

I

BACKGROUND

A. Applicable statutory provision

Under the Program, compensation awards are made to individuals who have suffered injuries after receiving certain vaccines listed in the statute. The statutory deadlines for filing Program petitions are provided at § 300aa-16. With respect to vaccinations administered after October 1, 1988, as were the vaccinations at issue here, § 300aa-16(a)(2) provides that a Program petition must be 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.”

B. The petitioner’s claim, and the “Omnibus Autism Proceeding”

This petition was filed on April 7, 2004, by the petitioner, Alfreda Armstrong, appearing *pro se*, on behalf of her son, Wister J. Armstrong. This petition was one of about 5,000 Program petitions that have been filed over a period of several years, involving claims that a condition known as “autism,” or a similar condition, was caused by one or more vaccinations. These claims were grouped together in a proceeding known as the Omnibus Autism Proceeding. See the *Autism General Order #1*, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). A committee of attorneys, known as the Petitioners’ Steering Committee (PSC), was formed to represent the general interests of the autism petitioners in the course of the Omnibus Autism Proceeding. As noted in the *Autism General Order #1*, the task of the PSC was to develop evidence concerning the *general issue* of whether thimerosal-containing vaccines and/or MMR vaccines can cause or aggravate autism. (Such evidence was, in fact, developed, and was presented to myself and two other special masters during several hearings held over the past 15 months, in six “test cases.” Rulings concerning those test cases will likely be filed during the next few months.)

Pursuant to the *Autism General Order #1*, the petition in this case was filed as a “short form autism petition.” As such, the petition did not provide a detailed statement of petitioner’s claim, but instead stated that the petitioner “adopt[s] the Master Autism Petition for Vaccine Compensation.” As the *Autism General Order #1* provides, by adopting the “Master Autism Petition,” the petitioner, in effect, alleged that her son had “developed a neurodevelopmental disorder, consisting of Autism Spectrum Disorder or a similar disorder,” and that such disorder “was caused by a measles-mumps-rubella (MMR) vaccination [or] by the thimerosal ingredient in certain other vaccinations.” 2002 WL 31696785 at *4, 7-8.

C. Procedural history concerning respondent’s dismissal motion

The petitioner did not file any medical records with her petition. However, she appears to have submitted certain medical records to the respondent, who, in turn, filed those documents into the record of the case, along with respondent’s Motion to Dismiss, on December 30, 2004. In that motion, respondent alleged that the medical records show that Wister exhibited the first symptoms of his autism as early as 1994, and was diagnosed as suffering from autism in April of 1996.

Because that diagnosis was made approximately eight years before the filing of the petition, which was filed April 7, 2004, respondent argued that the petition must be dismissed pursuant to § 16(a)(2), because it was not timely filed.

In response, the petitioner, after obtaining several extensions of the time in which to file a response to respondent's motion to dismiss, filed, on July 12, 2005, a document that did not dispute the facts alleged by respondent, but merely requested that the petition remain pending "until further supportive vaccine studies are concluded or petitioner finds a vaccine attorney willing to represent her claim."

Accordingly, on October 5, 2005, I filed a Decision dismissing the petition as untimely filed. In that Decision, I noted that the petitioner's contention appeared to be that Wister's autism was *originally caused* by several vaccinations received in 1991 and 1992, and that Wister's autism was diagnosed by April of 1996 at the latest. Therefore, it was clear that the filing of the petition in this case, on April 7, 2004, took place far longer than 36 months after the first symptom of Wister's autism. Therefore, the petition clearly had to be dismissed as untimely.

However, on October 18, 2005, the petitioner filed a motion for reconsideration of my Decision. The motion seemed to indicate that petitioner was alleging *additional* injury to Wister by vaccinations received as late as March 5, 2002. The motion also indicated that the petitioner, still proceeding *pro se* at that time, had believed, prior to the issuance of my Decision on October 5, 2005, that she still had time to file an additional response to respondent's Motion to Dismiss. Accordingly, in an effort to give the *pro se* petitioner every opportunity to prove her case, I exercised my discretion pursuant to Rule 10(c) of the Vaccine Rules of this court (see Appendix B to this court's Rules), and, on October 26, 2005, I filed an Order that withdrew my Decision of October 5, 2005, so that petitioner could file another response to the respondent's Motion to Dismiss. I gave petitioner until January 13, 2006, in which to file such a response.

At the time that I withdrew my Decision, on October 26, 2005, I fully intended that, after petitioner filed her response, and the respondent filed any reply thereto, I would then again review the case, and promptly file a ruling concerning the respondent's dismissal motion. Petitioner filed a response, on January 17, 2006, and the respondent filed a reply thereto on February 21, 2006. However, at that point, the fact that the case was again ripe for a ruling was, mistakenly, not called to my attention. At that time, more than 4,700 autism cases were pending on my docket, awaiting the results of the upcoming trials of the Omnibus Autism Proceeding test cases. It was our procedure at the Office of Special Masters that staff members would monitor filings in the autism cases, bringing to my attention any cases in which either party sought any ruling. Inadvertently, however, this particular case was not brought to my attention again after the filings of January and February, 2006. It was not until September 3, 2008,² that I was made aware (1) that the case had been

²The Order that I issued in this case on January 15, 2008, calling for the filing of medical records, was one of a large group of identical Orders in many cases, prepared by court staff, that were issued on that date. When I signed that group of orders, I was, again, unaware that the dismissal motion was pending in this case.

reassigned to Special Master Abell on August 25, 2008, and (2) that respondent's dismissal motion in the case remained pending from early 2006. At that time, I concluded, and the Chief Special Master concurred, that, since I acted on the original Motion to Dismiss on October 5, 2005, it was appropriate that I should be the special master to consider the respondent's currently-pending Renewed Motion to Dismiss.³

I apologize to the parties for the fact that, inadvertently, I failed to act on the pending motion since early 2006.

I also note that in the last several months, additional medical records have been filed, respondent filed a Renewed Motion to Dismiss on June 10, 2008, and petitioner filed a response thereto on June 19, 2008. I have reviewed those documents, as well as the documents filed by the parties in 2004-2006, in the preparation of this Order.

II

DISCUSSION

As noted above, § 300aa-16(a)(2) requires that a Program petition, with respect to a vaccination that was administered after October 1, 1988, must be filed within 36 months after the date of the first symptom of the "onset" of the injury in question, or within 36 months of the first symptom of a "significant aggravation" of the injury. In this case, the petitioner, as noted above, raises at least two separate claims: (1) that Wister's autism was *initially caused* by certain vaccinations received in 1991 and 1992, and (2) that his autism was *significantly aggravated* by certain vaccinations received in late 2001 and 2002. (See Petitioner's Response filed on June 19, 2008, page 1.)

A. "Onset" claim

As respondent points out, the medical records filed in this case indicate that Wister's autism was diagnosed by April of 1996, while the Program petition was not filed until 2004. Accordingly, it seems clear that, as respondent argues, the petition was not filed within "36 months after the date of the occurrence of the first symptom or manifestation of *onset*" of Wister's autism. Therefore, it appears that as to petitioner's *first* claim, that Wister's autism was *initially caused* by his 1991-1992 vaccinations, the petition, was, in fact, untimely filed.

B. "Aggravation" claim

As to petitioner's *second* claim, concerning "significant aggravation," however, I conclude that it would *not* be appropriate for me to dismiss the claim on timeliness grounds. If the cited vaccinations in late 2001 and 2002 did in fact aggravate Wister's autism, then obviously the first

³Accordingly, the Chief Special Master reassigned the case back to my docket on September 4, 2008.

symptom of that *aggravation* must have occurred in late 2001 or thereafter, so that the filing of the petition in April of 2004 occurred within 36 months after the first symptom of that aggravation.

Surprisingly, as to the petitioner's *aggravation* claim, respondent's only argument seems to be that the petitioner has not supplied *evidence demonstrating* that a vaccine-caused aggravation occurred and that the "first symptom or manifestation" of that aggravation occurred less than three years prior to the date on which the petition was filed. Of course, petitioner *will* have to provide such proof, in order to gain a Program award. But because such proof has not yet been filed does *not* mean that petitioner's petition was *untimely filed*, as to this aspect of petitioner's claim. Respondent seems to be erroneously conflating the *timeliness* issue with the need to supply proof of *causation*.

III

CONCLUSION

As to petitioner's first claim, the petition was not timely filed, and under current law I clearly would be barred from affording petitioner any compensation for that alleged injury. However, the petition does not appear to be untimely as to petitioner's *second* claim, that Wister's autism was *aggravated* by certain vaccinations administered in late 2001 and 2002. Accordingly, it is *not* appropriate that I dismiss this petition at this time; instead, it seems appropriate that I afford petitioner the opportunity to offer evidence supporting her factual contention as to the "causation" element of her aggravation claim.

However, I must also point out that petitioner and her counsel need to understand clearly that they will need to *prove* their aggravation claim factually, to the level of "more probable than not." In this regard, they should note well that the evidence supplied by the Petitioners' Steering Committee in the autism "test cases" tried in 2007 and 2008 will *not* under any circumstances be adequate to prove the type of aggravation claim advanced by the petitioner here. That is, in the three test cases tried in 2007, the petitioners were attempting to prove that an MMR vaccination received *at around 15 months of age* can contribute to the *initial causation* of autism in a previously neurologically normal infant. In the three 2008 test cases, the petitioners were trying to prove that thimerosal-containing vaccines received *during the first 18 months or so of life* could contribute to the *initial causation* of autism that was first manifested during the second year of life. *None* of those cases involved allegations *even remotely similar* to the petitioner's aggravation claim here, *i.e.*, the claim that vaccinations received at age 10 or 11 can aggravate autism in a child whose autism was diagnosed five or more years beforehand. Thus, even if the petitioners were to prevail in all six of the "test cases," that would *not* likely afford any significant support to the petitioner's claim here.

Accordingly, the petitioner and her counsel need to focus realistically, at this time, on the issue of whether they can find an *expert witness* who might support their unusual aggravation claim in this case. They are hereby instructed to file, within 120 days, a status report explaining their

progress toward obtaining such an expert report, or otherwise explaining how they propose to shoulder their burden of proof concerning this aggravation claim.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master