

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

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ERNIE WAYNE FEIERABEND,

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Petitioner,

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v.

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SECRETARY OF HEALTH  
AND HUMAN SERVICES,

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Respondent.

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No. 12-35V

Special Master Christian J. Moran

Filed: April 23, 2012

Dismissal; statute of limitations;  
significant aggravation; true nature  
of the action

Ernie W. Feierabend, pro se;

Lynn Elizabeth Ricciardella, United States Dep't of Justice, Washington, D.C. for  
respondent.

### DECISION DISMISSING PETITION<sup>1</sup>

Ernie Wayne Feierabend filed a petition for compensation on January 18, 2012. Mr. Feierabend is pursuing a theory that a series of three hepatitis B vaccinations, given to him in 1994, contributed to his multiple sclerosis ("MS"). Pet. at 1. He seeks compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006).

For the reasons explained below, the petition is DISMISSED.

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<sup>1</sup> The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

## I. Facts and Procedural History

The relevant factual events are not disputed.

Mr. Feierabend was born in 1946. Exhibit 1 at 8.<sup>2</sup> He received a series of three hepatitis B vaccinations in 1994. Exhibit 1 at 9; pet. at 1, ¶ 2.<sup>3</sup>

Mr. Feierabend claims, in his petition, that he was diagnosed with “relapsing remitting multiple sclerosis” on October 9, 2003. Pet. at 2, ¶ 6 (citing exhibit 1 at 12-13). Evidence supports this assertion. On October 3, 2003, a lumbar puncture revealed evidence of two oligoclonal bands. Exhibit 1 at 11-13. A much more recent record states that this lumbar puncture and CT scans from October 2003 confirmed his diagnosis of multiple sclerosis. Exhibit 1 at 15 (letter from Dr. Kevin J. Callerame, Mr. Feierabend’s neurologist, dated September 20, 2011). The Social Security Administration found Mr. Feierabend was disabled as of October 2, 2003. Exhibit 1 at 14.

The only record providing information as to Mr. Feierabend’s worsening of his MS is the September 20, 2011 letter from Dr. Callerame. In this letter, Dr. Callerame states that he last saw Mr. Feierabend on August 26, 2011, and during this visit, he noticed that Mr. Feierabend’s “condition had deteriorated on an EDSS scale to at least a level of 7.” Dr. Callerame further notes that Mr. Feierabend has “markedly gotten worse over the last year” and is “unable to ambulate even 3-5 meters without assistance.” Exhibit 1 at 15.

Mr. Feierabend filed a petition for vaccine compensation on January 18, 2012. Mr. Feierabend’s petition states that he experienced a significant aggravation of his MS in approximately August 2010, and that this worsening was documented on August 26, 2011. Pet. at 1; see also exhibit 1 at 15.

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<sup>2</sup> Because Mr. Feierabend filed his petition and medical records as one document, respondent separated these documents for clarity and cited to the petition with pages 1-4, and the records as exhibit 1 with the original pagination. This method of citation is followed here.

<sup>3</sup> Mr. Feierabend has not provided records from before receiving the hepatitis B vaccinations. In his response to the motion to dismiss, Mr. Feierabend indicates that he has ordered records from the Navy Department, which have not yet been received. He states that these records will show that he had no pre-existing health conditions prior to 1995. See Pet’r Response at 5-6.

Whether this petition is timely filed was discussed in the initial status conference on March 2, 2012. During this conference, respondent stated that she would file a motion to dismiss based on the fact that the petition was not timely filed.

Respondent did file a motion to dismiss on March 8, 2012. In her motion, respondent alleges that Mr. Feierabend “filed his claim for compensation after the expiration of the statutorily prescribed limitations period, set forth in Section 16(a)(2) of the Vaccine Act.” Respondent additionally contended that Mr. Feierabend’s interpretation of “significant aggravation” is not in accord with how this phrase is used in the Vaccine Act. Accordingly, a claim for significant aggravation would also not make Mr. Feierabend’s claim timely. Resp’t Mot. at 4-5.

Mr. Feierabend filed his response on March 23, 2012. Mr. Feierabend does not dispute respondent’s assertion that his MS was manifest by October 2003. However, as evidence that his claim is timely, Mr. Feierabend points to the date that his condition worsened as being within the 36 month statute of limitations. Mr. Feierabend states that the significant aggravation of his injury occurred between August 2010 and August 2011. Mr. Feierabend also suggests that respondent misinterpreted his claim as a Table injury, as opposed to significant aggravation of a non-table injury. Pet’r Resp. at 4-5.

In an informal communication with the court, respondent indicated that she does not intend to file a reply. Thus, this case is ready for adjudication.

## **II. Analysis**

Although the hepatitis B vaccine is listed on the Vaccine Injury Table, MS is not associated with that vaccine. See 42 C.F.R. § 100.3 ¶ VIII. Mr. Feierabend is necessarily proceeding on an “off-Table” claim.

For injuries not listed on the Vaccine Injury Table, the Vaccine Act permits petitioners to pursue two different theories. The first --- and far more common --- theory is that a vaccine caused the initial injury. The second --- and much less common --- theory is that a vaccine significantly aggravated a pre-existing injury. 42 U.S.C. § 300aa—11(c)(1)(C)(ii)(I). These two causes of action are distinct because a vaccine cannot “both be [a] cause [of] the injury and simultaneously

aggravate it.” Childs v. Sec’y of Health & Human Servs., 33 Fed. Cl. 556, 559 (1995).

Here, there is some ambiguity about Mr. Feierabend’s pleading, possibly due to his status as a pro se petitioner. In such circumstances, the judicial officer should “look to the true nature of the action in determining the existence or not of jurisdiction.” Tex. Peanut Farmers v. United States, 409 F.3d 1370, 1372 (Fed. Cir. 2005) (quoting Nat’l Ctr. For Mfg. Sciences v. United States, 114 F.3d 196, 199 (Fed. Cir. 1997)).

Various factors show that the “true nature” of Mr. Feierabend’s claim is that the hepatitis B vaccines caused his multiple sclerosis, not that the hepatitis B vaccines aggravated his multiple sclerosis. First, the basic chronology of events in Mr. Feierabend’s medical history is consistent with a causation theory.

Year	Event
1994	Three doses of the hepatitis B vaccine
2003	Diagnosed with multiple sclerosis
2010	Multiple sclerosis worsens

The hepatitis B vaccines cannot have aggravated Mr. Feierabend’s multiple sclerosis because there is no allegation that he was suffering from multiple sclerosis in 1994 when he received the vaccinations. Congress defined “significant aggravation” as “any change for the worse in a preexisting condition.” 42 U.S.C. § 300aa—33(4) (emphasis added). The term “preexisting condition” indicates that the disease afflicted the person before the vaccination. A person who is not suffering from a disorder at the time of vaccination cannot allege that the vaccine aggravated it. Childs, 33 Fed. Cl. at 560.

Second, although, again, Mr. Feierabend’s pleadings are not a model of clarity, his arguments support the conclusion that he is really alleging that the hepatitis B vaccines caused his multiple sclerosis. In responding to the Secretary’s motion to dismiss, he stated he is making a claim for a “non-table demyelinating injury from Multiple Sclerosis caused by the Table Hepatitis B vaccine.” Pet’r Response at 4. Similarly, he relies upon a case in which a special master found that the hepatitis B vaccine caused multiple sclerosis. Id. at 3 (citing Doe/14 v. Sec’y of Health & Human Servs., No. [redacted]V, 2008 WL 982929 (Fed. Cl. Spec. Mstr. Mar. 28, 2008)).

For these reasons, the petition’s use of the term “significant aggravation” does not define his cause of action accurately. Mr. Feierabend’s petition will be construed as one setting forth the claim that the hepatitis B vaccine caused his multiple sclerosis. The Secretary’s motion to dismiss contends that the statute of limitations bars this action.

The statute of limitations requires a petition to be filed within 36 months “after the date of the occurrence of the first symptom or manifestation of onset . . . of such injury.” 42 U.S.C. § 300aa-16(a)(2). In a case discussing the accrual of the statute of limitations, the Court of Federal Claims distinguished a causation claim from a significant aggravation claim. In Brice, the petitioners argued that their son, Tilghman, suffered a significant aggravation of his seizure disorder in September 1994. However, Tilghman received his vaccination on April 30, 1992, and suffered a seizure nine days later. The Court held that this seizure was the manifestation of his seizure disorder, and thus the date on which the statute began to run.

[W]here, as here, a petitioner alleges that a vaccine caused an injury and that later there was a 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 and does not have the option to file within 36 months after the alleged significant aggravation.

Brice v. Sec’y of Health & Human Servs., 36 Fed. Cl. 474, 476 (1996). After a remand to consider equitable estoppel, the Federal Circuit stated it agreed with the ruling that the statute of limitations began to run with the manifestation of Tilghman’s first symptoms. Brice v. Sec’y of Health & Human Servs., 240 F.3d 1367, 1369 n.1 (Fed. Cir. 2001).<sup>4</sup>

Mr. Feierabend does not dispute that his MS was manifest in October 2003. See Pet. at 1. Thus, the statute of limitations for Mr. Feierabend’s claim that a vaccine caused his multiple sclerosis expired in October 2006, just as Tilghman Brice’s claim for a seizure disorder expired in April 1995, three years after the manifestation of his seizures. Mr. Feierabend did not file his petition until January

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<sup>4</sup> The en banc Federal Circuit overruled Brice’s holding regarding equitable estoppel. Cloer v. Sec’y of Health & Human Servs., 603 F.3d 1341, 1340 (Fed. Cir. 2011) (en banc). The en banc court did not comment upon the portion of Brice cited in the text.

2012. Accordingly, he may not recover upon a theory that the vaccine caused his MS. See Cloer, 654 F.3d 1322.

### **III. Conclusion**

There can be no dispute on this record that Mr. Feierabend experienced the “first symptom or manifestation of onset” of MS more than 36 months before he filed his petition. Therefore, the statute of limitations bars recovery on a theory that the hepatitis B vaccine caused his MS. Accordingly, Mr. Feierabend’s petition must be dismissed.

The Clerk’s Office is instructed to enter judgment in favor of respondent unless a motion for review is filed.

IT IS SO ORDERED.

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Christian J. Moran  
Special Master