

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

No. 13-442V

Filed: December 19, 2013

(Not for Publication)

MARIA GONZALEZ AND JOEL GONZALEZ, *
legal representatives of a minor child, *
Joel Gonzalez, Jr., *

Petitioners, *

Dismissal; Statute of Limitations
Untimely Filing

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *
Respondent. *

Maria Gonzalez and Joel Gonzalez, legal representatives of a minor child, Joel Gonzalez, Jr., pro se petitioners.

Ryan Pyles, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION¹

Vowell, Chief Special Master:

On July 1, 2013, Maria Gonzalez and Joel Gonzalez, legal representatives of a minor child, Joel Gonzalez, Jr., [“petitioners”] filed a petition for compensation under the National Childhood Vaccine Injury Act² [“Vaccine Act”] on behalf of their son, Joel Gonzalez, Jr. [“Joel”]. Petitioners’ filing included medical records. Petitioners alleged that Joel “received a pneumococcal conjugate (hereinafter “PCV”) and rotavirus (hereinafter “RV”)³ on June 28, 2010, and who suffered 6 hours later, on June 28, 2010,

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post it on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will redact such material from public access.

² 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, 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.

³ While petitioners refer to only the pneumococcal conjugate and rotavirus vaccinations in the first sentence of the Petition, later in paragraphs 3 and 7 the D.T.P. vaccine is referenced. Petition at 1.

a fever, jerking of his arms and legs, and a staring episode, which was “caused-in-fact” by the above-stated vaccination.” Petition at 1.

A status conference was held in this matter on August 20, 2013, before Special Master Daria Zane. During the status conference petitioners stated that the petition was mailed on Friday, June 28, 2013, the last day the claim could be timely filed. On September 4, 2013, respondent filed a motion to dismiss based on the claim not being filed within the statutorily prescribed limitations period set forth in Section 16(a)(2) of the National Childhood Vaccine Injury Act of 1986, as amended. Respondent’s Motion to Dismiss at 1. In respondent’s motion she notes that while the petition itself was dated June 18, 2013, the petition was received and filed on July 1, 2013. Petition at 1-2. As stated above, petitioners alleged onset of injury as occurring on the same day of vaccination, June 28, 2010. Petition at 1.

On September 5, 2013, I was assigned this case. On September 9, 2013, I ordered petitioners to file by no later than November 22, 2013, (1) their response to respondent’s motion to dismiss and (2) the records identified as missing by respondent. To date, petitioners have failed to respond.

Statute of Limitations

The Vaccine Act provides that:

In the case of . . . (2) 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)(emphasis added).

In *Cloer*, the Court of Appeals for the Federal Circuit affirmed that “the first symptom or manifestation of onset of a vaccine-related injury is ‘the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.’” *Cloer*, 654 F.3d. at 1335 (quoting *Markovich v. Sec’y, HHS*, 477 F.3d 1353, 1360 (Fed. Cir. 2007)). In *Wilkerson*, the Federal Circuit explained that the “recognition may have occurred some time after the symptoms first occurred.” *Wilkerson v. Sec’y, HHS*, 593 F.3d 1343, 1346 (Fed. Cir. 2010).

The Federal Circuit has held that “[t]here is no requirement that the vaccine injury be diagnosed.” *Cloer*, 654 F.3d at 1329 (emphasis omitted). The Circuit determined the date of the first symptom or manifestation of injury is “a statutory date that does not depend on when a petitioner knew or reasonably should have known anything adverse

about her condition.” *Cloer*, 654 F.3d 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.*

In this case, petitioners’ stated in the petition that Joel Jr. suffered a fever, jerking of his arms and legs, and a staring episode on June 28, 2010, six hours after receipt of his vaccinations that day. Pet. at 1. Further, in the affidavits of both Joel and Maria Gonzalez, his seizure disorder is stated to have developed on June 28, 2010, the same day as the vaccination. Petitioners’ Exs. 6-7. The medical records indicate that Joel Jr. presented to the emergency department on June 28, 2010, with a chief complaint of a single seizure that occurred that same day. Pet. Ex. 8 at 1. This supports the position that the first symptom of onset occurred by June 28, 2010. Therefore, the statutory deadline for filing within 36 months after the first symptom or manifestation of injury means that the petition was required to be filed by June 28, 2013. The petition was not filed until July 1, 2013.

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)). While I am sympathetic to petitioners’ situation, petitioners did not put forth an argument for equitable tolling and the record does not support a finding that equitable tolling is applicable.

Conclusion

Petitioners have the burden to show timely filing. Petitioners have 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). Furthermore, petitioners have not demonstrated any extraordinary circumstances warranting equitable tolling. **Thus, 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.

Denise K. Vowell
Chief Special Master