special Master.**

**I. PROCEDURAL BACKGROUND**

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<sup>1</sup> 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.

On June 18, 2007, the petitioner, Richard W. Janssen, Jr. filed a petition on behalf of his minor son, William Jacob Janssen. Petition (hereinafter Pet.) at 1. The petition alleged certain vaccinations caused William to suffer the injury of "Autistic Spectrum Disorder." Id. The petition stated "Jake was diagnosed on May 31, 1998." Id. For the reasons set forth below the undersigned must dismiss this petition as untimely filed.

On July 12, 2007, respondent filed a Motion to Dismiss petitioner's claim on the basis that the petition was filed "at least six years after the expiration of the statutorily prescribed limitation period." Respondent's Motion to Dismiss at 1. On July 13, 2007 the undersigned issued an Order requiring petitioner to file all medical records required by 42 U.S.C. § 300aa-11(c)(2), as well as a "Statement Regarding Timely Filing", devoted to establishing the filing of this claim within 36 months from the date of the occurrence of "the first symptom or manifestation of onset or of the significant aggravation of such injury." Order filed July 13, 2007. On September 12, 2007, petitioner filed a letter addressed to the undersigned which included as attachments medical and legal records. Petitioner's letter to the undersigned stated that William was diagnosed with his "Autistic condition" on May 28, 1998.<sup>2</sup> Petitioner's September 9, 2007, letter filed September 12, 2007.

Thereafter, on September 27, 2007, the undersigned ordered petitioner to respond to respondent's Motion to Dismiss, addressing specifically "why if William was diagnosed on May 31, 1998 with Autistic Spectrum Disorder, this case should not be dismissed as it was untimely filed since the first symptom of the alleged injury occurred over nine years ago." Order filed September 27, 2007 at 2. Petitioner filed a Response to respondent's Motion to Dismiss on November 13, 2007. Response filed November 13, 2007.

## **DISCUSSION**

Pursuant to the National Childhood Vaccine Injury Act of 1986, as amended ("the Vaccine Act")<sup>3</sup> petitioners may be compensated for injuries caused by certain vaccines. 42 U.S.C. §§ 300aa-10 to -34. However, the Vaccine Act provides statutory deadlines for filing program petitions at § 300aa-16. In relevant part, the Vaccine Act provides:

a vaccine set forth in the Vaccine Injury Table which is administered after October

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<sup>2</sup>The undersigned notes that the petition states William was diagnosed with autism on May 31, 1998; however, petitioner's letter to the undersigned states William was diagnosed on May 28, 1998. This three-day discrepancy is not critical to this decision as the petition was filed more than six years out of time.

<sup>3</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. §§ 300aa-10 *et seq.* (West 1991 & Supp. 2002) ( hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C.A. § 300aa of the Act.

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). The Federal Circuit recently held that “‘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.” Markovich v. Sec'y of Dept. of Health and Human Servs., 477 F.3d 1353, 1360 (Fed. Cir. 2007). Accordingly, petitioners have 36 months from the first recognizable sign of injury to file their claim.

In this case, the petition, as well as petitioner's September 9, 2007 letter, assert that William was diagnosed with autism on either May 28 or May 31, 1998. For purposes of this decision, utilizing the May 31, 1998 date as the date of the first sign of injury, petitioner's case would have to have been filed by no later than May 31, 2001 to comply with the statute. Petitioner filed his case on June 18, 2007, which is more than six years past the statutory deadline. In accordance with the Federal Circuit's opinion in Markovich, the petition in this case was not timely filed under §16(a)(2) and therefore the petition must be dismissed.

Petitioner argues in his Response to respondent's Motion to Dismiss that the Motion in the above-captioned case should not be granted for the following reasons: 1) the court failed to advise petitioner “of his rights to file for compensation within this venue”; 2) respondent failed to notify petitioner of his right to file for compensation “through the National Vaccine Injury Compensation Program” and that “the statute of limitation is three years from the onset of symptoms”; 3) “[r]espondent failed to notify Petitioner of the harmful effects that Thimerosal causes to infants”; 4) “[r]espondent didn't disclose to Petitioner that Thimerosal was in certain vaccine given to Petitioner”; and 5) respondent failed to “adequately review the documents filed in this court on September 9, 2007, before mailing a motion to dismiss.” Petitioner's Response at 1-2.

Petitioner presented no legal arguments for denying respondent's Motion to Dismiss, but instead presented what amounts to a series of policy arguments. As noted above, the Federal Circuit determined that the Vaccine Act's 36 month filing requirement begins to run from the date of “the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.” Markovich v. Sec'y of Dept. Of Health and Human Servs., 477 F.3d 1353, 1360 (Fed. Cir. 2007). In addition, the Federal Circuit has found that “the statute of limitations [in the Vaccine Act] begins to run upon the first symptom or manifestation of onset of injury, even if the petitioner reasonably would not have known at that time that the vaccine caused an injury.” Brice v. Sec'y of Dept. Of Health and Human Servs., 240 F.3d 1367, 1373 (Fed. Cir. 2001). The Federal Circuit's precedent is legally binding on the undersigned. Since petitioner's claim by his own admissions was filed more than six years past the filing deadline, the undersigned has no option but to dismiss this case.

Regarding petitioner's policy arguments, as my colleague noted in a similar case "while

petitioners may have a *policy* argument of some appeal, they have failed to offer any meritorious *legal* reason why I should do anything except enforce the statute. . . ." Weinstein v. Sec'y of Dept. Of Health and Human Servs., No. 02-2059V, 2004 WL 3088663, at \*3 (Fed. Cl. Spec. Mstr. Oct. 25, 2004). Policy arguments concerning the wisdom of a statutory provision "must be directed to Congress, not a judiciary officer." Id.; Beck v. Sec'y of Dept. Of Health and Human Servs. 924F.2d 1029, 1034 (Fed. Cir. 1991) ("Regardless of their merits, these policy arguments may be implemented only by Congress. Our duty is limited to interpreting the statute as it was enacted, not as it arguably should have been enacted.") The undersigned must apply the law as enacted, and the law as applied to this case requires petitioner's case be dismissed.

Lastly, petitioner argues that a determination in this case should not be made until the conclusion of the "Autism Omnibus Proceedings." See Autism General Order #1 at <http://www.uscfc.uscourts.gov/OSM/AutismDocket.htm>. The undersigned assumes from this statement petitioner is requesting that a ruling not be made regarding timeliness of the instant proceeding until the causation "test cases" in the Omnibus Proceeding are concluded. The outcome in the Autism Omnibus Proceeding test cases will have no effect on petitioner's case since, regardless of the outcome of the causation "test cases," the undersigned would be legally obligated to dismiss the instant petition as it was not timely filed.

Accordingly, the undersigned finds that petitioner's claim must be dismissed as petitioner has not proved by a preponderance of the evidence that the petition 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. Petitioner's claim is dismissed. The Clerk shall enter judgment accordingly.

**IT IS SO ORDERED.**

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Gary J. Golkiewicz  
Chief Special Master