

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-0269V

March 21, 2012; Re-Issued on May 31, 2012¹

_____)	
ALISSA BURSE and)	UNPUBLISHED
DERREN BURSE, parents of)	
DERREN JOSIAH BURSE, a minor,)	Autism; Dismissal of
)	Claim as Untimely;
)	Equitable Tolling
Petitioners,)	
)	
v.)	
)	
SECRETARY OF THE DEPARTMENT)	
OF HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

Alissa and Derren Burse, pro se, Charlotte, NC.

Katherine Carr Esposito, United States Department of Justice, Washington, DC.

DECISION²

Petitioners filed a Short-Form Autism Petition for Vaccine Compensation on April 30, 2007,³ seeking compensation for injuries allegedly sustained by their son, Derren

¹ The decision was re-issued on May 31, 2012, to correct typographical errors in the original decision.

² The opinion originally issued under seal on March 21, 2012. The parties did not request redaction of the opinion prior to its publication, pursuant to Vaccine Rule 18(b). Accordingly, the opinion was re-issued with typographical corrections and for publication, unsealed, on May 25, 2012.

³ By electing to file a Short-Form Autism Petition for Vaccine Compensation, petitioners allege that:

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has

Josiah Burse (Josiah), following his receipt of a number of childhood vaccines administered on various dates between July 29, 2002, and January 19, 2004. Petitioners' Exhibit (Ps' Ex.) 3 at 2.

I. Procedural History and Current Posture of the Case

Petitioners did not file any medical records with their petition. However, on August 9, 2007, petitioners filed Exhibits 1-7 which included an affidavit from Josiah's mother as well as Josiah's birth certificate and medical records. According to the medical records, Josiah received the following vaccinations: diphtheria-tetanus-acellular pertussis vaccine (DTaP) on July 29, 2002, September 23, 2002, February 25, 2003 and January 19, 2004; Haemophilus influenza type b/Hepatitis B vaccines (Hib/Hep B) on July 29, 2002, September 23, 2002, and May 22, 2003; inactivated polio virus (IPV) on July 29, 2002, September 23, 2002, and May 22, 2002; measles, mumps, and rubella (MMR) on May 22, 2003; pneumococcal conjugate (PCV) on July 29, 2002, September 23, 2002, May 22, 2003 and January 19, 2004; and varicella on January 19, 2004. See id. Petitioners allege that Josiah "slowly began to slip away from us into his own little world" after his first birthday. Ps' Ex. 1 at 1. Petitioners also claim that Josiah "would scream and cry" after receiving vaccinations between one and two years of age and on one occasion "broke out in hives and a fever." Id.

On February 13, 2009, the undersigned ordered petitioners to submit all medical records along with a "Statement of Compliance with Phase One Medical Records Production" (statement of compliance) no later than May 14, 2009. Petitioners failed to respond to that Order. On July 23, 2009 the undersigned again ordered petitioners to file all medical records along with their statement of compliance within 30 days. On May 14, 2010, Mrs. Burse contacted the undersigned by phone.⁴ During this conversation, Mrs. Burse explained that she believed that she had already filed her medical records and

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 This phone conversation, while not mentioned in the record, is referenced in both respondent's motion to dismiss (dated June 25, 2010) and petitioners' response to respondent's motion to dismiss (dated July 8, 2010).

statement of compliance. See Respondent’s Motion to Dismiss (R’s Mot.) at 2; Petitioners’ Response to Respondent’s Motion to Dismiss (P’s Resp. to R’s Mot.) at 1. The undersigned instructed respondent to consider this May 14, 2010 conversation as petitioners’ statement of compliance and to file, in response, a statement regarding whether the claim should proceed no later than June 28, 2010. See id.

On June 25, 2010, respondent submitted both a motion to dismiss, and Evidence Regarding Onset of Autism (R’s Evid.). In the motion to dismiss, respondent asserted that the “evidence demonstrates that this case was filed beyond the relevant statutory limitations period.” R’s Mot. at 5. As such, respondent moved for dismissal of petitioners’ claim due to lack of jurisdiction. Id. at 1. To bolster this claim, respondent submitted evidence which focused on the symptoms generally considered the first signs of autism by the medical community. See R’s Evid. Exhibits A-E. The evidence consisted of two medical articles⁵ and three expert opinions⁶ from the Omnibus Autism Proceedings (OAP).⁷ All of the evidence states that language delay and other developmental disruptions can be early signs of autism. R’s Evid. at 2.

On July 8, 2010, petitioners filed a response to respondent’s motion to dismiss claiming that they had in fact submitted their petition within the statute of limitations. The undersigned deferred any action on respondent’s motion to dismiss until after the appellate review of several cases interpreting the statute of limitations. See Order of 9/13/11 at 1.

On August 27, 2010, the Federal Circuit Court ruled on the final OAP test case. See Cedillo v. Secretary of Health & Human Services, 617 F.3d 1328 (Fed. Cir. 2010).

⁵ The two articles are (1) Luyster, R.J., et al., Language Assessment and Development in toddlers with Autism Spectrum Disorders, 38 J. Autism Dev. Dirord. 1426-38 (Jan. 2008). (2) Landa, R.J., Diagnosis of autism spectrum disorders in the first 3 years of life, 4 Nature Clinical Practice Neurology 138-47 (Mar. 2008).

⁶ The three experts are: (1) Eric Fombonne, M.D., a Professor of Psychiatry and the Head of the Division of Child Psychiatry of McGill University in Montreal, Canada; (2) Max Wiznitzer, M.D., an Associate Professor of Pediatrics, Neurology and International Health at Case Western University School of Medicine, and a staff child neurologist at the Rainbow Babies and Children’s Hospital in Cleveland, Ohio; and (3) Sir Michael L. Rutter, M.D., Ph.D., a Professor of Developmental Psychopathology at the Institute of Psychiatry, Kings College, London. R’s Evid. at 2-3

⁷ The Omnibus Autism Proceeding consists of a large group of petitions alleging that certain childhood vaccinations cause or contribute to the development of a serious neurodevelopmental disorder known as “autism spectrum disorder” or “autism.”

The OAP test cases concluded that there was no reliable evidence supporting the claim that vaccines cause autism.⁸ While these decisions are not binding on parties claiming that vaccines cause autism, if no new evidence or theories are presented, the parties' claims are unlikely to be successful.

On September 22, 2010, the undersigned ordered petitioners to inform the court within thirty days whether they wished to proceed with their claim. Petitioners failed to respond. On December 7, 2010,⁹ the undersigned again ordered petitioners to inform the court within thirty days whether they wished to proceed. On December 30, 2010, petitioners responded by filing their Submission of Evidence Regarding the Onset and Development of Autism (P's Evid.). Petitioners claim that this evidence offers a theory of how the vaccines administered to Josiah allegedly caused his autism. Specifically, petitioners argue that the vaccines "initiated the interaction of multiple methylated genetic factors that combined with the environmental factors which were present in the vaccines." See P's Evid. at 1. According to petitioners, this interaction led to Josiah being unable to excrete the metals found in the vaccines at a normal rate, which in turn led to his impeded neurological growth. Id.

On August 5, 2011, the Federal Circuit Court issued an en banc decision in Cloer v. Secretary of Health & Human Services, 654 F.3d 1322 (Fed. Cir. 2011), one of several cases under review by the Court which interpreted the Vaccine Act's statute of limitations. On September 13, 2011, the undersigned informed both parties that they would have an opportunity to file additional pleadings addressing Cloer's impact. See Order of Sept. 13, 2011. Additionally, the undersigned ordered both parties to file any medical or scientific evidence, discussing the significance of speech delay as an early symptom of an autism spectrum disorder, no later than October 13, 2011. See id.

On October 12, 2011, petitioners filed their response (P's Resp.) to the undersigned's order, claiming that on January 19, 2004, Josiah's "verbal skills were on target," which they believed meant that the Vaccine Act's limitations period should not have started on that date. Ps' Resp. at 1. Petitioners also state that June 29, 2004 was the first time that the pediatrician began to suspect developmental delay. Id. Thus, petitioners consider the June 29, 2004 visit to the pediatrician as the earliest point at which the Vaccine Act's statute of limitations could begin to run. Id.

⁸ The OAP test case decisions are available on the court's website at: <http://www.uscfc.uscourts.gov/node/5026>.

⁹ This order to show cause was initially filed on November 24, 2010. The order was re-filed on December 7, 2010, to reflect the correct case name.

On October 13, 2011, respondent filed her response (R's Resp.) to the September 13, 2011 order. In her response, respondent asserts that under Cloer, petitioners filed their petition outside the Vaccine Act's statute of limitations. R's Resp. at 3. As such, respondent contends that the undersigned cannot consider the case due to untimeliness. Respondent points to the record note of "delayed speech"¹⁰ written on the January 19, 2004 checkup record. P's Ex. 3 at 14. Respondent also points to several statements made by Mrs. Burse which indicated Josiah started to act differently between 1 and 1 ½ years of age. See R's Resp. at 3 n.1. Respondent avers that this demonstrates that the "first symptom or manifestation of onset" occurred on—if not before—the January 19, 2004 visit to the pediatrician.

The undersigned issued an order on December 9, 2011, compelling petitioners to show cause why their vaccine petition should not be dismissed as untimely. In a January 9, 2012 filing, petitioners respond that they were unaware that Josiah's speech delay could be caused by autism until their pediatrician recommended Josiah be tested in November 2004 and that Josiah was not formally diagnosed with an ASD until August 2006. Petitioners argue that the statute of limitations was not triggered until Josiah's doctors linked his speech delay with autism.

II. Respondent's Challenge of Timeliness

Respondent has moved for dismissal of this claim and contends that the claim must be dismissed because petitioners filed their claim beyond the applicable statute of limitations. A motion to dismiss is asserted to challenge the sufficiency of a pleading. RCFC 12(b). Here, petitioners filed their claim as a short-form petition, which by design requires neither medical records nor evidence to be filed with the pleading. Because the undersigned must consider matters outside this pleading to rule on respondent's timeliness challenge, the motion must be analyzed as a motion for summary judgment under RCFC 56. RCFC 12(d).

A motion for summary judgment will be granted if the pleadings, the discovery, and other evidence demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). To determine whether there are genuine issues as to material fact, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." DIRECTTV Group, Inc. v. U.S., No. 2010-5031, 2012 WL 233978, *3 (Fed. Cir. Jan. 26, 2012)

¹⁰ It should be noted that respondent originally thought that the note of "delayed speech" really said "beware Autism". All subsequent filings by both parties focus on this mistake. Respondent has since recognized her error yet still contends that the note of "delayed speech" is enough to start the Vaccine Act's statute of limitations. See October 21, 2011 document.

(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

III. Applicable Legal Standard

The Vaccine Act provides that in the case of:

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....”

42 U.S.C. § 300aa-16(a)(2).

As written, the statute requires that petitioners file their claim under the Vaccine Program within 36 months of the onset of the earliest symptoms of injury. See Markovich v. Sec’y, HHS, 477 F.3d 1353, 1357 (Fed. Cir. 2007) (holding that “either a ‘symptom’ or a ‘manifestation of onset’ can trigger the running of the statute [of limitations], whichever is first”). As explained in Markovich, a symptom may be a sign “of a variety of conditions or ailments,” while a manifestation of onset “is more self-evident of an injury and may include significant symptoms that clearly evidence an injury.” Id. at 1357. The Federal Circuit has held that the first symptom or manifestation of onset of a vaccine-related injury is “the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.”¹¹ Markovich, at 1360; see also Cloer, 654 F.3d 1322. Identification of either the first symptom or manifestation of onset, however, does not require a doctor’s diagnosis. Id. at 1358 (quoting Brice v. Sec’y, HHS, 36 Fed. Cl. 474, 477 (1996)). Nor does the identification of the signs of an injury turn on the subjective view of petitioner. Markovich, at 1360 (reasoning that “a subjective standard that focuses on the parent’s view would result in an uneven and perhaps overly broad application of the statute of limitations dependent entirely on the subjective perceptions of lay persons having widely varying degrees of medical awareness or training”). The language in the statute, that “no petition may be filed,” prohibits the filing of a vaccine claim, as a matter of law, if it does not meet the threshold 36-month requirement. § 300aa-16(a)(2).

¹¹ The undersigned notes that opinions of the United States Court of Appeals for the Federal Circuit are binding on the Office of Special Masters. See Snyder ex. rel. Snyder v. Sec’y, HHS, 88 Fed. Cl. 706, 719 n.23 (Fed. Cl. 2009).

Determining whether petitioners timely filed their claim necessarily requires an examination of Josiah's medical history.

IV. Factual Background

Josiah was born on May 22, 2002. P's Ex. 2 at 1. Throughout his first year of life, Josiah was seen regularly for routine checkups and immunizations. P's Ex. 3 at 2, 16-20. On February 10, 2003, at the age of 8 months, Josiah was taken to Cobb Pediatrics because his eyes were pink and puffy, he was congested, and his eardrums were full and red. Id. at 17. On August 18, 2003, Josiah was again seen because of ear problems. Id. at 15. The pediatrician noted that Josiah's left ear drum was full and white and diagnosed Josiah with an inner ear infection. Id.

On January 19, 2004, petitioners took Josiah to Cobb Pediatrics for his 18 month checkup. Id. at 14. During this visit everything was found to be normal. Id. However, in the assessment section there is a notation of "mild speech delay." Id. The pediatrician discussed this with Mrs. Burse then wrote "?Behavior issues? ... just will watch." Id.

Six months later, when petitioners took Josiah to Cobb Pediatrics for his two year well-child visit on June 29, 2004, Josiah's speech capabilities were still a concern. Id. at 13. The pediatrician noted on the medical record that Josiah started walking at thirteen months of age but then stopped. Id. He added that Josiah didn't start walking again until he was sixteen months old. Id. The medical records reflect that the pediatrician "discussed development in depth" with Josiah's parents and recommended that Josiah be encouraged to talk. Id.

During that same visit, Josiah was referred to Children's Healthcare of Atlanta for an occupational therapy assessment. Id. On July 15, 2004, Josiah received an initial speech language assessment. P's Ex. 7 at 7.¹² In the clinical summary section, Darlene M. McKee, a licensed occupational therapist, noted that Josiah "presents with a severe articulation disorder, in addition to a moderate receptive and expressive language disorder." Id. Also, in the developmental history section, Dr. McKee wrote that "per parental report, Derren did coo and babble during his first 6-9 months of life; however, he did not begin talking until the age of 18 months." Id. at 8. Josiah was 18 months old on November 11, 2003.

¹² Note that the court had two copies of petitioners' filing of exhibits 1-7. All the information contained within the two copies is the same. However the pagination of exhibit 7 is different between the two copies. All the other section pages are identical in both copies. The court chose one copy at random and used that pagination system when referring to exhibit 7.

On August 9, 2004, Josiah once again experienced ear problems. P's Ex. 3 at 12. Josiah was lethargic and was sent home from daycare with an unknown temperature. Id. According to the pediatrician at Cobb Pediatrics, his left eardrum was red with a splayed light reflex. Id. The pediatrician diagnosed it as a left inner ear infection. Id. Furthermore, in the additional history section, the pediatrician wrote that Josiah had three other inner ear infections though he went to other places for medical help. Id. One audiologist at Children's Healthcare of Atlanta told petitioners that Josiah had pressure behind his ears. Id.

On August 19, 2004, petitioners took Josiah to Atlanta Kids ENT, PC because of his recurring left ear infections. Ps' Ex. 5 at 1. A specialist observed Josiah and told petitioners to return in four weeks. Id. at 2. The specialist noted that if there was no improvement with Josiah's ear problems, he would consider proceeding with a bilateral myringotomy with tubes, an adenoidectomy, and even possibly a tonsillectomy. Id. at 3.

On September 9, 2004, petitioners returned to Atlanta Kids ENT, PC where Josiah was once again examined. Id. at 4. Since Josiah's ear problems still persisted, a bilateral myringotomy with tubes and an adenoidectomy were scheduled for September 14, 2004. Id. at 5. Josiah's follow-up to his surgery was on October 20, 2004. Id. at 8. Petitioners were informed that Josiah should return in four weeks for an audiogram. Id.

Petitioners returned to Atlanta Kids ENT, PC on November 18, 2004. During this visit, the doctor recommended that Josiah be evaluated by a neurologist. Id. at 12. The doctor noted that he was concerned Josiah might possibly have autism. Id. Petitioners were informed that they might need a referral from their primary care physician before they could see a neurologist. Id.

Petitioners visited their primary care physician on January 11, 2005. P's Ex. 3 at 9. The purpose of this visit was to discuss the possibility of having Josiah examined by a neurologist for autism. Id. Josiah's pediatrician referred the family to the Marcus Institute. Id.

On August 15, 2005, Amy Thornhill Pakula, MD, the Director of Neurodevelopmental Pediatric Clinics at the Marcus Institute evaluated Josiah. P's Ex. 4 at 7. In her evaluation, Dr. Pakula noted that in a recorded conversation Mrs. Burse stated that Josiah "'faded away from us' between 12 and 18 months of age." Id. at 2. Additionally, Dr. Pakula found that Josiah's "overall developmental and behavioral profile is consistent with a diagnosis of Pervasive Developmental Disorder, Autism." Id. at 4.

On June 20, 2006, petitioners took Josiah to Pediatric Neurology of Georgia. P's Ex. 3 at 27. There they met with Gary M. Miller, M.D. for a follow up consultation on Josiah's suspected autism. Id. Dr. Miller came to the conclusion that the "previous

diagnosis of autism appears to be correct.” Id. at 28. In his evaluation, Dr. Miller wrote that “the family first became concerned about him [Josiah] at about 1-1/2 years of age, when he was not speaking and did not seem to play normally with other children.” Id. at 27. In the family history section Dr. Miller noted that “a maternal cousin has had a diagnosis of autism.” Id. at 28.

V. Analysis and Discussion

It is well-documented that speech delay is commonly the first symptom of an ASD. *See* Resp’t’s Submission of Evid. A at 1-2, B at 1-2, C at 1264A-1266A. In this case, Josiah’s earliest symptom of an ASD was his speech delay. The first documented impression of this speech delay occurred in January 2004 at Josiah’s 18-month checkup. Accordingly, this date triggered the running of the statute of limitations under the Vaccine Act. For petitioners’ vaccine claim to be found timely, petitioners would have had to file their petition by January 19, 2007. However, petitioners did not file their claim until April 30, 2007.

(1) Petitioners argue that they did not know about the possible link between Josiah’s speech delay and his ASD until 2004.

Petitioners argue that their claim is timely because Josiah’s parents were not aware that Josiah’s speech delay could be caused by autism until November 2004. In sum, petitioners assert that the 36-month time period should not begin to run until the time at which they discovered that they had a vaccine claim. The applicability of a discovery rule in vaccine cases, however, has been considered and rejected by the Federal Circuit in Cloer. Cloer, 654 F.3d at 1322.

In Cloer, petitioner argued that her claim arose when she was diagnosed with multiple sclerosis, almost eight years after she received the vaccinations she believed to have caused her condition. Cloer, 654 F.3d at 1324. Petitioner urged the appellate court to recognize a discovery rule that would delay the running of the statute of limitations until the first symptom or manifestation of a developing health condition is formally diagnosed. Cloer, 654 F.3d at 1328. Rejecting this argument, the Federal Circuit found that the Vaccine Act does not contain an explicit discovery rule, nor is there evidence that Congress intended that a discovery rule be read into the Vaccine Act’s limitations period. Cloer, 654 F.3d at 1337. Instead, the Court reaffirmed Markovich’s holding that the first symptom or manifestation of onset of a vaccine-related injury is “the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.” Cloer, 654 F.3d 1322 at 1335 (citing Markovich, at 1360).¹³

¹³ It is unfortunate that petitioners’ pediatrician did not diagnose Josiah’s speech delay as autism sooner; however, the inquiry is not whether a particular medical

Because the statute does not contemplate a discovery rule, petitioners' claim that the limitations period did not begin to run until November 2004—when petitioners first learned of the possibility that Josiah's injury was vaccine-related—is unavailing.

(2) Petitioners' case does not involve the type of circumstances in which equitable tolling might apply.

The Federal Circuit's decision in Cloer now permits petitioners, in limited circumstances, to seek equitable tolling of the statute of limitations. Although petitioners have made only a cursory equitable tolling argument here, the undersigned finds that an effort by petitioners to invoke equitable tolling would be highly unlikely to succeed on the facts of this case.

The Federal Circuit made it clear that equitable tolling should not be invoked based solely on a claimant's belief that she is being treated unfairly due to the statute of limitations. Cloer, 654 F.3d at 1344. As the Supreme Court has instructed, the doctrine is to be used "sparingly." Irwin v. Dept. of Veterans Aff., 498 U.S. 89, 96 (1990). In certain circumstances, courts have recognized that the doctrine of equitable tolling may apply to allow the filing of an otherwise untimely claim. When a litigant has been "pursuing his rights diligently" but "some extraordinary circumstance" beyond his control has prevented him from filing his claim within the statute of limitations, the doctrine of equitable tolling may apply. Pace v. DiGuglielmo, 544 U.S. 408 (2005). Other cases in which equitable tolling may be appropriate are those involving fraud or duress. *See, e.g.* Holmberg v. Armbrrecht, 327 U.S. 392, 397 (1946) (stating that if "a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part," the statute of limitations does not begin to run until the fraud is discovered).

There is no evidence of any extraordinary circumstance beyond petitioners' control that prevented them from making a timely filing. Nor does the record in this case reveal any evidence of fraud or bad acts committed by a third party that would have prevented petitioners from filing their claim for Josiah within the pertinent 36-month period. Therefore, the facts of this case are not of the sort that would support a successful claim for equitable tolling.

VI. Conclusion

professional would recognize the symptom as a possible vaccine-injury. Rather, the undersigned must consider whether the medical profession at large identifies speech delay as a symptom of an ASD. It is clear that it does. See Resp't's Submission of Evid. A at 1-2, B at 1-2, C at 1264A-1266A.

The Vaccine Act clearly states that claims must be filed within 36 months of the “occurrence of the first symptom or manifestation of onset.” Petitioners failed to do so on this record. Thus, their filed claim is untimely as a matter of law.

For the reasons set for above, **this case is DISMISSED. The Clerk of the Court is directed to enter judgment accordingly.**

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Chief Special Master