

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: April 24, 2008)

DO NOT PUBLISH

ALLEN EDWIN LANE,)
)
Petitioner,)
)
v.)
)
SECRETARY OF)
HEALTH AND HUMAN SERVICES,)
)
Respondent.)

No. 08-0292V
Tetanus-Diphtheria (Td) Vaccine;
Brachial Neuritis/Brachial Plexitis;
Statute of Limitations; Dismissal

DECISION¹

Petitioner, Allen Edwin Lane (Mr. Lane), seeks compensation under the National Vaccine Injury Compensation Program (Program).² Appearing *pro se*, Mr. Lane filed his Program petition on **April 18, 2008**. *See* Petition (Pet.). Mr. Lane alleges that he sustained brachial neuritis after he received a tetanus-diphtheria (Td) vaccination on August 10, 2004. *See* Pet. at 1.

THE MEDICAL RECORDS

Mr. Lane received a Td vaccination on August 10, 2004. *See* Petitioner’s exhibit (Pet. ex.) 2-B. On **September 3, 2004**, Mr. Lane presented to a physician at the Bridgewater Medical Group

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

in North Bridgewater, New Jersey. See Pet. ex. 3. Mr. Lane complained about arm pain following a Td vaccination “w[ee]ks ago.” Pet. ex. 3. Mr. Lane commenced a course of medical treatment and physical therapy to address his condition. See, e.g., Pet. ex. 5 (10/14/04: evaluation for “L[eft] arm weakness” that had persisted for “2 months following tetanus shot in L[eft] arm”); Pet. ex. 6 (10/18/04: evaluation for “weakness” in “L[e]f[t] arm” lasting “2 months”); Pet. ex. 7-A (10/21/04: “neurological consultation” regarding “weakness in the left upper extremity since August 2004”); Pet. ex. 11-A (1/17/05: “neurosurgical consultation” for “decreased strength” in the “left upper extremity ongoing for the past five months” following “tetanus shot”); Pet. ex. 12-A-B (2/11/05: physical therapy progress report); Pet. ex. 13-A (2/14/05: “followup neurosurgical consultation”); Pet. ex. 14-A-B (3/7/05: physical therapy discharge summary); Pet. ex. 15-A (3/16/05: neurological evaluation for “complaints of left shoulder weakness” since “tetanus injection” in August 2004). By **April 7, 2005**, Patrick Gainey, M.D. (Dr. Gainey), a neurologist associated with Princeton & Rutgers Neurology, P.A., concluded that Mr. Lane’s “symptoms are most consistent with a post-vaccination left upper trunk brachial plexitis.” Pet. ex. 16-B.

DISCUSSION

The United States Supreme Court instructs: “An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims.” *Hughes v. Rowe*, 449 U.S. 5, 15 (1980). However, “the leniency” that a special master must extend to a *pro se* petitioner “with respect to mere formalities” does not apply to substantive matters. *Saladino v. U.S.*, 62 Fed.Cl. 782, 787 (2004), citing *Kelly v. Sec’y, U.S. Dep’t of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987). Thus, despite his status as a *pro se* litigant, Mr. Lane must satisfy the Program’s “jurisdictional requirements.” *Id.*

The United States is sovereign, and no one may sue the United States without the sovereign’s waiver of immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The Program represents a waiver of sovereign immunity. See, e.g., *Markovich v. Secretary of HHS*, 477 F.3d 1353, 1360 (Fed. Cir. 2007), citing *Brice v. Secretary of HHS*, 240 F.3d 1367, 1370 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1040 (2001). Therefore, the special master must construe “strictly and narrowly” Program provisions. *Markovich*, 477 F.3d at 1360.

A statute of limitations is a jurisdictional condition to the waiver of sovereign immunity. *United States v. Mottaz*, 476 U.S. 834, 841 (1986). The statutory limitations period governing Mr. Lane’s petition is contained in § 300aa-16(a)(2). Under § 300aa-16(a)(2), a petitioner seeking compensation related to an injury associated with a vaccine administered after October 1, 1988, may not file a petition “after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset” of the injury. In *Markovich*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) accorded different meanings to the word “symptom” and to the phrase “manifestation of onset.” See *Markovich*, 477 F.3d at 1357. According to the Federal Circuit, “either a ‘symptom’ or a ‘manifestation of onset’ can trigger the running of the statute, whichever is first.” *Markovich*, 477 F.3d at 1357. And, according to the Federal Circuit, “the first

symptom or manifestation of onset,’ for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of” a petitioner’s alleged vaccine-related injury “by the medical profession at large.” *Markovich*, 477 F.3d at 1360. Thus, the Federal Circuit confirmed that “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.

Mr. Lane’s medical records reflect that on **April 7, 2005**, Dr. Gainey determined that Mr. Lane had suffered likely a vaccine-related injury. *See* Pet. ex. 16-B. Mr. Lane’s medical records reflect also that Mr. Lane experienced symptoms and manifestations of his likely vaccine-related injury for many months before April 7, 2005, perhaps as early as **mid-to-late August 2004**. *See, e.g.*, Pet. ex. 3 (9/3/04: reporting “arm” pain for several weeks); Pet. ex. 5 (10/14/04: evaluation for “L[eft] arm weakness” that had persisted for “2 months following tetanus shot in L[eft] arm”); Pet. ex. 6 (10/18/04: evaluation for “weakness” in “L[e]f[t] arm” lasting “2 months”); Pet. ex. 7-A (10/21/04: “neurological consultation” regarding “weakness in the left upper extremity since August 2004”); Pet. ex. 11-A (1/17/05: “neurosurgical consultation” for “decreased strength” in the “left upper extremity ongoing for the past five months” following “tetanus shot”); Pet. ex. 15-A (3/16/05: neurological evaluation for “complaints of left shoulder weakness” since “tetanus injection” in August 2004). Yet, Mr. Lane did not commence his Program action until **April 18, 2008**. *See* Pet.

The special master notes that April 7, 2005—the date of Mr. Lane’s diagnosis—*precedes* the 36-month period before April 18, 2005—the date that Mr. Lane filed his Program petition. *Prior to diagnosis, Mr. Lane exhibited certainly symptoms and manifestations of his condition*. Logically, then, given the record as a whole, the date of the first symptom or manifestation of onset of Mr. Lane’s condition *precedes* the 36-month period before the date that Mr. Lane filed his Program petition. Therefore, the special master rules as a matter of law that, on its face, Mr. Lane’s petition is barred by § 300aa-16(a)(2). The special master possesses no authority under any circumstances to waive the limitation period in § 300aa-16(a)(2). *See, e.g., Brice v. Secretary of HHS*, 240 F.3d 1367, 1370 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1040 (2001)(doctrine of equitable tolling does not apply in Program cases). Indeed, the special master “has no power to do anything but strike the case from [the] docket.” *See Johns-Manville Corporation v. U.S.*, 893 F.2d 324, 327 (Fed. Cir. 1989) (citation omitted).

CONCLUSION

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition as barred by the statute of limitations contained in § 300aa-16(a)(2).

The clerk of court shall send Mr. Lane's copy of this decision to Mr. Lane by overnight express delivery.

John F. Edwards
Special Master