

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

JESSICA HEDRICK, Parent of, *
CAMERON I. HEDRICK, a Minor *

Petitioner, *

No. 07-539V
Special Master Christian J. Moran

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

Filed: September 22, 2008
Reissued: November 3, 2008

Dismissal for lack of jurisdiction;
statute of limitations; multiple
vaccines; autism

UNPUBLISHED DECISION DISMISSING PETITION¹

On July 17, 2007, the Clerk’s Office filed a “Short -Form Autism Petition for Vaccine Compensation” submitted by Jessica Hedrick on behalf of her minor son, Cameron I. Hedrick (“Cameron”). The petition essentially alleges that various vaccines cause Cameron to develop autism. The respondent filed a motion to dismiss the petition for lack of jurisdiction on the ground that the statute of limitations bars the action. For the reasons stated below, this motion is GRANTED.

¹ This decision is being reissued with one modification. This reissued decision incorporates errata, dated November 3, 2008.

Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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, a party has 14 days to identify and to move to delete such information before the document’s disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–(12)(d)(4); Vaccine Rule 18(b).

I. Facts and Procedural History

The relevant factual events are not disputed. The petition filed by Ms. Hedrick contained some medical records including prenatal, delivery, pre-vaccination, vaccination and post-vaccination medical records.²

Cameron was born on April 8, 2000. Exhibit 1 at 3. The medical records indicate that Cameron received the following vaccinations on the dates as indicated:

<u>Vaccination</u>	<u>Date of Administration</u>
DtaP	06/02/00; 11/20/00; 01/26/01; 08/22/01; 05/24/04
Hep B	06/02/00; 11/20/00; 01/26/01
Hib	06/02/00; 11/20/00; 01/26/01; 05/24/04
MMR	08/22/01; 05/24/04
Varicella	04/24/01

Exhibit 1 at 2.

On April 27, 2004, Cameron was evaluated by Dr. Rodolfo Perez-Gallardo during a routine medical visit. Dr. Perez-Gallardo’s records state that Cameron appeared to “have significant speech delay” and “[a history] of difficult speech for [his] age.” The medical records from Dr. Perez-Gallardo also indicate that Cameron had a history of “problems following simple instructions” given by his mother. Cameron was given a “provisional diagnosis” of “cognitive speech delay.” Dr. Perez-Gallardo referred Cameron to a neurologist for further evaluation. Exhibit 1 at 59-61.

On June 23, 2004, Cameron was evaluated by a pediatric neurologist, Dr. Samir El-Zind, who also noted “developmental delay[,] mainly in speech.” Dr. El-Zind indicated that Cameron did “not seem to interact well with others,” that he exhibited “repetitive behavior” and would

² As the medical records submitted by Ms. Hedrick with the petition are not paginated, the Court will adopt the respondent’s method of referring to the various medical records filed in this case as labeled in respondent’s first motion to dismiss. The first group of records are entitled “Cameron Hedrick’s Records.” These records will be referred to as petitioner’s exhibit 1, and the pagination begins after the cover page of the exhibit. The second group of records are entitled “Jessica Hedrick’s Pre/Post Delivery Records.” These records will be referred to as petitioner’s Exhibit 2, and the pagination will begin after the cover page of the exhibit. The third group of records entitled “Cameron Hedrick’s IEPs” will be referred to as petitioner’s exhibit 3. The pagination of exhibit 3 begins after the cover page of the exhibit.

“fixate with certain toys.” Dr. El-Zind stated that Cameron “panics and is irritated very easily.” Exhibit 1 at 66.

On July 31, 2007, respondent filed a motion to dismiss the petition stating that the petition was filed more than two months after the expiration of the statutorily prescribed period. Ms. Hedrick, on behalf of her son, filed a response on November 9, 2007, stating that her son was diagnosed with autism on February 14, 2005, and that this should be the time from which the statute of limitations begins to toll.

On February 21, 2008, respondent filed a renewed motion to dismiss. A status conference was held on April 24, 2008. Pursuant to this status conference, respondent was ordered to file a status report explaining whether any evidence indicated that Cameron’s delayed speech development was “a symptom or manifestation of onset” of autism as specified by 42 U.S.C. § 300aa-16(a)(1).

On May 22, 2008, respondent filed the declaration of Dr. Catherine Shaer, M.D., a medical officer of the Division of Vaccine Injury Compensation. Exhibit A. In that declaration, Dr. Shaer concluded that based on the medical records filed with the petition, that the “speech difficulties” that Cameron exhibited on April 27, 2004, were signs that he had autism and that therefore, the onset of autism in Cameron was no later than April 27, 2004.

Another status conference was held on June 12, 2008. During that status conference, Ms. Hedrick was given an opportunity to file a response to respondent’s Exhibit A. Ms. Hedrick filed her response on July 15, 2008.

In her response, Ms. Hedrick agrees that Cameron was seen by Dr. Perez-Gallardo on April 27, 2004 and that the doctor “noticed that Cameron had speech and cognitive delay for his age.” However, Ms. Hedrick argues that because no doctor diagnosed Cameron with autism until February 14, 2005, that the statute of limitations does not begin to run until that date.

After reviewing the records and pleadings in this matter, respondent’s motion is ready for adjudication.

II. Analysis

For this case, 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).

Ms. Hedrick argues that Cameron’s claim complies with the statute of limitations because the petition was filed within three years of February 14, 2005, the date that Cameron was diagnosed with autism. Pet’r Resp. at 1. This point is unpersuasive.

In her response, Ms. Hedrick concedes that on April 27, 2008, Dr. Perez-Gallardo “noticed that Cameron had speech and cognitive delays for his age.” Ms. Hedrick also does not appear to dispute Cameron’s diagnosis of autism. And although not stated in her written responses, Ms. Hedrick does not appear to dispute that Cameron’s manifestations of speech and cognitive delays on April 27, 2004, were symptoms of his autism. Thus, to comply with 42 U.S.C. § 300aa-16(a)(2), Ms. Hedrick was required to file her petition by April 2007. She did not. The petition was filed on July 17, 2007, approximately two months after the time set by the statute of limitations expired. Therefore, the statute of limitations precludes Ms. Hedrick with proceeding with her petition.

In enforcing statutes of limitations, the Supreme Court has been mindful that a statute of limitations may exclude otherwise meritorious claims. Board of Regents of University of State of N. Y. v. Tomanio, 446 U.S. 478, 487 (1980) (stating “in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.”); Kavanagh v. Noble, 332 U.S. 535, 539 (1947) (stating statutes of limitations “are established to cut off rights, justifiable or not, that might otherwise be asserted”) (emphasis added).

Federal tribunals may not disregard statutes of limitations. Kavanagh, 332 U.S. at 539 (stating statutes of limitations “must be strictly adhered to by the judiciary”). “Courts are not free to engraft exceptions on the statute of limitations.” Hart v. United States, 910 F.2d 815, 819 (1990).

These binding authorities also teach that fact-finding tribunals, such as the Office of Special Masters, may not question the wisdom of choices made by Congress. “If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.” Holmberg v. Armbrrecht, 327 U.S. 392, 395 (1945).³ Many other cases also defer to Congress’s prerogative in setting the statute of limitations. See, e.g., Kavanagh, 332 U.S. at 539 (stating “it is not our province to speculate as to why Congress established a shorter period of limitations” for one cause of action than for another cause of action); Hart, 910 F.2d at 819 (stating Congress “may lengthen the time for bringing suit against the government.”); see also Beck, 924 F.2d at 1034 (stating “Our duty is

³ Although Holmberg states that statutes of limitations do not bar actions based in equity, this exception does not assist Cameron. Holmberg, 327 U.S. at 396. Actions for compensation pursuant to the Vaccine Act are actions at law, not actions in equity. See Brice v. Sec’y of Health & Human Servs., 240 F.3d 1367, 1372 (Fed. Cir. 2001) (stating “a claim under the Vaccine Act is similar to a traditional tort claim in the sense that it seeks monetary recovery from an injury that was traditionally redressed by tort law.”). The Court of Federal Claims lacks general equitable powers. Beck ex rel. Beck v. Sec’y of Health & Human Servs., 924 F.2d 1029, 1035 (Fed. Cir. 1991).

limited to interpreting the statute as it was enacted, not as it arguably should have been enacted.”).

Consequently, when a petition is filed outside of the statute of limitations, the petition must be dismissed. To avoid this result, Ms. Hedrick argues that Cameron’s case, in fact, was filed within the statute of limitations. However, this argument also fails.

Ms. Hedrick argues that she complied with the statute of limitations by acting upon information once she received it. Specifically, Mr. Hedrick asserts that no one knew to file a petition alleging that the vaccine caused Cameron’s injuries until Cameron was diagnosed with autism and that only through her own research was she able to file a petition.

Although this argument has appeal, decisions by the United States Supreme Court and the United States Court of Appeals for the Federal Circuit reject it. In short, Ms. Hedrick’s claim, on behalf of Cameron, accrued on the date of the occurrence of the first symptom or manifestation of onset regardless of when Cameron was diagnosed with the cause of that injury. Weddell v. Sec’y of Health & Human Servs., 100 F.3d 929, 931 (Fed. Cir. 1996). The statute of limitations contained in the Vaccine Act defines the accrual date, for cases alleging the vaccine caused an injury, as the “date of the occurrence of the first symptom or manifestation of onset.” 42 U.S.C. § 300aa-16(a)(2). This date starts the running of the statute of limitations “even if the petitioner reasonably would not have known at that time that the vaccine had caused an injury.” Brice v. Sec’y of Health & Human Servs., 240 F.3d 1367, 1373 (Fed. Cir. 2001). Here, the medical records indicate that Cameron’s symptoms or manifestation of onset were noted by a physician in April 2004. Thus, her petition, which was filed in July 2007, is out of time.

By claiming ignorance of the ability to file a cause of action, Cameron’s case is analogous to United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, Mr. Kubrick, a veteran, suffered deafness because the staff at a hospital administered by the Veterans Administration committed medical malpractice. Kubrick, 444 U.S. at 114-15, 122. Mr. Kubrick eventually filed a lawsuit pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2801. The Supreme Court held that the statute of limitations barred Mr. Kubrick from recovering compensation. In reaching this conclusion, the Supreme Court considered and rejected Mr. Kubrick’s argument that for a certain amount of time, although he knew he was injured, he did not know the medical cause of his injury and did not know the legal significance of his injury. The Supreme Court stated:

A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.

Kubrick, 444 U.S. at 123. The reasoning that required the dismissal of Mr. Kubrick's lawsuit also requires the dismissal of the petition for Cameron.

III. Conclusion

Here, the petition was filed after the statute of limitations expired. Arguments that Cameron's case either should be adjudicated without regard for the statute of limitation or that his case complies with the statute of limitations are unpersuasive. Therefore, the statute of limitations bars the action.

Respondent's motion to dismiss is GRANTED. The Clerk's Office is ordered to enter judgment in favor of respondent unless a motion for review is filed. See Vaccine Rule 23.

IT IS SO ORDERED.

Christian J. Moran
Special Master