

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 03-0461V

Filed: August 6, 2009
To Be Published

MEGAN MUNOZ, a minor, by.	*	
NANCY J MUNOZ and LAWRENCE,	*	Autism; Policy Arguments;
E. MUNOZ her parents and natural	*	Statute of Limitations;
guardians,	*	Untimely Filing;
	*	Equitable Tolling
Petitioners,	*	
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES	*	
	*	
Respondent.	*	
	*	

Michael T. Gallagher, The Gallagher Law Firm, Houston, TX, for petitioner.
Chrysovalantis P. Keflas, United States Department of Justice, Washington, DC, for respondent.

DECISION¹

VOWELL, Special Master.

Petitioners, Nancy and Lawrence Munoz filed a Short-Form Autism Petition (hereinafter Petition) for Vaccine Compensation under the National Childhood Vaccine Injury Act² (hereinafter "Vaccine Act" or the "Act") pursuant to Autism General Order #1

¹ Because this decision contains a reasoned explanation for my 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, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. *Id.*

² 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) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to

on behalf of their daughter Megan, which adopted the Master Autism Petition for Vaccine Compensation on February 26, 2003.³ In order to establish that the petition was timely filed⁴ and to complete the petition by filing the statutorily required medical records, §11(c)(2), on March 13, 2009 the court ordered petitioners to file all medical records “from the period of the vaccinee’s birth through either, whichever date is later, (1) the date of petition filing, or (2) the date of the vaccinee’s initial diagnosis of autism, autism spectrum disorder, a speech or language delay related to an autism diagnosis, or any similar neurological disorder related to an autism diagnosis.” Order filed March 13, 2009 at 5. On June 5, 2009 petitioners filed the required medical records. On July 15, 2009, respondent filed a Motion to Dismiss alleging the Petition was filed outside the statutorily prescribed limitations period. Petitioners filed a Response contesting the Motion to Dismiss (hereinafter Petitioners’ Response) on July 29, 2009. The issue of whether petitioners’ claim was timely filed is now ripe for resolution. For the reasons set forth below, I dismiss this petition as untimely filed.⁵

42 U.S.C.A. § 300aa of the Vaccine Act.

³ By electing to file a Short-Form Autism Petition for Vaccine Compensation petitioners alleged 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.

⁴ In relevant part, the Vaccine Act provides:

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).

⁵ The Office of Special Masters (OSM) has over 5000 claims pending in the court’s Omnibus Autism Proceeding (OAP). A substantial number of these claims present § 16(a)(2) or “timing” issues. As noted in the court’s March 13, 2009 Order, “the issue of ‘first symptom or manifestation of onset’ is particularly challenging in autism cases due to the insidious nature of the onset of autism: thus determining when the 36 month period begins is often difficult to determine.” Order filed March 13, 2009 at 3. Many of these cases require further proceedings to resolve controverted questions of fact regarding onset and may require testimony from physicians to resolve whether a particular symptom is related to an autism spectrum diagnosis. Because some petitioners’ counsel have a significant number of OAP claims with § 16(a)(2) issues, “test cases” presenting statute of limitations issues have been identified and

Pursuant to the Vaccine Act petitioners may be compensated for injuries caused by certain vaccines. 42 U.S.C. §§ 300aa-10 to -34. However, the Vaccine Act provides statutory deadlines for filing program petitions at §16. In relevant part, the Vaccine Act provides:

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). The Federal Circuit has held that “‘the first symptom or manifestation of onset,’ for purposes of §300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.” *Markovich v. Sec’y of Dept. of Health and Human Servs.*, 477 F.3d 1353, 1360 (Fed. Cir. 2007). Accordingly, petitioners have 36 months from the first recognizable sign of injury to file their claim.

In this case, petitioners have, in effect, conceded that their claim was not timely filed. In arguing that Megan’s speech delay, noted on January 9, 1998 was “not the first symptom or manifestation of onset of autism under the *Markovich* standard,” petitioners asserted that “baby Megan’s condition was not recognized by a medical professional until September 27, 1999.” Petitioners’ Response at 6-7. Petitioners further argued they “have presented substantial evidence that baby Megan’s symptoms were not clearly apparent to a medical professional until September 27, 1999.” *Id.* at 10. The medical records establish that, on September 27, 1999, Megan was diagnosed with Pervasive Developmental Disorder⁶ by her pediatric neurologist, Ronald O. Hadden, M.D. Petitioners’ Exhibit 14 at 2.

Notwithstanding the earlier symptoms of speech delay, Megan’s condition was “clearly apparent to a medical professional” on September 27, 1999 when Megan was diagnosed with her injury. For the purposes of determining whether the instant petition

litigated, including one filed by these petitioners’ counsel, Mr. Gallagher. Decisions in most of Mr. Gallagher’s other cases with § 16(a)(2) issues have been deferred, pending resolution of the test cases. I am ruling on the instant Motion to Dismiss because the crucial fact regarding timeliness is uncontested and the legal issues presented by that fact are resolved by clear precedent.

⁶ Pervasive Developmental Disorder is an umbrella term encompassing all diagnoses on the autism spectrum. Diagnostic and Statistical Manual of Mental Disorders, Fourth Ed., Text Revision, American Psychiatric Association (2000), at 69-84, [“DSM-IV-TR”]; Autism General Order # 1 filed July 3, 2002; *Snyder v. Sec’y of Dept. Of Health and Human Servs.*, No. 01-162V, 2009 WL 332044, at *31-32 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

was timely filed, I need not address the contested issue of whether Megan's speech delay in January, 1998, constituted the first symptom or manifestation of onset. Using the conceded date of diagnosis on September 27, 1999, the statute of limitations required petitioners to have filed Megan's claim by no later than September 27, 2002.⁷ This petition was not filed until February 26, 2003, which is at least five months past the statutory deadline. In accordance with the Federal Circuit's opinion in *Markovich*, the petition in this case was not timely filed under §16(a)(2). Because petitioners have, in effect, conceded that Megan's diagnosis occurred more than three years before the petition was filed, their claim is untimely, and I have no option but to dismiss this case.

I briefly address petitioners' two alternative arguments in opposition to the Motion to Dismiss: one grounded in policy and the other in court interpretations of statutes other than the Vaccine Act.

Petitioners cite the history of the Vaccine Act as "a 'no fault' compensation program under which awards can be made to vaccine-injured persons, quickly, easily, and with certainty and generosity" to support their argument that the Motion to Dismiss should be denied. Petitioners' Response at 7-8⁸. In enacting the Vaccine Act, Congress balanced many competing considerations. Petitioners are correct in asserting that the Vaccine Act is a no-fault compensation program. This aspect of the statutory compensation scheme relieves petitioners from the requirement to prove elements of traditional tort causes of action such as negligence, defective design or manufacture, or a failure to warn. However, another aspect of the same statutory compensation scheme imposes a strict statute of limitations requirement.⁹ I need not intuit whether the no-fault nature of the Vaccine Act evinces such a lenient policy with regard to timing requirements so as to allow this claim to proceed in the face of a clear statutory provision barring it.

As my colleague noted in a similar case "while petitioners may have a *policy*

⁷ Citing to Petitioners' Exhibit 3, p. 19, respondent alleges the first sign or manifestation of onset of Megan's vaccine related injury was on January 9, 1998, when Megan's pediatrician "assessed her with speech delay and planned for a speech therapy consultation." Respondent's Motion at 3. It is not necessary for me to determine whether the speech delay noted on January 9, 1998 was the first symptom or manifestation of Megan's injury, because Megan's diagnosis was made at a date that places her claimed vaccine injury outside the statute of limitations. Notwithstanding, I note that the manifestation of speech delay is a criteria or feature used in diagnosing autistic disorder. DSM-IV-TR at 70-75.

⁸ *Citing* H.R. REP. NO. 99-908, at 3 (1986).

⁹ Most states have statutes of limitations for tort actions that are far more generous, particularly with regard to minors. In many states, the statutes of limitations for injuries to a minor do not begin to run until the minor reaches the age of majority. *Cf. Hennessey v. Sec'y of Dept. Of Health and Human Servs.*, No. 01-190V, 2009 WL 1709053, n. 21 (Fed. Cl. Spec. Mstr. May 29, 2009).

argument of some appeal, they have failed to offer any meritorious *legal* reason why I should do anything except enforce the statute. . . ." *Weinstein v. Sec'y of Dept. Of Health and Human Servs.*, No. 02-2059V, 2004 WL 3088663, at *3 (Fed. Cl. Spec. Mstr. Oct. 25, 2004). Policy arguments concerning the wisdom of a statutory provision should be directed to Congress, not to a court. *Id.*; *Beck v. Sec'y of Dept. Of Health and Human Servs.*, 924 F.2d 1029, 1034 (Fed. Cir. 1991) ("Regardless of their merits, these policy arguments may be implemented only by Congress. Our duty is limited to interpreting the statute as it was enacted, not as it arguably should have been enacted."). I must apply the law as enacted, and the law applicable to this case requires dismissal of the petition as untimely.

Petitioners also argued that "equitable tolling" renders the instant claim timely filed. Petitioners' Response at 8-10. Arguing an implied statutory presumption, petitioners alleged that equitable tolling is consistent with Congressional intent in enacting the Vaccine Act. In support, petitioners cited several cases involving other statutes. *Id.* However, petitioners completely ignored controlling precedent from the Federal Circuit holding that equitable tolling is not applicable to a claim arising under §16(a)(2) of the Vaccine Act. *Brice v. Sec'y of Dept. Of Health and Human Servs.*, 240 F.3d 1367, (Fed. Cir. 2001), *cert. denied sub nom. Brice v. Thompson*, 534 U.S. 1040 (2001). Petitioners did not even attempt to distinguish *Brice*. Given Megan's clear diagnosis of an autism spectrum disorder at a time that places her claim outside the statute of limitations, an equitable tolling argument would likely fail, even under the precedents cited by petitioners.

Neither petitioners' policy arguments nor equitable tolling can salvage this petition. Because Megan was diagnosed with an autism spectrum disorder more than three years before the petition for compensation was filed on her behalf, I have no choice but to dismiss this claim as untimely filed.

Accordingly, as petitioners have not proved by a preponderance of the evidence that the petition was 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, the claim is dismissed. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

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