IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 02-2002V
Filed: August 14, 2012

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GARY KOMPOTHECRAS and BETH KOMPOTHECRAS, parents of Jefferson Kompothecras, a minor,	*	
Petitioners,	*	Motion for Relief from Judgment; RCFC 60(b)(1); Excusable neglect; Non-Meritorious Claim
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

ORDER DENYING PETITIONERS' MOTION FOR RELIEF FROM JUDGMENT[1]

Vowell, Special Master:

On May 9, 2012, petitioners Gary and Beth Kompothecras filed a Motion for Relief from Judgment pursuant to Rule 60(b) of the Rules of the United States Court of Federal Claims ["Motion for Relief"].[2] Their petition was dismissed on July 26, 2011, based on a failure to prosecute. Because petitioners have failed to demonstrate "excusable neglect" in their failure to prosecute an untimely filed claim, their motion for relief is denied.

[1] Because this unpublished order contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims's website, in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). 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] Respondent filed a response ["Response to Motion for Relief"] on May 22, 2012, which was not signed by respondent's counsel of record. Respondent refiled her response, with the correct signature block, on May 24, 2012. Petitioners then filed a reply in support of their motion on June 5, 2012 ["Petitioners' June 5, 2012 Reply"].

I. Procedural History.

On December 27, 2002, petitioners filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq*.[3] [the "Vaccine Act" or "Program"], on behalf of their minor son, Jefferson Kompothecras ["Jefferson"]. Petitioners filed the "short form" petition authorized by Autism General Order # 1.[4] By filing a short form petition, petitioners asserted that (1) Jefferson had a disorder on the autism spectrum, and (2) that one or more vaccines listed on the Vaccine Injury Table[5] were causal of this condition.[6] No medical records were filed with the petition. Like most other cases in the Omnibus Autism Proceeding ["OAP"],[7] the case remained on hold until discovery in the OAP was concluded, causation hearings in the test cases were held, and entitlement decisions were issued in the test cases.[8]

This case was assigned to me on March 9, 2007. At the time, the attorney of record was Steven Savola. I granted a motion to substitute Walter S. Holland ["Mr. Holland"], in place of Mr. Savola, as the attorney of record on November 30, 2007. Order, filed Nov. 30, 2007.

On January 15, 2008, while the OAP cases were being litigated, I ordered petitioners' to file Jefferson's medical records to position this case for resolution after the test case decisions. After being granted a 30 day extension of time, Mr. Holland filed Petitioners' Exhibits ["Pet. Exs."] 1–25 via CD-ROM, on behalf of petitioners, on

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[3] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

[4] The text of Autism General Order #1 can be found at http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf ["Autism Gen. Order #1"], 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002).

[5] 42 C.F.R. § 100.3 (2010).

[6] The theories of causation specifically addressed in Autism Gen. Order # 1 were that the measles, mumps, and rubella ["MMR"] vaccine was causal [the "MMR theory" or "Theory 1"] or that vaccines containing a mercury-based preservative called thimerosal [the "TCV theory" or "Theory 2"] were causal, and that a combination of the MMR vaccine and TCVs were causal.

[7] The OAP is discussed in detail in *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

[8] The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 706 (2009). Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims. The Theory 2 cases are *Dwyer*, 2010 WL 892250; *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The petitioners in each of the three Theory 2 cases chose not to appeal.

May 15, 2008. On May 22, 2008, Mr. Holland filed a motion to convert this case to electronic filing, which was granted on May 30, 2008.

Based on the medical records filed, respondent filed a Motion to Dismiss on the grounds that the case was time-barred, asserting that his medical records establish that Jefferson's first symptom or manifestation of onset of injury occurred more than 36 months before the filing date. Respondent's Motion to Dismiss, filed June 26, 2008. Petitioners' response to the motion to dismiss was filed by Mr. Holland on August 27, 2008.

On February 12, 2009, the *Hazelhurst*, *Cedillo* and *Snyder* cases were decided. Following those decisions, Mr. Holland filed a motion for extension of time in this and his other pending OAP cases, to communicate with petitioners about the effect of the test case decisions on their claim. Petitioners' Motion, filed Mar. 3, 2009. Although there were no pending deadlines in this case, I granted the motion for extension of time. Order, filed Mar. 12, 2009. This motion was petitioners' last filing before the dismissal of their claim in July 2011.

After the final appeal in the OAP test cases was decided on August 27, 2010, *Cedillo*, 617 F.3d 1328, the court began the process of determining how the approximately 4800 remaining OAP claims would be resolved. The court anticipated that most OAP claims would be dismissed but that some cases would proceed on alternate theories or, possibly, based on new evidence for the rejected theories. How to ascertain what cases would continue, and to dismiss and resolve attorney fees and costs applications for those that would not, presented a significant logistical challenge for the court and counsel alike.

In February 2011, Special Master Golkiewicz and I began holding conference calls with counsel representing more than 20 OAP petitioners, and counsel for respondent designated by the U.S. Department of Justice, to determine how the claims would proceed.[9] Mr. Holland, with 46 OAP cases, was one of the attorneys who were contacted by the court informally to determine the status of their cases. At 11 AM on February 4, 2011, Special Master Golkiewicz held the conference call with Mr. Holland. Ms. Linda Renzi appeared on behalf of respondent. Affidavit of Office of Special Masters Staff Attorney Stacy Sims ["Sims Aff."] at 1.[10] During this call, Special Master Golkiewicz updated Mr. Holland on the current status of the OAP, and instructed him to contact petitioners in his OAP cases and ascertain whether they wished to proceed with their claims. *Id.* Special Master Golkiewicz also instructed Mr. Holland to update Ms. Sims on the status of his autism cases in 30 days, copying Ms. Renzi on any correspondence. *Id.*

[9] Pro se litigants and counsel who represented smaller numbers of OAP litigants received orders in individual cases over a period of several months, to inform the court how they intended to proceed. Attorneys who represented larger numbers of OAP petitioners were contacted to discuss how best to handle the workload that would ensue if the court ordered them to file case-specific amended petitions in all their pending cases.

[10] Ms. Sims' affidavit was filed on July 16, 2012, as Court Exhibit 1.

Between March and April 2011, Ms. Sims tried contacting Mr. Holland several times via email to get an update on his OAP cases. Either Mr. Holland or his daughter, Ms. Kristina Holland, who works in his office, would respond to Ms. Sims' emails with reasons for delay, but no update on his cases was conveyed or filed. *Id.* at 1-2. On April 14, 2011, Mr. Holland indicated to Ms. Sims that he was moving offices, but that he would have a preliminary report for her by the following week. *Id.* at 2. He failed to make this report. *Id.* During this time period, Ms. Sims was communicating with Mr. Holland at the following email address: swh@ferrarolaw.com. *Id.*

Based on Mr. Holland's failure to update the court on the status of his cases, the special masters began issuing formal orders on a rolling basis in Mr. Holland's case, to inform the court how petitioners intended to proceed.

On May 16, 2011, I ordered petitioners in this case to inform the court within 30 days if they wished to proceed with this claim. Petitioners failed to respond to my order. On June 22, 2011, I ordered petitioners to show cause, within 30 days, why their claim should not be dismissed for failure to prosecute. Petitioners failed to respond to the show cause order as well. Therefore, on July 26, 2011, I dismissed petitioners' claim for failure to prosecute. Decision, filed July 26, 2011; Judgment, entered Aug. 26, 2011.

On December 2, 2011, petitioners' counsel filed a Notice of Change of Address. On May 9, 2012, petitioners filed the instant motion, requesting relief from judgment pursuant to Rule 60(b)(1) of the Rules of the United States Court of Federal Claims ["RCFC"].

II. The Applicable Legal Standards.

Under Vaccine Rule 36, Appendix B, RCFC ["Vaccine Rule"], a party may seek relief from judgment pursuant to Rule 60 of the RCFC. Rule 60 is identical to Rule 60 of the Federal Rules of Civil Procedure. Under RCFC 60, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." RCFC 60(b)(1). Petitioners' motion was filed pursuant to Rule 60(b)(1). Specifically, petitioners assert that their failure to comply with court orders constitutes "excusable neglect."[11]

In considering Rule 60(b) motions, courts have considered the merits of the underlying claim in determining whether relief from judgment is appropriate. *See e.g. Curtis v. United States*, 61 Fed. Cl. 511, 512 (2004)("[A] litigant, as a precondition to relief under Rule 60(b), must give the trial court reason to believe that vacating the judgment will not be an empty exercise.") (quoting *Teamsters, Chauffeurs,*

[11] The motion is filed by Mr. Holland, and primarily discusses his conduct in failing to prosecute petitioners' claim. I note that Mr. Holland neglects to mention any of the informal communications by court staff with him and his associates at the office of record for him during the February – April 2011 time frame. *See* Sims' Aff. and supporting court exhibits, filed July 16, 2012.

Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Inc., 953 F.2d 17, 20 (1st Cir. 1992)) (emphasis added).

Thus, in evaluating petitioners' motion for relief from judgment, I consider whether their failure to respond to court orders was excusable as well as whether the underlying claim is viable.

A. Excusable Neglect.

The term "excusable neglect" is not defined in the RCFC. Thus, I look to decisions of other courts to determine when neglect of a litigant's obligations to the court is excusable. The United States Supreme Court has held that determination of excusable neglect is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). *Pioneer* sets out four factors for consideration when determining whether a party's conduct constitutes excusable neglect: (1) the danger of prejudice to the nonmoving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Id.*[12] In *Pioneer*, the Court granted a debtor relief from a filing deadline for his petition at a bankruptcy court. *Id.* at 399. The Court's ruling was based on the circumstances surrounding the party's conduct, focusing on the reason for the delay and whether it was within the party's control. *Id.* at 398-99. The Court found that the neglect of counsel was excusable due to the "peculiar and inconspicuous placement of the bar date in a notice regarding creditors' meeting." *Id.* at 398. Relief from judgment was granted primarily because of an "unusual form of notice" employed by the Bankruptcy Court to notify counsel of a deadline. *Id.* at 398-99.

Since *Pioneer*, several United States Circuit Court of Appeals have addressed the term "excusable neglect" in the context of 60(b)(1) motions. *See Fischer v. Anderson*, 250 Fed. Appx. 359 (Fed. Cir. 2007); *Robinson v. Wix Filtration Corp. L.L.C.*, 599 F.3d 403 (4th Cir. 2010). Circuit Courts have typically given greater weight to the third *Pioneer* factor. *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003) (citing *Graphic Communications Int'l Union, Local 12–N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5–6 (1st Cir. 2001)).

In *Fischer*, the Federal Circuit, in an unpublished decision, affirmed a decision by the United States Patent and Trademark Office Trademark Trial and Appeals Board ["TTAB"] to deny a 60(b)(1) motion in light of *Pioneer. Fischer*, 250 Fed. Appx. at 363. The TTAB had denied an application for a trademark registration due to the applicant's prior counsel's failure to prosecute. *Id.* at 361. The Federal Circuit held that prior counsel's inaction and failure to respond to the court's show cause order did not constitute "excusable neglect." *Id.* at 362. The court further held that the applicant was bound by the conduct of her attorney, and his conduct was imputable to her. *Id.*

[12] Petitioners' reliance on *Pioneer* is discussed in Section III, *infra*.

In *Robinson,* the Fourth Circuit held that the inability of an attorney to receive email because of computer problems did not constitute "excusable neglect." *Robinson*, 599 F.3d at 413. The Fourth Circuit noted that counsel did not actively monitor the court's docket to ascertain whether summary judgment motions were filed on the date that he expected. *Id.* Further, he never informed the court or opposing counsel of the computer malfunctions, and was therefore not entitled to relief under 60(b)(1). *Id.* at 413-14.

B. Meritorious Claim.

A meritorious claim "merely states a legally tenable cause of action." *Stelco Holding Co. v. United States*, 44 Fed. Cl. 703, 709 (1999). For Rule 60(b) determinations, the underlying merits of the claim are of particular importance where relief is sought from a default judgment. *See Solano v. Lascola* 48 Fed. Appx. 4 (1st Cir. 2002); *Seven Elves, Inc., v. Eskenazi,* 635 F.2d 396 (5th Cir. 1981).

In *Solano*, the defendant faced both a civil and a criminal case filed by the Department of Labor. *Solano*, 48 Fed. Appx. 4. The defendant requested relief from default judgment in his civil suit, under 60(b)(1), arguing that his failure to respond to the case was a result of preoccupation with the criminal suit, and should constitute excusable neglect. *Id.* at 5. The First Circuit held, in an unpublished decision, that even if the default judgment was a product of excusable neglect, relief was not appropriate because defendant failed to demonstrate a meritorious defense to the underlying claim. *Id.*

Seven Elves lists 8 factors important in determinations of relief under Rule 60(b): "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5*)* whether, if the judgment was a default or a dismissal in which there was no consideration of the merits, the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *Seven Elves*, 635 F.2d at 402 (emphasis added).

While these cases are not binding precedent, I find them persuasive. Based on these interpretations of Rule 60(b), the relevant inquiries in evaluating the instant motion for relief are, whether (1) counsel's neglect is excusable, and (2) whether the underlying Vaccine Act claim is legally tenable.

III. The Motion for Relief from Judgment.

In the instant motion, petitioners claim that their failure to respond to two successive court orders resulted from "excusable neglect" under RCFC 60(b)(1).

A. Excusable Neglect.

Petitioners' counsel has listed several reasons for his failure to prosecute the claim, and why his conduct should be categorized as "excusable neglect." First, he contends that he took over the case from petitioners' prior counsel, Mr. Savola, and therefore was not aware whether the court reports were addressed to him or to Mr. Savola. Second, he was in the process of transitioning from the Ferraro Law Firm to another office between February 2011 and December 2012, and was completely out of the Ferraro Law Firm by July 1, 2011. He asserts that he was unaware of my May 2011 and June 2011 orders, and had no notice of the Decision on July 26, 2011, and the Judgment on August 26, 2011, because of leaving the Ferraro Law Firm.

1. Substituting for another attorney.

Mr. Holland states that he took over this case from petitioners' previous attorney, Mr. Savola, in "approximately 2006," and that he received several reports from the Office of Special Masters detailing the handling of OAP test cases. Motion for Relief at 1. He goes on to state that he has no "special recollection" if such reports where formally addressed to himself or to Mr. Savola. *Id.*

I reject this attempt by Mr. Holland to characterize the situation as one that results from one attorney substituting for another. Mr. Savola was terminated as the attorney of record on November 30, 2007. Thereafter, Mr. Holland was actively involved in the filing of petitioners' exhibits and motions of extension of time. *See, e.g.,* Pet. Exs. 1–25; Petitioners' Response, filed Aug. 28, 2008. Further, Mr. Holland appeared on behalf of petitioners in a status conference as late as February, 2011, and he and an associate were communicating with the court staff about his OAP cases until April, 2011.

It is clear to me that Mr. Holland was aware that he was responsible for all deadlines in this case. His assertion that he is unsure whether the court addressed reports and orders to him or to Mr. Savola is at odds with his conduct as the attorney of record between December 2007 and April 2011. This mischaracterization of events does not convince me that his conduct was in any way excusable.

2. Transitioning to new office space.

Mr. Holland identified his move from the Ferraro Law Firm as a significant factor contributing to his failure to respond to my Orders of May 16 and June 22, 2011. Motion for Relief at 2-3. Mr. Holland, relying on *Pioneer* asserts that his failure to respond to my orders is "excusable neglect." Petitioners' June 5, 2012 Response. He contends that the Supreme Court expanded the concept of excusable neglect in that case to include carelessness, and would have me hold that his conduct is excusable in light of

Pioneer. *Id.* at 2-3. However, *Pioneer* is distinguishable from the present case. In *Pioneer* the Court held that the neglect of counsel to meet a bankruptcy court filing deadline was excusable due to the "peculiar and inconspicuous placement of the bar date in a notice regarding creditors' meeting." *Id*. at 398. Here, unlike in *Pioneer*, the court issued its orders in a manner consistent with previous orders to which Mr. Holland responded. Additionally, unlike *Pioneer*, where the deadline issued by the bankruptcy court was inconspicuous, here, the May 16, 2011, and June 26, 2011 orders listed petitioners' deadlines in a clear and conspicuous manner.[13]

It is apparent that Mr. Holland simply did not check his email, which contained the notices of filing for the two orders to which he failed to respond. Furthermore, he failed to update the court with his new email address when he changed offices or firms. His failure to see my orders resulted not from any lack of clarity about deadlines, but from his own carelessness during the time that he was moving from the Ferraro Law firm.

Notably, in *Pioneer*, the Supreme Court also indicated that, "[i]n assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time." *Id.* at 398. Likewise, I give little weight to Mr. Holland's excuse that he was moving from the Ferraro Law Firm. As the attorney of record, Mr. Holland is required to keep the court updated with his current email address. *See* Vaccine Rule 14(b)(2) ("[t]he attorney of record must . . . promptly file with the clerk and serve on all other parties a notice of any change in the attorney's contact information.") (emphasis added).

Mr. Holland, relying on the *Pioneer* factors for excusable neglect determinations, *Pioneer* at 385, argues that there is no danger of prejudice to the respondent, the length of delay in this case is "de minimis," and that by bringing the matter to the attention of the court as soon as he became aware of it, he acted in good faith. Mr. Holland does not address the third *Pioneer* factor, "whether the delay was beyond the reasonable control of the person whose duty it was to perform." Mr. Holland claims that he was unaware of my Orders of May 2011 and June 2011. He does not address that his lack of awareness stems from his own failure to open email notifications of filings.[14] Mr. Holland could have checked the court docket himself or had another person check the docket for him. He could have promptly informed the court of his new contact information. He could have maintained the informal contact with court staff discussing

[13] Other courts have distinguished *Pioneer* on similar grounds. *See In re President Casinos, Inc.*, 391 B.R. 20, 23-24 (Bankr. E.D. Mo. 2008) ("Here, this Court entered its Order on the Omnibus Objection referring Creditor to mediation and directing Creditor to file a Mediation Statement . . . . Unlike *Pioneer,* notice of the filing deadline was clear."), *aff'd,* 397 B.R. 468 (B.A.P. 8th Cir. 2008); *United States v. Clark*, 51 F.3d 42, 44 (5th Cir. 1995) (denying a Rule 60(b)(1) motion because "[u]nlike *Pioneer,* there is simply no dramatic ambiguity in this case which would mandate such an extraordinary determination.").

[14] Electronic case filings are governed by Appendix E of the RCFC. "A filing by the court under this Appendix has the same force and effect as a paper copy entered on the docket in the traditional manner." RCFC Appendix E 22(b). Mr. Holland, like all other attorneys, was required to pass a Case Management/Electronic Case Filing ["CM/ECF"] certification test before he could use the online system, and therefore has notice of the rules governing electronic filings.

how best to resolve his cases. He failed to do any of the actions expected of an attorney and officer of the court. Instead, he neglected his obligations. Certainly, there was neglect in this case. But based on *Pioneer*, I cannot find his neglect to be excusable.

B. Lack of a Meritorious Claim.

I dismissed petitioners' claim for failure to prosecute and failure to follow court orders. However, another basis for dismissal was also present in this case: the claim was untimely filed. Under the Vaccine Act, for vaccines administered after October 1, 1988:

> [I]f a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program . . . 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). A vaccine-related injury "is the injury which the petitioner avers is caused by the vaccine." *Cloer v. Sec'y, HHS*, 654 F.3d 1322, 1334 (Fed. Cir. 2011) (en banc).

In filing a "short-form" petition on Jefferson's behalf, petitioners averred that Jefferson's vaccine-related injury was an autism spectrum disorder. The first symptom or manifestation of onset of a vaccine-related injury is "the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." *Markovich v. Sec'y, HHS*, 477 F.3d 1353, 1360 (Fed. Cir. 2007). Jefferson's claim cannot be legally tenable if it was filed more than 3 years after the first symptom or manifestation of onset of the injury caused by a vaccine. A diagnosis is not necessary to trigger the running of the statute. In *Cloer*, the Federal Circuit rejected the argument that the statute of limitations for petitioner's claim did not begin to run until a clinically definite diagnosis of a vaccine-related injury had been made. *Cloer*, 654 F.3d at 1331-32. The petitioner's claim was found to be untimely because she had suffered symptoms more than three years before the filing of her petition, despite not having a clinical diagnosis for her illness. *Id.* at 1328.

Jefferson's medical records establish that the first symptom or manifestation of onset of disease occurred outside the 36 month statute of limitations for a vaccine claim. Petitioners filed their claim on December 27, 2002. To be timely filed under the Vaccine Act, the first symptom or manifestation of onset of disease must have occurred on or after December 27, 1999. Jefferson's records show that he displayed signs of autism before December 1999. Specifically, in Dr. Joseph Casadonte's evaluation on April 27, 1998, Jefferson is diagnosed with "mixed communication disorder with autistic features." Pet. Ex. 4, p. 12. Doctor Casadonte opines that Jefferson "falls within the autistic spectrum of disorders, but I would think this would be a mild form." *Id.* Further, in some of his medical records from 1998, Jefferson is noted as having Pervasive Developmental Disorder, although the date and source of this diagnosis is unclear. *Id.* at 45. On December 15, 1998, Dr. Casadonte faxed Jefferson's records to Mr.

Kompothecras' office, noting that Jefferson was going to see a specialist for autism. Pet. Ex. 11, p. 20. To be timely filed, petitioners must have brought their claim no later than April 28, 2001, twenty months before the actual filing date.

In their reply to Respondent's Motion to Dismiss, petitioners advanced the same argument as that advanced in *Cloer*, namely, that in the absence of a clear diagnosis of autism, Dr. Casadonte's report does not establish the occurrence of the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large. Petioners' Response to Respondent's Motion to Dismiss at 3. This issue was resolved in *Cloer*, where the Federal Circuit held that finding a clear diagnosis for the vaccine-related injury was not necessary to trigger the statute of limitations.

Jefferson's communication disorder is sufficient to establish the first event objectively recognizable as a sign of autism. *See White v. Sec'y, HHS*, 04-337V, 2011 WL 6176064 (Fed. Cl. Spec. Mstr. Nov. 22, 2011). In *White*, I found that under the *Markovich* and *Cloer* standards, triggering of the statute of limitations is not dependant on a health care provider's association of behaviors with autism. The minor child in *White*, like Jefferson in the present claim, suffered from speech and language delay, and I found that communication impairment satisfied the "first symptom or manifestation of onset" condition required by the statute. Here, Jefferson's medical records establish that he suffered from "mixed communication disorder with autistic features, (emphasis added)" over 36 months before the filing deadline. Petitioners' claim is time-barred because they filed their claim approximately twenty months after the statutory period of 36 months had passed, and have therefore not established a legally tenable cause of action.

IV. Conclusion.

In light of the above, I find that petitioners have established neither excusable neglect, nor the existence of a legally tenable underlying claim. Therefore, I **DENY** petitioners' motion for relief from judgment pursuant to RCFC 60(b)(1).

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master