

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-0083V

Filed: December 3, 2012

(Not to be Published)

LEANN CAMPBELL, parent of *
DAVID CAMPBELL, a minor, *

Petitioner, *

Autism; Statute of Limitations;
Untimely Filed

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

DECISION¹

On February 1, 2007, Leann Campbell ["petitioner"] filed a Short-Form Autism Petition for Vaccine Compensation² under the National Childhood Vaccine Injury Act³

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access

² By electing to file a Short-Form Autism Petition for Vaccine Compensation, petitioner alleges that:

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the "thimerosal" ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B (HIB) vaccinations; or by some combination of the two.

Autism General Order #1, filed July 3, 2002, Exhibit A, Master Autism Petition for Vaccine Compensation at 2.

["Vaccine Act" or the "Act"] on behalf of her son David Campbell ["David"]. By filing a short-form petition, petitioner opted into the Omnibus Autism Proceeding ["OAP"].⁴

Petitioner has the burden of demonstrating that her case was properly and timely filed under the Vaccine Act's statute of limitations. § 16(a)(2). Based on my analysis of the evidence, petitioner has not met her burden, and thus **this case is dismissed as untimely filed.**

I. Procedural History.

During the period between the test case hearings and the final appellate action on the test case decisions, petitioner, like others in the OAP, was ordered to file all required medical records and to establish that her petition was timely filed under the Vaccine Act's statute of limitations. Order filed February 13, 2009; see § 11(c)(2). Petitioner filed medical records on May 13, 2009.

In response, respondent filed a Motion to Dismiss ["Res. Mot."] on June 19, 2009, alleging that the petition was untimely filed based on the Vaccine Act's statute of limitations. See §16(a)(2). Petitioner failed to respond.

Subsequent to the Federal Circuit's en banc decision in *Cloer v. Secretary of Health & Human Services*, 654 F.3d. 1322 (Fed. Cir. 2011), I order petitioner to show cause why this claim should not be dismissed as untimely filed. Order to Show Cause, filed October 12, 2012. Petitioner failed to respond to my Order to Show Cause.

II. Medical History.

David was born on October 1, 1998. Pet. Ex. 3 at 1.⁵ Between October 1, 1998 and December 12, 1999, David received routinely administered childhood vaccinations. Pet. Ex. 4 at 1-2.

The first symptom or manifestation of David's autism spectrum disorder occurred no later than October 26, 2001, when Dr. N. Gupta reported that David was unable to speak words. Pet. Ex. 5 at 30. At this visit David was diagnosed with language delay and referred to an audiologist and speech therapist. *Id.* On November 28, 2001, David was referred to speech and language therapy by B. Bricca. See *id.* at 37. David was

³ The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. §§ 300aa-10 et. seq. (2006). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

⁴ A detailed explanation of the creation of the OAP and the effects of opting into it can be found in *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

⁵ Petitioner filed seven sections of medical records which lacked pagination. As a result, citations will provide the assigned exhibit number followed by the page number consecutively assigned in each exhibit.

evaluated on January 9, 2002 by Helen P. Clark, M.A., C.C.C. who recommended that he receive speech therapy “due to his severe language delay.” *Id.* at 34. On March 4, 2002 during a “Psychoeducational Evaluation,” Lisa Dolstra, M.A., PPS of the Jarupa Unified School District determined that David fell within the mildly autistic range on the Childhood Autism Rating Scale [“CARS”]. Pet. Ex. 6 at 3. David was diagnosed with an autism spectrum disorder [“ASD”] by David Rice, M.D. on July 16, 2002. Pet. Ex. 5 at 51-52.

III. Statutory Requirements for Timely Filing.

The Vaccine Act provides that:

a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such 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...

§ 16(a)(2) (emphasis added). In *Cloer*, the Federal Circuit affirmed that the “statute of limitations begins to run on a specific statutory date: the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury recognized as such by the medical profession at large.” 654 F.3d at 1340. The date of the occurrence of the first symptom or manifestation of onset “does not depend on when a petitioner knew or reasonably should have known” about the injury. *Id.* at 1339. Nor does it “depend on the knowledge of a petitioner as to the cause of an injury.” *Id.* at 1338.

The Federal Circuit also held that equitable tolling of the Vaccine Act’s statute of limitations is permitted. *Id.* at 1340. However, the Circuit noted that equitable tolling is to be used “sparingly,” and not applied simply because the application of the statute of limitations would otherwise deprive a petitioner from bringing a claim. See *Cloer*, 654 F.3d at 1344-45 (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The Circuit also noted that equitable tolling should be applied only in “extraordinary circumstance[s],” such as when petitioner timely filed a procedurally defective pleading, or was the victim of fraud, or duress. *Cloer*, 654 F.3d at 1344-45 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); see also *Irwin*, 498 U.S. at 96.

IV. Arguments and Analysis.

David’s medical records establish that this claim was not timely filed. He began exhibiting symptoms of an ASD as early as October 26, 2001. Pet. Ex. 5 at 30. To be timely filed, this petition must have been filed on or before October 26, 2004. It was not filed until February 1, 2007, more than two years too late.

Furthermore, David was diagnosed as mildly autistic on March 4, 2002 and as having an ASD on July 16, 2002. Pet. Exs. 6 at 3; 5 at 51-52. Utilizing even the later of these dates, recognizing that the first symptom or manifestation of onset of David's ASD occurred earlier, this claim is still more than 1½ years too late.

Petitioner has not asserted any extraordinary circumstances that would merit equitable tolling of the Vaccine Act's statute of limitations in this case. Although her claim is clearly untimely, based on the recent change in the law regarding equitable tolling, I afforded her the opportunity to do so, ordering petitioner to show cause why this case should not be dismissed, rather than simply dismissing it. See Order to Show Cause, filed October 10, 2012. Petitioner failed to respond to my Order to Show Cause.

V. Conclusion.

Petitioner has the burden to show timely filing. Petitioner here has failed to do so. There is preponderant evidence that this case was not filed within "36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury" as required by the Vaccine Act. § 16(a)(2). Petitioner has also failed to demonstrate any extraordinary circumstances warranting equitable tolling.

Therefore, this claim is dismissed as untimely filed under the Vaccine Act's statute of limitations. §16(a)(2). The clerk is directed to enter judgment accordingly.⁶

IT IS SO ORDERED.

Denise K. Vowell
Special Master

⁶ This document constitutes my final "Decision" in this case, pursuant to § 12(d)(3)(A).