

OFFICE OF SPECIAL MASTERS

No. 04-1337V

Filed: April 25, 2005

EDWARD R. LEWIS and ROBIN E. LEWIS,
as natural parents of Alexandra Lewis, a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES,

Respondent.

Unpublished
To be posted¹

ORDER DENYING MOTION TO DISMISS

Respondent's "Motion to Dismiss," filed on November 17, 2004, is hereby denied. The available records in this case do not demonstrate that the petition was not timely filed, because they simply do not clearly indicate when the first symptom of the vaccinee's autism occurred. Those records, while certainly indicating some abnormalities in Alexandra prior to August 19, 2001 (the petition was filed on August 19, 2004), do *not* make it clear whether the first symptom of Alexandra's *autism* took place prior to August 19, 2001. For example, while respondent points to evidence of language difficulties on March 27 and June 11, 2001, it is not clear whether those difficulties actually constitute evidence of *autism*. Respondent has not given me any evidence, for example, indicating that those difficulties, were, in fact, evidence of autism.

Of course, if and when the petitioners ultimately attempt to prove "causation," it will become clear when the first symptom of Alexandra's autism occurred. *At that time* we can assess whether the petition was timely filed. There is no need to do so at this time. (I note, however, that in cases in which the available medical records *do* clearly indicate that the first symptom predated the filing of the petition by more than three years, I will continue to dismiss such cases, as I have in the past. *See, e.g., Weinstein v. HHS*, No. 02-2059V, 2004 WL 3088663 (Oct. 25,

¹Because this document contains a reasoned explanation for my action in this case, I intend to post this order 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). Therefore, 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, this entire document will be available to the public. *Id.*

2004), *aff'd sub nom Hebert v. HHS*, ___ Fed. Cl. ___ (2005); *Tucker v. HHS*, No. 03-0346V, 2004 WL 950012 (Fed. Cl. Spec. Mstr. Apr. 15, 2004); *Kinsala v. HHS*, No. 03-1289V, 2004 WL 828459 (Fed. Cl. Spec. Mstr. Mar. 19, 2004).)

Finally, I note that the above analysis assumes that the petitioners' attempt in March 2003 to file a petition did *not* constitute the valid "filing of a petition." On this point, I note that an affidavit of Petitioner Edward Lewis (hereinafter Aff.) filed on September 7, 2004, indicates that the petitioners, acting without a lawyer, sent a petition via express mail, return receipt requested, "* * * to the United States Court of Federal Claims, Office of Special Masters on March 17, 2003." (Aff. at 1.) Attached to that affidavit, however, was a return receipt which indicates that the petitioners sent something to the *Secretary of Health and Human Services*, rather than the court, which was received by the Secretary on March 19, 2003. (Aff. at 3.)

Because of this apparent confusion about whether a petition was sent to this Court in March of 2003, I asked the petitioners to clarify their affidavit and explain exactly to whom they sent their petition. On February 18, 2005, petitioners' counsel responded by writing that his clients "* * * in March of 2003 * * * sent only the single Petition to the Secretary of Health and Human Services, but have no record of a copy being sent to the U.S. Court of Federal Claims."

In addition, attached to the respondent's motion is a letter from the Department of Health and Human Services to the petitioners, which seems to corroborate that in 2003, only a single petition was sent to the Secretary of Health and Human Services, and was not served on the court. That petition was returned to the petitioners on April 10, 2003. See Ex. A of Respondent's Motion.

42 U.S.C. § 300aa-11(a)(1) states that "A proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition * * * with the United States Court of Federal Claims." The precedent has been lenient concerning what kind of document, *sent to this court*, will be accepted as a valid petition. See, e.g., *Robles v. Secretary of HHS*, 1998 WL 228174 (Fed. Cir. 1998) (unpublished) (letter to the clerk constituted a valid petition); *Stewart v. HHS*, No. 02-819V, 2003 WL 22300298, at *16 (Fed. Cl. Spec. Mstr. Sep. 3, 2003) (collecting cases). However, in this case, the petitioners in March of 2003 sent a petition to the *respondent*, and *not* to the *court*. See petitioners' filing of February 18, 2005 ("* * * in March of 2003, [petitioners] sent only the single Petition to the Secretary of Health and Human Services, but have no record of a copy being sent to the U.S. Court of Federal Claims."). While the argument can be made that respondent was on notice of petitioners' claim, 42 U.S.C. § 300aa-11(a)(1) specifically states that proceedings are commenced by *service* on the respondent and *filing* with the court. Therefore, for purposes of this petition, it appears that the 2003 attempt was a nullity.

George L. Hastings, Jr.
Special Master