

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

CARLA AND KENNETH SIZEMORE, *
Parents of SEAN SIZEMORE, *
A Minor, *
Petitioners, *

No. 04-148V
Special Master Christian J. Moran

v. *

Filed: March 3, 2010

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *
Respondent. *

autism, statute of limitations

Shawn Khorrami, Esq., Khorrami Pollard & Abir, LLP, Los Angeles, CA., for petitioners;
Traci R. Patton, Esq., United States Dep't of Justice, Washington, D.C. for respondent.

PUBLISHED DECISION DISMISSING PETITION FOR LACK OF TIMELINESS*

Kenneth and Carla Sizemore allege that various vaccines caused their son, Sean Sizemore ("Sean") to develop autism. They seek compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006). However, Mr. and Ms. Sizemore filed their petition after the period of time for filing a petition expired. Therefore, the petition is DISMISSED.

* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, the person submitting the information has 14 days to identify and to move to delete such information before the document's disclosure. If the special master agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access. 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

I. Factual and Procedural History

The relevant factual events are not disputed. Notably, because the petition was filed on February 4, 2004, a critical date in determining the timeliness of the petition is February 4, 2001.

Sean was born on August 31, 1995. Pet'r Exhibit B at 1.¹ Sean received various vaccinations between October 25, 1995 and August 4, 1997. Pet'r Exhibit D at 1-2.

In December 2000, Sean was evaluated by Dr. Vallesteros, a pediatrician. Pet'r Exhibit G at 11. Dr. Vallesteros diagnosed Sean with a sensory processing/sensory integration disorder and recommended an occupational therapy evaluation and occupational therapy as well as a neurologic evaluation. Pet'r Exhibit E at 3-4.

On December 22, 2000, in a medical history given by Ms. Sizemore to Kimberly Roberts, an education school psychologist, Ms. Sizemore stated that Mr. Sizemore and she observed "Sean pick up language at the age of fourteen months and then noticed a regression of communication skills or loss of skills until the age of three." Pet'r Exhibit G at 2. Ms. Sizemore also stated that "she realized long ago that Sean's behavior was different from most children." Id. In that report, Ms. Robert stated that Mr. and Mrs. Sizemore sought an evaluation of Sean due to several developmental concerns and suspected that Sean had Asperger's syndrome. Pet'r Exhibit G at 1, 5.

On March 1, 2001, the Sizemores had Sean evaluated by Dr. James Wilson of the Roanoke Neurologic Center. The history given by Ms. Sizemore at this March 1, 2001 evaluation, stated that Sean "appeared to be normal until about 2 years of age." Pet'r Exhibit E at 1-2. According to Mr. and Ms. Sizemore, at this time, Sean began "having difficulties with communication and language expression including normal enunciation, but sentence syntax and expressive patterns were atypical. [Sean] demonstrates repetitive behaviors, has several obsessive compulsive features, and demonstrates a very altered pattern of social interaction." Id. If the Sizemores' March 1, 2001, statement that Sean "appeared normal" until the age of two is accurate, then Sean was displaying problems by September 1997.

In a typed summary that Ms. Sizemore prepared for the evaluation with Dr. Wilson, she stated:

It is our belief that Sean has Asberger's [sic] syndrome, possible coupled with mild autism . . . Dr. Vallestros has recommended an evaluation for Sensory Processing Disorder, as well. (Sean has demonstrated acute auditory sensitivity since around 18 mos. As a rule, he doesn't want to be touched or even approached by strangers, but if he's in

¹ Typically, petitioners use numbers to assign to their exhibits and respondent uses letters. In this case, petitioners used letters to assign their exhibits. To avoid confusion, petitioners were permitted to continuing using letters to assign to their exhibits.

the mood, he loves to cuddle, tickle, and “romp” with myself, my husband, and/or others he feels comfortable with. He must be the initiator, though.)

Exhibit G at 11-12.

Based on the medical history and the evaluation on March 1, 2001, Dr. Wilson stated that he fully concurred “with his mother’s impression that this young man demonstrates a pattern of behavior characteristic of Asperger’s syndrome.” Pet’r Exhibit E at 1-2. Information about Sean’s development after he was diagnosed with Asperger’s Syndrome is not relevant to determining the timeliness of the petition.

The petitioners filed their short-form petition on February 4, 2004. They did not file any medical records with their petition. When this petition was filed, the Office of Special Masters was attempting to manage the numerous petitions that were claiming various vaccines caused autism. A history of these efforts is provided in Cedillo v. Sec’y of Health & Human Servs., No. 98-916V, 2009 WL 331968, at *7 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), motion for review denied, 89 Fed. Cl. 158, 182 (2009), appeal docketed, No. 2009-5004 (Fed. Cir. Oct. 7, 2009). In conjunction with these efforts, this case was stayed.

The petitioners’ case resumed in 2008, when a special master ordered the petitioners to file medical records. The petitioners filed exhibits A through F on May 14, 2008. Petitioners later presented additional factual information about Sean. In informal status conferences, the parties discussed whether the petition was filed within the time permitted by the statute of limitations.

On June 25, 2008, respondent filed a motion to dismiss the petition, stating that based on the medical records filed to date, petitioners were required to file their petition no later than August 2000, which, according to respondent, is thirty-six months after the first symptom or manifestation of the onset of Sean’s alleged vaccine injury. Mot. to Dismiss.

On July 14, 2008, petitioners filed an opposition to respondent’s motion to dismiss. In the opposition, petitioners argued that the first symptom or manifestation of a vaccine injury “is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.” Pet’r Opp. at 2 (citations omitted). As such, petitioners alleged that because Sean was not diagnosed with Asperger’s Syndrome until March 1, 2001, their petition, which was filed on February 4, 2004, is timely.

Respondent filed a declaration from Dr. Catherine Shaer, a Medical Officer with the Division of Vaccine Injury Compensation, on February 25, 2009. Resp’t Exhibit A. Dr. Shaer stated that Sean was exhibiting abnormal behaviors, consistent with symptoms of autism, as early as October 1996, when Sean was 14 months old. Resp’t Exhibit A at 1. Based upon this report, respondent maintained that the petition was not filed within the time permitted by the statute of limitations.

Petitioners requested and were granted an opportunity to evaluate Dr. Shaer's report. Order, filed Nov. 20, 2009. Eventually, petitioners filed a status report stating that "[a]t this time petitioners are unable to submit an expert report disputing the findings in Respondent's report. As such, Petitioners request that the Special Master issue a judgment based on the Respondent's expert statement and medical records submitted to date." Pet'r Status Rep't, filed Dec. 23, 2009.

II. Analysis

For cases in the Vaccine Program, 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). For this case to be filed timely, the "first symptom or manifestation of onset" of Sean's disease must have occurred after February 4, 2001.

Several documents describe the timing of the onset of certain of Sean's behaviors. The first is Ms. Sizemore's own description of Sean's behavior, which describes Sean as having language regression at age 14 months. Pet'r Exhibit G at 2. A pre-admission health evaluation by Dr. Vallesteros diagnosed Sean with a sensory processing/sensory integration disorder on February 8, 2000. Pet'r Exhibit E at 3-4. Ms. Sizemore repeated her belief that Sean had Asperger's Syndrome when she presented Sean for an evaluation on March 1, 2001. In a letter written to Dr. Wilson on March 1, 2001, Ms. Sizemore indicated that Sean had demonstrated that he had demonstrated acute auditory sensitivity since he was 18 months old. Pet'r Exhibit G at 11. Dr. Wilson diagnosed Sean with Asperger's Syndrome on March 1, 2001. Pet'r Exhibit E at 2.

Respondent presented the declaration of Dr. Shaer who, based upon these records, opined that Sean was exhibiting abnormal behaviors, consistent with autism, as early as October 1996 when he was fourteen months of age. Dr. Shaer also noted that Sean clearly had abnormal development consistent with autism by December 2000, when he was diagnosed with sensory processing/sensory integration disorder by Dr. Vallesteros. Resp't Exhibit A at 1. Dr. Shaer's opinion places the onset of Sean's problems outside the time set by the statute of limitations.

Here, the petitioners have not presented a report from an expert who disagreed with Dr. Shaer, that is, an expert who believes that Sean's language regression, which was noticed at 14 months, was not a manifestation of Sean's autism. Although Dr. Shaer's unrebutted report is not necessarily probative, Applied Medical Resources Corp. v. United States Surgical Corp., 147 F.3d 1374, 1379 (Fed. Cir. 1998); Dr. Shaer's report is persuasive. Special masters have recognized that problems with language may be a manifestation of autism. See Snyder v. Sec'y of Health & Human Servs., 88 Fed. Cl. 706, 709 & 746 (2009)(noting special master's summary of facts included that the autistic child had speech delays); Hokkanen v. Sec'y of Health & Human Services, No. 03-1753, 2009 WL 4857386, at *23 (Fed. Cl. Spec. Mstr. Dec. 9, 2009) (finding that a speech delay was a readily discernible manifestation of autism), not for review filed (Dec. 29, 2009).

A preponderance of the evidence supports a finding that Sean’s language regression, which was observed when he was 14 months, constitutes a manifestation of his autism. This finding means that the time for filing a petition began no later than October 1996. Pursuant to 42 U.S.C. § 300aa–16(a)(2), the petitioners were required to file their petition within 36 months, that is, by October 1999. They did not. Therefore, the petition must be dismissed.

III. Conclusion

The evidence demonstrates that Sean experienced the “first symptom or manifestation of onset” of autism more than 36 months before the petitioners filed their petition. Therefore, the petition was not filed within the statute of limitations. Therefore, the statute of limitations bars recovery. The petition is DISMISSED.²

IT IS SO ORDERED.

Christian J. Moran
Special Master

² When a petition is filed outside the time permitted by the statute of limitations, the Court of Federal Claims lacks subject matter jurisdiction to entertain the action. Without subject matter jurisdiction, special masters may not award attorneys’ fees and costs. Brice v. Sec’y of Health & Human Servs., 358 F.3d 865, 868 (Fed. Cir. 2004); Kay v. Sec’y of Health & Human Servs., 80 Fed. Cl. 601, aff’d without decision, ___ F.3d ___, 298 Fed. Appx. 985 (Nov. 10, 2008), cert. denied, ___ U.S. ___, 129 S.Ct. 1933 (2009).