IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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MARK ARNOLD and ROBIN ARNOLD parents of JONATHAN ARNOLD, minor child,	*	
	*	No. 02-1084V
Petitioners,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: August 12, 2008
	*	Reissued with correction: Aug. 19, 2008
	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	autism, statute of limitations, Markovich
	*	
Respondent.	*	
* *		

Jean S. Martin, Shipman & Wright, LLP, Wilmington, N.C., for petitioners;
Linda S. Renzi, United States Department of Justice, Washington, D.C. for respondent.

CORRECTED DECISION GRANTING MOTION TO DISMISS[*]

Mark Arnold and Robin Arnold allege that various vaccines caused their son, Jonathan, to develop autism. They seek compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa–10 et seq. (2006). However, the Arnolds filed their petition after the period of time for filing a petition expired. Therefore, the respondent's motion to dismiss the petition is GRANTED.

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[*] Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, the person submitting the information has 14 days to identify and to move to delete such information before the document's disclosure. If the special master agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access. 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

I. Factual and Procedural History

The relevant factual events are not disputed. They are set forth to establish the predicate for the crux of the motion – the proper interpretation of the decision of the Federal Circuit in Markovich v. Sec'y of Health & Human Servs., 477 F.3d 1353 (Fed. Cir. 2007).

Jonathan was born on December 31, 1992. He received vaccinations between February 25, 1993, and November 11, 1998. Exhibit 2 at 1; exhibit 3 at 1.

On August 21, 1995, Jonathan was evaluated at the Duke University Medical Clinic. The report from this evaluation states that Jonathan is "a 31 month old with an undiagnosed problem causing delayed myelination, developmental delay, and autistic like features." Exhibit 13 at 1. In 2001, Jonathan was diagnosed with autism. Exhibit 3 at 87.

The facts in the preceding paragraph were asserted in respondent's motion to dismiss. Resp't Mot. to Dismiss at 2. In response, the Arnolds stated that "it is not disputed when Jonathan Arnold first exhibited signs and symptoms that could later be contributed [sic] to a diagnosis of autism." Pet'r Resp. at 2.

The Arnolds filed a petition on August 29, 2002. (They used the short-form autism petition authorized by Autism General Order #1 issued by the Office of Special Masters.) Like thousands of other cases, this case did not proceed for a period of years while certain test cases moved forward.

In 2008, the Arnolds filed medical records. After respondent received information about Jonathan, respondent filed the pending motion to dismiss and argued that the Arnolds did not comply with the statute of limitations, 42 U.S.C. § 300aa–16(a)(2). The Arnolds filed a response that was discussed during a status conference held on July 22, 2008. The motion is ready for adjudication.

II. Analysis

For this case, the statute of limitations requires a petition to be filed within 36 months "after the date of the occurrence of the first symptom or manifestation of onset . . . of such injury." 42 U.S.C. § 300aa–16(a)(2).

Here, as mentioned above, the Arnolds do not dispute respondent's assertion that Jonathan's autism was manifest by August 1995. See Pet'r Resp. at 2. Thus, to comply with 42 U.S.C. § 300aa–16(a)(2), the Arnolds were required to file their petition by August 1998. The Arnolds did not. They actually filed their petition in August 2002, four years later. Therefore, the statute of limitations precludes the Arnolds from proceeding on their petition.

Against this conclusion, the Arnolds argue that Markovich requires a different result. Pet'r Resp. at 3. The Arnolds quote, accurately, Markovich as stating the "'first symptom or manifestation of onset' . . . is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Pet'r Resp. at 5 (quoting Markovich, 477 F.3d at 1360) (ellipses in the Arnolds' brief). Based on this passage, the Arnolds contend that the statute of limitations has not begin to run in their case because the medical profession has not recognized autism as a vaccine injury. Pet'r Resp. at 6-7; see also id. at 9 ("Based upon the strict reading of Markovich, there is a requirement that the medical profession at large recognize a condition, disorder or disease as being capable of being caused by a vaccination in order for the statute to start running.")

The Arnolds's argument is flawed for several reasons. First, the statute itself does not refer to the medical profession. Courts should not add qualifications to a statute of limitations. "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." Holmberg v. Armbrecht, 327 U.S. 392, 395 (1945). "Our duty is limited to interpreting the statute as it was enacted, not as it arguably should have been enacted." Beck ex rel. Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029, 1034 (Fed. Cir. 1991).

The second reason relates to the first. Notwithstanding the Arnolds's arguments, Markovich did not change the process for determining when a claim to seek compensation pursuant to the National Vaccine Injury Compensation Program accrues. Consistent with Brice v. Sec'y of Health & Human Servs., 240 F.3d 1367, 1373 (Fed. Cir. 2001), and Weddell v. Sec'y of Health & Human Servs., 100 F.3d 929, 931 (Fed. Cir. 1996), Markovich states "Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act." Markovich, 477 F.3d at 1358.

The Arnolds argue that "the full holding of Markovich must be given consideration." Pet'r Br. at 9; accord id at 5-6. This proposition is not controversial. Decisions of the Federal Circuit are binding upon Special Masters. 42 U.S.C. § 300aa–12(f).

The Arnolds, however, err in their view of what the "holding" of Markovich is. In determining what is the "holding" of Markovich, the actions of the court are more important than the words in the decision. Ingram v. Comm'r of Social Sec. Admin., 496 F.3d 1253, 1265 (11th Cir. 2007). In contrast to a holding, dicta are "statements made by a court that are unnecessary to the decision in the case, and therefore[,] not precedential (although [they] may be considered persuasive)." National American Ins. Co. v. United States, 498 F.3d 1301, 1306 (Fed. Cir. 2007) (quotation marks deleted and brackets in original). According to the United States Supreme Court, "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979).

In Markovich, the Federal Circuit affirmed the decision of a judge of the Court of Federal Claims that, in turn, upheld the decision by a special master that the petition was filed outside of the statute of limitations. Markovich, 447 F.3d at 1354. The primary issue, the one that was pressed by the petitioners / appellants, was whether the statute of limitations begins to run only after a parent recognizes some behavior (in Markovich, eye-twitching) as the sign of an injury. The Markoviches argued for this subjective standard, while the government countered with an objective standard. Id. at 1356-57 (setting out parties' positions).

According to the Federal Circuit, the parties did not dispute that Ashlyn Markovich "suffers from seizure disorders as a result of the administration of such vaccines." Id. at 1356.[1] A reasonable inference from this statement is that the Federal Circuit believed that Ashlyn's injuries were "vaccine related."

Under these circumstances, the word "vaccine" in the statement "'first symptom or manifestation of onset' . . . is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large" must be considered dictum. The Federal Circuit did not have reason to consider whether Ashlyn's seizures were "vaccine related" because the parties conceded this point. Consequently, the word "vaccine" in the phrase "vaccine injury" is not part of the holding of Markovich and, therefore, not binding.

This reading of Markovich makes Markovich more consistent with Brice than the interpretation offered by the Arnolds. Brice states "the statute of limitation 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." Brice, 240 F.3d at 1373. Brice indicates that knowledge (held by the petitioner) that the vaccine caused an injury is not a factor in considering when the statute of limitations began to run. If the Federal Circuit in Markovich had intended that knowledge held by the medical community that the vaccine caused an injury should be a factor in starting the statute of limitations, Markovich probably would have distinguished Brice. But, Markovich did not distinguish Brice. Markovich actually cited Brice with approval. Markovich, 477 F.3d at 1358 & 1360. Thus, contrary to the Arnolds' argument here, Markovich does not require that the medical community accept an injury as being caused by a vaccine before the statute of limitations begins to run.

Finally, the standard urged by the Arnolds is unworkable in practice. The Arnolds argue that their claim has not accrued (meaning the statute of limitations has not started to run) because the medical community does not recognize autism as a vaccine injury. Pet'r Resp. at 9. Yet, in apparent contradiction, the Arnolds have actually filed a petition. If the Arnolds were correct that the statute of limitations has not begun to run, then it would appear that the Arnolds have filed

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[1] Whether the respondent conceded this point for the limited purposes of the motion to dismiss or whether the respondent made a more general concession is not known. However, it is unusual for respondent to concede that the vaccines that Ashlyn Markovich received cause a seizure disorder.

their case prematurely in the sense that all the elements are not present. See Indiana Michigan Power Co. v. United States, 422 F.3d 1369, 1378 (Fed. Cir. 2005) (discussing statute of limitations for claims that have not accrued).

III. Conclusion

The parties agree that the evidence shows that Jonathan was showing signs of autism in 1995. However, the Arnolds did not file a petition within 36 months of this date. Therefore, the statute of limitations bars the action.

Respondent's motion to dismiss is GRANTED. The Clerk's Office is ordered to dismiss the petition.

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master