

decisions I issued in the OAP test cases, and will not be repeated here.³ For the first five years after this petition was filed, there was very little case-specific activity, although in the OAP discovery was completed and test cases were litigated. On March 15, 2010, petitioners were ordered to file all medical records from Genevieve's birth through either the date petitioners filed their petition or the date of Genevieve's diagnosis of an autism spectrum disorder, whichever was later. Petitioners filed two exhibits containing medical records on July 6, 2010.

No further activity occurred in this case, until December, 2011, when attorney Michael Gallagher filed a motion to withdraw as counsel. I granted his motion on January 11, 2012. I held a status conference with pro se petitioner George Harding and respondent's counsel on February 10, 2012, where I indicated I had some concerns regarding whether this case was timely filed. I ordered respondent to review the medical records in the record and provide the court with her assessment of whether this case was timely filed.

Respondent filed her assessment on March 9, 2012, in the form of a Motion to Dismiss ["Motion"]. The motion asserts that this case was filed over two and a half years after the statute of limitations had expired. Motion at 1. My February 10, 2012 order noted that once respondent filed her assessment of the medical records, I would issue another order informing petitioners when their response was due and how to file the response with the court. On May 2, 2012, I issued an order to show cause, which instructed petitioners to file their response by June 1, 2012. To date, nothing has been received from petitioners.

I. Facts.

Genevieve was born on June 18, 1997. Petitioners' Exhibit ["Pet. Ex."] ⁴ 1, p. 1. Between July 31, 1997 and September 24, 1998, she received routine childhood vaccinations. Pet. Ex. 2, p. 1. At her 15 month well-child visit, on September 24, 1998, Genevieve's pediatrician assessed her as a well child with speech delay, and specifically noted that her receptive language skills were impaired. Pet. Ex. 4, p. 33.

On July 12, 1999, at her two year well child visit, she was again assessed as a well child with a speech delay. *Id.*, p. 39. Genevieve said only a few words, such as "dada," and "mama." *Id.*, pp. 14, 39. She had a limited vocabulary at her three year

³ *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044, at *4 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 706 (2009) and *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). I incorporate these discussions of the history of the OAP by reference into this decision.

⁴ I note that petitioners filed exhibits 1 and 2 with their initial petition. Petitioners identified the two exhibits filed on July 6, 2010 as exhibits 1 and 2 as well. I will refer to the July exhibits as petitioners' exhibits 3 and 4.

well child visit, on May 24, 2000, as well. Her pediatrician noted that she only understood the word “ya” for “yes,” and that she used non-verbal signs, such as pointing and leading someone by a hand, to communicate. *Id.*, p. 45. Genevieve was assessed as a well three year old, with developmental delay, especially in language. *Id.*

In August 2000, Genevieve underwent a two day developmental evaluation at Children’s Hospital of Minnesota. Pet. Ex. 3, pp. 1-13. During the evaluation, she would not look at the examiners, and she did not follow commands, wave, or play catch. *Id.*, p. 3. Genevieve would occasionally vocalize during the evaluation, but she did not say any words. *Id.* Additionally, she exhibited some repetitive stereotypic behaviors such as staring at lights, swaying, and laughing for no reason. *Id.*, p. 4. She could not respond to 80% of the items testing her receptive language skills. *Id.*, p. 5. Genevieve also demonstrated severely delayed expressive language skills, obtaining a score equivalent to a 3-6 month old child. *Id.* The examiners also noted that her fine and gross motor skills were delayed. *Id.*, p. 6. Based on their observations during the evaluation, the multidisciplinary team diagnosed Genevieve with autistic disorder. *Id.*, p. 6.

II. Applying the Facts to the Law.

The Vaccine Act’s statute of limitations provides in pertinent part that, in the case of:

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 . . .

§ 300aa-16(a)(2). The date of occurrence “is a statutory date that does not depend on when a petitioner knew or reasonably should have known anything adverse about her condition.” *Cloer v. Sec’y, HHS*, 654 F.3d 1322, 1339 (Fed. Cir. 2011) (en banc). Additionally, the date “does not depend on the knowledge of a petitioner as to the cause of an injury.” *Id.* at 1338. When drafting the Vaccine Act, Congress rejected a discovery rule-based statute of limitations, in favor of one that does not consider knowledge and runs solely from the date of an event, the first symptom or manifestation of onset. *Id.*

Because petitioners filed the petition on behalf of Genevieve on April 6, 2004, the first symptom or manifestation of onset of Genevieve’s autistic disorder cannot have occurred before April 6, 2001, in order for the petition to be considered timely. See *Markovich v. Sec’y, HHS*, 477 F.3d 1353, 1357 (Fed. Cir. 2007) (holding that “either a ‘symptom’ or a ‘manifestation of onset’ can trigger the running of the statute [of limitations], whichever is first”); *Cloer v. Sec’y, HHS*, 654 F.3d 1322, 1335 (Fed. Cir. 2011) (holding that the “analysis and conclusion in *Markovich* is correct. The statute of

limitations in the Vaccine Act begins to run on the date of occurrence of the first symptom or manifestation of onset.”).

In *Cloer*, the Federal Circuit acknowledged that equitable tolling⁵ applies to Vaccine Act cases, but only under very limited circumstances, such as when a petitioner was the victim of fraud or duress, or when a procedurally deficient pleading was timely filed. *Cloer*, 654 F.3d at 1344-45. The Federal Circuit rejected the notion that equitable tolling should apply only because the application of the statute of limitations would otherwise deprive a petitioner from bringing a claim. *Id.*

Although petitioners expressed a desire to proceed with their claim, the medical records establish that it was not timely filed. Genevieve was first noted to have speech delay, a symptom of autism,⁶ at her 15-month well baby visit on September 24, 1998, well before the critical date of April 6, 2001. Even if I were to use the date most generous to petitioners, that of Genevieve’s diagnosis, as triggering the statute of limitations, this petition would still be untimely. Given her date of diagnosis of August 17, 2000, the petition needed to be filed by August 17, 2003 to be considered timely. However, it was not filed until April 6, 2004, approximately seven months later.

III. Conclusion.

The Vaccine Act provides that “no petition may be filed . . . after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset . . . of such injury . . .” § 300aa-16(a)(2). There is preponderant evidence that this case was not filed within the 36-month period. Additionally, petitioners have not demonstrated any extraordinary circumstances warranting equitable tolling.

By the plain language of the statute, and the interpretations of the Federal Circuit of that language, **this claim was untimely filed and is therefore dismissed. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.**

IT IS SO ORDERED.

Denise K. Vowell
Special Master

⁵ The doctrine of equitable tolling is a legal principle that acts to overcome a statute of limitations problem in certain situations. If a case is untimely filed and the doctrine of equitable tolling applies, then the case will be permitted to continue.

⁶ To be diagnosed with autism, a child must display abnormal development in three different domains: (1) language and communication; (2) social interaction; and (3) repetitive patterns of play, behavior, or interests. *Snyder v. Sec’y, HHS*, 2009 WL 332044 at *36.