

Petitioners have the burden to demonstrate that their case was properly and timely filed. Petitioners have not met their burden and I therefore dismiss this petition as untimely filed.

I. Procedural History.

During a status conference held on October 28, 2010, I noted that the petition appeared to be untimely filed, based on the Vaccine Act's statute of limitations, §300aa-16(a)(2). I deferred any additional action on the timeliness of this case pending the Federal Circuit's en banc decision in *Cloer v. Secretary of Health & Human Services*, 654 F.3d. 1322 (Fed. Cir. 2011). To position this case for resolution after the Federal Circuit ruled in *Cloer*, I ordered petitioners to file: 1) Pierre's birth certificate, 2) his vaccination record, and 3) records pertaining to Pierre's autism spectrum diagnosis. Order, filed Oct. 29, 2010. Petitioners complied on November 30, 2010.

Shortly after the August 5, 2011 decision in *Cloer*, I ordered respondent to file a Vaccine Rule 4(c) report based on the records currently filed and to address respondent's position on the timeliness of the petition. Order, filed Aug. 22, 2011. On October 6, 2011, respondent filed a Vaccine Rule 4(c) report and motion to dismiss ["Resp. Motion"] alleging that the petition was untimely filed. Petitioners did not file a response to the motion to dismiss.

On November 8, 2011, I issued an Order to Show Cause. The order explained that the medical records and other evidence filed in this case establish that the petition was filed more than eight years after Pierre's autism diagnosis, and thus is untimely. I noted that because of a recent change in the law regarding equitable tolling, I would afford petitioners an opportunity to show cause why this case should not be dismissed. Petitioners were to respond by December 5, 2011. To date, petitioners have not filed a response.⁴

II. Facts.

Pierre was born on November 26, 1995. Petitioners' Exhibit ["Pet. Ex."] 1.⁵ Between January 12, 1996 and May 20, 1997, he received routinely administered

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).

⁴ I note that my order was sent by both regular and certified mail. The copy sent by certified mail was delivered on November 25, 2011. Since the copy sent by regular mail was not returned, I presume it was delivered within a few days of my issuing the order.

⁵ The evidence filed in response to my October, 29, 2010 Order included three documents: 1) Pierre's birth certificate, 2) his vaccination record, and 3) NYC Early Intervention Program Summary of Multidisciplinary Evaluation/Screening. Petitioners' response was not paginated and the three accompanying documents were not given exhibit numbers. I have assigned the following exhibit numbers to petitioners' documents: Exhibit 1, Pierre's birth certificate; Exhibit 2, Pierre's vaccination record; and Exhibit 3, NYC Early Intervention Program Summary of Multidisciplinary Evaluation/Screening.

childhood vaccinations. Pet. Ex. 2. Petitioners claim that Pierre exhibited symptoms of a vaccine injury in the hours following some of these vaccinations.

On June 17, 1998, when Pierre was about 30 months old, Mrs. LaBarre brought Pierre to the Child Development Program at the New York Hospital-Cornell Medical Center for a developmental evaluation. Pet. Ex. 3. He was evaluated by a developmental pediatrician, psychologist, speech therapist, and audiologist. *Id.* Doctor Evelyn G. Lipper, the director of child development, noted in her written evaluation that Pierre exhibited “global delays in adaptive self help skills, cognitive development, and communication skills, social emotional development and motor skills.” *Id.* Doctor Lipper concluded that “[c]ombined with his behavioral issues and lack of imaginative play, Pierre best fits the diagnostic category of autistic disorder.” *Id.*

III. Arguments and Analysis.

Respondent moved to dismiss this case because it was “filed beyond the relevant statutory limitations period and does not merit equitable tolling.” Resp. Motion at 4. Petitioners have put forth no arguments regarding timeliness of their petition. I conclude that Pierre’s claim was untimely filed.

A. Untimely Filing

1. The Statutory Requirements.

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...

§ 300aa-16(a)(2) (emphasis added).

2. Interpreting the Statute of Limitations

In *Cloer*, the Court of Appeals for 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. *Cloer*, 654 F.3d. at 1339. Nor does it depend on the knowledge of a petitioner as to the cause of the injury. *Cloer*, 654 F.3d. at 1338.

Pierre's medical records establish that this claim was not timely filed. Petitioners allege that Pierre experienced symptoms in the hours following his vaccinations in 1996 and 1997. Pierre was diagnosed with an "autistic disorder" by Dr. Lipper on June 17, 1998. For the purposes of determining whether this petition was timely filed, I need not address whether the symptoms observed by Pierre's parents following Pierre's vaccinations constituted the "first symptom or manifestation of onset."⁶ § 300aa-16(a)(2). Based on the date of diagnosis this claim must have been filed by June 17, 2001. The petition was not filed until June 7, 2010, more than eight years too late.

B. Equitable Tolling.

The Federal Circuit has held that equitable tolling of the Vaccine Act's statute of limitations is permitted. *Cloer*, 654 F.3d at 1340. However, citing to *Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990), 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 to *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), 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; see also *Irwin*, 498 U.S. at 96.

Although likely not exhaustive, these examples provide no basis to apply equitable tolling under the circumstances of this case. There is no evidence of fraud, duress, or extraordinary circumstances here. Petitioners Vaccine Act claim was filed long after the Vaccine Act's 36 month status of limitations had expired. The doctrine of equitable tolling cannot assist petitioners in overcoming this defect.

III. Conclusion.

For the reasons set forth above, **this case is dismissed as untimely filed. The clerk is directed to enter judgment accordingly.**

IT IS SO ORDERED.

Denise K. Vowell
Special Master

⁶ It is not necessary for me to determine whether the symptoms observed by Pierre's parents constituted the "first symptom or manifestation of onset" because Pierre's diagnosis was made at a date that places his petition outside the statute of limitations.