

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-1470V

Filed: June 20, 2013

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IVONNE VALEZ,<sup>1</sup> \*  
Individually and as Next Friend of, \*  
DARIEN RICHARD CRESPO, a minor \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

Autism; Statute of Limitations;  
Untimely Filing

## DECISION<sup>2</sup>

On June 12, 2003, Ivonne Valez [“petitioner”] filed a complaint [hereafter referred to as the “petition”] for vaccine injury compensation under the National Childhood Vaccine Injury Act<sup>3</sup> [“Vaccine Act”] on behalf of her son, Darien Richard Crespo

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<sup>1</sup> I am aware of the fact that Ms. Valez’s last name is correctly spelled as Velez. I have spoken to petitioner and her husband, Mr. Crespo, about the mistake. As I explained, Ms. Valez’s former attorney, John H. Kim, incorrectly spelled her name as Valez on the original petition. I have instructed petitioner to file a request to correct the caption on several occasions, but petitioner has failed to do so.

<sup>2</sup> Because this decision contains a reasoned explanation for the action in this case, I intend 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, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

<sup>3</sup> The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended,

["Darien"]. Petitioner alleges that Darien "received a series of mercury-containing vaccines and . . . subsequently demonstrated developmental problems." Petition at 1. Petitioner contends that her claim is timely filed or that, in the alternative, her claim is equitably tolled because she did not and could not know the factual basis for her claim. *Id.*

## I. Procedural History.

Petitioner opted into the Omnibus Autism Proceeding ["OAP"].<sup>4</sup> See Notice, filed Jul. 7, 2003. During the period between the test case hearings and the final appellate action on the test case decisions,<sup>5</sup> petitioner, like others in the OAP, was ordered to file the medical records necessary to establish that the petition was timely filed. Order, filed Oct. 15, 2009, at 1-3, 5. Petitioner filed some of the required records on January 11, 2010. See Petitioner's Exhibits ("Pet. Exs.") 1, 2.

In response, respondent filed a statement indicating, based on the record to date, she "cannot determine whether petitioner has established . . . that [her] claim was filed within the statutorily prescribed limitations period set forth in Section 16(a) of the [Vaccine Act]." Respondent's Statement, filed Feb. 26, 2010, at 1. Petitioner responded to respondent's statement by filing additional medical records. See Pet. Ex. 3.

After the resolution of the OAP test cases,<sup>6</sup> petitioner was required to inform the court if she wished to proceed with her claim. See Order, filed May 8, 2012, at 2. If

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42 U.S.C.A. §§ 300aa-10 et. seq. (2006). All citations to the Vaccine Act in the decision will be to 42 U.S.C. § 300aa.

<sup>4</sup> Petitioner's claim is equivalent to the second theory of causation ["Theory 2"] being litigated in the OAP. A detailed discussion of the OAP can be found at *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at \*3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

<sup>5</sup> The Petitioners' Steering Committee ("PSC"), an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of ASDs.

<sup>6</sup> Decisions in each of the three test cases pertaining to the PSC's first theory rejected the petitioners' causation theories. *Cedillo v. Sec'y HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec'y HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec'y HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 706 (2009).<sup>6</sup> 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 v. Sec'y HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010), 2010 WL 892250; *King v. Sec'y HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

petitioner wished to continue with her claim, she was ordered to file an amended petition, setting forth her theory of causation. *See id.* at 3.

On June 7, 2012, petitioner's counsel filed a motion to withdraw as attorney of record. Counsel explained that petitioner wished to continue with her claim but that he was unable to assist her since he believed there was no reasonable basis to proceed. Motion at 1. I granted counsel's request and ordered petitioner to contact my chambers to schedule a telephonic status conference. Order, filed Sept. 10, 2012, at 1-2.

On September 28, 2012, I held a telephonic status conference with the parties. Ryan Pyles appeared on behalf of respondent. Both petitioner and Darien's father, Richie Crespo, participated in the call. I ordered petitioner to file the following: (1) a statement explaining her theory of causation; (2) statements from both parents indicating when Darien's symptoms began; and (3) a list of all medical facilities visited by her for prenatal care and by Darien from birth to four years of age.<sup>7</sup> Scheduling Order, filed Sept. 28, 2012, at 2.

On December 7, 2012,<sup>8</sup> petitioner filed a copy of a letter requesting medical records,<sup>9</sup> a statement signed by both parents, and records from the Nanticoke Area School District.<sup>10</sup> In their statement, Darien's parents claim that Darien was in good health until he was nineteen months old (on January 23, 2000). They allege that Darien stopped responding to his name and saying the handful of words that he knew "7 to 8 days" after receiving his measles, mumps, and rubella ["MMR"] vaccination when he was eighteen months old.<sup>11</sup> Statement at 1.

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<sup>7</sup> During the call, Darien's parents informed me they had encountered difficulty obtaining Darien's medical records. I ordered petitioner to file a list of all medical facilities visited so that subpoenas might be prepared to obtain any missing medical records.

<sup>8</sup> Because petitioner did not include the case number 03-1470V on her submissions, they were mistakenly filed into a new case, number 12-0848V. When this mistake was discovered, the newer case was closed and the submissions were entered into the docket in this case on January 22, 2013. I will refer to these documents as being filed on December 7, 2012, when they were first received by the Court.

<sup>9</sup> The letter contains an added notation that "they dispose of all [r]ecords," after five years, indicating petitioner's prenatal records and Darien's medical records. Letter, filed Dec. 7, 2012, at 1. Petitioner does not indicate to whom the letter was sent.

<sup>10</sup> Petitioner did not assign exhibit numbers to any of these documents. Thus, I will refer to them by the following descriptive names: letter, statement, and school records.

<sup>11</sup> The medical records indicate that Darien received the MMR vaccine on June 28, 1999, when he was one year old. *Compare* Petitioner's Statement at 1 *with* Pet. Ex. 3, p. 96. (Darien's immunization records also indicate he received a second measles vaccine on August 23, 2002 and second rubella vaccine on January 14, 2003. Pet. Ex. 3, p. 96.)

On January 3, 2013, I held another telephonic status conference with petitioner. Ryan Pyles appeared on behalf of respondent. Both petitioner and Mr. Crespo participated in the call.<sup>12</sup> During the call, I explained to petitioner and Mr. Crespo that the case appeared to be untimely filed. See Order, filed Jan. 4, 2013, at 2. I again ordered petitioner to file a list of medical facilities visited.<sup>13</sup> *Id.* at 3.

On January 7, 2013, respondent filed a motion to dismiss pursuant to Rule 12(b)(6), asserting that petitioner's claim was filed after the expiration of the Vaccine Act's statute of limitations. Motion to Dismiss at 1; See § 16(a)(2) (Vaccine Act's statute of limitations). Respondent requested that I either dismiss petitioner's claim or order petitioner to show cause why her claim should not be dismissed as untimely filed. *Id.* at 4.

On March 1, 2013, I ordered petitioner to show cause why this claim should not be dismissed as filed after the expiration of the Vaccine Act's statute of limitations. Order to Show Cause at 4-5. Petitioner responded on March 25, 2013, requesting that I not dismiss her claim because she did not understand what autism was and did not realize she needed to file her claim in a timely manner.

## **II. Medical History.**

Darien was born on June 27, 1998. See Pet. Ex. 3, p. 10. At his two week well child check-up, petitioner reported no concerns. *Id.*, p. 11.

Darien visited his pediatrician, Niloufar Gidfar, M.D., again on October 29, 1998 for his four month well child check-up. Pet. Ex. 3, pp. 23-24. At that visit, Dr. Gidfar recorded that Darien was cranky the previous night due either to teething or an upper respiratory infection ["URI"]. *Id.*, p. 23. He could hold his head up and roll over. The only other concerns recorded were Darien's hypospadias and some eczema on his face. *Id.*

Darien's next well child check-up was on March 10, 1999. Pet. Ex. 3, pp. 28-29. At that visit, Darien's parents reported a concern about Darien's "habit" of shaking his head. *Id.*, p. 28. Dr. Gidfar noted that Darien was sitting and attempting to crawl and reassured his parents, presumably regarding his head shaking. *Id.*, pp. 28-29.

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<sup>12</sup> There was a slight delay at the beginning of this call because Ms. Valez was not on the call. Both I and an OSM staff attorney have informed Darien's parents on several occasions that petitioner must submit a written request for Mr. Crespo to be added as a petitioner in this case if he will be participating as Darien's representative without Ms. Valez in any status conferences. See, e.g., Order, filed Jan. 4, 2013, at 1 and 1 n.2.

<sup>13</sup> On January 22, 2013, petitioner filed a list of visits to the Beth Israel Medical Center. Unless this facility was the only one visited by petitioner for her prenatal care and by Darien from birth to four years of age, petitioner still has not complied with my September 28, 2012 and January 4, 2013 Orders.

Darien's one year well child check-up was on June 21, 1999. Pet. 3, pp. 63-64. Darien's parents had no complaints. *Id.* Under development, Dr. Gidfar recorded that Darien "cruises" and says "bye-bye." *Id.*, p. 63. The medical records indicate Darien received his third polio vaccine and first MMR vaccine at this visit. *Id.*, p. 64; see also *id.*, p. 97 (Darien's record of immunizations).

Darien saw Dr. Gidfar next for his fifteen month well child check-up. Pet. Ex. 3, pp. 65-66. At that visit, Dr. Gidfar noted that he was saying "Dada" and cruising but "NOT walking." *Id.*, p. 65 (emphasis in original).

It appears that Darien did not see Dr. Gidfar again until his two year well child check-up visit on June 21, 2000. Pet. Ex. 3, pp. 55-56. At that visit Dr. Gidfar recorded that Darien had poor speech ("no words"), was a picky eater, had no eye contact, and had been covering his ears. *Id.*, p. 55. She assessed Darien as having speech delay and needing to be evaluated for "PPD".<sup>14</sup> *Id.* Dr. Gidfar referred Darien to the New York Early Intervention Program.

In August and September 2000, Darien was evaluated by multiple health care providers. As both Spanish and English were spoken in the home, the evaluations were conducted in both languages. See, e.g., Pet. Ex. 1, p. 2. He was noted to have fleeting or no eye contact. *Id.*, p. 4. Several times, Darien put his hands over his ears and made noises or clapped his hands and then placed them over his ears while "making noise or mumbling." *Id.*, p. 3. Darien's parents confirmed that he "does this most of the time," and that he "also turns the air conditioner on and off to hear the noise," flushes the toilet so he can hear the sound, and turns his carriage over to watch the wheels spin. *Id.* Additionally, Darien's parents informed the evaluator that Darien was a picky eater who did not feed himself, but could drink from a sippy cup or regular cup if held for him. *Id.* When taken to the park Darien played by himself and showed no excitement or interest in other children. *Id.*, p. 4.

According to petitioner, Darien used the words "bath, mamamama and the letters O,E, and A." Pet. Ex. 1, p. 3. Darien pointed, screamed or used the sounds "e" or "mmm" to indicate wants and needs. *Id.* Darien was assessed as "demonstrate[ing] severely delayed receptive and expressive language development." *Id.*, p. 15. He was diagnosed with PPD. *Id.*, p. 4.

On September 16, 2000, Darien was diagnosed as having autism by Irene Giusti, Ph.D., a licensed bilingual psychologist. Pet. Ex. 2, pp. 3, 8. Dr. Giusti noted that Darien scored 31.5 on the CARS test which placed him in the mildly autistic range. *Id.*,

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<sup>14</sup> Pervasive developmental disorders ["PPD"] is the umbrella term for autism spectrum disorders ["ASDs"] used in the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 4th ed text revision 2000) ["DSM-IV-TR"] which has since been replaced by the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 5th ed text revision 2013) ["DSM-V"], which now uses the term "autism spectrum disorder."

p. 6. Darien parents informed Dr. Giusti that “Darien began experiencing autistic-like symptoms after he was 12 months old” and “that he began to speak when he was about 14 months old and then he regressed. *Id.*, p. 3. They explained “that he began to cover his ears and place his hands in front of his face in a self-stimulatory manner.” *Id.* He was unable to make eye contact with Dr. Giusti during his evaluation.

### **III. Statute of Limitations.**

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). In *Cloer*, the Court of Appeals for the Federal Circuit affirmed that the statute of limitations begins to run on “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, 1325 (Fed. Cir. 2011). The Circuit explained that this date is “a statutory date that does not depend on when a petitioner knew or reasonably should have known anything adverse about her condition.” *Id.* at 1339. The date is dependent on when the first sign or symptom of injury appears, not when a petitioner discovers a causal relationship between the vaccine and the injury. *Id.*

Although the Federal Circuit held that doctrine of equitable tolling applies to Vaccine Act claims, the Circuit explained that it is only available in “extraordinary circumstances,” such as when a petitioner is the victim of fraud or duress. *Id.* at 1344-45 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). In the *Cloer* case, the Circuit declined to apply equitable tolling because the petitioner did not know of a causal link between her injury and vaccination until 2004. 654 F.3d at 1344-45. The Circuit specifically held “that equitable tolling under the Vaccine Act due to unawareness of a causal link between an injury and administration of a vaccine is unavailable.” *Id.* at 1345.

### **IV. Analysis.**

#### **A. First Symptom or Manifestation of Onset.**

To be timely filed under the Vaccine Act’s statute of limitations, this claim must have been filed within 36 months from the date of the occurrence of the “first symptom or manifestation of onset or of the significant aggravation” of Darien’s injury. 42 U.S.C.

§ 16(a)(2). Since the petition was filed on June 12, 2003, the claim is untimely filed if Darien exhibited his first symptom or manifestation of onset prior to June 12, 2000.

According to the statement from Darien's parents, Darien's first symptom occurred in January 2000, if not earlier. See *supra* note 10. Additionally, the medical records clearly show Darien was exhibiting multiple symptoms of autism prior to June 21, 2000, supporting the time frame endorsed by Darien's parents. These symptoms recorded on June 21, 2000, such as "no eye contact" and "no words" were significant enough to prompt his pediatrician, Dr. Gidfar, to refer him for an evaluation for PPD. Pet. Ex. 3, p. 55.

Furthermore, earlier medical records show little if no speech development. Prior to his two year well child check-up visit on June 21, 2000, Darien was noted to have used only two words. Darien's use of "bye-bye" was recorded at his one year well child check-up, and his use of "Dada" was recorded at his fifteen month well child check-up. *Id.*, pp. 63, 65. Darien was fifteen months old on September 27, 1999.

Throughout Darien's medical records, his parents indicate that his symptoms began either at twelve or eighteen months. For example, during Darien's evaluation by Dr. Giusti, his parents informed Dr. Giusti that Darien's symptoms, including his self-stimulatory behavior, began when he was twelve to fourteen months old.

Including their submissions from late 2012 and early 2013, Darien's parents have consistently asserted that his symptoms of autism began sometime between June 23, 1999 when he was twelve months old and January 23, 2000 when he was nineteen months old. At no point has petitioner argued otherwise. Since the latest date indicated by petitioner, January 23, 2000, is still almost five months prior to June 12, 2000, I find that this claim was filed after the expiration of the Vaccine Act's three year statute of limitations.

## **B. Equitable Tolling.**

In her original petition, petitioner argues that equitable tolling should apply to her case because she did not and could not know the factual basis for her claim. Petition at 1. However, this argument was rejected by the Federal Circuit in *Cloer*. 654 F.3d at 1344-45. The Federal Circuit specifically held that the fact that petitioner does not know of a potential causal link between injury and vaccine is not "the sort of circumstance that might merit equitable tolling." *Id.*

In her response to my Order to Show Cause, petitioner asks that I not dismiss her claim because she did not understand what autism was and did not realize she needed to file her claim in a timely manner. Response, filed Mar. 25, 2013, at 1. Although I am sympathetic to petitioner's desire to avoid a dismissal on the grounds that the petition was untimely filed, I cannot apply equitable tolling to her case, based on the circumstances she presented. Petitioner has not alleged, nor does it appear there is any basis to allege, that she was prevented from filing a timely petition because she

was a victim of fraud, duress, or other extraordinary circumstances. See *Cloer*, 654 F.3d at 1344.

Petitioner has not presented any arguments that would support the application of equitable tolling to this claim, and the undersigned's examination of the record does not disclose any basis for applying equitable tolling to this case.

#### **V. Conclusion.**

Petitioner has the burden to show timely filing. Petitioner has failed to do so. There is preponderant evidence that this case was not 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). Petitioner has not demonstrated any extraordinary circumstances warranting equitable tolling. **Therefore, this claim is dismissed as untimely filed under the Vaccine Act's statute of limitations. The clerk is directed to enter judgment accordingly.**

**IT IS SO ORDERED.**

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Denise K. Vowell  
Special Master