In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-767V

Filed: May 17, 2012

ARTHUR W. ASKEW, Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	)	TO BE PUBLISHED Motion to dismiss; motion for summary judgment; statute of limitations; equitable tolling; date of onset; manifestation of symptoms

Petitioner appears Pro se,
Darryl R. Wishard, United States Dep't of Justice, Washington, D.C., for Respondent.

ORDER[1]

I. INTRODUCTION AND SUMMARY

Pro se Petitioner Arthur W. Askew ("Petitioner") alleges that he developed transverse myelitis ("TM"), an inflammatory disease of the spinal cord, following an influenza ("flu") vaccination on October 9, 2007. Petition ("Pet.") at 1-3.[2] By certified mail on October 28, 2010, Petitioner served his Petition on the Secretary of the Department of Health and Human Services (the "Secretary" or "Respondent"), but failed to file with the Court. Respondent moved to dismiss the Petition on the ground that by the time Petitioner's Petition was filed with the Court, on November 9, 2010, the statute of limitations had expired. Resp't's Mot. to Dismiss ("Mot."), Dec. 13, 2010, ECF No. 4; see 42 U.S.C. § 300aa-16(a)(2).

[1] In accordance with Vaccine Rule 18(b), a petitioner has 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Rules of the United States Court of Federal Claims ("RCFC"), Appendix B, Vaccine Rule 18(b). Redactions ordered by the special master, if any, appear in the document as posted on the United States Court of Federal Claims' website.

[2] Myelitis is "inflammation of the spinal cord, often part of a more specifically defined disease process." Dorland's Illustrated Medical Dictionary 1218 (32nd ed. 2012). Transverse myelitis is "myelitis in which the functional effect of the lesions spans the width of the entire cord at a given level." Id.

The Motion to Dismiss was converted to a Motion for Summary Judgment by order dated March 8, 2012, and both parties were provided an opportunity to submit additional information. Order, ECF No. 14. The Order invited the parties "to submit additional information concerning the symptoms of transverse myelitis that would be recognized as such by the medical profession at large." Id. at 2. Additionally, the Order notified the parties that I intended to rely on Court Exhibit 1, a fact sheet published by the National Institute of Neurological Disorders and Stroke ("NINDS") and posted on its website. Id.[3]

To comply with the statute of limitations, the Petition would have had to be filed in court within 36 months after the first symptom of Petitioner's TM.[4] It was not. In Cloer v. Secretary of the Department of Health & Human Services, 654 F.3d 1322 (Fed. Cir. 2011) (hereinafter "Cloer I"), however, the Federal Circuit held that the doctrine of equitable tolling may be employed to permit a claim to proceed in the Vaccine Program even if it was not filed in court within the limitations period. Defective but timely filing is one of the rare circumstances noted by the Circuit in Cloer I that may result in equitable tolling. Here, Petitioner's filing, had it not been defective, would have been timely. Petitioner timely served the Secretary, as required by the Vaccine Act, but did not file his Petition with the Clerk of Court until eight days later. For the reasons stated herein, I hold that equitable tolling permits the instant Petition to proceed, because I construe what occurred in these circumstances as encompassed within the concept of timely but defective filing. The Secretary's Motion to Dismiss/Motion for Summary Judgment therefore is **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Petition

On November 9, 2010, Petitioner filed his Petition alleging that he suffered TM from a flu vaccination received on October 9, 2007. Pet. at 1. The Petition stated that on "a date subsequent to Nov. 8, 2007, [Petitioner] knew or ought to have known he suffered Transverse Myelitis which was 'caused-in-fact' by" his vaccination. Id. Petitioner claimed $4,222.40 in compensation. Pet. cover sheet.

B. Pertinent Medical Records

Petitioner received the flu vaccination at his doctor's office on October 9, 2007. Pet'r's Ex. 1 at 1. At the time of vaccination, Petitioner was a 69-year-old school teacher living in Myrtle Beach, South Carolina. Id. at 2, 4. He had a remote history of a

[3] Transverse Myelitis Fact Sheet, National Institute of Neurological Disorders and Stroke, http://www.ninds.nih.gov/disorders/transversemyelitis/detail_transversemyelitis.htm (last visited Mar. 7, 2012).

[4] 42 U.S.C. § 300aa-16(a)(2) provides in part that "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."

heart transplant and was accordingly "immunosuppressed." Id. at 2. He suffered from numerous additional medical conditions. Pet'r's Ex. 2 at 1; Pet'r's Ex. 3 at 8.

On November 8, 2007, Petitioner presented to Conway Medical Center ("Conway") with "paresthesias, progressive from feet to lower chest." Pet'r's Ex. 2 at 1.[5] Under "HPI" (History of Present Illness), the intake record states: "Onset: The symptoms/episode began/occurred 1 week(s) ago." Id. The record states that "the symptoms became worse 1 day(s) ago." Id.

After being examined and subjected to various tests, Petitioner was discharged from Conway and ordered to proceed to the Medical University of South Carolina ("MUSC") in Charleston for admission with "Paraesthesia (Neuropathy)." Id. at 3, 17.

Petitioner was admitted to MUSC later that same day, November 8, 2007. Pet'r's Ex. 3 at 8. On the handwritten Inpatient History and Physical Form, his chief complaint is noted as "Parasthesias [sic]." Id. at 1. The record, under "History of Present Illness," states that Petitioner "felt well" in August and began "working at school." Id. He developed an upper respiratory infection and improved in about two weeks with "no intervention." Id.

> On Oct 12-21st pt began to feel 'ill'. He describes . . . sore throat, runny nose, nasal congestion, post nasal . . . , productive cough. . . . On Oct 24th pt began to develop 'progressive neuropathy' to ankles (usually at feet). This steadily progressed to knees/thighs over the next week and now to upper abd. He describes a tightness across upper abd.

Id. (emphasis added).

The MUSC discharge summary states that Petitioner was well in August and had an upper respiratory infection ("URI"), which cleared in two weeks without intervention. Pet'r's Ex. 3 at 8. The discharge summary records that Petitioner was given the flu shot on October 9, "and 2 weeks later on 10/20/2007, he began to feel 'ill.'" Id. at 8.[6] The discharge summary records the same types of upper respiratory symptoms noted on the intake form. Id. The discharge summary also is consistent with the intake form in reporting that "[o]n 10/24/2007, patient began to develop 'progressive neuropathy' to his ankles." Id.

The record created in the Conway ER differs from the MUSC records, which also differ from each other in regard to the onset of Petitioner's TM symptoms. The ER record from Conway clearly identified the onset of TM symptoms as one week before

[5] Paresthesia (var. paraesthesia) is defined as "an abnormal touch sensation, such as burning, prickling, or formication, often in the absence of an external stimulus." Dorland's at 1383. Formication is "a tactile hallucination in which there is a sensation of tiny insects crawling over the skin." Id. at 734.

[6] For whatever reason, this discharge report differs from the intake form in being more precise as to the date on which Petitioner began to feel ill. Compare Pet'r's Ex. 3 at 1 ("Oct 12-21st pt began to feel 'ill'"), with Pet'r's Ex. 3 at 8 ("On 10/20/2007, he began to feel 'ill'").

Petitioner's presentation to the hospital on November 8, 2007. Pet'r's Ex. 2 at 1. The MUSC records, however, stated that the "progressive neuropathy" began on October 24, 2007. Pet'r's Ex. 3 at 1. From October 24, 2007 to November 8, 2007, is 15 days. If October 24, 2007, actually was the date on which Petitioner's neuropathy began, it was more than two weeks—not one week—before he presented for treatment.

The MUSC intake form is internally inconsistent, as well, noting progressive neuropathy over a period of a week (starting October 24) "and now" to the upper abdomen. Pet'r's Ex. 3 at 1 As noted, from October 24, 2007, to "now" on the MUSC intake form is 15 days, not a period of a week. The MUSC discharge summary blurred this contradiction, stating:

> He usually has numbness of his feet, presumably secondary to his medications but this was different and was progressing superiorly to his knees, thighs, over the next week, and eventually to the upper abdomen.

Id. at 8 (emphasis added). The time between onset and Petitioner's hospitalization on November 8, 2007, was rendered indeterminate by use of the term "eventually," which could cover one or two weeks. Id. Whatever the explanation, there is considerable doubt cast on the entries from MUSC indicating onset of Petitioner's TM symptoms on October 24, 2007.[7]

The subsequent history does not illuminate the issue. Petitioner was treated at MUSC over a period of eight days "for his transverse myelitis." Id. at 9. "Symptoms started to improve after high-dose Solu-Medrol was started." Id.[8] He was discharged on November 16, 2007. Id. at 8.

On November 20, 2007, a physical therapist noted "[p]atient reports receiving diagnosis of transverse myelitis with lesions T1-T3 on October 23, 2007 around the time of receiving flu shot." Pet'r's Ex. 4 at 1.[9]

After completing a course of steroids, Petitioner had recurrent TM and was re-admitted to MUSC on November 28, 2007. Pet'r's Ex. 5 at 9. A MUSC discharge

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[7] The Secretary relies heavily on the reports in the medical records of paresthesias commencing around October 23-24, 2007. See Resp't's Reply to Special Master's Mar. 8, 2012 Order Regarding Mot. Summ. J. ("Resp.") at 1-2, Apr. 6, 2012, ECF No. 15.

[8] Solu-Medrol is an anti-inflammatory glucocorticoid. Drugs@FDA: FDA Approved Drug Products, U.S. Food & Drug Admin., http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm?fuseaction=Search.DrugDetails (last visited May 15, 2012).

[9] This information is inconsistent with the other medical records. First, Petitioner was not diagnosed with TM until November 8, 2007. Pet'r's Ex. 2 at 1. Second, Petitioner received the flu shot on October 9, 2007, not "around" October 23, 2007. Pet'r's Ex. 1 at 1. Third, he was diagnosed almost a full month after receiving the flu shot, not "around the time" of receiving the flu shot. I conclude that the information reported in Petitioner's Exhibit 4 at 1 is not reliable. In addition, I give this record less weight because it was created 11 days after the records from Conway and MUSC, which were closer to the date of onset and diagnosis of Petitioner's illness, and therefore may be considered more reliable. See discussion of medical records, infra.

summary dated December 1, 2007, after Petitioner was hospitalized for a recurrence of TM, confirms that he had received two days of "high-dose Solu-Medrol." Id. at 10.

At some point, Petitioner submitted a report to the Vaccine Adverse Event Reporting System ("VAERS"). Pet'r's Ex. 1 at 2. In the VAERS report, Petitioner provided October 20, 2007, as the "[a]dverse event onset" date. Id. The date on which the report was completed or received, however, does not appear on the copy submitted to the special master.[10] Petitioner maintains that this form was completed around December 1, 2007, at a time when his mental status was impaired by the effects of "several high-doses of Solu-Medrol," and that "under the circumstances, what is stated as an onset date must not be taken as gospel." Pet'r's Mot. to Deny Dismissal and Retain Juris. ("Opp.") at 2, Sept. 14, 2011, ECF No. 12. Regardless of the reason, I find that the medical records do not support the stated onset date on the VAERS form of October 20, 2007, and that the medical records from Petitioner's hospital treatment on November 8, 2007, are more reliable on this point. See discussion, infra.

C. Proceedings Regarding Timeliness of the Petition

1. Secretary's Motion to Dismiss

According to Respondent, Petitioner's symptoms began on October 20, 2007. Mot. at 1-2. Based on the filing date of November 9, 2010, Respondent moved to dismiss for lack of jurisdiction on the ground that the filing was outside the statute of limitations period. Id. at 2. The Motion was based upon (1) the VAERS report filed by the Petitioner, and (2) medical records noting an onset date of October 20, 2007. Respondent alleged that, under 42 U.S.C. §300aa-16(a)(2), the Petition was late by a period of 20 days.

2. Petitioner's Opposition

In his Opposition, Petitioner stated that the Petition was mailed to Respondent on October 28, 2010, and that Respondent "signed for the Petition on November 1, 2010." Opp. at 2. Petitioner denied the accuracy of the VAERS report, stating that October 20, 2007, was not the onset date of his TM, but "was a flu like episode." Id. at 3. Petitioner asserted that his "state of mind" while on medication resulted in the entry of inaccurate information on the VAERS form. Id. Petitioner asserted that the actual date of his TM onset was early November 2007, and that he filed his Petition "2 to 4 days" before the statutory period expired. Id. at 5.

Petitioner submitted a document showing a return receipt dated November 1, 2010, for an item addressed to the "Secretary of HHS c/o Dir – Div of VICP" at the correct address in Rockville, Maryland. Id. at 6.

[10] A letter acknowledging receipt of the VAERS report is dated December 19, 2007. Pet'r's Ex. 1 at 3.

3. Response to Order Issued March 8, 2012

Petitioner submitted no additional information in response to the Order converting the Secretary's Motion to Dismiss into a Motion for Summary Judgment.

The Secretary, notwithstanding the invitation to submit additional information concerning the first symptoms or manifestations of TM, also submitted no such information, and did not object to the information contained in Court Exhibit 1. Instead, the Secretary simply noted conflicting notations from the medical records concerning the onset of Petitioner's TM. Resp't's Reply to Special Master's Mar. 8, 2012 Order Regarding Mot. Summ. J. ("Resp.") at 1-2, Apr. 6, 2012, ECF No. 15.

III. DISCUSSION

A. Summary

Two questions must be answered to resolve the question of whether equitable tolling applies in this instance: (1) does Petitioner's service on the Secretary without simultaneously filing with the Court qualify as a defective filing; and (2) if there was a defective filing, was it timely?

(1) Petitioner's service of the Petition and supporting documentation on the Secretary was defective. He served the Secretary with a copy of his Petition but did not contemporaneously file the Petition with the Court. This constituted a defective filing for purposes of invoking the doctrine of equitable tolling. Petitioner's actions constituted a reasonable effort to comply with the statute's requirements. The statutory provision concerning initiating a proceeding under the Vaccine Act is unusual, and could readily have been misconstrued by a pro se petitioner. More importantly, there was no prejudice to Respondent or harm to the Program from the defective filing, in that the purpose of the statute of limitations, i.e., providing notice to Respondent and preventing "stale or unduly delayed claims," Cloer I, 654 F.3d at 1341 (internal quotation marks omitted) (citing and quoting John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008)), was satisfied by service on the Secretary.

(2) Petitioner's claim was timely. The date that triggered the statute of limitations was the date on which his symptoms of TM would have been recognized as such by the medical profession at large. Cloer I, 654 F.3d at 1335; Markovich v. Sec'y of Dep't of Health & Human Servs., 477 F.3d 1353, 1360 (Fed. Cir. 2007). Based on Petitioner's medical records, construed in the light most favorable to his cause, the date Petitioner's symptoms of TM first manifested was on or around November 1, 2007. His Petition, had it been properly filed on November 1, 2010 (the date the Petition was stamped received by the Secretary), would have been timely. Under the doctrine of equitable tolling, therefore, this Petition may proceed.

B. Summary Adjudication

1. Rule 12(b)(6) [11]

In an appropriate case, a defense based on the statute of limitations may properly be raised under Rule 12 (b)(1) or 12(b)(6), Federal Rules of Civil Procedure ("Fed. R. Civ. P."). Since the Federal Circuit held in Cloer I that the statute of limitations is not jurisdictional, the Secretary's argument under Rule 12(b)(1) is foreclosed. 654 F.3d at 1340-44.

Statute of limitations can be raised as an affirmative defense under Rule 12(b)(6). See, e.g., Nader v. Democratic Nat. Comm., 555 F.Supp.2d 137, 156 (D.D.C. 2008) ("A defendant may raise the affirmative defense of statute of limitations via a Rule 12(b)(6) motion when the facts that give rise to the defense are clear from the face of the complaint." (citing Smith-Haynie v. Dist. of Columbia, 155 F.3d 575, 578 (D.C. Cir. 1998))). To withstand a motion to dismiss under Rule 12(b)(6), a claim requires enough factual matter (taken as true) to set forth a plausible case. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007). "[C]ourts generally consider only the allegations contained in the complaint, exhibits attached to the complaint[,] and matters of public record" when deciding a motion to dismiss. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

A court must convert a motion to dismiss to a motion for summary judgment if matters outside the pleadings are presented and not excluded by the court, to give all parties a reasonable opportunity to present pertinent information. See Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993). A document incorporated by reference or attached to the complaint may be considered by the court on a motion to dismiss, however, if the documents are central to the plaintiff's claim and the parties do not dispute authenticity. See Jacobsen v. Deseret Book Co., 287 F.3d 936, 941 (10th Cir. 2002). The court may consider "documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

Both parties here have relied on the facts alleged in the Petition and various documents attached to the Petition, whose authenticity has not been challenged. In addition to those documents, I have relied, without objection by either party, on an

[11] Vaccine Rule 1(b) permits a special master to regulate practice in vaccine cases in "any matter not specifically addressed by the Vaccine Rules." Vaccine Rule 1(c) provides: "The RCFC apply only to the extent they are consistent with the Vaccine Rules." RCFC 12(b)(6) is consistent with the Vaccine Rules and applies in this case. Application of RCFC 12(b)(6) in cases under the Vaccine Act should be consistent with practice under Rule 12(b)(6), Fed. R. Civ. P. See Champagne v. United States, 35 Fed. Cl. 198, 205 n.5 (1996) ("In general, the rules of this court are closely patterned on the [Fed. R. Civ. P.]. Therefore, precedent under the [Fed. R. Civ. P.] is relevant to interpreting the rules of this court . . . ."); see also C. Sanchez and Son, Inc. v. United States, 6 F.3d 1539, 1541 n.2 (Fed. Cir. 1993) ("The [RCFC] generally follow the [Fed. R. Civ. P.]."). Accordingly, I rely on cases interpreting Rule 12(b)(6), Fed. R. Civ. P., as well as those interpreting Rule 12(b)(6), RCFC.

official governmental website maintained by the National Institutes of Health ("NIH"), an agency of the Department of Health & Human Services ("HHS").[12] Nevertheless, out of an abundance of caution, and to ensure that all parties had the opportunity to present evidence bearing on the application of the statute of limitations, I converted the Secretary's Motion to Dismiss to a Motion for Summary Judgment and invited the parties to submit additional information.

2. Rule 56

Under Rule 56, summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is not appropriate if genuine issues of material fact exist. RCFC 56(a). To determine whether there are any genuine issues of material fact, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." DIRECTV Group, Inc. v. United States, 670 F.3d 1370, 1374-75 (Fed. Cir. 2012) (internal quotation marks omitted) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). The existence of a dispute concerning a material fact may be established or controverted by materials already in the record. See RCFC 56(c)(1) (materials permitted include affidavit or other written or oral evidence).

C. The Vaccine Act's Statute of Limitations

In relevant part, the Vaccine Act provides that:

> [I]f a vaccine-related injury occurred as a result of the administration of [a] 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[.]

42 U.S.C. §300aa-16(a)(2).

"[T]he statute of limitations of the Vaccine Act begins to run on the calendar date of the occurrence of the first medically recognized symptom or manifestation of onset of the injury claimed by the petitioner." Cloer I, 654 F.3d at 1324-25. This reflects a decision by Congress that the statute of limitations would begin to run "not on the date of injury" but "on the date that injury first became symptomatic or manifested." Id. at 1327. "'[T]he first symptom or manifestation of onset' is the 'first event objectively

[12] "It is not uncommon for courts to take judicial notice of factual information found on the world wide web." O'Toole v. Northrop Grumman Corp., 499 F.3d 1218, 1225 (10th Cir. 2007). In O'Toole, the Tenth Circuit indeed found it was an abuse of discretion for the district court to refuse to take judicial notice of information on the Internet. Special masters for years have routinely taken judicial notice of information in medical dictionaries and other reliable reference materials. See, e.g., Hines v. Sec'y of Dep't of Health & Human Servs., 940 F.2d 1518, 1525-26 (Fed. Cir. 1991) (approving special master's reliance on medical textbook).

recognizable as a sign of a vaccine injury by the medical profession at large.'" Id. at 1329 (citing and quoting Markovich, 477 F.3d at 1360).

In Cloer I, the Federal Circuit affirmed that there is no discovery rule under the Vaccine Act, but reversed its decision in Brice v. Secretary of the Department of Health & Human Services, 240 F.3d 1367 (Fed. Cir. 2001) and held that equitable tolling was available in vaccine cases. 654 F.3d at 1340-44. Equitable tolling is rare but permissible, under appropriate circumstances. Id. at 1344-45. Among these circumstances, Cloer I stated, are cases involving "timely filing of a procedurally defective pleading." Id. at 1345 (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)).

D. Timely Filing

To comply with the statute of limitations, the Petition must have been filed within 36 months of the first occurrence or manifestation Petitioner's TM that would have been recognized as TM by the medical profession at large. See Cloer I, 654 F.3d at 1335 (reaffirming "the analysis and conclusion in Markovich"). I discuss below the first symptoms or manifestations of Petitioner's TM, and the date those symptoms or manifestations first occurred.

1. Initial Symptoms or Manifestations of TM

Initially, the Secretary maintained that the first symptom of Petitioner's TM occurred on October 20, 2007, when Petitioner reported flu-like symptoms, including congestion, runny nose and cough. Resp't's Reply to Pet'r's Mot. to Deny Dismissal and Retain Juris. ("Reply") at 3, Sept. 16, 2011, ECF No. 13. In her Response, the Secretary also pointed to notations in the medical records dating the onset of Petitioner's paresthesias as October 23-24, 2007. Resp. at 2. Petitioner claimed that his first symptom of TM occurred on November 1, 2007, approximately one week before he presented to the emergency room for treatment of paresthesias in his legs. Pet'r's Ex. 2 at 1.

I find that the medical community at large would not have recognized Petitioner's flu-like symptoms as the first symptom or manifestation of TM, but would have recognized as such the paresthesias he began to experience, based on the most reliable evidence, several weeks later. Absent the weakness and paresthesias characteristic of TM, the medical community at large would not identify the onset of that disorder based on the symptoms of a common cold/flu, which is what Petitioner manifested as of October 20, 2007, according to his medical records.[13]

[13] As noted elsewhere herein, the Secretary submitted no medical evidence on this point and appeared to concede that the first symptom or manifestation of TM is paresthesias such as those experienced by Petitioner several weeks after his vaccination.

Two documents in the record support this conclusion. Petitioner's Exhibit 11, an article entitled "A Primary Care Guide to Transverse Myelitis," notes the variety of symptoms with which patients with TM initially present.[14] "A variety of sensory dysfunction symptoms may be the first cause of concern." Pet'r's Ex. 11 at 3. "Adults are . . . likely to present with paresthesias (ie, burning and tingling) and a sensory level in the midthoracic region . . . ." Id. Other possible symptoms noted "include sensory loss or numbness, heightened or diminished sensitivity to temperature, and allodynia—pain caused by nonpainful stimuli." Id. In addition, early symptoms may include pain, weakness, and autonomic dysfunction. Id. Cold and flu symptoms are not among those recognized as signaling the initial presentation of TM.

In its "Transverse Myelitis Fact Sheet," the NINDS, an agency of the NIH, which in turn is an agency of HHS, instructs that "[i]nitial symptoms usually include localized lower back pain, sudden paresthesias (abnormal sensations such as burning, tickling, pricking, or tingling) in the legs, sensory loss and paraparesis (partial paralysis of the legs)." Ct. Ex. 1 at 2. Again, the symptoms of a common cold/flu are not listed as first manifestations or symptoms of TM.

Based on the evidence of record, I find that Petitioner's cold symptoms in mid-October 2007 did not trigger the running of the statute of limitations, and that it was only when Petitioner began to experience weakness, tingling, numbness, etc., that his symptoms would have been recognized by the medical profession at large as characteristic of TM.

It is irrelevant that Petitioner himself may have identified the onset of his alleged vaccine reaction as contemporaneous with the development of his cold symptoms in mid-October 2007. Petitioner's views on this point are those of a layperson, and, as Petitioner points out, a layperson who was cognitively disabled at the time the VAERS report was filed. What matters is the view of the medical profession at large. The Secretary has submitted no evidence that the medical profession would recognize a runny nose, congestion, and a cough as the first symptoms of TM.

2. Date of Initial Onset of Petitioner's Symptoms or Manifestations of TM

Having identified the first manifestations or symptoms of TM as weakness, tingling, numbness, etc., the question is on what date Petitioner first experienced those symptoms. The record contains several conflicting dates relating to the onset of Petitioner's symptoms of TM. The information in the most pertinent medical records ultimately reflects the information Petitioner provided to treating personnel, which was

[14] Angela Middleton et al., A Primary Care Guide to Transverse Myelitis, Patient Care: Primary Care Topics in Neurol. & Psychiatry, Sept. 2007, reprinted with permission by The Transverse Myelitis Association.

inconsistent, at least as recorded.[15] Since Petitioner did not know he was suffering from TM when he sought treatment on November 8, 2007, it is altogether understandable that he would not have given a reliable account of when his symptoms of TM commenced. The medical records reflect Petitioner's lack of understanding and confusion, under circumstances that were alarming. Nothing can be done to improve the record at this point.

Some guides to the interpretation of conflicting evidence are helpful to resolve the issue. Medical records created contemporaneously with the events they describe are considered more reliable, as a general rule, than later recollections. See, e.g., Cucuras v. Sec'y of Dep't of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993) ("Medical records, in general, warrant consideration as trustworthy evidence."). "But, like any norm based upon common sense and experience, this rule should not be treated as an absolute and must yield where the factual predicates for its application are weak or lacking." Campbell ex rel. Campbell v. Sec'y of Dep't of Health & Human Servs., 69 Fed. Cl. 775, 779 (2006). In addition, "[w]ritten records which are, themselves, inconsistent, should be accorded less deference than those that are internally consistent." Murphy v. Sec'y of Dep't of Health & Human Servs., 23 Cl. Ct. 726, 733 (1991), aff'd, 968 F.2d 1226 (Table) (Fed. Cir. 1992).

In this case, where there are several pertinent records that are inconsistent with each other, I cannot rely reflexively on any of the black letter guides to interpretation. See Shapiro v. Sec'y of Dep't of Health & Human Servs., 101 Fed. Cl. 532, 538 (2011) ("Reflexively invoking the 'contemporaneous record' rule and other evidentiary principles . . . without observing the[ir] practical limitations . . . can hinder rather than promote the accuracy of the fact-finding process."). Instead, I must piece together a coherent account of events that is as consistent as possible with the most reliable records. I conclude that the medical record created at the Conway ER, when Petitioner first presented for treatment, is the clearest and most reliable. This record states that Petitioner's symptoms began one week before, which would be November 1, 2007.

Taking account of all the information in the records concerning Petitioner and his medical condition, the most plausible scenario is that he had a respiratory infection in mid-October, then some time later (the amount of time is uncertain) he began to experience paresthesias around his ankles, which increased and ascended over the course of a week. These symptoms became so worrying, reaching the area of the upper abdomen, by November 8, 2007, that he presented to the Conway ER on that date. In particular, because Petitioner had a history of a heart transplant, there was concern about the feeling of tightness in his chest. See Pet'r's Ex. 2 at 16 (describing cardiac test results).

[15] Caution must be exercised when construing records such as these. In general, the bare record does not inform the reader what question generated the answer that was recorded by hospital personnel. It is quite possible that a nurse or doctor asked a question, but that the Petitioner misunderstood and answered a different question. That may account for the inconsistencies; we will never know. To be sure, Petitioner must be deemed to have provided the most accurate information he could under the circumstances. See Cucuras, 993 F.2d at1528 ("With proper treatment hanging in the balance, accuracy has an extra premium.").

The paresthesias in Petitioner's ankles were the first symptoms or manifestations of his TM. These symptoms occurred for the first time between October 23-24 and November 1, 2007. To determine exactly when, during this one-week period, Petitioner actually began to experience the paresthesias is impossible. Petitioner suffered neuropathy in his feet even before the onset of his symptoms of TM. Pet'r's Ex. 3 at 8. It might have been difficult for him, even on November 8, 2007, to discern when those symptoms became significantly worse or different, so as to distinguish his accustomed feelings of neuropathy from the paresthesias that signaled the onset of his TM.

In her Response to the March 8, 2012 Order, the Secretary simply noted the medical records indicating onset of symptoms in mid-October, but gave no weight to the evidence indicating onset in the beginning of November. The Secretary also relied on later conflicting statements by Petitioner that are less reliable than the information recorded in more contemporaneous medical records.[16]

I choose November 1, 2007, as the date of onset for several reasons.[17] As noted above, this is the date of onset Petitioner provided to treating personnel when he arrived at the ER in Conway for treatment on November 8, 2007, and the clearest statement of onset in the record. In addition, it seems unlikely that Petitioner would have waited two weeks to seek treatment if he was experiencing increasing paresthesias. In particular, it is most likely that, given his medical history, as soon as he began to feel discomfort in the area of his upper abdomen, he would have reported for treatment. If Petitioner experienced progressive paresthesias for a period of one week before seeking treatment, the paresthesias would have started no earlier than November 1, 2007. This scenario matches the clear account he gave to the personnel in the Conway ER, and it is plausible. Pet'r's Ex. 2 at 1 (noting under History of Present Illness, "Onset: The symptoms/episode began/occurred 1 week(s) ago . . . . became worse 1 day(s) ago."). Further, under applicable law, I must interpret conflicting facts in the light most favorable to Petitioner.

[16] For example, in the Secretary's Response, she notes that "Petitioner reported to his physical therapist on November 20, 2007, that his transverse myelitis was diagnosed on October 23, 2007." Resp. at 2. This may be the statement of Petitioner, but it is incorrect. It is clear that Petitioner's TM was first diagnosed no earlier than November 9, 2007. See Pet'r's Ex. 3 at 13 (radiology report noting findings compatible with TM); id. at 39 (physician consultation report).

[17] Technically, a court does not decide or determine facts on a motion for summary judgment. In ruling on a motion for summary judgment, "'[t]he evidence of the non-movant is to be believed' by the court, 'and all justifiable inferences are to be drawn in his favor.'" Jadwin v. County of Kern, 2009 WL 1139987, at *2 (E.D. Cal. 2009) (alteration in original) (citing and quoting Liberty Lobby, Inc., 477 U.S. at 254). Courts have recognized that "the 'facts' at the summary judgment stage may not turn out to be the actual facts if the case goes to trial." Id. (internal quotation marks omitted) (quoting Cottrell v. Caldwell, 85 F.3d 1480, 1486 (11th Cir. 1996)).

The Petition was served on the Secretary on October 28, 2010, and stamped received on November 1, 2010. Using the date of November 1, 2007, as the trigger for running the statute of limitations, the Petition would have been timely.[18]

E. Defective Filing

1. Fairness

In Irwin, the Supreme Court noted that equitable tolling has been allowed "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." 498 U.S. at 457-58. As an example, the Court cited Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965), in which the plaintiff filed his complaint in the wrong court. 498 U.S. at 458 n.3.

The rationale adopted by the Supreme Court favoring equitable tolling in such cases fits the circumstances presented here. "[W]hen process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without issuance of new initial process, it is enough to commence the action" under federal law. Burnett, 380 U.S. at 426 (internal quotation marks omitted) (citing and quoting Herb v. Pitcairn, 325 U.S. 77, 79 (1945)). Accord, e.g., American Pipe & Const. Co. v. State of Utah, 414 U.S. 538, 554 (1974). The Petition and supporting documents, received by the Secretary on November 1, 2010, without question were sufficient to put the Secretary on notice of the claim and commence the process of adjudication.

"Statutes of limitations are primarily designed to assure fairness to defendants." Burnett, 380 U.S. at 428. In addition, statutes of limitations relieve the courts of "the burden of trying stale claims when a plaintiff has slept on his rights." Id. In this case, as in Burnett, both of those concerns are satisfied. Petitioner sent a timely Petition directly to the party that needed to be notified of his claim in order to prepare a defense. He complied in part with the statute, and his error resulted in no substantive prejudice to the Secretary or burden on the Court. See Burnett, 380 U.S. at 429 ("Service of process was made upon the respondent notifying him that petitioner was asserting his cause of action."). There is no indication that Petitioner failed to file his Petition with the Court out of laziness or carelessness; he apparently believed, erroneously, that serving the Secretary was sufficient. See id. at 429-30.

2. Pro se Status of Petitioner

The Vaccine Act provides in pertinent part:

> (1) 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 containing the matter prescribed by subsection (c) of

[18] Because the Petition was not received by the Secretary until November 1, 2010, I used that date rather than the date of mailing as the effective filing date, pursuant to Vaccine Rule 17(b)(4)(A).

> this section with the United States Court of Federal Claims. The clerk of the United States Court of Federal Claims shall immediately forward the filed petition to the chief special master for assignment to a special master under section 300aa-12(d)(1) of this title.

42 U.S.C.§300aa-11(a)(1).

In this instance, Petitioner erroneously served only the Secretary without contemporaneously filing the Petition with the Court. The Petition and supporting documents were served on the Secretary by certified mail on October 28, 2010. These materials were stamped received in the Secretary's office on November 1, 2010. Petitioner did not file his Petition contemporaneously with the Court, as required by the statute. The Petition subsequently was filed with the Court on November 9, 2010.[19]

The correct procedure for initiating an action under section 11(a)(1) would not necessarily be evident to a non-lawyer with no previous experience in the Vaccine Program. Even to an experienced attorney, it is unusual to require service on the respondent in order to initiate a lawsuit. It is therefore understandable that this pro se Petitioner evidently misconstrued the provision, believing that he had initiated the proceeding in a timely fashion by serving the Secretary.

While pro se status does not relieve a party from complying with the statute of limitations, a pro se petitioner should be entitled to some relaxation of the standards applicable to attorneys. Cf. Kelley v. Sec'y, U.S. Dep't of Labor, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (dismissing claim but stating that "leniency with respect to mere formalities should be extended to a pro se party"); Toliver v. County of Sullivan, 841 F.2d 41 (2d Cir. 1988) (where complaint was delivered to pro se clerk's office within the limitations period but not officially deemed "filed" until weeks later, after complainant was granted permission to proceed in forma pauperis, complaint was deemed timely filed). This is not to say "that procedural rules . . . should be interpreted so as to excuse mistakes by those who proceed without counsel." McNeil v. United States, 508 U.S. 106 (1980). In the circumstances presented here, however, where a pro se Petitioner made a reasonable effort to comply with the provisions of the statute in a timely manner, and timely placed Respondent on notice of the claim and its particulars, but failed to perfect the filing and thus filed eight days late, equitable tolling is appropriate.

3. Consistency With Purposes of Vaccine Act

It is well established that "[t]he equitable tolling of a statute of limitations is appropriate when consistent with the policies underlying the statute and the purposes underlying the statute of limitations." See 51 Am. Jur. 2d Limitations of Actions §153 (2000). "Remedial legislation like the Vaccine Act should be construed in a manner that effectuates its underlying spirit and purpose." Cloer v. Sec'y of Dep't of Health &

[19] The record does not disclose the pathway that led to the filing of the Petition with the Clerk of Court.

Human Servs., 675 F.3d 1358, 1362 (Fed. Cir. 2012) (hereinafter "Cloer II") (citing Atchison, Topeka, & Santa Fe R. Co. v. Buell, 480 U.S. 557, 561-62 (1987)).[20]

Permitting equitable tolling in this case is appropriate given the purposes of the Vaccine Act. A primary purpose of the Vaccine Act is to create a means for obtaining redress and restitution for vaccine injuries that is "'simple, and easy to administer' while also being 'expeditious and fair.'" Cloer I, 654 F.3d at 1325 (citing and quoting legislative history). The Vaccine Program is intended to "'provide[] relative certainty and generosity' of compensation awards in order to satisfy petitioners in a fair, expeditious, and generous manner." Id. at 1326 (citing and quoting legislative history). It would be neither fair nor generous to deny Petitioner here an opportunity to seek redress for his alleged vaccine injury because he directed his Petition to the Secretary without filing it immediately with the Court.

IV. CONCLUSION

Respondent in this instance failed to apply the doctrine of equitable tolling in accordance with the Federal Circuit's decision in Cloer I. Respondent cited as support for dismissal the decisions in Ashman v. Secretary of the Department of Health & Human Services, No. 08-880V, 2009 WL 400396 (Fed. Cl. Spec. Mstr. Jan. 27, 2009) and Acevedo v. Secretary of the Department of Health & Human Services, No. 07-501V, 2007 WL 2706159 (Fed. Cl. Spec. Mstr. Aug. 31, 2007), aff'd sub nom. Mojica v. Secretary of the Department of Health & Human Services, 79 Fed. Cl. 633 (2007), aff'd, 287 Fed. Appx. 103 (Fed. Cir. 2008). Reply at 2. The entire rationale in those cases, however, was the unavailability of equitable tolling. See Ashman, 2009 WL 400396, at *1 ("there is no possibility of equitable tolling under the Vaccine Act even in the circumstances presented by this case") (internal quotation marks omitted) (quoting Mojica, 287 Fed. Appx. at 104 (citing Mojica, 79 Fed. Cl. at 639)); see also Mojica, 79 Fed. Cl. at 638 ("Brice's holding categorically bars equitable tolling in all cases involving late petitions under the Vaccine Act."). Indeed, following the decision in Cloer I, the court reversed the dismissal in Acevedo/Mojica and reinstated the claim, applying the doctrine of equitable tolling. Mojica v. Sec'y of Dep't of Health & Human Servs., 102 Fed. Cl. 96 (2011). The pre-Cloer I cases cited by the Secretary thus are not helpful in resolving this matter.

Relying on Cloer I and the doctrine of equitable tolling recognized therein, Petitioner is entitled to proceed. Accordingly, Respondent's Motion to Dismiss/Motion for Summary Judgment is **DENIED**, and Petitioner's Motion to Deny Dismissal and

[20] Congress intended that the Vaccine Program offer petitioners a generous alternative to traditional tort litigation. See, e.g., Cloer I, 654 F.3d at 1350 ("Thus, it is clear from the legislative history that Congress intended the Vaccine Act's compensation program to be more generous than the civil tort system."); Capizzano v. Sec'y of Dep't of Health & Human Servs., 440 F.3d 1317,1327 n.7 (Fed. Cir. 2006) (noting that "awards are to be made to vaccine-injured persons quickly, easily, and with certainty and generosity" (citing and quoting Knudsen v. Sec'y of Dep't of Health & Human Servs., 35 F.3d 543, 549 (Fed. Cir. 1994))).

Retain Jurisdiction is **GRANTED**. A status conference will be scheduled at the earliest opportunity to discuss the next steps in this matter.

IT IS SO ORDERED.

Dee Lord
Special Master