

OFFICE OF SPECIAL MASTERS

No. 02-1317V

(Filed: November 26, 2003)

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HOWARD and MELISSA WOOD, *

Individually and on behalf of their minor child, *

ALEXANDRA WOOD, *

*

Petitioners, *

TO BE PUBLISHED

*

v. *

*

SECRETARY OF HEALTH AND *

HUMAN SERVICES, *

*

Respondent. *

*

* * * * *

Jeffrey F. Speer, Lafayette, Louisiana, for petitioner.

Traci R. Manning, Department of Justice, Washington, D.C., for respondent.

RULING ON DISMISSAL MOTION

HASTINGS, Special Master.

This is an action seeking an award under the National Vaccine Injury Compensation Program¹ (hereinafter “the Program”). Respondent has filed a motion contending that this petition was untimely filed, and therefore should be dismissed. For the reasons set forth below, I conclude that respondent’s contention is correct in part and incorrect in part.

¹The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2000 ed.). Hereinafter, all “§” references will be to 42 U.S.C. (2000 ed.).

I

BACKGROUND

A. *The petitioners' claims*

This petition was filed on September 23, 2002. In the petition filed on that date, the petitioners, Howard and Melissa Wood, alleged that their daughter, Alexandra, suffers from the condition known as "autism," and that Alexandra's autism was caused by certain vaccinations that she received in 1996 and 1997. However, on October 6, 2003, petitioners filed a "Supplemental and Amending Petition" in which they raised a second claim--*i.e.*, that Alexandra's autism was "significantly aggravated" by certain additional vaccinations, including an "MMR" (measles/mumps/rubella) vaccination, that she received on April 11, 2000.

B. *Applicable statutory provision*

Under the Program, compensation awards are made to individuals who have suffered injuries after receiving certain vaccines listed in the statute. The statutory deadlines for filing Program petitions are provided at § 300aa-16. With respect to vaccinations administered after October 1, 1988, as were the vaccinations at issue here, § 300aa-16(a)(2) provides that Program petition must be 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."

II

DISCUSSION

As noted above, § 300aa-16(a)(2) requires that a Program petition with respect to a vaccination that was administered after October 1, 1988, be filed within 36 months after the date of the first symptom of the onset of the injury in question, or within 36 months of the first symptom of a "significant aggravation" of an injury. In this case, the petitioners, as noted above, essentially raise two separate claims: (1) that Alexandra's autism was initially caused by certain vaccinations received in 1996 and 1997, and (2) that her autism was "significantly aggravated" by certain vaccinations received on April 11, 2000. My conclusion is that their petition was timely *not* timely filed as to the *first* claim, but *was* timely filed as to the *second* claim.

A. *First claim*

As respondent points out, the medical records filed in this case appear to indicate the following general history of the initial stages of Alexandra's autism condition. Suspicions of developmental delays began in late 1996 (Ex. 3, pp. 3, 17); therapy for delays was prescribed by late 1997 (Ex. 2, p. 85); one

physician noted “autism” on July 2, 1998 (Ex. 3, p. 17); another physician noted the impression of “autistic-like behavior” on December 21, 1998 (Ex. 3, p. 48). The Program petition, however, was not filed until September 23, 2002. Therefore, it appears that the petition clearly was not filed within “36 months after the date of the occurrence of the first symptom or manifestation of onset” of Alexandra’s autism.

With regard to this first claim, petitioners argue that the petitions should be considered timely under the test set forth in *Setnes v. United States*, 57 Fed. Cl. 175 (2003). I cannot agree. Respondent takes issue with whether *Setnes* correctly interprets the statutory section in question, but I do not need to reach any conclusion on that question here. As respondent has argued, even assuming the correctness of *Setnes*, the petition in this case would *still* be untimely as to the petitioners’ first claim in this case. That is, in *Setnes*, the court held that the “first symptom or manifestation of onset” of autism does not occur until the occurrence of a symptom that “clearly or obviously” signals the onset of autism. 57 Fed. Cl. at 181. In this case, as I read the record, by late 1998 not only were the symptoms of autism clear and obvious, but physicians were already noting “autism” or “autistic-like behavior.” (See history of Alexandra’s autism at pp. 2-3 above.) Thus, even assuming that the *Setnes* analysis is correct, this petition would still be untimely as to petitioners’ first claim.

Also with regard to this first claim, petitioners argue that the petition should be deemed timely under the “continuing tort doctrine.” Again, I cannot agree. As respondent has pointed out, the “continuing tort doctrine” would appear to have no application to § 300aa-16(a)(2), in which the limitations period runs from the *first symptom or manifestation of the injury*, not from the administration of the vaccine. Therefore, if petitioners’ *only* claim were their first claim, then I would have no choice but to dismiss their petition at this time.

B. Second claim

As to petitioners’ *second* claim, concerning “significant aggravation,” however, I conclude that it would *not* be appropriate for me to dismiss the claim on timeliness grounds at this time. If the April 2000 vaccinations did in fact aggravate Alexandra’s autism, then obviously the first symptom of that aggravation must have occurred in April 2000 or thereafter, so that the filing of the petition in September of 2002 occurred within 36 months after the first symptom of that aggravation.²

In respondent’s most recent filing (filed November 7, 2003), respondent contends that none of the three vaccinations that Alexandra received on April 11, 2000, contained the thimerosal preservative. Respondent seems to argue that I therefore should *not* permit petitioners to stay proceedings with respect

²Of course, to gain an award, petitioners will have to supply evidence *proving* that a vaccine-caused aggravation occurred and that the “first symptom or manifestation” of that aggravation occurred not earlier than three years prior to the date on which their petition was filed. They may either provide the necessary evidence themselves, or wait to see whether evidence supportive of their claim is provided in the Omnibus Autism Proceeding.

to their “significant aggravation” claim pending the Omnibus Autism Proceeding. This argument, however, ignores the fact that in the Omnibus Autism Proceeding, the Petitioners’ Steering Committee is attempting to develop evidence not only concerning whether *thimerosal-containing vaccines* can cause or aggravate autism, but also whether the *MMR vaccine* (measles, mumps, rubella) can cause or aggravate autism.³ And, as I understand the record, Alexandra did receive an *MMR vaccination* on April 11, 2000. Therefore, if petitioners wish to continue to stay proceedings with respect to their aggravation claim pending the Omnibus Autism Proceeding, I will allow them to do.

III

CONCLUSION

As to petitioners’ first claim, the petition was untimely, and under current law I clearly would be barred from affording petitioners any compensation for that alleged injury. However, the petition does appear to be timely as to petitioners’ *second* claim, that Alexandra’s autism was aggravated by her vaccinations of April 11, 2000. Accordingly, it is appropriate that I do not dismiss this petition, but instead afford petitioners the opportunity to offer evidence supporting their factual contentions as to the aggravation claim.

If petitioners wish to attempt to prove their aggravation claim at any time by *introducing their own evidence*, I will, of course, promptly permit them to do so. Until petitioners indicate that they wish to do so, however, I will continue to permit them to stay proceedings on their aggravation claim pending the conclusion of the Omnibus Autism Proceeding, since that Proceeding may provide evidence supporting their claim that an MMR vaccination can aggravate autism.

George L. Hastings, Jr.

³This case is one of over 3,400 pending Program petitions involving claims that a condition known as “autism” was caused by one or more vaccinations. Those claims have been linked together in a proceeding known as the Omnibus Autism Proceeding. See, e.g., *Autism General Order #1*, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). A committee of attorneys, known as the Petitioners’ Steering Committee, has been formed to represent the interests of the autism petitioners. As noted above, the Committee is attempting to develop evidence concerning the *general issue* of whether thimerosal-containing vaccines and/or MMR vaccines can cause or aggravate autism. When such evidence is developed, it will be presented to me at a hearing concerning the *general causation issue*. Any conclusions reached as a result of that hearing will then be applied to the *individual* autism cases. Almost all of the individual autism petitioners, like the petitioners in this case, have requested that proceedings in their own individual cases be stayed until the conclusion of the Omnibus Autism Proceeding.

Special Master