

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-0570V

Filed: July 31, 2012

(Not to be Published)

DEBBIE H. SMILEY, parent of *
JALEN SMILEY, a minor *

Petitioner, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

Autism; Dismissal of Claim
as Untimely Filed; Equitable
Tolling

DECISION¹

On August 27, 2009, petitioner, on behalf of her son, Jalen Smiley (“Jalen”), filed a claim for compensation pursuant to the National Vaccine Injury Compensation Program (“Vaccine Program” or “the Program”).² 42 U.S.C. §§ 300aa-1 to -34 (2006). Petitioner filed the Short-Form Petition authorized by Autism General Order # 1,³

¹ 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.

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.

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 alleged that:

thereby joining the Omnibus Autism Proceeding (“OAP”). Short-Form Autism Petition for Vaccine Compensation at 1.

Petitioner has the burden to demonstrate that her 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, petitioner has not met her burden, and thus **this case is dismissed as untimely filed.**

I. Procedural History

The petition was filed by petitioner on August 27, 2009. Like most other cases in the OAP,⁴ 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.⁵

[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).

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),

During the period between the test case hearings and the final appellate action on the test case decisions, petitioner, like others in the OAP, was ordered to file some medical records. Petitioner filed the required records on October 15, 2009. Pet. Exs. 1-42. In response to the records on February 2, 2010, 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). Petitioner filed a response to the Motion to Dismiss on June 7, 2010, arguing that the "court should waive" the statute of limitations because "children[] with autism need help with [their] medical need[s]." Response filed June 7, 2010.

After the final test case appeal was decided, the undersigned ordered petitioner on September 14, 2010 to inform the court if she wished to pursue her claim. Order filed September 14, 2010. Petitioner indicated to the court that she wished to proceed with the claim in a status conference held on August 4, 2011.

The undersigned deferred any additional action until a ruling regarding timeliness of this case could be made pending the Federal Circuit's en banc decision in *Cloer v. Sec'y, HHS*, 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 June 18, 2012. On July 16, 2012, petitioner filed a response to the Order to Show Cause arguing her claim should not be dismissed. Response filed July 16, 2012.

II. Facts.

Jalen was born on September 26, 2000. Pet. Ex. 1.⁶ Between November 27, 2000 and June 1, 2005, he received routinely administered childhood vaccinations. Pet. Exs. 2-3.

On September 1, 2004, when Jalen was three years old, he was referred to Dr. James Renfro of the Child Neurology Center of Northwest Florida for an autism evaluation due to "severe developmental delay and delayed speech and motor skills." Pet. Ex. 6.

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.

⁶ Petitioner has labeled each page of the filed records as a separate exhibit number and the undersigned will cite the records accordingly.

Jalen received a referral to the Center for Pediatric Rehab on March 7, 2005. The referral noted that Jalen was a “[four] year old male with autistic spectrum pervasive developmental delay.” Pet. Ex. 7.

On October 2, 2006, when Jalen was six years old, Dr. Gary Griffin notified the Escambia County School System that Jalen had autism and “should have appropriate educational placement.” Pet. Ex. 5.

III. Arguments and 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.

Jalen’s medical records establish that this claim was not timely filed. Jalen was diagnosed with “autistic spectrum pervasive developmental delay” by no later than March 7, 2005. Pet. Ex. 7. Accepting even the date of diagnosis, but recognizing that the first symptom or manifestation of onset of Jalen’s autism necessarily occurred

earlier, this claim must have been filed by March 7, 2008. The petition was not filed until August 27, 2009, more than a year too late.

Petitioner, in her response to the Order to Show Cause, argued that her claim should not be dismissed and that it was timely filed. Response filed July 16, 2012. However, petitioner fails to indicate how her claim falls within the statute of limitations. Additionally, petitioner's arguments that her claim should not be dismissed are policy argument as opposed to legal arguments. *Beck v. Sec'y, HHS*, 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."). Petitioner offers no meritorious legal or factual arguments for why her claim should not be dismissed as untimely filed.

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. Petitioner has 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). Petitioner has not demonstrated any extraordinary circumstances warranting equitable tolling. **Therefore, this claim is dismissed as untimely filed under the Vaccine Act's statute of limitations. § 300aa-16(a)(2). 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).