

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 11-694V

Filed: August 10, 2012

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CODIE MIMS,

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**Special Master Zane**

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Petitioner,

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v.

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Statute of Limitations;

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Ruling on the record; Dismissal for

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Insufficient Proof; Human

SECRETARY OF HEALTH

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papillomavirus (HPV) vaccine;

AND HUMAN SERVICES,

\*

Gardasil

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Respondent.

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William Patrick Ronan, III, The Ronan Law Firm, KS, for Petitioner

Darryl R. Wishard, United States Dep't of Justice, Washington, DC, for Respondent

### **UNPUBLISHED DECISION DISMISSING CASE<sup>1</sup>**

This matter is before the undersigned on Respondent's Motion to Dismiss for lack of jurisdiction filed on November 2, 2011, and Petitioner's Motion for a Decision Dismissing her Petition filed on July 11, 2012. In her motion, Respondent argues that Petitioner's claim is barred by the statute of limitations. In her motion, Petitioner advises that an investigation of the facts and science has revealed that she may not be able to prove entitlement. For the reasons set forth below, the undersigned grants Petitioner's motion, which is unopposed, finds that Petitioner

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<sup>1</sup>Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the website of the United States Court of Federal Claims in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

is not entitled to compensation and dismisses Petitioner's case. Given that Petitioner's action is dismissed, it is unnecessary to decide Respondent's argument that Petitioner's action was untimely.

## **BACKGROUND**

### **I. Petition**

On October 19, 2011, Petitioner, Codie Mims ("Petitioner"), filed a petition for compensation under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10, *et seq.* ("Vaccine Act"), alleging that the human papillomavirus ("HPV") vaccinations she received on May 24, 2007, July 25, 2007, and November 28, 2007, caused her to suffer from myasthenia gravis. Petition, ¶¶1-3; Petitioner's Exhibit ("P's Ex.") 1 at 14-16. In her petition, Petitioner stated that she was diagnosed with myasthenia gravis by her rheumatologist, Dr. Booth, nearly a year after she received the last vaccination, on November 19, 2008, *see* P's Ex. 2 at 24, and by her neurologist, Dr. Austin on November 24, 2008. *See* P's Ex. 3 at 48.

### **II. Respondent's Motion to Dismiss.**

On November 2, 2011, Respondent moved to dismiss Petitioner's action asserting that the petition was filed after the Vaccine Act's 36-month statute of limitations had expired. 42 U.S.C. 300aa-§16(a)(2); Respondent's Motion to Dismiss ("R's MTD") at 1. Respondent relied on physicians' notes made in connection with Petitioner's doctors' visits in October and November 2008. Those notes indicate that Petitioner had been suffering from symptoms of fatigue, dizziness, blurred vision and weakness dating back to September 2008. R's MTD citing P's Ex. 4 at 72 (notes of Petitioner's primary care physician dated October 21, 2008, indicating that symptoms began a month prior to that date); P's Ex. 4 at 24 (November 19, 2008, note of Petitioner's rheumatologist, Dr. Booth, stating that Petitioner's symptoms began 2-3 months prior to that visit); and P's Ex. 3 at 48 (November 24, 2008, note of Dr. Austin, a neurologist, recording Petitioner as having a 2-month history of weakness). Respondent, citing 42 U.S.C. § 300aa-16(a)(2) and *Cloer v. Sec'y of Health & Human Servs.*, 654 F.3d 1322, 1340 (Fed. Cir. 2011) (*en banc*), argued that because these notes place Petitioner's symptoms of an illness, *inter alia*, weakness and fatigue, as beginning in September 2008, the 36-month statute of limitations would have been triggered at that time, and would have expired prior to October 19, 2011, the date Petitioner filed her claim.

In her Response, Petitioner attached excerpts from several websites, *i.e.*, WebMD ([www.webmd.com](http://www.webmd.com)) and the National Institute of Neurological Disorders and Stroke of the National Institutes of Health ("NINDS/NIH") ([www.ninds.nih.gov](http://www.ninds.nih.gov)). Petitioner argued that those documents demonstrate that Petitioner's symptoms were or could have been general symptoms or symptoms of another illness, *i.e.*, goiter, with which Petitioner was also diagnosed, and that they were not symptoms of her alleged vaccine-related injury, *i.e.*, myasthenia gravis. Because these symptoms were symptoms of other illnesses, including some with which Petitioner may have been afflicted, Petitioner asserted that the statute of limitations did not bar her claim and that her claim was timely.

With her reply, Respondent submitted a complete copy of the NINDS/NIH Fact Sheet relating to myasthenia gravis and pointed out that the fact sheet identified symptoms of myasthenia gravis to include weakness of eye movement, facial expression and swallowing albeit noting that the “symptoms often are not immediately recognized as myasthenia gravis.” Respondent’s Reply (“R’s Reply”), Ex. 1 at 2. Respondent argued, pursuant to *Cloer*, that although these symptoms are not exclusively symptoms of myasthenia gravis, the alleged vaccine-related injury, in that they are and can be symptoms of myasthenia gravis, the statute of limitations should begin to run upon the onset of these symptoms. According to Respondent, because the onset of these symptoms was in September 2008, the 36-month statute of limitations would have expired prior to the filing of Petitioner’s claim.

### **III. Petitioner’s Motion to Dismiss (for Ruling on the Record).**

On July 11, 2012, prior to undersigned’s ruling on Respondent’s Motion to Dismiss, Petitioner filed a Motion for a Decision seeking to have her petition dismissed. In her motion, Petitioner explained that “[a]n investigation of the facts and science supporting this case has demonstrated to Petitioner that she may not be able to prove that she is entitled to compensation in the Vaccine Program....” Petitioner further stated that “[i]n these circumstances, to proceed further might not be reasonable and may waste the resources of the Court, the respondent, and the Vaccine Program.” Petitioner’s Motion for Decision, ¶¶ 1-2. Petitioner requested that the undersigned dismiss her petition based upon the existing record. *Id.* Respondent did not file a response to Petitioner’s motion.

## **DISCUSSION**

### **I. Ruling On The Record**

Having considered Petitioner’s motion and Respondent’s response, the undersigned hereby grants Petitioner’s motion for a ruling on the record and enters this ruling based upon the entire record. Vaccine Rule 8(d).

Regarding the merits of Petitioner’s claim, to be awarded compensation under the Act, a petitioner must prove either: 1) that she suffered a “Table Injury” – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of the vaccinations in question, or 2) that any of her medical problems were actually caused by the vaccine(s) at issue. *See* 42 U.S.C. §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). A petitioner may not be awarded compensation based on the petitioner’s claims alone. 42 U.S.C. § 300aa-13(a)(1). Rather, the petition must be supported by either medical records or by the opinion of a competent physician. *Id.*

An examination of the record demonstrates that it does not contain sufficient evidence to demonstrate by preponderant evidence that Petitioner was injured by the subject HPV vaccinations. First, there is no “Table Injury” associated with the HPV vaccination. Moreover, Petitioner does not allege and the record does not include evidence that Petitioner suffered a “Table Injury.” Second, the medical records do not indicate that any of Petitioner’s treating

physicians opined that her alleged injuries were caused or significantly aggravated by her receipt of the HPV vaccinations. *See generally* Petitioner's Exhibits 1-15. Finally, Petitioner has not submitted an opinion of a medical expert and, by her filing of the motion for decision, has stated that she will not be submitting such a report.

The evidence in the record is insufficient upon which to make a finding that Petitioner is entitled to compensation. Thus, dismissal of the petition is warranted.

## **II. Statute of Limitations**

In her motion to dismiss, Respondent argues that there is another reason for dismissing the petition, *i.e.*, that it was not timely. Respondent has not filed an opposition to the Petitioner's Motion to Dismiss/Ruling on the Record and, thus, Respondent has not set forth her position as to whether it is necessary to rule on Respondent's motion in light of Petitioner's subsequently filed motion for ruling on the record. For the reasons set forth below, the undersigned has determined that it is not necessary to decide Respondent's motion.

The Vaccine Act's statute of limitations provides in pertinent part that "no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the dates of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury . . . ." 42 U.S.C. § 300aa-16(a)(2). In its *en banc* decision, *Cloer v. Sec'y of Health & Human Servs.*, 654 F.3d 1322 (Fed. Cir. 2011), the Federal Circuit has clarified the operation of the Vaccine Act's statute of limitations. Significantly, in *Cloer*, the Federal Circuit recognized that the doctrine of equitable tolling may permit a claim barred by the statute of limitations to proceed under appropriate circumstances. *Id.* at 1344-45, *citing Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (noting that equitable tolling requires a litigant to have diligently pursued his rights, but that "some extraordinary circumstance stood in his way"). In recognizing that the doctrine of equitable tolling applies to the Vaccine Act's statute of limitations, the Court in *Cloer* reversed its prior ruling in *Brice v. Sec'y of Health & Human Servs.*, and held that the statute of limitations was not jurisdictional. *Cloer*, 654 F.3d at 1341 n. 9.

Because the Federal Circuit has held that the Vaccine Act's statute of limitations is not jurisdictional, there is no absolute requirement that the undersigned decide the statute of limitations issue prior to deciding other issues.<sup>2</sup> Here, the undersigned has decided that Petitioner is not entitled to an award of compensation and has determined that the case is to be

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<sup>2</sup> The *Cloer* court also noted that, in finding that the Vaccine Act's statute of limitations was not jurisdictional, henceforth, contrary to past practice, where a claim is ultimately found to be barred by the statute of limitations, an award of attorneys' fees and costs is not necessarily precluded. *Cloer*, 654 F.3d at 1341 n. 9; *see generally John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-134 (2008)(recognizing the distinction between statutes of limitation that are more absolute as being "jurisdictional" versus those that permit equitable tolling as being to protect a defendant against stale or unduly delayed claims).

dismissed. Because the case is to be dismissed, all remaining issues, including the issue of timeliness raised in Respondent's Motion to Dismiss, need not be decided.<sup>3</sup>

### **CONCLUSION**

As explained above, based on the record as a whole, Petitioner has failed to prove by a preponderance of evidence that she suffered a "Table Injury" or that her conditions were "actually caused" by a vaccination. For these reasons and in accordance with 42 U.S.C. § 12(d)(3)(A), **Petitioner's claim for compensation is denied, and this case is dismissed for insufficient proof.** In the absence of a motion for review, the Clerk of the Court is directed to enter judgment accordingly.

**IT IS SO ORDERED.**

/s/ Daria J. Zane  
Daria J. Zane  
Special Master

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<sup>3</sup> In the present case, deciding whether the statute of limitations had expired or that it should be tolled under the circumstances in this action is complicated and may likely require consideration of expert medical opinion. Although Petitioner and Respondent have both cited to websites purporting to outline relevant symptoms of Petitioner's illness, on the issue of whether Petitioner's symptoms constituted the first symptoms of her alleged vaccine-related injury or some other illness, the information provided is not definitive or conclusive. Additionally, Petitioner is arguing that the symptoms she experienced were actually symptoms of a separate, unrelated illness. *See* P's Response to Motion to Dismiss. Respondent acknowledges that the symptoms are not exclusively symptoms of myasthenia gravis. *See* R's Reply at 1. As a result, if it becomes necessary to decide these issues, for instance, as part of deciding whether Petitioner's counsel is entitled to fees, further development of the record through inclusion of expert opinions is likely to be needed.