

OFFICE OF SPECIAL MASTERS

No. 98-162V

(Filed: July 27, 1999)

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JULI LEVESQUE, on behalf of minor, and
injured party, ALEX LEVESQUE,

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Petitioner,

* **TO BE PUBLISHED**

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v.

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SECRETARY OF HEALTH AND
HUMAN SERVICES,

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Respondent.

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Joseph J. Appel, Esq., Walnut Creek, California, for petitioner.

Mark C. Raby, Esq., United States Department of Justice, Washington, D.C., for respondent.

DISMISSAL ORDER

On 6 March 1998, petitioner filed a claim for compensation under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)⁽¹⁾ on behalf of Alex Levesque. On 30 December 1998 respondent filed a motion to dismiss the case as time-barred under section 16(a)(2) of the Vaccine Act. Petitioner filed a response on 14 January 1999. Respondent filed a reply on 26 February 1999. The court heard oral argument on 7 April 1999.

Alex was born on 23 February 1993. On 23 February 1994, at Alex's one year well-baby visit, he was administered a MMR vaccine. Twelve days later, on 7 March 1994, Alex began to have diarrhea. By 14 March 1994, he also had a fever. During April 1994, petitioner brought Alex to his doctor a total of six times because of the diarrhea and fever. In May 1994, Alex contracted chicken pox. Alex continued to suffer from weakness, lack of appetite and diarrhea for several months. During this time, Alex was seen by several doctors who could not give petitioner a specific diagnosis for Alex's medical disorders. By December of 1994, the doctors began to suspect a neurological disorder. Alex saw more doctors in January and February of 1995. On 1 March 1995, Alex was given a nerve conduction test and his treating physician, Dr. Robert G. Miller, told petitioner that he thought Alex had Guillain-Barré Syndrome (GBS). This was the first time anyone had told petitioner that Alex may have that syndrome. For the next two years, Alex was seen by numerous doctors who reevaluated and rediagnosed his illness. On 23 April 1997, Alex was finally given a probable diagnosis that he was suffering from Guillain-Barré Syndrome or Chronic Demyelinating Inflammatory Polyneuropathy (CDIP). Three months later, in July of 1997, petitioner got onto the internet and found a GBS website. The GBS website had a link to a website about vaccine-related injuries. That website posted the letters of parents who believed their children developed GBS because of an MMR vaccination. Petitioner, for the first time, suspected that her son's GBS was caused by his MMR vaccination of 23 February 1994. Petitioner talked to Alex's doctor about a possible connection between GBS and MMR and the doctor investigated the issue. In October or November 1997, petitioner contacted several attorneys about her son's condition. On 6 March 1998, petitioner filed a petition in this court. The petition was filed forty-nine (49) months after Alex received his MMR vaccination (23 February 1994); forty-eight (48) months after Alex's first symptom of GBS (7 March 1994); thirty-six (36) months and five (5) days after Dr. Miller first mentioned GBS as a possible diagnosis (1 March 1995); ten and one-half (10 ½) months after Alex was given a firm diagnosis of GBS or CDIP (23 April 1997); and eight (8) months after petitioner first logged onto the GBS website.

From the medical records, petitioner's allegations and the response to respondent's motion to dismiss, the court can conclude that the first symptom or manifestation of the onset of Alex's alleged vaccine-related injury occurred on 7 March 1994. However, this petition was filed on 6 March 1998 -- four years after the date of the initial onset of the alleged vaccine injury. Thus, respondent claims that, because the applicable statute of limitations for this case is only three years from the date of onset, petitioner is time-barred from bringing this case and this court must dismiss it for lack of jurisdiction.

Petitioner argues that the doctrine of equitable tolling should be applied in this case and that it should not be dismissed. She contends that Alex was not affirmatively diagnosed with having GBS or CDIP until 23 April 1997. Thus, petitioner did not and could not have known that Alex had suffered an injury that was compensable under the Vaccine Act until that time. Petitioner concludes that the statute of limitations should be tolled until approximately July of 1997 when petitioner first logged onto the GBS website.

A. Statute of Limitations

For cases in which the vaccine in question was administered after 1 October 1988, the following statute of limitations applies:

In the case of --

(2) a vaccine set forth in the Vaccine Injury Table which is administered after the effective date of this subpart [1 October 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

Section 16(a)(2). Petitioner has clearly not satisfied this jurisdictional proviso. Well over 36 months expired after the manifestation of the first symptom before the petition was filed. However, petitioner argues that the statute of limitations should be tolled until the date the petitioner first learned her son's condition may have been caused by a MMR vaccination.

The statute of limitations begins to run upon accrual. In the vaccine program, the time at which § 16(a)(2) accrues is well settled. In *Brice v. Secretary of HHS*, 36 Fed.Cl. 474 (1996), Judge Andewelt examined this very issue in detail and concluded that:

Congress intended the 36-month statute of limitations in Section 16(a)(2) to commence to run upon the first symptom or manifestation of the onset of the injury and not to be delayed until the time the petitioner *has actual knowledge* that the vaccine recipient suffered an injury compensable under the Vaccine Act.

Id. at 478 (emphasis added). The cogent logic of the learned judge is flawless and is adopted by this court. Petitioner in this case alleges that the first symptom or manifestation of the onset of Alex's injuries occurred on 7 March 1994. Therefore, the 36 month statute of limitations as mandated by § 16(a)(2) accrued, or began to run, on 7 March 1994. Therefore, the running of the statute of limitations occurred on 7 March 1997. Since, the petition was not filed until 6 March 1998, it was filed after the running of the statute of limitations.

B. Equitable Tolling Petitioner argues that the statute should be tolled because she did not and could not have known that Alex had suffered an injury that was compensable under the Vaccine Act until she

received an affirmative diagnosis of said injury from medical professionals. Equitable tolling is a remedy which permits a court to deem a petition to have been filed in a timely manner.⁽²⁾ This remedy, however, is to be distributed in a most penurious manner. This is because the allowance of a suit against the government is a waiver of sovereign immunity. *United States v. Mottaz*, 476 U.S. 834, 841 (1986).

"[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied."

Block v. North Dakota, 461 U.S. 273 (1983). The Supreme Court in *Block* added:

When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity. Accordingly, although we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'

Id. (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)).

In *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court extended the doctrine of equitable tolling to suits against the United States. Therefore, the doctrine applies in the Vaccine Program. *Brice v. Secretary of HHS*, 36 Fed.Cl. 474, 481 (1996). In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), the court warned against overly liberal use of the equitable tolling doctrine. The Court stated:

Procedural requirements established by Congress for gaining access to the federal court are not to be disregarded by courts out of a vague sympathy for particular litigants.... "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 152 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). This court must rely on legal precedent rather than visceral caprice to determine which factual scenarios are worthy of the tolling of the statute of limitations. It is not the province of a judge to exercise will but to implement the letter of the law. *The Federalist No. 78* (Alexander Hamilton).

There is no clearly delineated test for the application of the equitable tolling doctrine. Perhaps the most lucid guidance was issued in the Supreme Court's opinion in *Irwin*:

Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. *Id.* at 96. The Court added: "the principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect." *Id.*

In the case *sub judice*, there were no defective pleadings filed. There is also no evidence, nor is there an allegation, that respondent employed nefarious procedural tactics to dupe petitioner into filing her petition after the expiration of the statutory period. For these reasons, equitable tolling will not be applied in this case.

The final issue to be addressed concerns the knowledge petitioner had of Alex's injuries and the due diligence exercised by the petitioner in pursuing and asserting her legal rights. In *Brice v. Secretary of HHS*, 36 Fed.Cl. 474, 481 (1996), the court expanded the doctrine of equitable tolling to allow courts to toll the running of the statute of limitations "when equity so demands, ... where a petitioner *did not know* and reasonably could not have known, that the vaccine recipient *had suffered an injury* compensable under the Vaccine Act." *Id.* (emphasis added). The rationale is simple: the court should avoid "penalizing a [petitioner] simply because under the circumstances [petitioner] did not and could not have known of the *facts* upon which the claim is based." *Id.* at 478 (emphasis in original). After a petitioner learns of the injury (facts), she must act with *due diligence* in pursuing her legal rights. The *Brice* case is still before the Court of Federal Claims, but regardless of the final disposition and status of the authority of that case, the court does not have the jurisdiction to hear the case at bar for the reasons stated *infra*.

The question of whether a petitioner knew of the injury (facts) and/or exercised due diligence depends upon the facts and circumstances of the case. *The court believes that the petitioner's lack of knowledge of an association between the vaccination and the injury is not a ground for equitable tolling.* A contrary rule would render the statute of limitations impotent and extend the waiver of sovereign immunity beyond the scope envisioned by Congress.

The court will address the issue of due diligence first. Petitioner in this case claims she was not aware that Alex suffered an injury compensable under the Vaccine Act until approximately July of 1997 when she logged onto the GBS website. Eight (8) months elapsed between the time petitioner learned of this alleged compensability from the internet and the filing of the petition. Why did petitioner not file a petition immediately? Such inaction can hardly be interpreted as due diligence.

Even if, assuming *arguendo*, the court found petitioner to have exercised due diligence, as stated in *Justice v. United States*, 6 F.3d 1474 (11th Cir. 1993), "due diligence on the part of the plaintiff, though necessary, is not sufficient to prevail on the issue of equitable tolling." *Id.* at 1479. In addition to the two instances listed in *Irwin* as sufficient cause for equitable tolling, the court in *Justice* listed the situation in which the petitioner had "no reasonable way of discovering the wrong perpetrated against her" as worthy of equitable tolling. *Id.* The court, in *Brice*, lists the similar instance of a petitioner who does not know that the vaccine recipient had suffered an injury. However, in this case petitioner knew her child was injured, but lacked the knowledge of an association between the vaccination and the injury. The child's injuries were not "masked," *per contra*, they were painfully apparent to the petitioner. There is also evidence in the record by which a reasonable person should have known that Alex suffered an injury. On 1 March 1995, twelve (12) months after Alex's vaccination, Dr. Miller first mentioned GBS as a possible diagnosis. Petitioner did not file a timely petition despite notice that Alex may be suffering from GBS. The failure to find the cause of the injury is irrelevant. The court finds that petitioner had

actual knowledge of the injury before the running of the statute of limitations. Hundreds of petitioners in this Program filed a petition in this court even though no treating physician made a connection between a vaccination and the vaccine-related injury. While she may have been acting in good faith, petitioner has not demonstrated circumstances that would warrant the extraordinary remedy of equitably tolling the statute. *Ignorance of the law and of one's rights is insufficient to toll the statute of limitations.* The doctrine of equitable tolling will not be applied in this case.

Conclusion

The petition in this matter was untimely filed and this court will not apply the doctrine of equitable tolling to deem it timely. Thus, this court does not have jurisdiction to hear this case. Accordingly, this petition is dismissed pursuant to Vaccine Rule 21(c).

In the absence of a motion for review filed pursuant to RCFC, Appendix J, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell

Special Master

1. ¹ The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. §§ 300aa-1 *et seq.* (West 1991 & Supp. 1997). Reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

2. The doctrine of equitable tolling merely suspends the running of the statute. It is a principle by which a court deems a petition to be timely filed when by strict interpretation of the law it was late. Equitable tolling does not delay the accrual of the statutory period. *Benge v. United States*, 17 F.3d 1286, 1288 (10th Cir. 1994).