

OFFICE OF SPECIAL MASTERS

No. 03-1289V

(Filed: March 19, 2004)

\*\*\*\*\*

JULIE KINSALA, Parent of CLOVER YALA, \*  
a Minor, \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

TO BE PUBLISHED

*Julie D. Kinsala, Charlotte, N.C., pro se.*

*Gregory W. Fortsch, Department of Justice, Washington, D.C., for respondent.*

DECISION<sup>1</sup>

HASTINGS, Special Master

This is an action seeking an award under the National Vaccine Injury Compensation Program (hereinafter "the Program").<sup>2</sup> Respondent has filed a motion contending that this petition was

---

<sup>1</sup>This document constitutes my final "decision" in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of this Court shall enter judgment in accord with this decision.

Also, the petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Rule 18(b)(2) of the Vaccine Rules of this Court, this decision will be made available to the public unless she files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."

<sup>2</sup>The 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.).

untimely filed, and therefore should be dismissed. For the reason set forth below, I conclude that respondent's contention is correct, and I hereby dismiss this petition.

## I

### BACKGROUND

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

This petition was filed on June 2, 2003 by the petitioner, Julie D. Kinsala, appearing *pro se* on behalf of her son, Clover Yala. The petition was filed as a "short form autism petition," pursuant to the *Autism General Order #1*, 2002 WL 31696785 (Fed. Cl. Spec. Mstr., July 3, 2003). As such, the petition did not provide a detailed statement of petitioner's claim, but instead stated that the petitioner "adopt[s] the Master Autism Petition for Vaccine Compensation." As the *Autism General Order #1* provides, by adopting the "Master Autism Petition," the petitioner, in effect, alleged that her son has "developed a neurodevelopmental disorder, consisting of Autism Spectrum Disorder or a similar disorder," and that such disorder "was caused by a measles-mumps-rubella (MMR) vaccination [or] by the thimerosal ingredient in certain other vaccinations." 2002 WL 31696785 at \*4, 7-8.<sup>3</sup> Along with the petition, the petitioner filed 168 pages of medical records and other documents.

#### *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 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."

---

<sup>3</sup>This case is one of over 3,700 pending Program petitions involving claims that a condition known as "autism," or similar condition, was caused by one or more vaccinations. These claims have been linked together in a proceeding known as the Omnibus Autism Proceeding. See the *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 general interests of the autism petitioners in the course of the Omnibus Autism Proceeding. As noted in the *Autism General Order #1*, the Petitioner's Steering 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.

## II

### DISCUSSION

#### *A. Untimely Filing of the Petition*

As noted above, § 300aa-16(a)(2) requires that a Program petition that alleges injury by a vaccination that was administered after October 1, 1988, must 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. I conclude that the petition in this case was *not* timely filed, for the reasons set forth below.

The respondent's motion to dismiss the petition was filed on July 1, 2003. The motion asserted that the medical records filed with the petition showed that the first symptoms of Clover's autism were noticed in 1997, far more than the three years before the filing of the petition, and thus well outside the statute of limitations.

On December 24, 2003, I sent a notice the petitioner asking her to respond to the respondent's motion to dismiss. I asked her to answer the following question:

What vaccinations, on what dates, do you think might have caused or aggravated Clover's autism condition?

I also allowed her to file "any other response that she wishes to make" to the respondent's motion. On March 1, 2004, the petitioner responded to my request, by filing a handwritten response reading, in full, as follows:

I respond (Clover Yala) developed autism spectrum disorder as a result of MMR vaccination and vaccinations that contain thimerosal. The date is in the Vaccine Record. Thank You. Julie D. Kinsala.

Attached to this response were a stack of letters from various attorneys, medical records, and other documents.

I have reviewed the documents filed by petitioner<sup>4</sup> to see if the respondent is correct in the assertion that Clover's autism became apparent more than three years before the filing of this petition. Those records indicate the following general history of Clover's autism.

---

<sup>4</sup>Neither the records filed with the petition, which I have designated "Ex. A," nor those filed on March 1, 2004, which I have designated "Ex. B," were paginated. However, I have paginated my own copy of each set of records, with the first page of each (the page stamped by the court clerk) designated as page 1.

Clover was born on April 19, 1995. (Ex. A, p. 1.) He received a number of vaccinations, including an MMR vaccination and vaccinations involving thimerosal-containing vaccines, in 1995 and 1996. (Ex. B, p. 47.) On March 11 and 17, 1998, personnel of the Mecklenburg County Preschool Services office evaluated Clover, and determined that he met the criteria for an autistic disorder. (Ex. A, pp. 164-68.) In August of 1999, testing at the Department of Psychiatry of the University of North Carolina confirmed that diagnosis. (Ex. A, pp. 149-62.)

Accordingly, the records available to me indicate that the manifestation of Clover's autism was apparent by March of 1998, if not earlier.<sup>5</sup> The petition, however, was not filed until June 2, 2003. Therefore, I am forced to conclude that respondent is correct: the first symptom of Clover's autism occurred more than thirty-six months prior to the filing of the petition, so that the petition was not timely filed.<sup>6</sup>

### ***B. The Doctrine of Equitable Tolling***

Despite the fact that the petition was untimely filed, I must add that my examination of the record indicates that this untimeliness was not necessarily a result of any lack of diligence by the petitioner in trying to seek some sort of legal compensation for her son's condition. It appears that Ms. Kinsala first contacted an attorney in 2000. (Ex. A, p. 8.) If that lawyer had acted promptly, it is conceivable that the petition could have been timely filed. The documents seem to indicate that only after petitioner consulted several attorneys did one lawyer provide her with the address of the U.S. Court of Federal Claims, which appears to have resulted in the filing of this petition.

In other situations, where a plaintiff is unaware of his or her rights, a court may delay the start of the running of a filing period under the doctrine of "equitable tolling." *See, e.g., Haakanson v. Wakefield Seafoods*, 600 P.2d 1087, 1091 (Alaska 1979). However, in Program cases, the U.S. Court of Appeals for the Federal Circuit has held that the equitable tolling doctrine is *not* available for extending the time period relevant here, i.e., § 300aa-16(a)(2). *Brice v. Secretary of Health and Human Services*, 240 F.3d 1367, 1372-73 (Fed. Cir. 2001). The precedent of *Brice* is legally binding upon this court. Therefore, even though it appears from the documents that the petitioner may have been diligent in attempting to gain relief for her son, and that she may have been tragically mistreated

---

<sup>5</sup>In *Setnes v. United States*, 57 Fed. Cl. 175, 181 (2003), 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. Respondent takes issue with whether *Setnes* correctly interprets the statutory section in question, but I do not need to reach any conclusions on that question here. Even assuming the correctness of *Setnes*, the petition in this case would *still* be untimely. That is, as I read the record, by early 1998, not only were the symptoms of autism clear and obvious, but Clover was, in fact, *diagnosed* with autism. (Ex. A, pp. 164-68.) Thus, even assuming that the *Setnes* analysis is correct, this petition would still be untimely.

<sup>6</sup>I note also that I found no indication in the records that Clover's autism was substantially aggravated at any later point in time by any other vaccinations.

by the attorneys that she contacted, I am powerless, under the binding precedent of *Brice*, to offer any relief to the petitioner.

### III

#### CONCLUSION

Based upon the records filed in this case, it appears that Clover Yala suffers from a terrible disorder, and that his mother has tried sincerely to obtain help from the Program on account of that disorder. Unfortunately, the records also indicate that this petition was not filed within the deadline specified by Congress. Further, under the decision in *Brice*, discussed above, I have no choice but to dismiss this petition because it was not timely filed, no matter how tragic Clover's condition, and no matter that this result may seem terribly unfair in light of petitioner's efforts to contact an attorney at a point in time when the case might have been timely filed. Accordingly, I hereby DISMISS this petition because it was untimely filed.<sup>7</sup>

---

George L. Hastings, Jr.  
Special Master

---

<sup>7</sup>In the absence of a timely-filed motion for review of this petition, the Clerk of this Court shall enter judgement accordingly.