

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-880V

Filed: January 27, 2009

KENNETH J. ASHMAN and LAURA
ASHMAN, parents of SANDER A. ASHMAN,
a minor,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES

Respondent.

Nunc Pro Tunc; Filing Defined; Mojica

ORDER¹

Petitioners filed a Short-Form Autism Petition for Vaccine Compensation, as well as a Motion for Leave to File Short-Form Autism Petition for Vaccine Compensation, *Nunc Pro Tunc* on December 10, 2008(hereinafter Motion). Petitioners allege counsel attempted to file their Short-Form Autism Petition for Vaccine Compensation on November 14, 2007. The undersigned notes petitioners' allegation is supported by a copy of a Short-Form Autism Petition for Vaccine Compensation date stamped "Received" by respondent, the Department of Health and Human Services, as well as an affidavits from counsel, and counsel's former law clerk. Motion, Exhibits A and B. However, for the reasons described below the undersigned must deny petitioners' Motion.

The Vaccine Act provides that a proceeding is "initiated by service upon the Secretary and the filing of a petition ... with the United States Court of Federal Claims." 42 U.S.C. § 300aa-11(a)(1) (emphasis added); see also Vaccine Rule 2(a). This court has previously

¹ Because this Order 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 Order will be available to the public. Id.

explained: “It is axiomatic in United States Court of Federal Claims practice that mailing is not filing. *See, e.g.*, Vaccine Rule 17(a). Rather, a petition ‘is filed when actually received and marked filed by the clerk.’ Vaccine Rule 17(a); *see also Widdoss v. Secretary of HHS*, 989 F.2d 1170, 1176 n. 5 (Fed. Cir. 1993).” *Acevedo v. Sec’y of HHS*, 2007 WL 2706159 at *3 (Fed. Cl. Spec. Mstr. Aug. 31, 2007), aff’d sub nom., 79 Fed. Cl. 633 (2007), aff’d, 287 Fed. Appx. 103 (Fed. Cir. 2008), rehearing en banc denied (Sep. 26, 2008), petition for cert. filed (U. S. Dec. 19, 2008).² While petitioners allege they mailed a copy of the Petition on November 14, 2007 to the clerk of court, the Petition was never received and marked filed by the clerk, as petitioners concede, see Motion at 2, and thus was never filed.

Petitioners’ claim in *Mojica* was dismissed for failure to file within the statutorily mandated time period.³ Despite counsel’s diligent efforts in *Mojica* to timely file the petition, the claim was not timely received by the clerk’s office due to multiple errors on the part of the professional delivery service. As is the case in the instant matter, the petition in *Mojica* was timely received by respondent. However, the special master was obligated to dismiss the petition in *Mojica* as untimely filed since the petition was not received by the court’s clerk’s office within 36 months of the occurrence of the first symptom or manifestation of onset of the vaccinee’s injury. The special master’s decision in *Mojica* was affirmed by the Court of Federal Claims, as well as by the Court of Appeals for the Federal Circuit. The Federal Circuit relying on *Brice v. Sec’y of HHS*, 240 F.3d 1367 (Fed. Cir. 2001) explained “‘there is no possibility of equitable tolling under the Vaccine Act even in the circumstances presented by this case where counsel took reasonable steps to fulfill her obligation to file in time. This result is draconian but compelled by law.’” *Mojica*, 287 Fed. Appx. at 104 citing to *Mojica*, 79 Fed. Cl. at 639. Based upon the binding Federal Circuit precedent, the undersigned is likewise obligated to deny petitioners’ Motion in the instant matter.

Petitioners cite to the undersigned’s decision in *Holmes v. Sec’y of HHS*, 1992 WL 121390 (Fed. Cl. Spec. Mstr. May 7, 1992) as support for their Motion. Motion at 3-4. However, in *Holmes* a letter from a *pro se* petitioner was sent to clerk of the court, and **was received and stamped** by the clerk. The clerk then returned the letter to petitioners as an invalid filing, due to its numerous deficiencies, with instructions for petitioners to file a “properly prepared petition” and move to have it filed *nunc pro tunc* with a copy of the returned letter

² The undersigned notes this case is reported as *Acevedo* in the decision issued by the special master, but is reported as *Mojica* in the decisions issued by the Court of Federal Claims and the Federal Circuit. The undersigned will utilize the name *Mojica* when referring to this case.

³In relevant part, the Vaccine Act provides “[i]n the case of”

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

which has “the date received stamped on it.” Holmes at 1. The facts in Holmes are inapposite to the facts in the instant matter, as the petitioner in Holmes attempted to file a Petition with the clerk which, while deficient as a Petition, was received by the clerk and stamped “received.” Holmes at 1. Unlike in Holmes, in the instant matter the petition was **never received or stamped by the clerk.**

Petitioners cite to several additional non-Vaccine Act cases in support of their Motion which the undersigned finds to be neither persuasive nor binding legal authority. See Motion at 2-3. The cases cited by petitioners are decisions arising from the Court of Federal Claims’ general jurisdiction which is distinct from the Court’s Vaccine Act jurisdiction. Further, the undersigned is legally obligated to follow the Federal Circuit’s precedent in the Brice and Mojica.

The petition in the instant matter was received and stamped by the clerk of the court on December 10, 2008. For the foregoing reasons the undersigned is obligated to deny petitioners’ Motion for Leave to File Short-Form Autism Petition for Vaccine Compensation, *Nunc Pro Tunc* on November 20, 2007.

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master