

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS**

**No. 07-551V**

**Filed: August 31, 2012**

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TROY AMAR STORY, SR., \*  
as parent and legal representative of \*  
Troy Amar Story Jr., a minor, \*  
Petitioner, \*

v. \*

Autism; Motion for Ruling on the Record;  
Statute of Limitations; Vaccine Act  
Entitlement

SECRETARY OF THE DEPARTMENT \*  
OF HEALTH AND HUMAN SERVICES, \*  
Respondent. \*

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**DECISION<sup>1</sup>**

**Vowell, Special Master:**

On July 19, 2007, Troy Amar Story, Sr., [“petitioner” or “Mr. Story”] filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*<sup>2</sup> [the “Vaccine Act” or “Program”], on behalf of his son Troy Amar Story, Jr. [“Troy”]. On June 22, 2012, petitioner filed a motion for a ruling on the record in this case as it now stands.<sup>3</sup> Petitioner’s Motion for a Ruling on the Record [“Pet. Motion for Ruling”]. For the reasons stated herein, I find that the first symptom or manifestation of onset of Troy’s autism spectrum disorder occurred more than 36 months prior to the date the petition was filed. I hold that the petition was untimely filed and it is therefore dismissed.

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in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, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

<sup>2</sup> 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).

<sup>3</sup> Petitioner filed this motion as a “Motion for Decision on the Record.” Upon the court’s inquiry in an order, petitioner clarified that the motion should be treated as a “Ruling on the Record.” See Order, filed June 26, 2012; Petitioner’s Status Report, filed July 3, 2012.

## I. Procedural History.

On July 19, 2007, petitioner filed the “short form” petition authorized by Autism General Order # 1,<sup>4</sup> and joined the Omnibus Autism Program [“OAP”].<sup>5</sup> By filing this short form petition, petitioner asserted that (1) Troy had an autism spectrum disorder [“ASD”], and (2) that one or more vaccines listed on the Vaccine Injury Table<sup>6</sup> were causal of this condition.<sup>7</sup> Pursuant to the then-assigned special master’s order, petitioner also filed Troy’s medical records shortly after filing the petition. See Order, filed July 30, 2007; Petitioner’s Exhibits [“Pet. Ex.”] 1-11, filed Sep. 18, 2007.

On November 20, 2007, pursuant to the court’s Order of October 17, 2007, petitioner filed additional medical records and a statement regarding timely filing. Petitioner’s Statement Regarding Timely Filing [“Pet. Statement”]. In the statement, petitioner indicated that the vaccines Troy received on April 22, 2004 led to “a rapid decline” in Troy’s language and behavior between April 22, 2004 and June 30, 2004. *Id.* at 2.<sup>8</sup> Petitioner also stated that the reaction to the vaccines prompted petitioner to take Troy to his pediatrician on June 30, 2004, on February 13, 2006 Troy’s “pediatrician was leaning towards diagnosing Troy with autism.” *Id.*

On January 11, 2008, respondent filed a Motion to Dismiss this claim, alleging that based on the medical records, the first symptom or manifestation of onset of the alleged vaccine-related injury occurred more than 36 months before filing of the claim, and thus, the claim is time-barred. Motion to Dismiss at 2-4. Petitioner filed a response to the Motion to Dismiss on March 6, 2008. In his response, petitioner did not address the legal basis for respondent’s motion, instead he informed the court that every effort had been made to file the petition in a timely fashion. Response at 1.

In April 2008, the then-assigned special master ordered respondent to have a U.S. Department of Health and Humans Services, Division of Vaccine Injury Compensation [“DVIC”] doctor write a report addressing the question of the date of onset of Troy’s autism.<sup>9</sup> Order, filed Apr. 21, 2008. Respondent filed a declaration from

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<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> 42 C.F.R. § 100.3 (2010).

<sup>7</sup> 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.

<sup>8</sup> The court is using the page numbers designated by petitioner in his filing.

<sup>9</sup> The Special Master noted that she was ordering respondent to file the expert report instead of petitioner,

Dr. Robert E. Weibel, M.D., in which Dr. Weibel opined that “the onset of Troy’s condition preceded his absence of speech on February 13, 2006 and was likely prior to April 22, 2004.” Respondent’s Exhibit [“Res. Ex.”] A, filed May 20, 2008.

In June 2008, petitioner was ordered to show cause why the case should not be dismissed for failure to file within the statutory time period, given Dr. Weibel’s report. Order, filed June 4, 2008. On July 29, 2008, petitioner filed his response, which included two letters from Troy’s pediatrician, Dr. Jerome A. Sherard, dated May 28, 2008 and July 18, 2008.<sup>10</sup> In the letter dated May 28, 2008, Dr. Sherard advanced equitable arguments about the family’s difficulty in finding legal counsel to present their autism claim and the unreasonableness of the statute of limitations as applied to autism cases. May 28, 2008 Letter at 2. In the second letter, Dr. Sherard clarified entries pertaining to his April 22, 2004 well child evaluation of Troy. July 18, 2008 Letter at 1.

On October 4, 2010, this case was reassigned to me. At the time of reassignment, it was one of approximately 4800 remaining OAP cases. After the final appeal in the OAP test cases was decided on August 27, 2010, *Cedillo v. Sec’y, HHS*, 617 F.3d 1328 (Fed. Cir. 2010), the court began the process of determining how the remaining OAP claims would be resolved. In an order issued on April 29, 2011, I detailed the results in the OAP test cases and ordered petitioner to inform the court whether he wished to proceed with his claim on a new medical theory or to exit the Vaccine Program. In his June 1, 2011 filing, petitioner expressed a desire to continue in the Program.

On June 7, 2011, I ordered petitioner to provide the court with a theory of how vaccines caused Troy’s ASD. My order also noted that I would wait for the U.S. Court of Appeals to issue a decision in a pending statute of limitations case, before determining the timeliness of petitioner’s claim and acting upon respondent’s motion to dismiss.<sup>11</sup> Petitioner’s causation statement, filed August 15, 2011, attributes Troy’s development of autism to “the toxins contained within [the 6 vaccines Troy received on April 22, 2004] in addition to the amount of vaccines given.” Causation Statement at 1.

In September 2011, petitioner retained Mr. Richard Gage as his counsel. See Petitioner’s Motion, filed Sep. 6, 2011. Subsequently, I ordered petitioner to file an amended petition. See Orders, filed Dec. 22, 2011 and June 18, 2012. In response, petitioner filed the current motion. Pet. Motion for a Ruling.

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because petitioner filed his petition *in forma pauperis*, and she did not wish to burden petitioner with additional costs. See Order, filed Apr. 21, 2008 at 3-4.

<sup>10</sup> This was the second time petitioner filed Dr. Sherard’s May 28, 2008 letter. It was originally filed on June 4, 2008. In the July 29, 2008 filing, petitioner refiled the letter and indicated that it was the “response to the show cause order.” Petitioner’s Response to Show Cause, filed July 29, 2008. The July 18, 2008 letter was identified as a response to Dr. Weibel’s declaration. *Id.*

<sup>11</sup>The Federal Circuit issued its decision on August 5, 2011. *Cloer v. Sec’y, HHS*, 654 F.3d 1322 (Fed. Cir. 2011) (en banc).

## II. Relevant Medical History.

Troy was born on May 8, 2002. Pet. Ex. 4. He was approximately three weeks premature, suffered from intrauterine growth retardation, and was admitted to the neonatal intensive care unit ["NICU"]. Pet. Ex. 2, p. 20. In spite of his small size (in the 10<sup>th</sup> percentile for gestational age), Troy did well in the NICU, and was discharged in good health on May 12, 2002. *Id.*, p. 21. He received his initial hepatitis B vaccine while in the NICU. *Id.*

The medical records from the first few weeks after Troy's birth reflect problems with excessive sleeping, nasal congestion, a necrotic umbilical cord, and an umbilical hernia. See Pet. Ex. 7, pp. 94-100. An apnea alarm was prescribed. *Id.*, p. 98. From four to 18 months of age, Troy's medical records reflect problems with nasal congestion, coughing, upper respiratory infection, constipation, and skin rash. *Id.*, pp. 78-81. Both parents were noted to be heavy smokers, contributing to Troy's respiratory symptoms. See Pet. Ex. 7, pp. 74, 82.

Between birth and two years of age, Troy received four diphtheria, tetanus, and acellular pertussis ["DTaP"] vaccinations, three Haemophilus influenzae type B vaccinations, three oral polio vaccinations, three hepatitis B vaccinations, and his initial measles, mumps, rubella, and varicella vaccinations. Pet. Ex. 5.

The first indication of any developmental concern is reflected on a February 16, 2004 Sherard Pediatric Clinic consult note. The consult note was a template form for an 18-month well child visit, although at the time of the visit Troy was 21 months of age. In the Hearing/Speech section, "No" was circled in response to "Says 15-20 words." Pet. Ex. 7, p. 76. At this visit, Troy was described as having a poor appetite and problems with bowel movements. *Id.*, p. 74.

On April 22, 2004, Troy was seen again at the Sherard Pediatric Clinic. Another 18-month template form was used to record this visit although Troy was then nearly two years old. Pet. Ex. 8, p. 71. In response to the question about whether Troy spoke 15-20 words, the "yes" entry is circled, but the entry contains some faint marks through the circle. *Id.* I conclude that this is the entry that Dr. Sherard clarified in his letter of July 18, 2008.<sup>12</sup> However, Dr. Sherard's letter refers to an entry indicating that Troy "was speaking," rather than to an entry concerning how many words he was speaking. There are no entries at all on the form that pertain specifically to speaking, other than the number of words used.

On June 30, 2004, then nearly 26 months of age, Troy visited the Sherard Pediatric Clinic for a well child visit. A circle in the Hearing/Speech section of the consult note, a template for a 2-year visit, indicated that Troy did not use two-three word

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<sup>12</sup> His letter stated that: "there are some stray marks on the 'yes' selection but the 'no' selection is not marked. My custom in changing an erroneous selection is to cross out [sic] the error and to select the opposite by circling it."

sentences. *Id.*, p. 63. The same form notes “no speech” under “[i]mpressions.” *Id.* Furthermore, another form dated June 30, 2004 states: “No Speech at All!!” (emphasis original). *Id.*, p. 65. References to Troy’s speech impairment appear in several subsequent medical records.<sup>13</sup>

Troy underwent a speech and language evaluation on April 26, 2005, when he was nearly 3 years old. His parents reported that Troy babbled as a baby, and at present was not imitating words or sounds and did not use any words. Pet. Ex. 8, p. 1. His expressive language skills were determined to be the age equivalent of an 8 month old, and his receptive language skills were deemed similar to that of a 9 month old. *Id.*, p. 2. The evaluation makes no reference to any loss of language skills at any point, including in the time period after his April 22, 2004 vaccinations.

The medical records filed do not reflect precisely when Troy was diagnosed with autism. He was referred for an Individualized Family Service Plan on December 21, 2004. Pet. Ex. 7, p. 51. The meeting took place in January 2005, and resulted in a service plan to address Troy’s needs until his third birthday (May 2005) when he would be re-evaluated for an individualized education plan. *Id.*, pp.43-44. He was to receive speech, occupational, and physical therapy. *Id.*, p. 43.

On March 22, 2005, Troy was seen by a physical therapist who recommended further evaluations to “determine if autism or behavioral problems” were causing his delays. Pet. Ex. 9, pp. 1-2. A month later, the evaluator at Troy’s speech and language evaluation reported numerous behaviors consistent with autism. The behaviors included tantrums, impaired play skills, poor social skills, pulling his parents by the hand to a preferred object, poor eye contact, and vocalizing only vowel sounds. Pet. Ex. 8, pp. 1-3. Additionally, the evaluator noted that he presented “with autistic-like characteristics.” *Id.*, p. 3.

On February 13, 2006, Troy received a DTaP vaccination. In the impression section of the consult note from the visit, the “well child,” “normal growth,” and “normal development” checkboxes are not marked, and instead a handwritten note “autism” appears. Pet. Ex. 7, p. 32. Doctor Sherard completed a medical evaluation form for Pediatrics Plus, on April 11, 2006, and noted a diagnosis of “severe autism.” Pet. Ex. 7, p. 22.

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<sup>13</sup> A February 2, 2005 letter to Dr. Sherard, regarding Troy’s recent Individualized Family Service Plan, noted a recommendation for speech/language therapy. Pet. Ex. 7, p. 42. Troy underwent a hearing evaluation later that month and it was reported that his speech was “limited to babbling” and that he did not “have any vocabulary.” *Id.*, p. 36. A referral for outpatient services for “language delay” was approved on March 22, 2005. *Id.*, p. 25. At an audiologic assessment, conducted on April 27, 2005, his parents reported that Troy was not talking and did not try to communicate. *Id.*, p. 26.

### III. Analysis.

#### A. Untimely Filing.

##### 1. Statutory Requirements.

The Vaccine Act's statute of limitations provides, in pertinent part, 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).

##### 2. Interpreting the Statute of Limitations.

In *Cloer*, the court defined the first symptom or manifestation of onset as “the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.” *Cloer*, 654 F.3d at 1335. This is an objective standard, and thus the statutory date “does not depend on when a petitioner knew or reasonably should have known anything adverse about her condition.” *Id.* at 1339. Furthermore, the date “does not depend on the knowledge of a petitioner as to the cause of the 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.

Additionally, in *Markovich*, the court explained the differences between “symptom” and “manifestation of onset,” as those words are used in the Vaccine Act. *Markovich*, 477 F.3d at 1357. A symptom may be associated with more than one condition, and it can be difficult for a lay person to connect a symptom with a particular injury. *Id.* Manifestation of onset, on the other hand, is something more clearly associated with an injury. *Id.* Neither requires a doctor making a definitive diagnosis of the injury. *Id.* at 1358 (quoting *Brice v. Sec’y, HHS*, 36 Fed. Cl. 474, 477 (1996)). Either a symptom or a manifestation can trigger the statute of limitations, “whichever is first.” *Id.* at 1357.

##### 3. Applying the Law to the Facts of the Case.

To determine if the case was timely filed, I must determine when the first symptom or manifestation of onset of the alleged vaccine injury occurred. Once that date is ascertained, I then compare it to the filing date of Troy's petition to determine if the petition was filed within the Vaccine Act's 36 month statute of limitations.

I have previously described the symptoms of ASD at length in *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 dependent on a health care provider's association of behaviors with autism. Similar to Troy in the present claim, the minor child in *White* suffered from speech and language delay,<sup>14</sup> and I found that communication impairment satisfied the "first symptom or manifestation of onset" condition required by the statute. *Id.* at \*12. Here, Troy's medical records, and petitioner's own description of the events after Troy's vaccinations on April 22, 2004, establish that Troy demonstrated speech delay by June 30, 2004, at the latest.

In his Statement Regarding Timely Filing, Mr. Story notes that he noticed a "rapid decline" in Troy's language skills, and behavioral changes such as refusal to make eye contact, between April 22, 2004, and June 30, 2004. Pet. Statement at 2. In fact, Mr. Story avers that these symptoms are what led him to take Troy to his pediatrician on June 30, 2004. *Id.* I note that the medical records for this visit reflect that "Mom" was the historian, and there is no indication on the form that Mr. Story was or was not present. The form does not reflect any specific parental concerns.

Based on petitioner's own statements and the pediatric records from June 30, 2004 which describe Troy as having no speech (see Pet. Ex. 7, pp. 63, 65), I find that Troy exhibited a communication impairment by June 30, 2004, and likely as early as February, 2004. Given the date of filing of July 19, 2007, this petition is untimely, as the first symptoms of Troy's autism manifested more than 36 months earlier.

#### B. Equitable Tolling.

On April 21, 2008, the then-assigned special master issued an order in this case, addressing petitioner's March 6, 2008 response to the motion to dismiss and interpreting it as a motion for equitable tolling. See Order, filed Apr. 21, 2008 at 3. The special master noted that equitable tolling was not available under the Vaccine Act. *Id.* Since April 2008, the case law on equitable tolling has changed.

In 2011, the Federal Circuit held that equitable tolling of the statute of limitations is permitted in Vaccine Act cases, overruling the *Brice*<sup>15</sup> decision on which the special master relied. However, the court declined to equate equitable tolling with a discovery rule. *Cloer*, 654 F.3d at 1345. Instead, the court discussed the applicability of equitable tolling in cases involving fraud or duress (citing to *Bailey v. Glover*, 88 U.S. 342, 349-50 (1874)), "extraordinary circumstances" adversely affecting an otherwise diligent litigant (citing to *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)), and cases of timely filing of a procedurally defective claim (citing to *Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

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<sup>14</sup> Notably, the child in *White*, like Troy in the present case, "did not talk" at a point that rendered the petition untimely filed. *Id.* at \*12.

<sup>15</sup> *Brice v. Sec'y, HHS*, 240 F.3d 1367 (Fed. Cir. 2001).

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. In essence, petitioner argues that circumstances beyond his control prevented him from filing Troy's case any sooner. However, I note that Troy's medical records reflect a specific concern about autism in early 2005, and nothing in the record supports a claim that petitioner could not have filed a petition in the two years still left on the statute of limitations at the time that diagnosis was discussed.

The medical records reflect that Troy was a difficult child to handle at age two and beyond, and I am very sympathetic to his father's and physician's claims that it was difficult to find an attorney willing to take their case. See Motion to Dismiss Response, filed March 6, 2008; May 28, 2008 letter. Filing a case pro se represents a significant amount of time and effort, particularly coupled with the care of a child with autism and a younger sibling. Nevertheless, lack of knowledge about the Vaccine Act, the purported connection between vaccines and autism, or the difficulty in preparing a pro se petition do not constitute sufficient legal grounds to apply equitable tolling in this case.

#### **IV. Conclusion.**

The statute provides that "no petition may be filed . . . after the expiration of 36 months after the date of the occurrence of the first symptom . . . of such injury . . ." § 16(a)(2). The evidence establishes that Troy displayed a recognized symptom of ASD, speech and language delay, more than 36 months before this claim was filed. 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