

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-1483V

Filed: May 31, 2012

HOURIA HRIECHE,
Individually and as Next Friend of,
BRIANNA LOPEZ,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

*
* UNPUBLISHED DECISION
*
* Autism; Statute of Limitations;
* Vaccine Act Entitlement;
* Denial Without a Hearing
*

Houria Hrieche, pro se petitioner, West Hills, CA.

Voris Johnson, respondent, Washington, DC.

DECISION¹

On June 12, 2003, petitioner filed a petition (Pet.) For Vaccine Compensation in the National Vaccine Injury Compensation Program² (“the

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, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). As provided by Vaccine Rule 18(b), each party has 14 days within which to file a motion for 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). In the absence of such motion, “the entire” decision will be available to the public. Id.

² The 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. §§ 300aa-10 *et seq.* (hereinafter “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

Program”), on behalf of her minor child Brianna.³ Petitioner alleged that Brianna “received a number of mercury-containing vaccines” and “subsequently demonstrated developmental problems.” Pet. at 1.

For the reasons discussed more fully below, the undersigned hereby **DISMISSES** this case because it was untimely filed.

I. Omnibus Autism Proceeding

This case is one of more than 5,400 cases filed under the Program in which petitioner alleged that conditions known as “autism” or “autism spectrum disorders” [“ASD”] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP, was set forth in the six entitlement decisions issued by three special masters as “test cases” for two theories of causation litigated in the OAP and will not be repeated here.⁴

Ultimately, the Petitioners’ Steering Committee [“PSC”], an organization formed by attorneys representing petitioner in the OAP, litigated six test cases presenting two different theories on the causation of ASDs. The first theory alleged that the measles portion of the measles, mumps, rubella vaccine could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant’s brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional test cases during several weeks of trial in 2008.

Decisions in each of the three test cases pertaining to the PSC’s first theory rejected the petitioners’ causation theories. Cedillo, 2009 WL 331968, aff’d, 89 Fed. Cl. 158 (2009), aff’d, 617 F.3d 1328 (Fed. Cir. 2010); Hazlehurst,

³ When the case was filed, petitioner was represented by counsel.

⁴ The Theory 1 cases are Cedillo v. Sec’y of Health & Human Servs., No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Hazlehurst v. Sec’y of Health & Human Servs., No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Snyder v. Sec’y of Health & Human Servs., No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are Dwyer v. Sec’y of Health & Human Servs., No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); King v. Sec’y of Health & Human Servs., No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); Mead v. Sec’y of Health & Human Servs., No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

2009 WL 332306, aff'd, 88 Fed. Cl. 473 (2009), aff'd, 604 F.3d 1343 (Fed. Cir. 2010); Snyder, 2009 WL 332044, aff'd, 88 Fed. Cl. 706 (2009).⁵ Decisions in each of the three “test cases” pertaining to the PSC’s second theory also rejected the petitioners’ causation theories, and petitioners in each of the three cases chose not to appeal. Dwyer, 2010 WL 892250; King, 2010 WL 892296; Mead, 2010 WL 892248. Thus, the proceedings in these six test cases are concluded.

II. Procedural Background

Petitioner’s claim was effectively stayed pending the outcome of the OAP cases. After the test cases were concluded, respondent filed a motion to dismiss for untimeliness on June 6, 2008. Resp’t Mot. Petitioner’s counsel filed a response on June 24, 2008. Pet’r’s Resp.

Counsel for petitioner moved to withdraw his representation of petitioner on December 9, 2011. Petitioner’s counsel’s motion was granted on March 29, 2012.

A digitally recorded status conference was conducted on April 25, 2012, to address Ms.Hrieche’s claim for compensation under the Vaccine Act. During the status conference, petitioner informed the undersigned that Brianna was diagnosed with autism in 1999. Petitioner filed her claim four years later. As the undersigned pointed out during the status conference, on the facts as presented, petitioner’s claim with respect to Brianna was not timely filed. Order, April 25, 2012. During the same call, Mrs. Hrieche stated that it was her belief that the case had been earlier filed with the court. The undersigned afforded Mrs. Hreiche additional time to corroborate her claim.

A second digitally recorded status conference was conducted on May 16, 2012, at Mrs. Hrieche’s request. Mrs. Hrieche explained that she had reviewed the file materials she received from her former counsel, and had sent them to the court. The documents have been received and filed. The documents confirm that petitioner’s case was filed with the court on June 12, 2003.

III. Factual Background

Brianna was born on May 8, 1998, and received vaccinations between May 21, 1998 and April 8, 2004. Pet’r’s Ex. 2 at 76. Based on the records filed to date, Brianna was diagnosed with autism by December 27, 2000. Id. at 49. The

⁵ Petitioner in Snyder did not appeal the decision of the U.S. Court of Federal Claims.

records also reflect that the first symptom or manifestation of onset of Brianna's alleged vaccine-related injury occurred on or about December 29, 1999, when suspected speech delay is noted on Brianna's "pediatric health supervision" record. Id. at 17. On April 19, 2000, her doctor also noted that she had no speech but her hearing was fine. Id. at 50. Medical records dated May 18, 2000, reflect that Brianna was a two-year old with speech delay and autism was suspected. Id. at 51.

IV. Untimely Filing

The Vaccine Act requires the dismissal of a claim not shown, by a preponderance of the evidence, to have been 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" as required by the Vaccine Act. §16(a)(2). Under the prescribed statutory limitations period, this petition was required to be filed prior to the expiration of thirty-six months after the first symptom or manifestation of onset of Brianna's alleged vaccine injury. 42 U.S.C. § 300aa-16(a)(2). In a binding decision issued on August 5, 2011, the United States Court of Appeals for the Federal Circuit affirmed that the "statute of limitations begins to run on a specific statutory date: the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury recognized as such by the medical profession at large." See Cloer v. Sec'y of Health & Human Servs., 654 F.3d 1322 (Fed. Cir. 2011).

The decision in Cloer affirms that the statute of limitations starts on the date that "the first event objectively recognizable as a sign of vaccine injury by the medical profession at large" occurs. Cloer at *15 (Fed. Cir. Aug 5, 2011) (citing Markovich v. Sec'y of Health and Human Servs., 477 F.3d 1353, 1360). Accordingly, a petitioner has 36 months from the first recognizable sign of the alleged injury to file a vaccine claim.

Brianna's medical records indicate that she began showing symptoms of her autism spectrum disorder by December 29, 1999, when she was noted to have speech delay.⁶ Speech delay is a common symptom of an autism spectrum disorder and is recognized as such by the medical profession at large. See Resp't's Ex. A-E. Accordingly, to have been timely filed, the petition in this case must have been filed no later than December 29, 2002.

Based on petitioner's representation during the April 26, 2012, and May

⁶ Brianna was diagnosed with questionable autism on May 18, 2000. Pet'r's Ex. 2 at 50. An autism diagnosis was confirmed on December 27, 2000. Id. at 49.

16, 2012, recorded status conferences, petitioner cannot demonstrate that this claim was timely filed.

Thus, the claim is DISMISSED and the Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Chief Special Master