

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 01-285V

Filed: June 26, 2013

JAMES C. MCCLOY and JENNIFER
MCCLOY, Parents and Next Friends of
JAMES C. MCCLOY, III

Petitioners,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Autism; Dismissal of Claim
as Untimely Filed;

DECISION¹

On May 9, 2001, the petitioners, on behalf of their son, James C. McCloy, III (“Jace”), filed a claim for compensation pursuant to the National Vaccine Injury Compensation Program (“Vaccine Program” or “the Program”).² 42 U.S.C. §§ 300aa-1 to -34 (2006). The petition alleged that a measles, mumps, and rubella (“MMR”) vaccination injured Jace.

¹ Because this decision contains a reasoned explanation for the action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims' 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)). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, the undersigned agrees that the identified material fits within the requirements of that provision, the undersigned will delete such material from public access.

² The National Vaccine Injury Compensation Program (“Vaccine Program” or “the Program”) is set forth in 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. (2006) (“Vaccine Act” or “the Act”). All citations in this Decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

Petitioners have the burden to demonstrate that their case was properly and timely filed under the Vaccine Act's statute of limitations. § 300aa-16(a)(2). Based on the analysis of the evidence, petitioners have not met their burden, and thus **this case is dismissed as untimely filed.**

I. Background and Facts.

The petition in this case, which was filed on May 9, 2001, alleged that Jace suffered injuries as the result of the MMR vaccination he received on May 1, 1998. (Petition, ¶4.) The medical records indicate that James suffered two seizures on either May 4 or May 5, 1998. (Sparrow Hospital records, May 4-6, 1998.) Petitioners claim that the MMR vaccination on May 1, 1998, caused either the seizures, or the injuries that manifested later. (Petition, ¶¶4-5)

II. Applying the Facts to the Law.

The Vaccine Act provides that:

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...

§16(a)(2) (emphasis added). Recently, in the *Cloer* case, the 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.” *Cloer v. Sec’y, HHS*, 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc).

Petitioners filed their vaccine claim on May 9, 2001. Therefore, to be timely filed, the “first symptom or manifestation of onset or of the significant aggravation” of Jace’s injury must not have occurred before May 9, 1998. §16(a)(2). Jace’s medical records, however, indicate that Jace exhibited symptoms of his alleged vaccine injury on May 4 or 5, 1998, four or five days too early for their Petition to have met the statutory filing deadline.

Subsequent to the Federal Circuit's *en banc* decision in *Cloer*, I ordered petitioners to file any arguments concerning the timeliness of their Petition by no later than October 13, 2012. (Order filed August 13, 2012.) Petitioners failed to file any response to that Order. On January 18, 2013, I ordered petitioners to file a statement by no later than February 18, 2013, if they disagreed that the first sign or symptom of Jace's alleged vaccine injury were the seizures he experienced on or about May 5, 1998. (Order filed January 18, 2013.) No response was filed.

IV. Conclusion.

Petitioners have the burden to show timely filing. Petitioners have failed to establish that this case 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" as required by the Vaccine Act. § 300aa-16(a)(2). Accordingly, while I am very sympathetic concerning the unfortunate condition from which Jace has suffered, under the law, I have no choice but to **dismiss this case as untimely filed. The clerk is directed to enter judgment accordingly.**

IT IS SO ORDERED.

George L. Hastings, Jr.
Special Master