



# I

## BACKGROUND

### *A. The petitioner's claim*

On November 28, 2011, the Petitioner, Tamera Jean Johnston, filed a petition for compensation alleging that the measles, mumps, and rubella (“MMR”) vaccinations that she received on November 10 and December 10, 2005, caused her to suffer from “systemic lupus erythematosus, mixed connective tissue disease, and rheumatoid arthritis.” (Petition (“Pet.”) at p. 1.) Petitioner also claims that these injuries were significantly aggravated in April 2010, when she developed the “sudden onset of significant fatigue and cognitive changes.” (*Id.*)

### *B. Applicable statutory provision*

Under the Program, compensation awards are made to individuals who have suffered injuries caused by vaccines. The statutory deadlines for filing Program petitions are provided in §16. With respect to vaccinations administered after October 1, 1988, as were the vaccinations at issue here, §16(a)(2) provides that a 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.”

### *C. Procedural history*

On November 28, 2011, along with her petition, Petitioner filed Exhibits (“Ex.”) A, B and C1-C30, which contained her relevant medical records. Those records indicate that Petitioner received MMR vaccinations on November 10 and December 19, 2005. (Ex. C1 at 1.) The petition asserted that Petitioner was diagnosed with connective tissue disease on March 21, 2006, systemic lupus erythematosus on September 8, 2006, and rheumatoid arthritis on March 19, 2009. (Pet., ¶¶ 11, 14 and 16). Also attached to the Petition, as Ex. A, was a letter from Doctor Thomas Osborn, dated August 2, 2011, stating that in his opinion, the MMR vaccines were the cause of Petitioner’s above-described conditions. On January 9, 2012, Respondent filed “Respondent’s Motion to Dismiss” (“Motion”), challenging the petition on timeliness grounds. (ECF No. 6.) Since then the parties have filed two additional memoranda addressing the timely filing issue--“Petitioner’s Opposition to Motion to Dismiss” (“Opp.”), filed on February 10, 2012, and “Respondent’s Reply to Petitioner’s Opposition to Respondent’s Motion to Dismiss” (“Reply”), filed on February 21, 2012. (ECF No. 9; ECF No. 10.)

### *D. Petitioner’s medical history*

At the age of 49, Petitioner received two MMR vaccinations, on November 10 and December 19, 2005. (Ex. C1 at 1.) Petitioner developed a rash over her cheeks and chin within two weeks of receiving the first vaccine. (Ex. C3 at 1.) She initially tried to manage his condition herself, but eventually sought medical help from the Mayo Clinic on January 9, 2006, after the rash became worse. (*Id.*) During that visit the doctor diagnosed the rash as “allergic

dermatitis,” which “could be due to the MMR vaccine” because “there seems to be no other agent responsible.” (*Id.* at 2.)

However, on subsequent visits, a variety of other potential explanations were advanced until, on March 20, 2006, it was suggested that Petitioner’s facial rash was indicative of a condition known as “systemic lupus erythematosus,” or simply “lupus.” (Ex. C5 at 5.) During this visit Petitioner was referred to a rheumatologist, after mentioning that she had been experiencing increased joint stiffness and pain. (*Id.*) The following day, Petitioner received a rheumatology consult from Dr. Thomas Osborn, where it was noted in the “history” section that she had experienced increased achiness, especially in her fingers, after receiving the December MMR vaccine. (*Id.* at 7.) It was also noted that Petitioner “has had arthralgias principally in her fingers,” though “multiple other joints besides the fingers” have also been affected. (*Id.*) This evaluation led to a diagnosis of “connective tissue disease” on March 21, 2006. (*Id.* at 8.)

Almost two months later, on May 23, 2006, Petitioner returned to Dr. Osborn, complaining of increased fatigue, pain in the dorsum of her hands and foot in the carpal and tarsal areas, and some puffiness in her fingers. (Ex. C7 at 8.) On September 8, 2006, Petitioner went to see Dr. Osborn because she was still experiencing fatigue, rashes, achy joints, and some puffiness in her joints. (Ex. C10 at 1.) During this visit Petitioner received a diagnosis of “systemic lupus erythematosus.” (*Id.*) At a December 15, 2006, visit, Dr. Osborn noted that Petitioner had joint pains and neuropathy in both feet, and that a flare in joint pain with some “sausage features” in her fingers occurred during November. (Ex. C12 at 1.)

Following a brief one-page report dated March 9, 2007, there is a two-year gap between medical records. (Ex. C13 at 1.) Then on March 19, 2009, Petitioner saw Dr. Osborn due to flares in joint pain, especially during the morning. (Ex. C14 at 4.) During this visit Petitioner received a diagnosis of “rheumatoid arthritis,” and was prescribed Enbrel to combat the symptoms. (*Id.* at 5.)

The next significant problem suffered by Petitioner occurred on April 15, 2010, when she received a diagnosis of “central nervous system changes, acute” from Dr. Osborn. (Ex. C22 at 3.) Petitioner stated that four days prior, she became disoriented going into work, which had never happened before, and she had gotten lost. (*Id.* at 2.) In addition, Petitioner stated she was in a mild state of confusion all day and the following days. She described the sensation as being similar to how she feels when drunk. (*Id.*) Dr. Osborn observed that during the consultation Petitioner “was not her usual personality,” as shown by a slight slurring in her speech and her being “tangential” in her answers. (*Id.*) On May 28, 2010, Petitioner was seen at the Mayo Clinic, where Dr. Christina Dilaveri ordered additional laboratory tests to determine what caused the sudden onset of Petitioner’s fatigue and confusion symptoms. (Ex. C23 at 16.) The tests seemed to indicate that menopause was the probable cause for Petitioner’s symptoms, and the possibility of hormone replacement therapy was discussed. (Ex. C24 at 2.)

On June 21, 2010, through a phone conversation, Petitioner reported that there was still significant pain and swelling in her hands, wrists, and feet, as well as pain in her knees, all of which had kept her bedbound for the last several days. (*Id.* at 8.) The next day, on June 22, 2010, Petitioner returned to the Mayo Clinic, where it was determined she had suffered from a

significant flare of her rheumatoid arthritis. (*Id.* at 9.) On July 9, 2010, a work status evaluation was done, which noted that Petitioner had a “history of Lupus/RA since 3/2006.” (Ex. C25 at 6.)

## II

### DISCUSSION

As noted above, §16(a)(2) requires that a Program petition, alleging injury by a vaccination administered after October 1, 1988, must be filed within 36 months after the date of the “first symptom or manifestation 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, Petitioner has in effect raised two separate claims: (1) that her three conditions described above were *initially caused* by her 2005 MMR vaccinations; and (2) that her conditions were somehow “significantly aggravated” *in 2010* by her 2005 MMR vaccinations.

#### A. Onset claim

In her memorandum, Petitioner seems to raise two separate arguments in order to establish her claim that the *initial onset* was vaccine-caused: 1) the limitations period did not begin to run until her conditions were *recognized* to be *vaccine-caused*; and 2) the “discovery rule” applies. I will discuss each of these issues in light of the recent *en banc* decision of the United States Court of Appeals for the Federal Circuit in *Cloer v. HHS*, 654 F.3d 1322, 1330 (Fed. Cir. 2011).<sup>3</sup>

#### ***1. The limitations period runs from the first symptom of injury, not from when an injury is recognized to be “vaccine-caused.”***

Petitioner first argues that the limitations period did not begin to run when her conditions were first exhibited, because her injuries were not objectively recognizable by the medical profession as “vaccine-related injuries” until her doctor stated that, in his opinion, the vaccine did in fact cause the injuries. (Opp. at 5-6.) However, a very similar argument was made, and rejected, in *Cloer*. In that case the petitioner argued that a “vaccine-related injury,” for purposes of the limitations provisions of the Vaccine Act, cannot occur “until the medical community at large understands and recognizes the causal relationship between the claimed injury and the administration of a vaccine.” (654 F.3d at 1330.) The *Cloer* court rejected that argument, and instead defined the term “vaccine-related injury,” as it pertains to non-Table injuries, as “the injury which the petitioner *avers* is caused by the vaccine.” (*Id.* at 1334, emphasis added.) Thus, the statute’s limitations period begins to run with the occurrence of the first symptom or manifestation of onset of the injury that the petitioner *alleges* to have been vaccine-caused. Finding that a vaccine can cause or actually did cause the injury is *not* necessary for determining when the Vaccine Act’s statute of limitations begins to run.

In *Cloer*, the Federal Circuit also re-affirmed the guidelines in *Markovich v. HHS*, 477 F.3d 1353 (Fed. Cir. 2007), for determining when the first symptom or manifestation of onset

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<sup>3</sup> Pronouncements of the Federal Circuit concerning legal issues are legally binding on this court. §300aa-12(f); *Coltec Industries, Inc. v. U.S.* 454 F.3d 1340, 1353 (Fed. Cir. 2006).

occurs. (654 F.3d at 1334.) The *Cloer* court affirmed the rule stated in *Markovich* that the start of the Vaccine Act's statute of limitations is a "statutory date that does *not* depend on when a petitioner knew or reasonably should have known anything adverse about her condition." (654 F.3d at 1339, emphasis added.) Instead, *Cloer* concluded that the objective view of the *medical community*, viewing the vaccinee's medical history retrospectively, would establish when the first symptom or manifestation of onset occurred. (*Id.* at 1340, citing *Markovich*, 477 F.3d at 1360.)

The petition in this case was filed on November 28, 2011. Accordingly, applying *Cloer* and *Markovich* to this case, insofar as Petitioner claims that the MMR vaccinations caused the *initial onset* of any of her chronic conditions--*i.e.*, her connective tissue disease, systemic lupus erythematosus, and rheumatoid arthritis--she must demonstrate that the "the first symptom or manifestation of onset" of such condition occurred on or after November 28, 2008. If any of Petitioner's symptoms or manifestations of those conditions occurred *earlier* than November 28, 2008, the petition would be time-barred, because it was not filed within the 36-month limitations period. Petitioner, however, was diagnosed with both mixed connective tissue disease and systemic lupus erythematosus in 2006. (Ex. C5 at 8; Ex. C10 at 1.) These diagnoses occurred well before November 28, 2008, and, as such, the initial onset of these two conditions clearly happened outside the statute of limitations period.

Petitioner was not formally diagnosed with rheumatoid arthritis until 2009, which date would be within the limitations period. (Ex. C14 at 5.) However, as both *Cloer* and *Markovich* make clear, "diagnosis" is *not* when the limitations period starts to run. The period begins to run earlier, on the date when the *first symptom or manifestation of onset* occurred. According to her medical records, Petitioner began to develop joint stiffness and pain, predominantly in the knees and hips, before March 20, 2006 (Ex. C5 at 5); arthralgias in her fingers and other joints before March 21, 2006 (*id.* at 7); and continuing fatigue starting before May 2006 and going through September 2006 (Ex. C7 at 8; Ex. C10 at 1), all of which are symptoms of rheumatoid arthritis.<sup>4</sup> Since all of these symptoms occurred well before November 28, 2008, it is clear that as to the onset of her *rheumatoid arthritis*, Petitioner again filed her petition outside the time period permissible under the statute of limitations. Therefore, under the plain meaning of the statute, Petitioner's *initial onset* claim clearly is time-barred as to all three of her allegedly vaccine-caused conditions.

## ***2. The "discovery rule" does not apply***

Next, Petitioner, even though she does not style it as such, also in effect makes an argument based on the so-called "discovery rule." If the "discovery rule" applies, the statute of limitations does not begin to run until an injured person *knew or should have known* that a vaccine had the ability to cause the injury from which she suffered. If there is no "discovery rule," the limitations period runs from the *first symptom* of injury, regardless of whether the vaccine suspected that such symptom was vaccine-caused. *Cloer*, 654 F.3d at 1336.

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<sup>4</sup> GARY S. FIRESTEIN ET AL., *KELLEY'S TEXTBOOK OF RHEUMATOLOGY VOLUME II* 1088-1089 (Saunders Elsevier 8<sup>th</sup> ed. 2009) (1981).

The Federal Circuit has noted that “A statute of limitation is a condition on the waiver of sovereign immunity by the United States’ and courts should be ‘careful not to interpret [a waiver] in a manner that would extend the waiver beyond what Congress intended.’” *Cloer*, 654 F. 3d at 1339 n.6. Guided by this principle, the *Cloer* court determined that there is no explicit “discovery rule” within the Vaccine Act, and that a discovery rule could *not* be read by implication into the Act’s statute of limitations. (654 F.3d at 1337.) Without a “discovery rule,” I find that Petitioner’s filing was outside the limitations period of the statute.

### ***B. “Significant aggravation” claim***

As noted above, Petitioner’s alternative argument is that her conditions were somehow *significantly aggravated* in 2010, by her 2005 MMR vaccinations. In other words, she seems to argue that even if her claim of causation of her *initial onset* is time-barred, nevertheless her separate *aggravation* claim should be considered timely-filed.

The type of “significant aggravation” argument raised by Petitioner in this case, however, has already been considered, and rejected as a matter of law, by the Federal Circuit. In *Brice v. HHS*, 240 F. 3d 1367 (Fed. Cir. 2001), the petitioners, like Petitioner in this case, raised an alternative argument concerning timely filing, arguing that even if their petition was not timely filed as to their allegation that a vaccination caused the *onset* of the vaccinee’s injury, nevertheless their petition should be held to be timely filed as to a *worsening--i.e.*, an “aggravation”--of the vaccinee’s condition that was manifested some years later than the original symptoms (two years later, in that case). The Federal Circuit, however, endorsed the holding of the Court of Federal Claims judge that:

“where, as here, a petitioner alleges that a vaccine caused an injury and that later there was significant aggravation of that *same* injury, the petitioner must file a petition within 36 months of the first symptom or manifestation of the *onset* of the injury.”

240 F. 3d 1367, 1369 n.1 (Fed. Cir. 2001) (emphasis added) (quoting favorably *Brice v. HHS*, 36 Fed. Cl. 474, 476 (1996)).

Thus, in this case, because Petitioner argues that the *same pair of 2005 vaccinations* caused both (1) the *onset* of Petitioner’s condition in 2006, and (2) the *aggravation* of that condition in 2010, under the binding precedent of *Brice*, both of Petitioner’s claims are untimely because the Petition was not filed within 36 months of the initial *onset* of Petitioner’s condition.

In regards to her “aggravation” claim, Petitioner also raises an argument that the doctrine of “equitable tolling” should apply to her case. And it is true that the Federal Circuit recently held that the doctrine of “equitable tolling” may be applied to toll the running of the limitations period in Vaccine Act cases, in appropriate circumstances. *Cloer*, 654 F. 3d at 1340.

