

The case was assigned to me on February 8, 2007. On May 15, 2009, I ordered petitioner to file all medical records between Mitchell's birth and either the date petitioner filed the short-form petition or the date of Mitchell's diagnosis of an autism spectrum disorder, whichever was later. Order, filed May 15, 2009. Petitioner filed two exhibits on August 13, 2009.

No further activity occurred in this case until October 13, 2011, when I ordered petitioner to inform the court if, in light of the results of the Omnibus Autism Proceeding ["OAP"]⁴ test cases, she wanted to move forward with her Vaccine Act claim or move to dismiss it. If petitioner wished to pursue her claim, she was ordered to file an amended petition, setting forth a theory of how vaccines caused Mitchell's condition.

On December 29, 2011, petitioner's counsel filed a motion to withdraw from representation. The motion indicated that, although petitioner's counsel wished to withdraw, petitioner wanted to proceed with her Vaccine Act claim. Petitioner's Motion to Withdraw from Representation ["Pet. Mot. to Withdraw"], filed Dec. 29, 2011, at 1. Respondent then filed a response objecting to the motion to withdraw. Respondent's Response to Petitioner's Motion to Withdraw from Representation ["Res. Resp."], filed Jan. 17, 2012. According to respondent, if petitioner's counsel could not continue representation in good faith, petitioner's claim lacked good faith and a reasonable basis and should thus be dismissed. Res. Resp. at 1. Additionally, respondent contended that petitioner's claim was untimely, as the first symptom or manifestation of onset of Mitchell's autism occurred by November 5, 1993, but the petition was not filed until nearly ten years later, on October 7, 2003. Res. Resp. at 1-2.

Petitioner's counsel filed a reply on January 24, 2012. Petitioner's Reply to Respondent's Response to Motion to Withdraw from Representation ["Pet. Reply"], filed Jan. 24, 2012.⁵ Petitioner's counsel stated that he determined he could no longer represent petitioner, and that this decision was not a reflection of petitioner's belief that the claim possessed both good faith and reasonable basis. Pet. Reply at 1.

On March 8, 2012, I issued an order to show cause. In the order, I noted that the evidence establishes that this petition was filed approximately four years after Mitchell's

⁴ A history of this proceeding was set forth in the two decisions I issued in the OAP test cases, and will not be repeated here. See *Synder 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. 02-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

⁵ Petitioner's counsel filed an amended reply brief on February 13, 2012. The initial reply brief stated that petitioner should be given an opportunity to file an amended petition to "include any theory of vaccine causation with regards to their case." Pet. Reply at 1-2. The amended brief specifies that the possible theories include claims regarding a mitochondrial disorder. Pet. Amd. Reply at 2.

autism diagnosis. Petitioner was ordered to show cause by Monday, April 9, 2012, why I should not dismiss this case.⁶

Petitioner filed a response to the show cause order on April 9, 2012. Because the response did not address the timeliness or the applicability of equitable tolling, I held a status conference on April 13, 2012. Petitioner was ordered to file a supplemental response by May 14, 2012. Order, filed April 13, 2012. To date, no supplemental response has been received.

I. Facts.⁷

The following facts appear to be uncontradicted. Mitchell was born on December 5, 1990. Petitioner's Exhibit ["Pet. Ex."] 1, p. 1. Between February 7, 1991 and July 31, 1995, he received routine childhood vaccinations. *Id.* He also received the hepatitis B series between ages seven and nine. *Id.*

In September 1999, when Mitchell was eight years old, he received a neuropsychological evaluation. Pet. Ex. 2, p. 5.⁸ During the evaluation, Ms. Moinat reported that Mitchell experienced "global developmental delays." *Id.* According to Ms. Moinat, although Mitchell spoke his first word at approximately one year of age, he was "still not talking very much" at age three. *Id.* He also lacked sensory awareness, walked on his toes, and displayed no fear response. *Id.* However, Mitchell excelled in some areas; for example, he could complete a 1,000-piece puzzle at age four. *Id.*

The evaluation confirmed Mitchell's developmental delays. His receptive and expressive language scores were "substantially below" his age level. Pet. Ex. 2, p. 8. Mitchell also exhibited delays in social, language, self-help, and motor skills. *Id.* He displayed a limited ability to interact emotionally with others. *Id.* Mitchell possessed "circumscribed interests" which interfered with his social communication, such as requiring that all questions be answered, regardless of whether he or someone else asked it. Pet. Ex. 2, p. 9. He also insisted certain things be said in a particular way. *Id.*

According to the evaluation, Mitchell's developmental delays, as a reflection of his autism spectrum disorder, were present before the age of 36 months. Pet. Ex. 2, p. 9. Mitchell was diagnosed with Pervasive Developmental Disorder-Not Otherwise

⁶ I deferred ruling on petitioner's counsel's motion to withdraw, which apparently is based on counsel's view of the merits of the underlying claim, as he is in the best position to proffer any explanation regarding the apparently untimely filing of this case.

⁷ The evidence filed to date in this case is scant, consisting of Mitchell's two-page vaccination record and a neuropsychological evaluation performed by three clinicians at the University of Texas.

⁸ Petitioner filed two exhibits of medical records, each with computer-generated page numbers in the bottom right corner. Exhibit 1 consists of four pages. Exhibit 2 consists of nine pages, with the first page numbered as page 5, the second page labeled as page 6, and so forth. I refer to the computer-generated numbers throughout this order.

Specified ["PDD-NOS"]. He was also diagnosed with severe Attention-Defecit/Hyperactivity Disorder and a Disorder of Written Expression. *Id.* at 10.

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).

Because Ms. Moinat filed the petition on behalf of Mitchell on October 7, 2003, the first symptom or manifestation of onset of Mitchell's PDD-NOS cannot have occurred before October 7, 2000, 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."). Furthermore, the date of the occurrence of the first symptom or manifestation of onset "does not depend on whether a petitioner knew or reasonably should have known" about the injury. *Cloer*, 654 F.3d at 1339. Nor does it depend on the petitioner's knowledge as to the cause of injury. *Id.* at 1338.

In *Cloer*, the Federal Circuit also acknowledged that equitable tolling 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 petitioner expressed a desire to proceed with her claim, the medical records establish that it was not timely filed. Mitchell was diagnosed with PPD-NOS on September 2, 1999, approximately four years prior to the filing of the petition. Pet. Ex. 2, p. 9. During Mitchell's evaluation, Ms. Moinat provided a thorough history of symptoms, such as toe-walking and speech delay, associated with his PDD-NOS. *Id.* at 5. Moreover, the evaluation indicates that sufficient evidence exists to conclude that Mitchell's symptoms began when he was three years old. *Id.* at 10.

Even if I were to use the date most generous to petitioner, that of Mitchell's diagnosis, as triggering the statute of limitations, the petition must have been filed by September 20, 2002. However, the petition was not filed until October 7, 2003, more

than one year later. I thus find the claim was not timely filed. Although petitioner indicated that she wishes to proceed with her claim, the filing of additional evidence pertaining to a new theory of vaccine causation will not cure this deficiency, as the statute prohibits the filing of a claim more than 36 months after the first symptom of the claimed vaccine injury.

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, petitioner has 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.

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