OFFICE OF SPECIAL MASTERS

No. 02-93V

Filed: July 21, 2006

Not for Publication

RYAN CHRISTOPHER SMITH, a minor, by his Mother and natural guardian, DEBORAH A. SMITH,	*	
	*	42 USC § 300aa-16(a)(2);
	*	Type 1 Diabetes; statute of
Petitioner,	*	limitations
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

Renée J. Gentry, Shoemaker and Associates, Vienna, Virginia, for petitioner.

Althea W. Davis, United States Department of Justice, Washington, DC, for respondent.

DECISION[1]

GOLKIEWICZ, Chief Special Master.

On January 31, 2002, petitioner, Deborah Smith, on behalf of her minor son, Ryan Christopher Smith ("Ryan"), filed a petition pursuant to the National Vaccine Injury

[1]The undersigned intends to post this decision on the United States Court of Federal Claims's 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.

Compensation Program[2] ("the Program") alleging that Ryan suffered Type I diabetes as a result of the vaccinations he received. Petition ("Pet.") at 1. In order to meet the impending statutory deadline for filing, the petition as originally filed was devoid of the required medical records. Petitioner completed the medical record on September 13, 2002, and subsequently, on May 14, 2004, moved for a judgment on the record.

Unfortunately, due to the retirement of the assigned special master, this case languished.[3] In March 2005, petitioner's counsel contacted the court regarding this case. Counsel pointed out the outstanding motion to the undersigned's law clerk and requested that the case be transferred. On March 23, 2005, a status conference was held before the undersigned during which respondent's counsel requested an opportunity to conduct a complete review of the record and file a Rule 4 report before a special master ruled on petitioner's motion. On April 4, 2005, respondent filed a "Response to Motion for Ruling on the Record/Supplemental Rule 4(b) Report." See Response to Motion for Ruling on the Record/Supplemental Rule 4(b) Report ("R. Report"), filed Apr. 4, 2005. In his report, respondent raised a jurisdictional issue, that being whether this matter was timely filed. R. Report at 2. Based on the medical records, respondent contended that the onset of symptoms occurred first between January 17 and January 24, 1999, not on February 14, 1999, when Ryan was admitted to Yuma Regional Medical Center. Id. Given the petition's filing date of January 31, 2002, the earlier onset of symptoms, between January 17 and January 24, 1999, would place the petition filing outside of the statute's three-year filing deadline. R. Resp. at 10; see § 16(a).

In reply to respondent's response, petitioner filed "Petitioner's Reply to Respondent's Response to Petitioner's Motion for Judgment on the Record/Supplemental Rule 4(b) Report." See Petitioner's Reply to Respondent's Response to Petitioner's Motion for Judgment on the Record/Supplemental Rule 4(b) Report ("P. Reply"), filed Apr. 7, 2005. On April 29, 2005, respondent filed a "Response to Petitioner's Reply to Respondent's Response to Petitioner's Motion for Judgment on the Record/Supplemental Rule 4(b) Report." See Response to Petitioner's Reply to Respondent's Response to Petitioner's Motion for Judgment on the Record/Supplemental Rule 4(b) Report, ("R. Resp."), filed Apr. 29, 2005.

After the briefings were filed, the undersigned convened status conference calls on August 26, 2005 and September 2, 2005, to discuss the issue of onset of Ryan's diabetes as it

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[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. (West 1991 & Supp. 2002) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

[3] This case was transferred to the undersigned on August 29, 2005.

related to the timeliness of petitioner's petition.[4] Although petitioner requested a ruling on the record, the undersigned believed that an expert was necessary to discuss the timing and medical significance of Ryan's symptoms. These issues were critical to resolving the jurisdictional issue. In lieu of petitioner retaining an expert, the undersigned encouraged the parties to jointly contact Ryan's treating pediatrician, Dr. Crawford, to ascertain whether the onset date of Ryan's condition could be determined through a review of the medical records pertaining to the time of the diagnosis of the diabetes. After filing several status reports describing their efforts to contact Dr. Crawford, on October 29, 2005, petitioner filed Exhibit 9, a letter from Dr. Crawford to petitioner's counsel. Although the undersigned found the letter helpful, the undersigned still believed that more expert testimony was required in order to make a determination regarding the timing of onset of the diabetes. Several months passed with no action in the case, at which time the undersigned's clerk contacted petitioner to find out if she intended to take Dr. Crawford's deposition or retain another expert for the purpose of exploring the onset issue. After several months of discussions, it was agreed by the parties and Dr. Crawford that he would testify before the undersigned on April 26, 2006. A hearing was held on that date. After the hearing, the parties orally agreed that the record was closed and the case was ripe for decision.

The relevant facts of this case are as follows. Ryan was born on August 23, 1986. Petitioner's Exhibit ("P. Ex.") 1; P. Ex. 8 at 168. Ryan received the following vaccinations: DTP, OPV/IPV on 10/23/86, 12/19/86, 2/19/87 and 4/29/88; MMR, Hib on 3/17/88; DTP, MMR on 8/27/92; DT, Hep B on 8/24/98; and Hep B on 10/16/98. Pet. at 2; P. Ex. 2. On February 14, 1999, Ryan presented at the emergency room with a three to four week history of illness. P. Ex. 8 at 247-49. Hospital records for that emergency room visit indicate that Ryan's mother related "that [Ryan] has been drinking excessive amounts of liquid and the patient relates that he has been urinating excessively." Id. at 248. Moreover, it was reported that Ryan's weight dropped from approximately 140 pounds at the beginning of the school year to between 110 and 115 pounds at the time of admission. Id. The records also indicate that Ryan vomited the evening prior to admission and experienced a mild upset stomach with "acid throat" frequently over the previous three-to-four weeks. Id. On February 14, 1999, Ryan's mother, a nurse, obtained a glucometer from work and checked Ryan's blood sugar. Id. The glucometer read a critically high value. Id. Accordingly, Ryan's mother took him to the emergency room and he was admitted to the hospital. Id. Ryan was discharged on February 18, 2002, with an assessment of "[n]ew onset juvenile diabetes mellitus." Id. at 249.

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[4]Whether the case is dismissed for lack of proof or is dismissed for lack of jurisdiction is more than just an intellectual exercise. If dismissed for lack of jurisdiction, petitioner is not entitled to attorney's fees and costs for prosecuting the case. Martin v. Secretary of Health and Human Services, 62 F.3d 1403, 1407 (Fed. Cir. 1995) (affirming the Court of Federal Claims dismissal of petitioners' request for attorney's fees and costs because there was no jurisdiction for the special master to consider the petition, and thus no jurisdiction over the request for fees and costs); Brice v. Secretary of Health and Human Services, 358 F.3d 865, 869 (Fed. Cir. 2004) (affirming Court of Federal Claims dismissal of petitioners' fees and costs petition because there was no jurisdiction over the original petition).

The petition, filed on January 31, 2002, claimed that Ryan began experiencing symptoms in early February 1999. Id. On April 12, 2002, petitioner filed an affidavit, asserting again that her son's symptoms started in February 1999. P. Ex. 1 at 2. In the affidavit, petitioner attested that on February 14, 1999, Ryan woke her in the middle of the night with an upset stomach and vomiting. Id. Petitioner explained that Ryan had been complaining of severe stomach burning for several days and had been drinking large quantities of liquids. Id. Petitioner further stated that, as a registered nurse, she put Ryan's symptoms together and checked Ryan's blood sugar with a glucometer. Id. The glucometer read "critical value" and she took Ryan to the local emergency room where his pediatrician, Dr. Daniel Crawford, MD, was waiting to examine Ryan. Id.

Relevant to the jurisdictional issue, the Vaccine Act mandates:

> [I]f a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation . . . 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 . . . .

42 U.S.C. § 300aa-16(a)(2). The issue before the undersigned is whether the petition in this case was filed within the statute of limitations imposed by the Act, that being whether 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." § 16(a)(2). Petitioner does not contest that medical records indicate that Ryan suffered symptoms of diabetes three-to-four weeks prior to receiving a diagnosis of the disease on February 14, 1999. P. Reply at 2. However, relying on the Court of Federal Claims' decision in Setnes v. Secretary of HHS, 57 Fed. Cl. 175 (2003), petitioner argues that "the manifestation of onset occurred when an event recognizable as a sign of injury by the medical profession at large occurred." P. Reply at 2. Accordingly, petitioner avers that using the "manifestation of onset" determination of the statute of limitations, the proper analysis is: "when did an event recognizable as a sign of the condition or injury by the medical profession at large first occur?" P. Reply at 2.

Petitioner argues that Setnes applies to the facts of her case because although she may have observed symptoms for "several days," it was not until a combination of symptoms were observed that petitioner interpreted them as a sign of diabetes. Id. In addition, petitioner asserts that "[a] review of Medline Plus gives the symptoms of diabetes [as] increased thirst, increased urination, weight loss despite increased appetite, nausea, vomiting, abdominal pain, fatigue. . . . Id. Petitioner argues that "[a] further review of Medline indicates that these are also symptoms of numerous other conditions as well." Id. As such, rather than finding the running of the statute of limitations commences upon the onset of the first symptom, which petitioner acknowledges is reported in the medical records as occurring three-to-four weeks prior to the February 14, 1999 diagnosis date, P. Reply at 2, petitioner believes that the onset point begins upon recognition of the symptom as part of the injury. Petitioner contends that such an event occurred in this case

when petitioner, a nurse, took Ryan's glucometer reading and brought him to the emergency room on February 14, 1999. Id. Accordingly, petitioner argues that her claim was filed within the applicable three-year period. Id.

Respondent argues that, based on the medical records, the onset of symptoms first occurred between January 17 and January 24, 1999, three-to-four weeks prior to Ryan's admission to Yuma Regional Medical Center on February 14, 1999. R. Res. at 2. Therefore, in respondent's view, the January 31, 2002 filing of the petition was beyond the applicable statute of limitations as it was more than three years after the occurrence of the first symptom or manifestation of onset of the diabetes. Respondent finds fault with petitioner's reliance on Setnes. First, respondent points out that the Setnes decision, a Court of Federal Claims decision, is not binding on the undersigned. Moreover, in respondent's view, manifestation of onset may include "subtle or insidious manifestations of the onset of the injury," noting that "Ryan's symptoms were sufficiently 'manifest' and noteworthy, not only in terms of what petitioner noted, but also in terms of when [petitioner] first noted specific symptoms, such that petitioner was able to recall this information and report it to medical personnel on February 14, 1999." R. Resp. at 10, 11.

Petitioner rebuts respondent's argument regarding the medical history taken on February 14, 1999, P. Ex. 8 at 248, which indicates that Ryan experienced symptoms related to diabetes for the previous three-to-four weeks. P. Reply at 2. Petitioner cites Setnes, in which Judge Futey found that the special master's decision regarding the statute of limitations was in fact, "the product of retroactive evaluation and enjoyed the benefit of hindsight. In other words, the expert in that case, Dr. Marks, had the fully assembled puzzle in front of him, and when taking the puzzle apart, opined that the pieces he was taking apart must have come from the puzzle." P. Reply at 2 (quoting Setnes, 57 Fed. Cl. at 180). Likewise, petitioner argues that respondent, with the benefit of hindsight, is declaring that the onset of Ryan's symptoms of diabetes was between January 17, 1999 and January 24, 1999. P. Reply at 2. Petitioner notes that the symptoms of Type 1 Diabetes, "unlike a seizure, are generic and in and of themselves can be indicative of any number of conditions." Id. Petitioner analogizes the instant case to Setnes, which petitioner states "cautions against picking a particular point of onset where a condition's symptoms (autism) are 'subtle and can easily be confused with typical child behavior.'" P. Reply at 2 (quoting Setnes, 57 Fed. Cl. at 179). Petitioner claims that in the case *sub judice*, Ryan's symptoms were subtle and easily confused with typical child behavior. P. Reply at 2.

Respondent argues that the court's holding in Setnes is contrary to Vaccine Act's plain language. R. Resp. at 3. Respondent avers that Judge Futey set forth a novel interpretation of the Vaccine Act statue of limitations, concluding that the term "manifestation" refers to an event that is "evident" and "open, clear, visible and unmistakable." Id. (quoting Setnes, 57 Fed. Cl. at 180). Respondent further contends that "[t]he Court in Setnes construed the word 'manifestation' too narrowly and further erred by reading into this term a requirement that events be appreciated for their medical significance at the time they occur." R. Resp. at 3. Respondent rejects the Setnes Court's interpretation of "manifestation,"which "would suggest that there can be no such thing as

a 'subtle manifestation' of disease." R. Resp. at 4 (quoting Setnes, 57 Fed. Cl. at 180). Respondent also argues that the Court in Setnes erred in differentiating between a "manifestation" and a "symptom." R. Resp. at 6-7. Respondent avers that the terms are "meant simply to describe the same event – the outwardly visible onset of injury" as evidenced by the Vaccine Act and its legislative history. Id. at 7-8. Thus, respondent concludes that "the ruling in Setnes that a subtle or mild symptom or manifestation of disease does not trigger the running of the Vaccine Act's statue of limitations is contrary to the plain language of the Act." Id. at 9. Instead, respondent maintains that both terms represent the earliest observable evidence of the disease. Id. In this case, petitioner observed symptoms of her son's diabetes prior to February 14, 1999, when Ryan was admitted to the hospital. Id. at 9-10. In support of this, respondent refers to a note from Ryan's February 14, 1999 hospital visit, which states, "Ryan is a 12 year-old, who presented with a three to four week history of illness. Mother relates that she noted that he is drinking excessive amounts of liquid and has been urinating excessively. In addition, he had an approximately 30 pound weight loss, falling between 140 to 110 pounds over this length of time." Id. at 10 (quoting P. Ex. 8 at 248). Respondent also notes that in Petitioner's Reply, petitioner herself argued "that although she 'may have observed symptoms for several days, it was not until she observed a combination of symptoms that she interpreted as a sign of diabetes did she get a glucometer reading and immediately take her child to the ER on February 14, 1999.'" R. Resp. at 9 (quoting P. Reply at 2).

Discussion

Based on the Vaccine Act and case law, the "manifestation of onset" is not synonymous with the point of diagnosis. See Goetz v. Secretary of HHS, 45 Fed. Cl. 340, 342 (1999) ("[T]he occurrence of an event recognizable as a sign of vaccine injury by the medical profession at large, not the diagnosis that actually confirms such an injury in the specific case."); Setnes v. Secretary of HHS, 57 Fed. Cl. 175, 181 (2003) ("The court is not holding that a medical or psychological diagnosis or verification of the 'occurrence of the first symptom or manifestation of onset' begins the running of the statue of limitations."). Moreover, as observed by respondent, the Court of Federal Claims has acknowledged that the statute of limitations can begin with awareness of "manifestations," which are not recognized as the onset of disease. In Brice v. Secretary of HHS, 36 Fed. Cl. 474 (1996), aff'd on other grounds, 240 F.3d 1367 (Fed. Cir. 2001) (equitable tolling not available to extend the Vaccine Act statute of limitations), cert. denied, 534 U.S. 1040 (2001), the court stated:

> [T]he terms of the Vaccine Act demonstrate that Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action...*Hence, a petitioner typically will recognize that a particular symptom constitutes the first symptom or manifestation of the onset of a certain injury only with the benefit of hindsight, after a doctor makes a definitive diagnosis of the injury.*

Id. at 477 (emphasis added). Moreover, the Vaccine Act does not distinguish between subtle and pronounced symptoms for determining the point of onset. As respondent notes, "[s]ubtle manifestations routinely meet the Vaccine Act's definition of 'first symptom or manifestation of onset' for purposes of establishing the occurrence of a Table injury under section 300aa-14(a)." R. Resp. at 4 n.2; see, e.g., Markovich v. Secretary of Health and Human Services, 69 Fed, Cl. 327, 334 (2005) ("It is not relevant to the onset query that the parents were unaware that the blinking episodes were a neurological symptom that served as the precursor to the seizure that Ashlyn would experience on August 30, 2000."); Gruber v. Secretary of HHS, No. 95-34V, 1998 WL 928423, at * 8 (Fed. Cl. Spec. Mstr. Dec. 22, 1998) ("When the seizures began in late November or early December of 1991, they were subtle, manifested only as very brief episodes of eye blinking or fluttering."); Williams v. Secretary of HHS, No. 94-1005V, 1997 WL 803112, at * 4 (Fed. Cl. Spec. Mstr. Dec. 10, 1997) ("Dr. Geraghty testified that Mrs. Williams, who was not trained in neurology, would have missed the more subtle manifestations of seizure activity."); Hargett v. Secretary of HHS, No. 90-1258V, 1992 WL 229385, at *5 (Cl. Ct. Spec. Mstr. Aug. 31, 1992) ("Dr. Wiznitzer posited that Melissa suffered from a chronic encephalopathy that manifested prior to the second month in an ongoing subtle process.").

The legal correctness of the Setnes decision remains in question.[5] However, assuming its correctness, the undersigned finds that upon examination of the record as a whole, factual differences preclude the application of Setnes to the case *sub judice*. In Setnes, the injured child suffered from autism, which went undiagnosed by his physicians for many months despite their best efforts and years of education and training. 57 Fed. Cl. at 177. To prevent the dismissal of their petition due to untimely filing, petitioners argued that "because of the unique nature of autism spectrum disorder, there can be no 'manifestation of onset' until such time as the medical and psychological professionals verify through reliable medical and psychological means that a constellation of behaviors presented in a specific child meet the criteria for autism spectrum disorder." Id. at 179. The Court held that "in a situation such as that before the court, where the symptoms of autism develop 'insidiously over time' and the child's behavior cannot readily be connected to an injury or disorder, the court may relay on the child's medical or psychological evaluations for guidance in ascertaining when the 'manifestation of onset' occurred." Id. at 181. The Court continued: "It is one thing to be unaware that an obvious injury or its onset was caused

[5] The correctness of the Setnes decision has yet to be determined by the United States Court of Appeals for the Federal Circuit. See Markovich v. Secretary of Health and Human Services, No. 03-2015V, 2005 WL 3112410 at *8, appeal docketed, No. 06-5039 (Fed. Cir. Dec. 27, 2005); see also, James-Bey v. Secretary of Health and Human Services, No. 05-10V, slip. op. at 6 n.2 (Fed. Cl. Aug. 8, 2005) (unpublished) (available at www.uscfc.uscourts.gov/unpublisheddecisions.htm.) (Judge Christine O. C. Miller noting that "The Court of Federal Claims is presently awaiting the resolution of an omnibus proceeding involving a number of autism cases where the Federal Circuit will ultimately rule on the acceptability of the Setnes standard."); Armstrong v. Secretary of Health and Human Services, No. 03-1280V, 2006 WL 337507 at *8 n.9 (Fed. Cl. Spec. Mstr. Jan. 27, 2006) (The undersigned noting that "Setnes presents legal issues that will have to be addressed by the United States Court of Appeals for the Federal Circuit.").

by a vaccination. It is quite another to lack knowledge, through no assignable fault, of the existence of the onset. This especially true where the treating physician does not associate the behavior as an onset of an injury." Id. [6]

[6]In an unpublished opinion, Hurd v. Secretary of Health and Human Services, No. 05-798V, filed on November 22, 2005 (available at http://www.uscfc.uscourts.gov/Unpublished%20Decisions/Futey.Hurd.pdf), Judge Futey seemingly narrowed the scope of the application of Setnes. In pertinent part, he stated:

> In Setnes v. U.S., this court held that where a condition, such as autism, is a collection of symptoms that may develop "'insidiously over time'" the statute of limitations does not run from the very first symptom of the disease. 57 Fed. Cl. at 181 (quoting expert's affidavit). Rather the "manifestation of onset" occurs when, in the aggregate, the behaviors indicate a disorder. Id. This does not mean, however, that "a medical or psychological diagnosis or verification of the 'occurrence of the first symptom or manifestation of onset' begins the running of the statute of limitations." Id. Instead, the statute of limitations runs from the date the aberrant behavior "clearly or obviously signal[s] the onset" of the condition, not the date of confirmed diagnosis. Id.

Hurd, slip. op. at 5.

Judge Futey then proceeded to distinguish the facts of Hurd from those of Setnes. More specifically, Judge Futey found that the statute of limitations commenced when petitioner knew her son's behavior was abnormal in November 1999, at which time petitioner reported that her son suffered from balance problems, high-pitched screaming in his sleep, shaking like seizures, eyesight trouble, uncontrollable behaviors, excessive thirst, and hearing and speech difficulties. He found that since these behaviors were "aberrant," they clearly signaled the onset of some medical condition. Since petitioner filed her petition in 2005, Judge Futey found that she was clearly out-of-time and upheld the dismissal of the petition.

The facts of the above-captioned case are more closely in line with those of Hurd as opposed to the facts of Setnes. As noted in the medical records, as related by petitioner, see P. Ex. 8 at 248, Ryan experienced excessive drinking, urination, and extreme weight loss. Thus, applying Judge Futey's Hurd analysis, the onset of Ryan's condition occurred at the latest, (probably even earlier according to Dr. Crawford's testimony, see *infra* p. 9.), when the mother reported "aberrant" behavior three-to-four weeks prior to his diagnosis of diabetes on February 14, 1999. Since that places the onset of Ryan's condition at the latest in mid-January, the petition, filed on January 31, 2002, is beyond the statute of limitations.

The undersigned found the September 2005 letter and the testimony of Dr. Crawford very helpful in making the distinction between Setnes and the case at bar. As described above on pages 2-3, after evaluating the filings related to petitioner's motion for a ruling on the record, the undersigned believed that potentially critical information regarding onset was present in petitioner's medical records, namely from the initial emergency room admission that occurred on February 14, 1999. More specifically, the attending physician and Ryan's treating pediatrician, Dr. Crawford, noted in his dictation following examination of Ryan that Ryan presented "with a three to four week history of illness." P. Ex. 8 at 248. As noted above, on October 25, 2005, petitioner filed a one-page letter dated September 28, 2005, from Dr. Crawford. P. Ex. 9. In this letter, Dr. Crawford stated that "[f]rom the hospital admission, it would appear that something had been going on for 3-4 weeks involving increasing thirst and increasing urination." Id. Moreover, he stated that the

> onset of diabetes is often insidious over a period of days or weeks and it usually takes a while for the parents of a child to realize that something serious is going on that would warrant a doctor's visit. As a nurse, I must assume that Ryan's mother would not have delayed taking her son to a doctor once she suspected that something as serious as diabetes might be involved. Apparently, for her, it was not evident that Ryan was seriously ill until right before she brought him to the doctor. I do not find this unusual at all.

Id.

Finding the doctor's letter to be confusing as to whether diabetes had an insidious onset similar to that of autism, the undersigned took oral testimony from Dr. Crawford in order to more fully understand his analysis of the onset of Ryan's condition. During the telephonic hearing that occurred on April 26, 2006, Dr. Crawford testified that his medical assessment of Ryan's symptoms upon admission to the ER was "[p]robable onset of diabetes." Tr. at 10. Dr. Crawford also testified that in his best assessment, based on the mother's reporting of symptoms beginning three-to-four weeks previously, that he "would assume that [the symptoms] probably started sometime a few weeks before," id. at 11, explaining that the first symptoms of onset were "excessive drinking of liquids and excessive urination." Id. Moreover, Dr. Crawford testified that "if [Ryan] lost that much weight, I would suspect that they had been going on for a while, but its hard to pinpoint these things." Id. Indeed, as reported by petitioner at the February 14 emergency room visit, petitioner commented to Dr. Crawford that Ryan weighed 140 pounds at the beginning of the school year, but weighed at that time between 110 and 115 pounds. P. Ex. 8 at 248.

It is clear from his testimony that unlike the facts in Setnes, Dr. Crawford had no doubt about associating Ryan's symptoms three-to-four weeks previous to the ER visit with the development of diabetes. Ryan's injury did not elude his physician and go undiagnosed for many months nor did his symptoms "develop insidiously over time." Unlike Setnes, petitioner

recognized that there were symptoms of some illness occurring, but did not realize the illness was diabetes until weeks later. The symptoms she noted are a far-cry from what is expected to be "typical childhood behavior." As recounted by petitioner, see P. Ex. 8 at 248, symptoms of the disease occurred **for at least** three-to-four weeks before Ryan was taken to the hospital and his treating physician contemporaneously diagnosed his diabetes. Tr. at 11. After taking Dr. Crawford's testimony, it is apparent that he, too, believes that the symptoms were present and recognizable at least three-to-four weeks prior to Ryan's diagnosis. According to Federal Circuit precedent, the statute of limitations under the Act "begins to run upon the first symptom or manifestation of the onset of the injury, even if petitioner reasonably would not have known at that time that the vaccine had caused an injury." Brice v. Secretary of Health and Human Services, 240 F.3d 1367, 1373 (Fed. Cir. 2001). Although petitioner reported these symptoms occurring three-to- four weeks previous to the February 14, 1999 admission to the emergency room, the doctor "would assume [that] they probably started sometime a few weeks before. And if he had lost that much weight, [the doctor] suspect[ed] that they had been going on for a while." Tr. at 11. Dr. Crawford's letter to petitioner's attorney conveys that although petitioner was not subjectively aware that Ryan was experiencing symptoms of diabetes per se, since she reported symptoms occurring weeks prior to the ER visit, she certainly recognized that something was going on for some time. See P. Ex. 8 at 248. Dr. Crawford's letter seems to indicate that although something was happening, "[a]pparently for [petitioner], it was not evident that Ryan was seriously ill until right before she brought him to the doctor." P. Ex. 9. That petitioner did not recognize that these symptoms occurring three-to-four weeks prior to the hospitalization were linked to diabetes, was not "unusual at all," according to Dr. Crawford. Id. However, what is legally and factually critical here is that they were *reported* by petitioner.

Similarly, the undersigned does not accept petitioner's argument that Ryan's symptoms could "easily be confused with typical child behavior." To the best of the undersigned's knowledge, a twelve year old boy exhibiting a 30 pound weight loss, as well as excessive thirst and urination are not associated with typical childhood behavior. Petitioner provided no citation or medical support for confirming that excessive thirst, urination, and weight loss are typical childhood behaviors. Thus, the undersigned is not persuaded by petitioner's argument that the symptoms occurring three-to-four weeks prior to Ryan's emergency room visit were "typical childhood behavior." Therefore, while the Setnes decision may be applicable to autism spectrum disorder, where the "child's behavior cannot readily be connected to an in injury or disorder," it is inapplicable to an injury such as diabetes, where there is a distinct onset of symptoms that are indicative of an adverse medical event.

Finally, petitioner argues that respondent has possessed petitioner's records since September of 2002 and at no point since then has respondent raised the issue of jurisdiction. P. Reply at 3. Thus, as a matter of equity, respondent should be barred from raising the jurisdictional issue now. Id. The undersigned concurs with respondent. Regardless of when respondent raised the issue of jurisdiction, it is well settled law that a court is obligated at any point in the proceedings to determine whether its jurisdiction over the claim is appropriate. Hines v. Secretary of Health and Human Services, 940 F.2d 1518, 1522 (Fed. Cir. 1991) (Federal

Circuit considered jurisdictional issue regarding the 1989 amendments to the Vaccine Act even though it was not raised by the parties); see also Mansfield, C. and L. M. RY. Co. v. Swan, 111 U.S. 379, 384 (1884) (Supreme Court holding that "the first duty of this Court is, *sua sponte*, if not moved to it by either party . . . to take care that neither the circuit court nor this court shall use the judicial power of the United States in a case to which the constitution and the laws of the United States have not extended that power.").

Conclusion

Petitioner has not met her burden of proving that the petition in this case was timely filed. The record indicates that the first symptom or manifestation of onset of Ryan's diabetes occurred at least three-to-four weeks prior to February 14, 1999. In this case, unlike the facts of Setnes, the disease was not undiagnosed, the determination that Ryan had diabetes was not a product of hindsight or of retrospective evaluation, nor did Ryan's behavior occur during the period of childhood where it is difficult for a parent to conclude that symptoms could be disease-related. As the petition was filed on January 31, 2002, clearly the petition was filed beyond the 36 month period after first manifestation of onset of his symptoms. Thus, petitioner's claim *is dismissed* for lack of jurisdiction.[7] The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

[7]As noted above in footnote 4, petitioner is not entitled to recover attorney's fees and costs when a petition is dismissed on jurisdictional grounds.