In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 90-3001V

Filed: March 28, 1997

JOSE GARCIA ROBLES and INES SANCHEZ TORRES, for themselves and for the conjugal society consisting of both of them, and on behalf of their daughters INES MARI GARCIA SANCHEZ and MERCEDES WONNE GARCIA SANCHEZ	*	
Petitioners,	*	**PUBLISHED**
v.	*	
SECRETARY OF THE DEPT. OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Isabel Pico Vidal, San Juan, Puerto Rico, for Petitioner.

Claudia Barnes, Washington, D.C., for Respondent.

DISMISSAL ORDER

GOLKIEWICZ, Chief Special Master

I. PROCEDURAL HISTORY

Petitioners filed a petition for compensation under the Vaccine Injury Compensation Program[1] (hereinafter "the Act") on October 1, 1990. Petition, filed 10/1/90. Petitioners allege that

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[1] **42 U.S.C.A. §300aa-1 et seq. (West 1991 and Supp. 1996). For convenience, individual sections of the Act will be cited hereafter without reference to 42 U.S.C.A. §300aa.**

their daughter, Ines Mari Garcia Sanchez, suffered from Subacute Sclerosing Panencephalitis (SSPE) as a result of the Measles-Mumps-Rubella (MMR) vaccination that she received on December 11, 1974. Id. at 2. Petitioners state that "on or about the first trimester of 1978 Ines Mari Garcia Sanchez was diagnosed with Subacute Sclerosing Panencephalitis (SSPE) post vaccination, as a result of a recurring seizure disorder she developed, accompanied by fever." Id.

Respondent filed a Motion to Dismiss Petitioners' claim on December 9, 1996, stating that it fails to meet the jurisdictional requirements set forth in §16(a)(1). Specifically, Respondent relies on the second clause contained in the section, which was amended in 1990 with an effective date of September 30, 1990[2], and which reads in relevant part:

> (a) General rule. In the case of--
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> > (1) a vaccine set forth in the Vaccine Injury Table which is administered before the effective date of this subpart, if a vaccine-related injury or death occurred as a result of the administration of such vaccine,....no such *petition may be filed if the first symptom or manifestation of onset or of the significant aggravation of such injury occurred more than 36 months after the date of administration of the vaccine[.]* [emphasis supplied.]

42 U.S.C.A. §300aa-16(a)(1). Pursuant to this provision of the statute and based on stipulated facts, Respondent argues "that Ines exhibited the first symptom or manifestation of the onset of her alleged vaccine injury approximately 41 months following the date of her Measles vaccination. This exceeds the 36 month period of limitation set forth in §16." Mot. To Dismiss at 2..

Petitioners filed a response to Respondent's motion on January 31, 1997. Petitioners' response did not contest Respondent's

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[2] Pub.L. 101-502, §5(e)(1)(A) and (B) (codified as amended at 42 U.S.C. §16(a)(1) (1990), and §5(h).

interpretation of amended §16(a)(1). Instead, Petitioners' claimed that §16(a)(1), as amended in 1990, did not apply to Petitioners' case because "[t]he filing date of the Program claim in our case was September 9, 1990 and not October 1, 1990 as it is alleged by respondent. At the time when this original claim was filed there was no jurisdictional limitation as to the filing of petitions of cases where the onset of symptoms had occurred 36 months after the administration of the vaccine." Oppo. To Mot. To Dismiss, filed 1/31/97, at 3. In support of the alleged September 9, 1990, filing date, Petitioners state that on or about that date, Ines Sanchez de Garcia (a.k.a. Ines D. Sanchez Torres), as mother and legal guardian of Ines Mari Garcia Sanchez, wrote the U.S. Court of Claims, that this pro se letter met the requirements under §11 of the Act and Rule 2 of the Vaccine Rules for the filing of a petition and, therefore, the letter constituted the filing of the claim. Id. at 3-4. In support of this argument, Petitioners attached a copy of a handwritten letter dated September 9, 1990, and addressed to the U.S. Claims Court, as well as a Sworn Statement from Ines Sanchez de Garcia averring that she sent the letter to the court, and that in response, she received information from the court about filing a formal application under the Program. Id. at Exhibit A-l and attached Sworn Statement of Ines Sanchez Torres dated January 27, 1997.

In addition, Petitioners state that the onset of the injury was in April 1978, not May 1978, as Respondent alleges, and cases involving SSPE, as is the situation here, have a mean latency which often exceeds the "36 months" provision, thereby effectively eliminating a number of similar cases. subject to the 1990 Amendments. Lastly, Petitioners request a liberal reading of §11, considering Petitioners' pro se status on or about September 9, 1990, and since 'a rigid interpretation" of the law would leave the Petitioners without judicial remedy. Id. at 5-7.

II. COURT'S ANALYSIS

In November 1990, Congress amended §16(a)(1), enlarging the time period within which a pre-Act petitioner must file their claim from within 24 months after the effective date of the subpart, which was October 1, 1988, to within 28 months from October 1, 1988. This amendment effectively required the pre-Act petitions to be filed by February 1, 1991, at the latest. In addition, the 1990 Amendments added a new clause, which is relevant for our purposes

here, and which placed a caveat on the February 1, 1991, deadline in so far as pre-Act petitioners could not file a claim "if the first symptom or manifestation of onset or of the significant aggravation of such injury occurred more than 36 months after the date of administration of the vaccine." 42 U.S.C.A. §300aa-16(a)(1). The amendments were made retroactive to September 30, 1990.[3] In order to be subject to the "24 month" clause ***and not subject to the 1990 Amendments,*** Petitioners in this case had to have filed the claim prior ***to*** September 30, 1990. In this case, it is clear that not only was a Petition filed with the Clerk's Office on October 1, 1990, but the affidavit attached to the petition was dated September 30, 1990, ***not prior to***.[4] Thus, to circumvent the application of the 1990 Amendments, the court must concur with Petitioners' allegations and find that the September 9, 1990, letter constituted the original petition.

The court is aware that between September 1990 and February 1, 1991, the clerk's office 'of the U.S. Court of Claims (as it was named at the time) was inundated with petitions by both pro se and represented individuals, and a high percentage of them did not literally meet the requirements set forth in the Act and the Vaccine Rules.[5] Due to the volume of claims received by the court, the clerk's office often filed these letters and informal petitions as submitted, with their legal sufficiency under the Act and Vaccine Rules to be decided at a later date by the Office of Special Masters. Indeed, in Holmes v. Secretary of HHS, No. 91-1343V, 1992 WL 121390 (Cl. Ct. Spec. Mstr. May 7, 1992), which

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[3] Pub.L. 101-502, §5(e)(1)(A) and (B)(codified as amended at 42 U.S.C. §16(a)(1) (1990), and §5(h).

[4] This is an important fact as it effectively cuts off any argument that the Petition was sent earlier than September 30, 1990, but was somehow delayed in arriving at the court or that the court was slow in stamping the Petition as filed.

[5] Prior to the 1990 Amendments, the deadline for filing pre-Act claims under §16(a)(1) was October 1, 1990, which was 24 months from the effective date of the Act, ie. October 1, 1988. Consequently, the clerk's office received an influx of cases at the end of September 1990. With the 1990 Amendments and the enlargement of the statute of limitations from 24 months to 28 months, the deadline was extended to February 1, 1991; hence the large volume of cases filed in January 1991.

Respondent discusses at pages 3-4 of their Reply, this court addressed the legal sufficiency of an informal letter submitted to the clerk's office. In Holmes, the petitioner sent an informal letter to the clerk's office, stating that she wanted to file a claim. The pro se letter's content was somewhat detailed as to the petitioner's name, birthdate, vaccination type, date of injury, and injury sustained. The Clerk stamped the letter "received" on January 31, 1991, which was one day prior to the deadline under the 1990 Amendments with respect to the "28 month" clause. However, the letter was thereafter returned by the clerk's office to the petitioner with a request to refile in a manner consistent with the applicable statute and rules. The Clerk also suggested that petitioner file a *nunc pro tunc* (now for then) motion. Upon review, this court ruled that, "[t]he letter submitted in this case was no different in content than the hundreds of similar letters filed by the court. Accordingly, the court's Clerk clearly erred in applying a different filing standard to this petition [and returning it to petitioner] . . .petitioner's letter met the requirements regarding the contents of a petition under the Act. . .this pro se's attempt to petition the court on January 31, 1991, was legally sufficient." Holmes, at 3-4.

The court is further aware that the Supreme Court has recognized the importance of leniency when handling pro se claims. In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), cert. denied, 434 U.S. 974, 98 S.Ct. 530, 54 L.Ed.2d. 465 (1977), cert. denied, 434 U.S. 970, 98 S.Ct. 518, 54 L.Ed.2d. 465 (1977), reh. denied, 420 U.S. 1066, 97 S.Ct. 798, 50 L.Ed.2d 785 (1977), the Court writes, "[t]he handwritten pro se document is to be liberally construed... [A] pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers..." Estelle, 429 U.S. at 106, 97 S.Ct. at 292 (citing Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 596, 30 L.Ed.2d. 652 (1972), quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Furthermore, the U.S. Court of Federal Claims has followed the Supreme Court's precedence. See Thomas v. U.S., 34 Fed. Cl. 619 (1995); see also Froudi v. U.S., 22 Cl. Ct. 290 (1991), Brown v. U.S., 22C.Ct.211 (1990). However, even with a liberal construction of Petitioners' September 9, 1990, letter, the court finds, for the following reasons, that this document does not rise to the level of a pleading or petition.

First, in this case, the court agrees with Respondent that Petitioners clearly intended that the letter be treated as a request for information from the Clerk, as opposed to a request for the Clerk to file the letter as the Petition. Ms. Sanchez de Garcia begins the letter with "I'm ***requesting information about the matter in reference*** [indicating the National Childhood Vaccine Injury Act] because I received some information from a relative, concerning children affected by a vaccine." Oppo. To Mot. To Dismiss, filed 1/31/97, at Exhibit A-l (emphasis supplied). Moreover, she writes, "I haven't received any orientation about her [her daughter's] rights or any help from public agencies. ***I would appreciate your orientation as soon as possible, because I was adviced [sic] that for the elegibility [sic] of the child we have to file an application before October 1, 1990." Id.*** (emphasis supplied). The plain meaning of this language clearly demonstrates Petitioners' intention that the Clerk send Ms. Sanchez de Garcia "orientation materials" so that Petitioners can then gather the required documents and file the petition, or "application" as Petitioners so refer, prior to the October 1, 1990 deadline. As it happened, Petitioners' did file a formal petition, including certain medical records, on October 1, 1990.[6]

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[6] Had Petitioners' intended that the September 9, 1990, letter be filed as a petition under the Act, and if the court accepted Ms. Sanchez de Garcia's affidavit as persuasive proof that the letter was sent and received by the clerk, the court could have found Petitioners' letter sufficient under the Act to constitute a claim. After all, the letter provides the following information: the child's name (Ines Mari Garcia Sanchez), current age (age 16 in September 1990), vaccine type (measles), relative date of administration (when the child was one and one-half years old), place of administration (implication is Puerto Rico), date of injury (at age 4), injuries received (suffered from myoclonic seizures, coma incidences, bedridden, unable to see, hear ***or*** move, and total and permanent impairment), diagnosis (of **SSPE as relating to the vaccination), and** a list of attending physicians or hospitals (Dr. **Manuel Martinez, Puerto Rico Medical Center, New York's Jacobi Hospital, and University of Chicago's Children's Hospital).** See Oppo. **To Mot. To. Dismiss, filed** 1/31/97, **at Exhibit A-l. This court has seen less detailed letters treated as claims under the Act. However, as stated above,** it **is clear that Petitioners had no intention for this document to operate as a Petition, but it was a request for information prior to filing a Petition.**

Second, the September 9, 1990, letter is distinguishable from the letter in Holmes for reasons other than the writer's intent. In Holmes, the petitioner's letter was stamped "received" by the clerk's office. However, in this case, there is no actual proof that the clerk's office ever received the September 9, 1990, letter. Petitioners' provide no concrete proof, such as a stamped copy of the letter, from the court. Moreover, the court does not find any stamped copy in the official file, nor attached to any other pleadings. Lastly, the court has confirmed through conversations with the clerk's office that, between September 1990 and February 1991, unless a letter was actually stamped "received" and/or filed, there is no way to confirm that the clerk's office received the letter. It is important to note that, assuming the letter was received by the clerk's office's, the Clerk's failure to stamp the letter strongly indicates that the office itself treated Ms. Sanchez de Garcia's letter as simply a request for information and not the filing of a petition. Moreover, if we are to believe the Sworn Statement at paragraph 6, wherein Ms. Sanchez de Garcia states, "[a]proximately [sic] a week after mailing my letter I received a document from the U.S. Claim Court with the rules and procedures to be followed in order to be compensated under the Vaccine Program", then Petitioners' own words further support that the court likely viewed Petitioners' letter as a request for orientation materials, and nothing more.

In support of Petitioners' Opposition, Ms. Sanchez de Garcia does avow in her affidavit at Exhibit A, that she sent the September 9, 1990, letter and that '[alproximately [sic] a week after mailing *my* letter I received a document from the U.S. Claim Court with the rules and procedures to be'followed in order to be compensated under the Vaccine Program." Oppo. To Mot. To Dismiss, filed 1/31/97, at Exhibit A, para. 6. However, Ms. Sanchez de Garcia also states, in her Sworn Statement at paragraph 3, that she 'learned from the Program, its address and the Oct. 1 deadline from the enclosed newspaper clipping of the 'Houston Chronicle of September 8, 1990 which was sent to me by relatives living in Texas, U.S.A." Id. Ms. Sanchez de Garcia asks the court to believe that she received the newspaper clipping, via mail, from her relatives, prior to *or* on September 9, 1990. But as the newspaper clipping at Exhibit A-2 shows, the article is dated September 8, 1990, which was a Saturday. Id., at Exhibit A-2. The court questions that Ms. Sanchez de Garcia received the newspaper article in her Puerto Rican home, from Texas relatives, the same

day the article ran in the newspaper, ie. September 8, 1990, or that it was received on September 9, 1990, which was a Sunday, a day in which no mail is delivered. Thus, there is reason to question Ms. Garcia's memory of the events at issue.

Finally, Ms. Sanchez de Garcia states, at paragraph 8, that the affidavit encloses 'all the documents in my possession regarding the filing of my original claim and of the document sent by the Claims Court." Id. Thus, whereas in Holmes the evidence clearly showed that the clerk's office had received the letter, and indeed had communicated with the petitioner by suggesting that the claimant file a *nunc* pro *tunc* motion, in this case, Petitioners have failed to demonstrate that the court actually received the September 9, 1990, letter. However, even if the court were to believe Petitioners' Sworn Statement that the Clerk received Petitioners' letter, as the court realizes this is not entirely impossible, and that the Vaccine Guidelines were sent by the Clerk in response, Petitioners' argument that the letter constituted the claim fails, for the reasons discussed.

Lastly, though the Petitioners do not make the argument, the court notes that, notwithstanding the clerk's office's docketing challenges between September 1990 and February 1991, it cannot be said that the petition was actually received by the clerk's office, but sat for days before its October 1, 1990, processing. It is true that prior to the October 1, 1990, deadline, nearly 3000 cases were filed, stretching the court's resources to a maximum. Nonetheless, clearly the situation at that time had no effect on this case, since the affidavit attached to the Petition itself shows that Petitioners were preparing critical aspects of the Petition on September 30, 1990. Petition, filed 10/1/90. Thus, assuming an argument that the Petition was sent prior to October 1, 1990, the earliest possible date that this court could view as the Petition filing date is September 30, 1990, which still subjects Petitioners to the 1990 Amendments and, therefore, the "36 month" clause.

Based on the above analysis, the court agrees with Respondent that Petitioners' allegations are unpersuasive and&supported, and that the September 9, 1990, letter was simply an inquiry about the Program and a request for information. Thus, the court finds that the "real" petition upon which the claim is grounded was filed October 1, 1990.

III. CONCLUSION

Given the court's finding that the Petition was as filed on October 1, 1990, and given further that Petitioners acknowledges that the onset of the injury occurred in April 1978[7], approximately 40 months following the vaccination date of December 11, 1974, the Petitioners' claim was filed outside the "36 month" limitation imposed by §16(a)(1) and is, therefore, untimely. Unfortunately, there is no legal or equitable remedy available to Petitioner from this court to correct that filing deficiency.[8] Thus, Respondent's Motion to Dismiss is hereby sranted.

The Clerk is instructed to enter judgment accordingly.

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

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[7] See Mot. To Dismiss, filed 12/9/96, at 2, and Oppo. To Mot. To Dismiss, filed 1/31/97, at 6. The discrepancy in the parties' facts regarding whether the onset was in April 1978 or May 1978 does not change our analysis or conclusion; either way, the onset occurred more than 36 months after the vaccination's administration.

[8] The court has not addressed equitable tolling, an issue often associated with the interpretation and application of §16, as it has not been raised or discussed by either party in their respective motion(s) and responses thereto.

However, the court will address Petitioners' comments at page 6 of their Opposition, wherein she raises an important issue concerning the connection between the MMR vaccination and SSPE. I concur with Petitioner that medical literature establishes that the onset of SSPE occurs, more often than not, outside the time period of 36 months from the vaccination date. Consequently, under the statute, the class of petitioners claiming SSPE from an MMR vaccination may oftentimes be barred from filing a claim, even though they could file timely under the '28 month" clause. However, whether or not the Act's limitation deadlines are unfair or arbitrary with respect to this particular class of petitioners is not for this court to decide, nor is 'this the proper forum for making that argument or for changing the law. This court is required to apply the limitation deadlines as written by Congress, unless and until such body sees a need 'to amend the law.