

OFFICE OF SPECIAL MASTERS

September 25, 2002

 *
 WILLIAM and SHANNON VESSELS, Parents of *
 JOSHUA VESSELS, *
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 Petitioners, * No. 02-182V
 * Published
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 v. *
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 SECRETARY OF THE DEPARTMENT OF *
 HEALTH AND HUMAN SERVICES, *
 *
 Respondent. *
 *

D. Michael Noonan, Dover, NH, for petitioners.
Catherine E. Reeves, Washington, DC, for respondent.

Millman, Special Master

DECISION

Petitioners filed a petition dated March 11, 2002, under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10 et seq., alleging that their son Joshua Vessels (hereinafter “Joshua”) suffered developmental delays and autism as a result of the cumulative administration of vaccines he had received since the age of two months. Pet. at ¶¶ 3-5.

Petitioners allege they began to notice Joshua regress in speech and language in the spring of 1999. Pet. at ¶ 4.

Joshua was born on March 3, 1997. The medical records show that, at the age of 14 months (May 1998), Joshua started losing eye contact, withdrew, was less responsive, was in his own world, looked “stoned,” and felt no pain. Med. recs. at 97. He had head banging behavior and clear speech delay since he was 18 months old (September 1998). Med. recs. at 40. On May 28, 2002, respondent moved to dismiss based on the failure of petitioners to file their petition within 36 months of the date of the occurrence of Joshua’s first symptom of developmental delay and autism.

Section 16(a)(2) of the Vaccine Act states:

In the case of--

a vaccine set forth in the Vaccine Injury Table which is administered after the effective date of this subpart, 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....[emphasis added].

The Act does not require diagnosis of a condition or disease to start the running of the statute of limitations. It starts the statute running from the date of the occurrence of the vaccinee’s first symptom or manifestation of onset of the alleged vaccine injury. The Act also does not require knowledge that the vaccine caused the symptom or manifestation of onset in order for the statute of limitations to start running.

On May 31, 2002, petitioners filed a First Amended Petition, alleging that Joshua’s developmental delays and autism were due to the cumulative effect of thimerosal in his vaccinations. Petitioners allege, as they did in their initial petition, that Joshua received vaccinations between May 19, 1997 and March 9, 1999. See ¶ 3. However, according to the vaccination record, Joshua’s last series of vaccinations was on March 25, 1998. Med. recs. at 1. On March 9, 1999, he had a physical. Id.

On June 24, 2002, petitioners filed another First Amended Petition, identical to the May 31, 2002 First Amended Petition.

On July 19, 2002, petitioners filed a Memorandum in Response to Judge's Request for Further Brief. On August 14, 2002, respondent filed Respondent's Response to Petitioners' Memorandum of Law.

DISCUSSION

The Federal Circuit in Brice v. Secretary of HHS, 240 F.3d 1367 (Fed. Cir.), cert. denied sub nom. Brice v. Thompson, 122 S. Ct. 614 (2001), stated, at 240 F.3d at 1370:

[A] "statute of limitations is a condition on the waiver of sovereign immunity by the United States," and courts should be "careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352 (Fed. Cir. 2000) (quoting *Block v. North Dakota*, 461 U.S. 273, 287 ... (1983) (internal quotation omitted)).

When Congress waives sovereign immunity, as it did in the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10, et seq., it grants jurisdiction to a deliberative body, i.e., the special masters, the judges of the United States Court of Federal Claims, the judges of the Federal Circuit, and ultimately the Justices of the United States Supreme Court, to hear cases arising under the statute. But the statute has certain requirements that petitioners must fulfill in order to file a valid petition.

Section 300aa-16(a)(2) states, for post-Act cases, that "no petition may be filed...after the expiration of 36 months after the date of the ...first symptom...of such injury..." Petitioners in the instant action violated this requirement by filing their petition more than 36 months after the onset of their son's alleged injury. The Vaccine Act states they cannot file this petition.

Petitioners assert in their Memorandum in Response that the statute of limitations should not start running until October 20, 1999 when Joshua was diagnosed with a developmental disorder. P. Memorandum in Response, p. 10. They state that, until a condition is known, petitioners cannot determine that a child has manifested a symptom. P. Memorandum in Response, p. 7.

The Federal Circuit, however, stated in Brice, supra, at 1373, “[W]e note that the statute of limitations here begins to run upon the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not have known at that time that the vaccine had caused an injury.”

Petitioners state that the Federal Circuit’s opinion in Brice applies only to Vaccine Table cases, but not to causation in fact cases, such as their case. Petitioners assert that they can therefore avail themselves of the doctrine of equitable tolling. Moreover, petitioners state that a symptom in a causation in fact case cannot be “defined” until the illness or condition is known (presumably diagnosed). Since Joshua’s autism was not diagnosed until October 1999, they assert their petition is timely (which would negate their need for relying on equitable tolling). P. Memorandum in Response, p. 10.

The statute, however, does not ask for the definition of a symptom (presumably a diagnosis), but only for the occurrence of it. Mrs. Vessels knew that her son stopped looking at people, became withdrawn, was less responsive, and was lost in his own world by May 1998. She knew his head banging occurred by September 1998. She did not need to know that her son had an underlying condition in order to recognize when the first symptom occurred. Having a diagnosis of developmental delay a year and one-half after the onset of his symptoms does not merge the timing of the onset of those symptoms into the later date of the diagnosis of the condition. Petitioners’

citation of the first order in the Omnibus Autism Proceeding giving petitioners a lengthy period of time within which to amass their evidence does not justify ignoring the statutory requirement that petitioners file their petition in a timely manner. P. Memorandum in Response, p. 9.

The Federal Circuit in Brice did not limit its holding that equitable tolling is inapplicable in Vaccine Act cases solely to Table cases. The only distinction it made was in pre-Act and post-Act cases (pre-Act cases concerned statutes of repose for which equitable tolling was never applicable). 240 F.3d at 1371. Turning to post-Act cases, the Federal Circuit held “there is good reason to find that Congress did not want the equitable tolling doctrine to apply in post-Act cases.” Id. at 1372. The Federal Circuit examined the Act’s specific exception from the limitations period for petitions improperly filed in state or federal court. The Act requires dismissal of the petition from that court, but considers the date the action was filed to be the date the later petition was filed if it was filed within one year of the date of dismissal. 42 U.S.C. § 300aa-11(a)(2)(B). The Federal Circuit stated, “When an Act includes specific exceptions to a limitations period, we are not inclined to create other exceptions not specified by Congress.” 240 F.3d at 1373.

The Federal Circuit refused to apply equitable tolling to Vaccine Act cases because “the limitations period is part of a detailed statutory scheme which includes other strict deadlines,” referring to the requirement that decisions be issued within 240 days of the filing of a petition, and the prohibition of suspending proceedings for more than a total of 150 days. 42 U.S.C. §§ 300aa-12(d)(3)(A)(ii) and (C). Id. Moreover, the Act “emphasizes the importance of quick resolution of claims,” stating that Congress intended the parties to obtain speedy and reliable judgments under the Act. Id. The Federal Circuit stated:

To allow equitable tolling would conflict with these principles. While the doctrine of equitable tolling is designed to prevent harsh and unjust results, the

difficulty with the doctrine is that it invites prolonged and wasteful collateral litigation concerning the running of the statute of limitations. ... Lengthy collateral litigation is directly inconsistent with Congress's objective in the Vaccine Act to settle claims quickly and easily.

Id.

Even before the Federal Circuit's opinion in Brice, lower courts have held that the discovery rule or doctrine is inapplicable to the Vaccine Act, i.e., the running of the statute of limitations is not delayed until petitioner discovers the vaccine caused the injury. Childs v. Secretary of HHS, 33 Fed. Cl. 556, 558 and n.2 (1995); Pertnoy v. Secretary of HHS, 1995 WL 579827, at *3, *4 (Fed. Cl. Spec. Mstr., Sept. 18, 1995); and Gribble v. Secretary of HHS, 1991 WL 211919, at *2 n.5 (Cl. Ct. Spec. Mstr., Sept. 26, 1991).

The Vaccine Act does not require that a symptom be "defined" in order for the statute of limitations to start to run in causation in fact cases, as petitioners assert. P. Response, p. 4. The Act requires that a symptom occur. Petitioners' assertion that in causation in fact cases, until a disease is diagnosed, a symptom cannot be "defined" and, therefore, the statute of limitations does not start to run is contrary to the statutory language.

In support of their assertion that, while equitable tolling is inapplicable to Table cases, it is applicable in causation in fact cases, petitioners state that United States v. Brockamp, 519 U.S. 347 (1997), upon which the Federal Circuit in Brice relied in concluding that equitable tolling was inapplicable in Vaccine Act cases, is not persuasive here. Petitioners claim that Brockamp's fifth criterion (speedy resolution) is inapplicable to causation in fact cases because they take longer to try than Table cases. Therefore, they posit, only Brockamp's fourth criterion (specific exceptions to the limitations period) applies herein, but that, by itself, is insufficient to justify not applying equitable tolling to causation in fact cases. P. Memorandum in Response, pp. 10-12.

But the Federal Circuit in Brice did not distinguish between Table and off-Table cases in holding that equitable tolling is inapplicable in Vaccine Act cases, emphasizing congressional intent for speedy resolution. In addition, applying equitable tolling to causation in fact cases would lengthen their resolution even further in direct opposition to congressional intent. Because the Federal Circuit in Brice held that equitable tolling is inapplicable to Vaccine Act cases, without distinguishing between Table and off-Table cases, and because applying equitable tolling to off-Table cases would protract their resolution even further, the undersigned cannot hold that petitioners may avail themselves of this doctrine.

Petitioners assert that the 36-month statute of limitations should be tolled until October 20, 1999 because they did not know, and reasonably could not have known, that Joshua had suffered an injury compensable under the Vaccine Act, citing Mogensen v. Secretary of HHS, 199 WL 1179612 (Fed. Cl. Spec. Mastr., Nov. 30, 1999). P. Memorandum in Response, p. 12. But the Mogensen case does not help petitioners herein. Firstly, the special master in Mogensen evaluated petitioners' claim for equitable tolling, assuming the doctrine applied, before the Federal Circuit issued its Brice decision, supra, saying equitable tolling does not apply in the Vaccine Program. Secondly, the special master dismissed the Mogensen case because he found petitioners had not exercised due diligence. The Vaccine Act starts the running of the statute of limitations on the occurrence, not the diagnosis, of the first symptom or manifestation of onset. Petitioners admit that prior to October 1999, Joshua showed "some delayed development," but attempt to deny the prior delay as the onset because they did not know they had a potential vaccine claim. Id. However, ignorance of one's rights is not enough to toll the statute of limitations. Dion v. United States, 137 Ct. Cl. 166, 167 (1956).

The Honorable John P. Wiese cited Dion in Goetz v. Secretary of HHS, 45 Fed. Cl. 340, 342 (1999), which petitioners herein state supports their argument. P. Memorandum in Response, p. 13. But Goetz does not support petitioners' argument since it resulted in a dismissal on statute of limitations grounds, which was affirmed on appeal. Judge Wiese stated, "[I]t is clear that Congress intended the cause of action in a ... case to accrue upon occurrence of the first symptom of an injury, not upon the first identification of a link between the injury and the vaccination." Id. at 341. Judge Wiese also agreed that equitable tolling did not apply in the case. Id. at 342. (The case was decided before the Federal Circuit's opinion in Brice.)

Joshua's symptoms of delays in language, social skills, and self-care were apparent to petitioners more than 36 months before they filed a petition. That there could be various causes for these developmental deficits does not remove from petitioners the obligation to secure their legal rights by filing a petition in a timely manner.

Petitioners state further that the statute of limitations really could not have run in this case because medical and scientific evidence has not yet confirmed that thimerosal in pediatric vaccines causes autism. P. Memorandum in Response, p. 13. This is a breathtaking statement because it means that the statute of limitations can never run as long as there is a dispute among the medical profession over whether someone indeed has a vaccine injury. We are far from the statutory language now which requires that the statute of limitations starts to run at the time of the first symptom or manifestation of onset.

Petitioners' statements that they are not late in filing an expert report since the first Autism General Order does not require one until August 2003 and that they have not missed any deadlines in the Omnibus Autism Proceeding are irrelevant. P. Memorandum in Response, pp. 14-15.

Because petitioners did not conform with the requirement of the Vaccine Act concerning timely filing of their petition, they are not entitled to participate in the Omnibus Autism Proceeding.

Since the onset of Joshua's injury precedes 36 months before petitioners filed their petition, the undersigned has no subject matter jurisdiction over this petition, and the petition must be dismissed.

CONCLUSION

The undersigned ORDERS that this case be dismissed for lack of subject matter jurisdiction. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master