

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

No. 03-2355V

Filed: January 18, 2012

To be Published

MELISSA COOK and SHAWN COOK,	*	
parents of Shawn Cook, Jr., a minor,	*	
	*	
Petitioners,	*	
	*	Autism; Statute of Limitations;
v.	*	Untimely Filing; Pending Civil Action
	*	
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

DECISION¹

VOWELL, Special Master:

On October 14, 2003, Melissa and Shawn Cook ["Mrs. Cook," "Mr. Cook," or "petitioners"] filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*² [the "Vaccine Act" or "Program"], on behalf of their son, Shawn Cook, Jr. ["Shawn"]. The petition was filed pursuant to Autism General Order #1,³ using a "short-form" petition for compensation.⁴ Although

¹ Because I have designated this decision to be published, petitioners have 14 days to request redaction of any medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Vaccine Rule 18(b). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material. Otherwise, the entire decision will be publicly available.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

³ The text of Autism General Order #1 can be found at <http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf> ["Autism Gen. Order #1"], 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002).

⁴ By electing to file a Short-Form Autism Petition for Vaccine Compensation petitioners alleged that:

petitioners were originally represented by counsel, they are now proceeding *pro se*.⁵

Respondent has filed two motions to dismiss this case, asserting in both that the petition was not timely filed. In the second motion, respondent also asserted that a civil action was pending at the time the petition was filed, and thus that the petition was defectively filed. Petitioners responded to both motions. I deferred a decision on the motions, pending an en banc decision of the U.S. Court of Appeals for the Federal Circuit addressing the Vaccine Act's statute of limitations. That decision was issued on August 5, 2011. See *Cloer v. Sec'y, HHS*, 654 F.3d 1322 (Fed. Cir. 2011) (en banc). After the *Cloer* decision was issued, I afforded the parties an opportunity to file additional matters. Order, filed Aug. 22, 2011. Respondent filed a supplemental response and evidence on September 19, 2011. Petitioners failed to respond.⁶ This case is now ripe for a decision on the dismissal motions.

Two factors affect the computation of the date of timely filing in this case. The first factor is when the first symptom or manifestation of onset of the alleged vaccine injury occurred. To be timely, the petition must have been filed within 36 months of that occurrence. See § 300aa-16(a)(1). The second factor is whether the earlier filing of a civil suit based on vaccine causation of Shawn's autism in the United States District Court for the Eastern District of Louisiana⁷ affects the running of the statute of limitations in this

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has 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 Gen.Order #1 at Ex. A, p. 2 (footnote omitted).

⁵ On June 27, 2007, petitioners themselves attempted to file correspondence received from their attorney, indicating his intent to withdraw from representation. In response, I ordered petitioners' counsel to file status reports concerning the reasons for seeking leave of court to withdraw from representation and his efforts to aid petitioners in securing other counsel. The efforts to secure replacement counsel were ultimately unsuccessful, and on August 26, 2008, I granted a July 31, 2008 motion filed by petitioners' counsel to withdraw. The petitioners thereafter proceeded *pro se*.

⁶ Petitioners' response was initially due by September 19, 2011. On or about October 24, 2011, petitioners telephonically contacted the court. Petitioners indicated they had retained counsel and requested additional time to file a response to respondent's supplemental filings addressing *Cloer*. I granted their request. Based on their representations I expected an attorney to promptly enter a notice of appearance in the case, and therefore extended the response deadline to thirty days after a notice of appearance was filed. Order, filed Oct. 24, 2011. However, no notice of appearance was filed, and on November 21, 2011, I ordered petitioners to file their response by December 21, 2011. My order noted that if an attorney entered an appearance before then, I would suspend the deadline until after I held a status conference. Order, filed Nov. 21, 2011. To date, no notice of appearance or supplemental response has been filed.

⁷ In their "short-form" filing, petitioners did not disclose the existence of a prior civil suit, filed May 19, 2003, in the United States District Court, Eastern District of Louisiana, against the manufacturers of Shawn's

case. See §§ 300aa-11(a)(2), 300aa-11(a)(5)(B). Additionally, this case presents the issue of whether the petition was properly filed in the first instance, given the pendency of a civil action. See § 300aa-11(a)(5)(B). That issue turns on the nature of the relief sought in the civil action.

For the reasons set forth below, **I dismiss this petition as improperly and untimely filed.**

I. Procedural History.

A. The Vaccine Act Petition.

After the petition was filed, this case was stayed for nearly six years (other than for action on the former attorney's motion to withdraw), pending completion of discovery and entitlement determinations in the Omnibus Autism Proceeding ["OAP"]. I set forth a brief history of the OAP in the two OAP test cases assigned to me, *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044, at *4 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 706 (2009) and *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010), and incorporate that history by reference here.

While the test cases were being heard and decided, orders were issued in most of the stayed OAP cases to position them for resolution at the conclusion of the test case appeals, and this case was no exception. On March 13, 2009, I ordered petitioners to file all medical records "from the period of the vaccinee's birth through either, whichever date is later, (1) the date of petition filing, or (2) the date of the vaccinee's initial diagnosis of autism, autism spectrum disorder, a speech or language delay related to an autism diagnosis, or any similar neurological disorder related to an autism diagnosis." Order, filed March 13, 2009, at 5 ["Phase 1 Order"].⁸

vaccines, and against the manufacturer of the thimerosal preservative contained in some of the vaccines. The civil suit complaint contended that vaccines were responsible for Shawn's autism. The existence of civil suit was brought to the court's attention on June 11, 2009. See *infra* Section I B1.

⁸ As detailed in Autism Gen. Order #1, the number of petitions alleging vaccine causation of autism spectrum and related disorders (ultimately about 5400 such petitions were filed) strained the resources of both the bench and bar, leading to the issuance of that general order. Autism Gen. Order #1 permitted petitioners to file petitions for compensation without any of the statutorily required documentation of vaccination, injury, and evidence of causation, while a group of attorneys (referred to as the Petitioners' Steering Committee ["PSC"]) representing the petitioners' bar gathered evidence to present in "test" cases. When the discovery process in the OAP drew to a close, these test cases were selected and hearings scheduled, which produced a large body of evidence that petitioners and respondent could use in subsequent cases. Before that evidence could be applied to determine causation, petitioners in other cases within the OAP needed to establish that the remaining statutory requirements for compensation had been met in their own individual cases, including the timely filing of their petitions. After consultation with the PSC and respondent's counsel, the Chief Special Master established a procedure by which approximately 200 cases in the OAP were selected each month, and petitioners in those cases were ordered to file certain records. This order was referred to as a "Phase 1 Order."

On June 11, 2009, petitioners filed medical records and a “Statement of Compliance” in response to the Phase 1 Order. Respondent filed a Motion to Dismiss [“Res. Mot.”] on July 9, 2009, asserting that the petition was filed outside the statute of limitations period. On August 12, 2009, petitioners responded, filing a document entitled Arguments in Opposition to Respondent’s Motion to Dismiss [“Pet. Opp.”]. The subsequent procedural history is contained in Part B.3 below.

B. The Civil Action.

1. Disclosure of the Pending Civil Action.

One of the records filed on June 11, 2009, was a “Notice of Collateral Proceedings” pertaining to Civil Action No. 03-1417, which had been filed on May 19, 2003, (approximately five months prior to filing of the Vaccine Act petition), in the United States District Court, Eastern District of Louisiana. See Petitioners’ Exhibit [“Pet. Ex.”] 15. The case was styled “*Melissa and Shawn Cook v. Eli Lilly and Co., Wyeth, Inc., and Aventis Pasteur, Inc.*” The body of the notice indicated that plaintiffs Melissa and Shawn Cook were “seek[ing] damages arising from an autistic minor child’s exposure to thimerosal, a mercury-based preservative used in childhood vaccines.” Pet. Ex. 15 at 1. This was the first indication that petitioners had filed a prior civil suit.

Neither Pet. Ex. 15 nor any other filing made in response to the Phase 1 Order indicated whether this was a suit for Mr. and Mrs. Cook’s loss of consortium or whether it sought recovery on Shawn’s behalf, although the style of the case suggested that it was not brought in a representative capacity. I therefore ordered petitioners to file a copy of the original complaint filed in the Eastern District of Louisiana. Petitioners complied on November 5, 2009.⁹

2. The Bases for the Civil Action.

The complaint asserts that Shawn “was poisoned by the cumulative doses of mercury in the thimerosal” that he received through vaccinations administered during his first years of life. Pet. Ex. 17, ¶ 12. The complaint sets forth several causes of action, including a products liability claim against the vaccine manufacturers [“Vaccine Defendants”] and a claim of negligent and/or fraudulent misrepresentations as to thimerosal’s safety against the “Thimerosal Defendant.”¹⁰ Pet. Ex. 17, ¶¶ 16-40.

Paragraphs 41 and 42 of the complaint assert:

⁹ Petitioners designated this complaint as “Exhibit 15.” As that exhibit designation had already been assigned to the Notice of Collateral Proceedings, I have redesignated the civil complaint as Petitioners’ Exhibit 17, the next-in-order exhibit number.

¹⁰ Eli Lilly and Company is the sole “Thimerosal Defendant.”

The Parent Plaintiffs reasonably believed that their decision to have vaccines administered to Shawn Cook, Jr., would inure not only to the physical health benefit of their child, but would also inure to their own benefit, the benefit of their relationship to Shawn Cook, Jr., their enjoyment of life, and peace of mind.

As the result of the combined acts of the Defendants, and the acts of each of them, the Parent Plaintiffs' [sic] have suffered and will continue to suffer from the loss of consortium of their minor child and from the loss of enjoyment of life.

Pet. Ex. 17.

The complaint further asserted that Mr. and Mrs. Cook [the "Parent Plaintiffs"] "have filed a petition for compensation for their child's injuries pursuant to the Vaccine Injury Compensation Program." Pet. Ex. 17, ¶ 43. This statement was incorrect, as, at the time the civil action was filed in United States District Court, May 19, 2003, no vaccine petition had yet been filed. The instant petition was not filed until some five months later, on October 14, 2003.

The prayer for relief section of the complaint sets forth different requests for damages, based on two classes of defendants. The first section, found at the top of page 12 of the complaint, seeks damages for the parents' loss of consortium against the Vaccine Defendants as the result of Shawn's autism. The second section seeks damages for loss of consortium and the past and future costs "necessitated by the mercury poisoning of Shawn Cook, Jr." plus loss of income and earning capacity as against the Thimerosal Defendant, Eli Lilly. Pet. Ex. 17 at 11-12. It thus appears that, as to Eli Lilly, the complaint is asserting an entitlement to damages for Shawn's own injuries, such as his loss of income or earning capacity, rather than solely asserting his parents' loss of consortium claim.¹¹

On December 1, 2003, the civil suit was stayed and closed for statistical purposes only. Pet. Ex. 17. There is no evidence that the civil complaint has been dismissed.¹²

¹¹ A possible reason for seeking only damages for loss of consortium as to the vaccine manufacturers, and both loss of consortium and lost income and earning capacity as to the thimerosal manufacturer, is addressed in Section IV.

¹² A search of the electronic docket for the case reveals two events have occurred since the December 1, 2003 order was issued. On December 22, 2003, defendant Eli Lilly's attorneys filed a notice of address change and on March 18, 2010, counsel for defendant Wyeth filed a corporate disclosure notice.

3. Actions Subsequent to the Disclosure of the Civil Action.

Based on the disclosure of the civil action and documents associated therewith, respondent filed a renewed Motion to Dismiss ["Res. 2d Mot."] on December 14, 2009. Petitioners filed their Argument in Opposition to Respondent's Second Motion to Dismiss ["Pet. 2d Opp."] on January 25, 2010. Respondent filed a supplemental response ["Res. Suppl. Response"] on September 19, 2011. Petitioners did not respond.

The effect of the civil action on the Vaccine Act claim and the statute of limitations is discussed in Section IV. In order to fully address the legal issues, it is necessary to determine when the first symptom or manifestation of onset occurred in Shawn's case. Thus, some discussion of his medical history and the diagnostic criteria for his disorder are necessary. These are addressed in Sections II and III, below.

II. Evidence Concerning Vaccinations, Symptoms, and Diagnosis.

Shawn was born on October 20, 1997, by cesarean section. Pet. Exs. 1, p. 1; 3, p. 1. Although his Apgar scores¹³ were 8 and 9, Shawn was placed in the neonatal intensive care unit, based on suspected sepsis and respiratory distress. He was discharged five days later in good health. Pet. Ex. 3, p. 1.

Shawn received a number of routine childhood immunizations between October 27, 1997 and January 8, 1999 (the date of the last recorded vaccination). Pet. Ex. 2, pp. 1-6. His pediatric records (see *generally*, Pet. Ex. 6) reflect a generally healthy infant, albeit one with frequent ear infections, resulting in the placement of bilateral myringotomy tubes on January 6, 2000, when he was 26 months old (Pet. Ex. 6, p. 20). He also had minor surgery at the same time to remove his adenoids and to clip a large frenulum.¹⁴ See Pet. Ex. 8, pp. 14, 18-20.

At a pediatric visit on April 14, 2000, when Shawn was 30 months old, his mother reported that he was "not talking." Shawn used only the words "mom," "dad," "ball," "dog," and "no."¹⁵ The health care provider's notes indicate that Mrs. Cook was

¹³ The Apgar score is a numerical assessment of a newborn's condition (with lower numbers indicating problems), usually taken at one minute and five minutes after birth. The score is derived from the infant's heart rate, respiration, muscle tone, reflex irritability, and color, with from zero to two points awarded in each of the five categories. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (32nd ed. 2012) ["DORLAND'S"], at 1682; Robert Kliegman, Bonita Stanton, Joseph St. Geme, III, Nina Schor, and Richard Behrman, NELSON TEXTBOOK OF PEDIATRICS (19th ed. 2011) ["NELSON'S"] at 536-37.

¹⁴ The frenulum is the mucous membrane that runs from the floor of the mouth to the bottom of the tongue. See DORLAND'S at 745. Shawn's frenulum was attached to the tip of the tongue, rather than further back along the dorsal aspect of the tongue. This resulted in a condition called ankyloglossia, in which restricted movement of the tongue causes speech difficulty. See DORLAND'S at 93; Pet. Ex. 6, p. 20; Pet. Ex. 8, pp. 18-20.

¹⁵ I note that a standard pediatric textbook indicates that by two years of age, the typical child has a vocabulary of between 50-100 words at two years of age. NELSON'S at 33. Shawn had only five words at

concerned about her son's lack of language. There was also some indication that Shawn was easily agitated and difficult to console. Pet. Ex. 6, p. 18. Shawn was assessed as a well child with speech delay, and referred for evaluation. *Id.*

Shawn was evaluated by the local school system on September 14, 2000.¹⁶ The evaluator noted that Shawn had adequate oral-motor functioning, with age-appropriate articulation. Nevertheless, he had delays in both receptive and expressive language skills. The evaluator also commented on Shawn's lack of interaction with peers or adults in an age-appropriate manner. His social performance was nine months below his chronological age, and his communication was 15 months below his age level. Pet. Ex. 11, pp. 1-2. He also displayed "repetitive motion and sound." According to the evaluator, Shawn displayed "sympto[m]s of mild Autism or Asperger's Syndrome." *Id.*, p. 1.

III. Diagnostic Criteria for Autism Spectrum Disorders.

Only respondent filed any evidence¹⁷ concerning the diagnostic criteria for autism spectrum disorder ["ASD"]. The information contained in this section is drawn from that evidence. The transcript excerpts contained in Respondent's Exhibits ["Res. Exs."] C-E were from OAP test case testimony provided by three pediatric neurologists with considerable experience in diagnosing ASD.

"Autism Spectrum Disorder" or "ASD" is an umbrella term for certain developmental disorders, including autism (also referred to as autistic disorder), pervasive developmental disorder - not otherwise specified ["PDD-NOS"], and Asperger's Disorder. See R. Luyster, et al., *Language Assessment and Development in Toddlers with Autism Spectrum Disorders*, J. AUTISM DEV. DISORD. 38: 1426-38, 1426 (2008) ["Luyster"] filed as Res. Ex. A. "Pervasive developmental disorders" is the umbrella term used in the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (American Psychiatric Association, 4th ed. text revision 2000) ["DSM-IV-TR"] at 69, rather than ASD. I use the term ASD throughout this opinion rather than PDD because of the possible confusion between "PDD" (the umbrella term referring to the general diagnostic category) and "PDD-NOS" (which is a specific diagnosis within the general diagnostic category of PDD or ASD). I use the term "autism" to refer solely to the specific diagnosis of "autistic disorder."

two and one half years of age.

¹⁶ There may have been an earlier evaluation by a different parish school, but a "no records available" statement from that parish was filed as Pet. Ex. 10. Shawn had been referred to "Childnet" in April, 2000 (Pet. Ex. 6, p. 18), and the list of exhibits filed by petitioners indicated that the "Terrebonne Parish School Board/CHILDNET" records were unavailable.

¹⁷ All of the evidence filed in the OAP test cases is available to any petitioner in the OAP, as well as to respondent. I note that there did not appear to be any material disputes in the OAP test cases about what constituted the early symptoms of autism or other ASD.

The specific diagnostic criteria for ASD are found in the DSM-IV-TR, the manual used in the United States to diagnose dysfunctions of the brain. Res. Ex. C, excerpt of testimony of Dr. Eric Fombonne in the *Cedillo* OAP test case [“Fombonne Tr.”], at 1278A. Thus, these are the behavioral symptoms recognized by the medical profession at large as symptoms of ASD. The DSM-IV-TR contains specific diagnostic criteria for autistic disorder (often referred to as “autism” or “classic autism”), Asperger’s disorder, and pervasive developmental disorder-not otherwise specified (most frequently referred to as “PDD-NOS”). It is not uncommon for parents and even health care providers to use these terms in non-specific ways, such as referring to a child as having an “autism diagnosis,” even though the specific diagnosis is PDD-NOS.

A. Diagnosing Autism Spectrum Disorders.

The behavioral differences in autism spectrum disorders encompass not only delays in development, but also qualitative abnormalities in development. Fombonne Tr. at 1264A; Res. Ex. D, testimony of Dr. Max Wiznitzer in the *Cedillo* OAP test case [“Wiznitzer Tr.”], at 1589-91. There can be wide variability in children with the same diagnosis. One child might lack language at all, while another with a large vocabulary might display the inability to engage in a non-scripted conversation. Wiznitzer Tr. at 1602A-1604. However, both would have an impairment in the communication domain.

Testing for the presence of an ASD involves the use of standardized lists of questions about behavior directed to caregivers and parents, as well as observations of behaviors in standardized settings by trained observers. Fombonne Tr. at 1272A-74A. One behavioral symptom alone, such as hand-flapping, would not be diagnostic of an ASD, but if present, it would be a symptom that would be part of the diagnostic picture. As Dr. Fombonne explained, in diagnosing an ASD, “we try to observe symptoms, and when we have observed enough symptoms, then we see if the child meets these criteria.” Fombonne Tr. at 1278A-79; see also Res. Ex. E, testimony of Dr. Michael Rutter in the *King* OAP test case [“Rutter Tr.”], at 3253-54 (describing diagnostic instruments and their use in clinical settings).

Typically in children with autism spectrum disorders, the symptoms have been present for weeks or months before parents report them to health care providers. Fombonne Tr. at 1283. The most common age at which parents recognize developmental problems, usually problems in communication or the lack of social reciprocity, is at 18-24 months of age. Rutter Tr. at 3259-60. The development of symptoms of an ASD occurs very gradually, and it is not uncommon for the parents to be unable to date the onset very precisely. Fombonne Tr. at 1285A-1286A.

1. Autistic Disorder.

A diagnosis of autistic disorder requires a minimum of six findings from a list of impairments divided into three domains of impaired function: (1) social interaction; (2) communication; and (3) restricted, repetitive, and stereotyped patterns of behavior, interests, and activities. At least two findings related to social interaction and at least one each in the other two domains are required for diagnosis. To meet the diagnostic criteria for autism, the child must have symptoms consistent with six of the twelve listed types of behavioral impairments. Furthermore, the abnormalities in development must have occurred before the age of three. Fombonne Tr. at 1264A, 1279; Wiznitzer Tr. at 1618; Rutter Tr. at 3250. Although the majority of children with autism have developmental delays, many are of normal intelligence. Fombonne Tr. at 1276; Rutter Tr. at 3256. In testimony in *Cedillo* OAP test case, Dr. Wiznitzer described the three domains as the “core features” of a diagnosis on the autism spectrum. Wiznitzer Tr. at 1589-92. Children with autism are most symptomatic in the second and third years of life. Wiznitzer Tr. at 1618.

2. Pervasive Developmental Disorder-Not Otherwise Specified.

The DSM-IV-TR defines PDD-NOS as “a severe and pervasive impairment in the development of reciprocal social interaction,” coupled with impairment in either communication skills or the presence of stereotyped behaviors or interests. DSM-IV-TR at 84. The diagnosis is made when the criteria for other autism spectrum disorders, or other psychiatric disorders such as schizophrenia, are not met. *Id.* It includes what has been called “atypical autism,” which includes conditions that present like autistic disorder, but with onset after age three, or which fail to meet the specific diagnostic criteria in one or more of the domains of functioning. *Id.* As I noted in *Dwyer*, it is the most prevalent of the disorders on the autism spectrum. *Dwyer*, 2010 WL 892250 at *30.

3. Asperger’s Disorder.

Asperger’s disorder is a form of high-functioning autism. It presents with significant abnormalities in social interaction and with restricted, repetitive, and stereotyped patterns of behavior, interests, and activities. See DSM-IV-TR at 84. Diagnosis of Asperger’s disorder requires two impairments in social interaction and one impairment in restricted, repetitive, and stereotyped patterns of behavior. *Id.* Of note, it does not require language or communication abnormalities. *Id.*

B. The Domains of Impairment and Specific Behavioral Symptoms.

1. Social Interaction Domain.

This domain encompasses interactions with others. Fombonne Tr. at 1264A. There are four subgroups within this domain. Wiznitzer Tr. at 1594. The subgroups include: (1) a marked impairment in the use of nonverbal behavior, such as gestures, eye

contact and body language; (2) the failure to develop appropriate peer relations; (3) marked impairment in empathy; and (4) the lack of social or emotional reciprocity. Wiznitzer Tr. at 1594-96. To be diagnosed with autism (autistic disorder), the patient must have behavioral symptoms from two of the four subgroups. Wiznitzer Tr. at 1594. For an Asperger's diagnosis, there must be two impairments in this domain as well. DSM-IV-TR at 84. For PDD-NOS, there must be at least one impairment in this domain. Fombonne Tr. at 1275A.

Doctor Wiznitzer described the degrees of impairment in interactions with others as a continuum, with affected children ranging from socially unavailable to socially impaired. A child who is socially unavailable may exhibit such behaviors as failing to seek consolation after injury or purposeless wandering, or may simply appear isolated. Wiznitzer Tr. at 1598. A less impaired child might be socially remote, responding to an adult's efforts at social interaction, but not seeking to continue the contact. This child might roll a ball back and forth with an adult, but will not protest when the adult stops playing. Wiznitzer Tr. at 1599. Given a choice between playing with peers and playing by himself, a child with impairments in social interaction will play by himself. *Id.* Some children with ASD demonstrate socially inappropriate interactions, such as pushing other children in an effort to interact. Wiznitzer Tr. at 1600. A higher functioning child might attempt interaction, but does so as if reading from a script. As an example, Dr. Wiznitzer discussed a patient who, when asked where he lived, could not answer, but responded appropriately when asked for his address. *Id.* at 1601.

Symptoms used to identify young children with impairments in the social interaction domain include lack of eye contact, deficits in social smiling, lack of response to their name, and the inability to respond to others. Fombonne Tr. at 1269A-70A. Others include a lack of imitation, lack of interest in other children, and infrequent seeking to share with others. R. Landa, *Diagnosis of autism spectrum disorders in the first 3 years of life*, NATURE CLINICAL PRACTICE NEUROLOGY, 4(3): 138-47 (2008) ["Landa"], filed as Res. Ex. B, at Table 1.

2. Communication Domain.

The communication domain involves both verbal and non verbal communication, such as intonation and body language. Fombonne Tr. at 1263; Wiznitzer Tr. at 1602A. Language abnormalities in ASD encompass not only delays in language acquisition, but the lack of capacity to communicate with others. Fombonne Tr. at 1267A. "Delays and deficits in language acquisition" are "among the key diagnostic criteria for autism spectrum disorders." Luyster at 1426.

There are four criteria within the communication domain. Wiznitzer Tr. at 1602A. They include: (1) a delay in or lack of development in spoken language, without the use of signs or gestures to compensate; (2) problems in initiating or sustaining conversation; (3) stereotypic or repetitive use of language, including echolalia and repeating the script of a video or radio presentation, such as singing a commercial jingle; and (4) the lack of

spontaneous imaginative or make-believe play. Wiznitzer Tr. at 1602A-05.

Language delay, limited babbling, lack of gestures, and a lack of pointing to communicate things other than basic wants and desires (lack of “protodeclarative” vs. “protoimperative” pointing), are all early symptoms used to diagnose impairments in the communication domain. Fombonne Tr. at 1266A-68A. Doctor Wiznitzer described the failure to share discoveries via language in autistic children as well. Wiznitzer Tr. at 1606A. Children with ASD who have more developed language skills may display difficulties in social communication outside their limited area of interest. *Id.* at 1607.

Within the communication domain, children with ASD have difficulties in joint attention, which Dr. Wiznitzer described as sharing an action or activity with another person or even an animal. They also have problems with what he called metalinguistic skills, referring to the meaning behind the language used, which may be conveyed by tone, body language, humor or sarcasm. Children with ASD may understand visual humor, illustrated by the cartoon of an anvil falling on the coyote’s head, but lack the ability to understand a joke. Wiznitzer Tr. at 1607-09. They focus on the literal, rather than the figurative, meaning of words: telling a child with ASD to “hop to it” may elicit hopping, rather than an increase in speed in completing a task. Children with ASD use language primarily for getting their needs met. *Id.* at 1609. Such a child might lead a parent to the cookie jar, but would not lead a parent to a caterpillar crawling along the sidewalk.

Children with ASD often have impairments in specific types of play. They may understand cause and effect play, but have difficulties in imitative or representational play. In other words, they can push a button to make a toy figure pop up, but have difficulty with holding a tea party, putting a stuffed animal to bed, or feeding a doll. Wiznitzer Tr. at 1610-11. They also have impairments in symbolic play, in which an object such as a stick represents another object, such as a magic wand or sword. *Id.* at 1612.

Speech and language delays are the symptoms most commonly reported by parents as a concern leading to a diagnosis of ASD. Luyster at 1426; see also Fombonne Tr. at 1284 (one of first concerns noted by parents is the lack of language development); Rutter Tr. at 3253 (problems in social and communication domains tend to be observed much earlier than stereotyped behaviors).

A deficit in at least one of the subgroups in the communication domain is required for an autism diagnosis. Wiznitzer Tr. at 1602 A. An Asperger’s diagnosis does not require a communication domain impairment and a PDD-NOS diagnosis requires an impairment in either this domain or the patterns of behavior discussed next. See Fombonne Tr. at 11275A-76; Wiznitzer Tr. at 1592.

3. Restricted, Repetitive and Stereotyped Patterns of Behavior Domain.

There are four categories within this domain. They include (1) a preoccupation with an interest that is abnormal in intensity or focus, such as spinning a plate or a wheel or developing an intense fascination with a particular interest, such as dinosaurs, cartoon characters, or numbers; (2) an adherence to nonfunctional routines or rituals, such as eating only from a blue plate, sitting in the same seat, or walking the same route; (3) stereotypic or repetitive motor mannerisms, such as finger flicking, hand regard, hand flapping, or twirling; and (4) a persistent preoccupation with parts of an object, such as focusing on the wheel of the toy car and spinning it, rather than playing with it as a car. Wiznitzer Tr. at 1613A-15; Fombonne Tr. at 1271A-72A.

As Dr. Fombonne explained, this domain reflects abnormalities in the way play skills develop, as well as repetitive and rigid behavior. Fombonne Tr. at 1264A. A typical toddler may flick a light switch a few times, but the child with ASD performs the same action to excess. Wiznitzer Tr. at 1616. Doctor Rutter described one child who would not turn right; to make a right turn at a crossroads, he would have to make three left turns. Rutter Tr. at 3252-53.

For a diagnosis of autism, a child must display behaviors in at least one of the categories included in this domain. Wiznitzer Tr. at 1613A. For an Asperger's diagnosis there must be at least one behavioral impairment encompassed in this domain. See Fombonne Tr. at 1275A-76. A PDD-NOS diagnosis requires either an impairment in this domain or an impairment in the communication domain. See Wiznitzer Tr. at 1592.

D. Summary.

The evidence establishes that a diagnosis of ASD is based on observations of behavioral symptoms. The symptoms are categorized into three domains.

For a definitive diagnosis of autism, the child must display specific behavioral abnormalities in each of the domains, with six behaviors from the list of twelve present. There must be at least two behaviors encompassed in the social interaction domain, reflecting the importance of impaired social interaction in diagnosing ASD. Of significance, the behavioral abnormalities must be manifest before the age of three.

Thus, the absence of any specific symptom would not rule out the diagnosis, so long as the requisite numbers of impairments in each domain of functioning are present. Conversely, autism cannot be diagnosed by any single abnormal behavior, but the ultimate diagnosis is based on an accumulation of symptomatic behaviors. The existence of any one behavioral abnormality associated with autism is sufficient to trigger the running of the statute of limitations.

For a diagnosis of Asperger's disorder, the child must display behavioral abnormalities similar to those of children with autistic disorder, but need not have a

language abnormality. Fombonne Tr. at 1275A-76; see also DSM-IV-TR at 84 (requiring two impairments in social interaction and one in restricted, repetitive, and stereotyped patterns of behavior, interests, and activities for this diagnosis).

For a PDD-NOS diagnosis, the child must display behavioral abnormalities in all three domains. However, the diagnosis is given when the impairments fall short of the criteria for a diagnosis of autism (autistic disorder). Fombonne Tr. at 1275A.

IV. Analysis.

There are two reasons this claim must be dismissed. First, a civil action seeking damages for lost earning capacity was pending at the time the Vaccine Act petition was filed. Second, the petition was untimely, both as filed, and considering the “saving” provision of § 300aa-11(a)(2)(B). Either reason necessitates the dismissal of this case.

A. A Pending Civil Action.

After petitioners filed a copy of the civil action against the vaccine manufacturers and Eli Lilly, respondent renewed her motion to dismiss, focusing her arguments on the improper filing of the petition while the civil action was pending.¹⁸ Noting that the civil action had been stayed, respondent argued that staying a case is not the same as dismissing the civil action. I agree.

What respondent did not address in her second motion to dismiss is the subtler issue of whether the civil action sought damages for only Mr. and Mrs. Cook’s loss of consortium claim, based on Shawn’s condition, or whether the damages sought were for Shawn’s own injuries. If the civil action involved only Mr. and Mrs. Cook’s loss of consortium claim, the civil action would not act as a jurisdictional bar to the Vaccine Act petition. As petitioners correctly noted, citing to *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004), the Vaccine Act does not apply to loss of consortium claims. See also *Abbott v. Sec’y, HHS*, 19 F.3d 39, 1994 WL 32656 (Fed. Cir. 1994)(table) (a parent’s recovery of civil damages for loss of consortium is a separate action from that available to her son’s estate under § 300aa-11(c)(1)(E)).

Petitioners contend that the civil action involves only their own damages, and not those of Shawn. Pet. 2d Opp. at 3. With regard to the vaccine manufacturers, petitioners’ assertion appears correct. The prayer for relief concerns only a loss of consortium claim. However, with regard to the “Thimerosal Defendant,” Eli Lilly, it appears that petitioners are seeking damages on behalf of Shawn. The language of the prayer for relief so suggests, in that the damages sought include Shawn’s loss of earning capacity, but the style of the case does not indicate that the suit was brought in a

¹⁸ Although in footnote 1, respondent renewed her assertion that the petition was untimely filed, Res. 2d Mot. at 3, most of the argument concerned the application of § 300aa-11(a)(5)(B): “If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under [the Vaccine Act] for such injury or death.”

representative capacity. Petitioners pointed to a ruling of the Mississippi Supreme Court, *Cook v. Children's Medical Group, P.A.*, 756 So. 2d 734 (Miss. 1999), indicating that the Vaccine Act does not encompass fraudulent misrepresentation claims, and thus the bar on civil actions in § 300aa-11(a)(2) was inapplicable. Pet. 2d Opp. at 2. However, *Cook* so held only with regard to parents' claims, not those of the child. 756 So. 2d at 742-43.

Determining whether the Vaccine Act petition was improperly filed is complicated by the fact that the loss of earning capacity claims were brought against Eli Lilly, the "Thimerosal Defendant." In civil litigation outside the Vaccine Program, a number of plaintiffs have contended that thimerosal was an adulterant, not a vaccine component, and thus civil suits based on the theory that thimerosal caused autism spectrum disorders could be brought without first filing a Vaccine Act claim. In 2002, then-Chief Special Master Golkiewicz ruled that the Vaccine Act encompassed thimerosal claims. *Leroy v. Sec'y, HHS*, 2002 WL 31730680 (Fed. Cl. Spec. Mstr. Oct. 11, 2002). Similar rulings have been issued by other courts. *E.g. Liu v. Aventis Pasteur*, 219 F. Supp. 2d 762 (W.D. Tex 2002); *Laughter v. Aventis Pasteur*, 291 F. Supp. 2d 406 (M.D. N.C. 2003); *Benasco v. American Home Products, et al*, 2003 WL 2217470 (E.D. La 2003).

Another legal issue is whether a civil action against Eli Lilly is one against a "vaccine manufacturer," referring to the bar against bringing a civil action for damages found in §300aa-11(a)(2)(A). According to the civil complaint, Eli Lilly manufactured a vaccine component, thimerosal, not the vaccines themselves. The second cause of action in petitioners' civil suit, and the only one that implicates Shawn's own damages, is based on a claim of negligent and/or fraudulent misrepresentation as to the safety of thimerosal. Some courts have indicated that § 300aa-11(a)(2) permits such suits, holding that Eli Lilly and other thimerosal manufacturers are not "vaccine manufacturers" since they only make a component and not the entire vaccine. *See Moss v. Merck & Co.*, 381 F.3d 501, 503-04 (5th Cir. 2004); *Reilly ex rel. Reilly v. Wyeth*, 876 N.E. 2d 740, 751 (Ill. App. Ct. 2007). *But see Ferguson ex rel. Ferguson v. Aventis Pasteur Inc.*, 444 F. Supp. 2d 755, 761 (E.D. Ky. 2006) (holding that thimerosal manufacturers are covered by the Act because it covers vaccine-related claims).

After *Leroy* was issued by Special Master Golkiewicz, Congress amended the definitional section of the Vaccine Act. The definition of manufacturer was expanded to include any corporation that made a component or ingredient of a vaccine. *Ferguson*, 444 F.Supp.2d at 760; Homeland Security Act, Pub. L. No. 107-296 §1714 (Nov. 25, 2002). In 2003, Congress repealed the definition amendments, but noted that their action should not be viewed as an indication that *Leroy* was incorrectly decided. *Ferguson* at 760; Pub. L. No. 108-7, Div. L. § 102(c) (Feb. 20, 2003).

In 2011, the United States Supreme Court held that the Vaccine Act governs all design defect claims against vaccine manufacturers, and preempts the assertion of those claims in other courts. *See Brusewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011). The decision noted that the Vaccine Act program is based on the premise that in exchange for

funding the compensation program through an excise tax, vaccine manufacturers receive immunity from civil tort actions. *Id.* at 1074, 1080. Although the Court did not directly address the distinction between manufacturers of entire vaccines and those who produce only components of vaccines, the reasoning used in the opinion supports viewing vaccine-component manufacturers in the same manner as vaccine manufacturers.

I find that petitioners filed this Vaccine Act petition on Shawn's behalf while a civil suit seeking damages for Shawn's own injuries was still pending. Thus, based on the plain language of § 300aa-11(a)(5)(B), the petition must be dismissed as improperly filed.

B. The Statute of Limitations Issues.

To determine if this case was timely filed, I must determine when the first symptom or manifestation of onset of the alleged vaccine injury occurred. Once that date is ascertained, I then compare that date to the filing date of Shawn's petition to determine if the petition was filed within the Vaccine Act's 36 month statute of limitations.

The arguments raised by the parties in this case also necessitate a second analysis, pertaining to the savings clause of § 300aa-11(a)(2)(B), which allows the filing date of an improperly filed civil action to serve as the date by which timely filing of a Vaccine Act case to be measured.

1. The Statutory Requirements.

The Vaccine Act's statute of limitations provides in pertinent part 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. . . ."

§ 300aa-16(a)(2).

2. Interpreting the Statute of Limitations.

Because petitioners filed their petition on behalf of Shawn on October 14, 2003, the first symptom or manifestation of onset of Shawn's autism must have occurred after October 14, 2000, in order for the petition to be considered timely. 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"); *Cloer*, 654 F.3d at 1355 (holding that the "analysis and conclusion in *Markovich* is correct. The statute of limitations in the Vaccine Act begins to run on the date of occurrence of the first symptom or manifestation of onset.").

a. The First Symptom or Manifestation of Onset.

Respondent contends that the symptoms of speech and language delay that prompted Shawn's referral to Childnet in April 2000, constituted the first symptom or manifestation of onset of his autism. Petitioners claim that Shawn's November, 2000, diagnosis of an autism spectrum disorder constitutes the date from which timely filing should be measured.

Speech delay is one of many symptoms of autism, and although, standing alone, it is not diagnostic of the condition, it is one of the criteria by which autism is diagnosed. See DSM-IV-TR at 75. At 30 months of age, in April, 2000, Shawn used only five words; the average two year old child would have between 50-100 words and would be using simple sentences. See *Dwyer*, 2010 WL 892250, at *172 n.640. Shawn's ear infections and ankyloglossia undoubtedly had some impact on his language development, but his speech delay was a significant factor in the ultimate autism diagnosis. See, e.g., Pet. Ex. 13, p. 2 (Dr. John Willis' assessment on October 20, 2000, of Shawn's "speech delay, a mild generalized developmental delay, and autistic behavior"). The first record of speech delay was in April, 2000; petitioners' attribution of that delay to Shawn's other health problems notwithstanding.

Petitioners contend that a "diagnosis of 'Speech Delay' alone by a medical professional in April of 2000 did not indicate [Shawn] had autism or vaccine injury in this case." Pet. Opp. at 2 (emphasis original). Petitioners referred to an undated note (Pet. Ex. 6, p. 20) by John Falgout, a nurse practitioner, in support of their position that the referral for speech delay was based on Shawn's multiple episodes of otitis media and ankyloglossia, not a suspicion of autism. Pet. Opp. at 2. Mr. Falgout's note states: "I referred Shawn Cook Jr. to Louisiana Childnet after examining him for a complaint of Speech Delay of unknown etiology." Pet. Ex. 6, p. 20 (emphasis added). Mr. Falgout then recited Shawn's history of otitis media and ankyloglossia, and his corrective surgery for both conditions in January, 2000. However, Mr. Falgout did not specifically attribute the speech delay to Shawn's chronic otitis media or tight frenulum. *Id.*

Petitioners also asserted that Shawn "did not exhibit any other symptom of autism caused by a vaccine injury at this time [April 2000]." Pet. Opp. at 2. This statement is not factually correct. Although the handwritten notes are not entirely clear, the health care provider who evaluated petitioners' complaint of speech delay also noted that Shawn was easily agitated and difficult to console (Pet. Ex. 6, p. 18), behavioral problems that are not uncommon in those with an autism spectrum disorder. See, e.g., *Snyder*, 2009 WL 332044 at *37; see also *supra* at Section III. B.

Even if petitioners are correct in their assertion that Shawn was referred to Childnet solely because the speech delay was suspected to be related to his ear and tongue problems, my determination that the speech delay in April, 2000 was the first symptom of Shawn's autism would be unchanged. A single symptom may be common to many different diagnoses, but, viewed in retrospect after a diagnosis is made, remains

the first symptom of that diagnosed condition. See, e.g., *Wilkerson v. Sec’y, HHS*, 593 F.3d 1343, 1346 (Fed. Cir. 2010) (recognition of the link between the first symptom and ultimate diagnosis need not be present at the time of the first symptom in order to trigger the running of the statute of limitations); *Cloer*, 654 F.3d at 1345 (rejecting a discovery rule¹⁹ and holding that the statute of limitations runs from “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.”).

Assuming, arguendo, that speech delay alone or accompanied by non-specific behavioral problems is insufficient to trigger the running of the statute of limitations in an autism case, other records indicate that Shawn likely had autism before his formal diagnosis. Both the St. James Parish Individualized Education Program [“IEP”] evaluation performed on September 14, 2000²⁰ and Mrs. Cook’s own concerns about Shawn’s “autistic tendencies” in October 2000²¹ trigger the running of the statute.

3. Does the Civil Action Affect the Vaccine Act’s Statute of Limitations Here?

Respondent’s Motion to Dismiss raised the issue of a caveat to the Vaccine Act’s statute of limitations involving civil actions for vaccine injuries. The Vaccine Act prohibits the filing of a civil action for damages for a vaccine injury, without first filing a petition under the Vaccine Program. See § 300aa-11(a)(2)(A). Once a Vaccine Act petition is filed, a petitioner may exit the Vaccine Program and file a civil suit only if (1) a judgment issues on the Vaccine Act petition, and the petitioner rejects the judgment and elects to file a civil action or (2) if the Vaccine Act petition is withdrawn because the special master or the court fails to act on the petition within the time periods specified in the Vaccine Act. See §§ 300aa-11(a)(2)(A), 300aa-21(a)-(b).

If a civil suit is filed in state or federal court without first filing a Vaccine Act petition and properly exiting the Program via one of these mechanisms, the Vaccine Act requires the court to dismiss the civil suit. § 300aa–11(a)(2)(B). The Vaccine Act provides that “the date such dismissed action was filed shall, for purposes of the limitations of actions prescribed by section 300aa-16 of this title, be considered the date the petition was filed if the petition was filed within one year of the date of the dismissal of the civil action.”

§ 300aa–11(a)(2)(B); see also *Lauder v. Sec’y, HHS*, No. 06-758 (Fed. Cl. Spec. Mstr. April 9, 2007) (order vacating the filing date on Mr. Lauder’s second Program petition and

¹⁹ A discovery rule would start the running of the 36 month statute of limitations from when a petitioner knew or had a reason to know that a vaccine caused the vaccine-related injury.

²⁰ The September, 2000 IEP evaluation found Shawn’s communication skills to be severely impaired: at three years of age, Shawn had the communication skills of a child 15 months younger. Pet. Ex. 11. The IEP details other symptoms consistent with the DSM-IV-TR diagnostic criteria for autism spectrum disorders: engaging in solitary play; lack of social interaction with peers and adults; inability to follow directions; and lack of eye contact; among others.

²¹ Shawn’s October 10, 2000 medical record notes that “mother concerned – showing autistic tendencies.” Pet. Ex. 12, p.1.

substituting a filing date of January 1, 2005, the date his civil action was filed). If more than one year passes between the dismissal of a petitioner's civil action and the filing of his petition, petitioner may not invoke the § 300aa-11(a)(2)(B) savings provision. *Flowers*, 49 F.3d at 1562.

In the original Motion to Dismiss, respondent indicated that, by operation of this provision of the Vaccine Act, the date Mr. and Mrs. Cook filed their civil action in the Eastern District of Louisiana, May 19, 2003, would be the date the Vaccine Act petition would be deemed filed, by operation of 300aa-11(a)(2)(B). Res. Mot. at 4 n.2. In so asserting, respondent did not address the conditions precedent to using the civil action exception.²² First, the prior civil action must have been dismissed prior to filing the Vaccine Act petition. See 300aa-11(a)(5)(B); *Aull v. Sec'y, HHS*, 462 F.3d 1338, 1344 (Fed. Cir. 2006) (holding that the failure to dismiss a civil action involving a vaccine injury before filing a Vaccine Act petition required dismissal of the petition as improperly filed); *Flowers v. Sec'y, HHS*, 49 F.3d 1558 (Fed. Cir. 1995). Second, the prior civil action must have been one which could have been brought under the Vaccine Act.²³

With regard to the first condition, there is no evidence that the prior civil action was ever dismissed. Petitioners' Exhibit 17 indicates that their civil action was stayed and closed for statistical purposes only on December 1, 2003. It does not indicate that the civil action was dismissed.²⁴ If the civil action involved a claim for Shawn's own injuries, the failure to dismiss it before filing the Vaccine Act petition on Shawn's behalf rendered the Vaccine Act petition improperly filed. *Flowers*, 49 F.3d at 1561 (interpreting § 300aa-11(a)(5)(B)).

With regard to the second condition, if the civil action only addressed Mr. and Mrs. Cook's loss of consortium claim, and did not encompass a claim for Shawn's injuries, it would not be barred by the Act.²⁵ However, the civil action does appear to involve a claim on behalf of Shawn, and thus its existence renders the Vaccine Act petition improperly filed. Although petitioners could dismiss the civil action, file another Vaccine Act petition, and use the savings provision in § 300aa-11(a)(2)(B) to relate the filing date

²² Respondent addressed the conditions in 300aa-11(a)(5)(B) in her recent Supplemental Response. Res. Suppl. Response at 1 n.1.

²³ The precise language of the Vaccine Act bars a "civil action for damages in an amount greater than \$1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal Court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, . . . unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury. . . ." § 300aa-11(a)(2)(A).

²⁴ The December 22, 2003 and March 18, 2010 filings by defendant Eli Lilly and Wyeth, respectively, reflect that they still consider the case active, and do not view it as dismissed.

²⁵ The Vaccine Act does not authorize compensation for loss of consortium claims. See *Abbott v. Sec'y, HHS*, 19 F.3d 39 (Fed. Cir. 1994) (a parent's recovery of civil damages for loss of consortium is a separate action from that available to her son's estate under § 300aa-11(c)(1)(E)).

of the civil action in 2003 as the triggering date for the running of the statute of limitations, that effort would not salvage this claim. Shawn displayed symptoms of autism at a time that would still make any Vaccine Act petition untimely.

V. Conclusion.

I find that because petitioners' civil action sought damages for Shawn's lost earning capacity and was still pending when their vaccine petition was filed, this case was improperly filed. § 300aa-11(a)(5)(B)

Additionally, I find that the speech delay identified on April 14, 2000, constituted the first symptom of Shawn's autism spectrum disorder. Because petitioners did not file their Vaccine Act petition on Shawn's behalf until October 14, 2003, the petition was filed 42 months after the first symptom occurred. It is thus untimely under the Vaccine Act's 36 month statute of limitations. 300aa-16(a)(2).

I also note that the petition would still be untimely even if the "saving clause" of 300aa-11(a)(2)(B) were applicable, as the civil action was filed approximately 37 months after the first symptom was noted.

For the reasons set forth above, **this case is dismissed. The clerk is directed to enter judgment accordingly.**

IT IS SO ORDERED.

Denise K. Vowell
Special Master