

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-536V

April 22, 2008

BRIAN BEASLEY and TAMMY BEASLEY, *
Parents of DAKOTA BEASLEY, *

Petitioners, *

v. * Autism; onset

SECRETARY OF THE DEPARTMENT OF *
HEALTH AND HUMAN SERVICES, *

Respondent. *

ORDER¹

On July 16, 2007, petitioners filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq. (hereinafter, the Vaccine Act), alleging that various vaccinations caused autism in their son Dakota Beasley (hereinafter, “Dakota”).

¹ Because this order contains a reasoned explanation for the special master's action in this case, the special master intends to post this order 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). Vaccine Rule 18(b) states that 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, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

On November 16, 2007, respondent filed a Motion to Dismiss this petition on the ground that Dakota's onset of autism was more than 36 months before petitioners filed their petition. The Vaccine Act requires petitioners to file their petitions within 36 months of the first symptom or manifestation of onset of the alleged injury. See §300aa-16(a)(2) of the Vaccine Act. That means that if the first symptom or manifestation of onset of Dakota's autism occurred before July 15, 2004, petitioners' petition would be time-barred for their failure to file the petition within 36 months of the onset of Dakota's autism. Autism begins when the first symptom or manifestation of onset occurs, not when the autism is diagnosed. See Markovich v. Secretary of HHS, 477 F.3d 1353, 1357 (Fed. Cir. 2007).

Petitioners filed a Response and Memorandum of Law in Opposition to respondent's Motion to Dismiss on January 14, 2008. Petitioners are under the misconception that the onset of autism is the date it is diagnosed. This is not the law. The onset of autism is when the first symptom or manifestation of onset occurs.

On December 7, 2004, Dr. Margie A. Morales, a pediatric neurologist, noted that when Dakota was nine months of age (November 2002), he did not respond to his name and did not seem interactive. When Dakota was about 18 months of age (August 2003), petitioners were concerned about Dakota's speech and language skills. Med. recs. at Ex. 6, p. 76-77. Both November 2002 and August 2003, when Dakota manifested failure to respond to his name, lack of interactivity, and speech delay are before 36 months before petitioners filed their petition.

Petitioners will note that Dr. Partington, the psychologist who diagnosed Dakota with autism, also relies on the date of diagnosis as the onset of Dakota's autism. Filing of January 14, 2008. Dr. Partington disparages Dakota's earlier failure to respond to his name, lack of

interactivity, and speech delay, saying Dakota had much more severe behavioral problems when Dr. Partington saw him. He also says “it could not be said with certainty that Dakota’s lack of interaction or speech and language delays were symptoms of autism spectrum disorder, rather than the result of his behavior issues.” Last page of affidavit.

First, the burden of proof here is not certainty, but probability. Secondly, Dr. Partington’s statement is not credible. Dr. Roberto F. Tuchman, a neurologist engaged in neurodevelopmental evaluation at Miami Children’s Hospital, relies upon Dakota’s aloofness and speech delay in diagnosing him with autism. P. Ex. 11, p. 99. The very symptoms that Dakota had earlier when he was nine months and 18 months old are the basis for Dr. Tuchman’s diagnosis of autism, yet these are the symptoms psychologist Partington rejects as the onset of Dakota’s autism. Dr. Tuchman, who witnessed Dakota’s temper tantrums, did not attribute Dakota’s speech delay and aloofness to his temper tantrums. P. Ex. 11, p. 99.

Petitioners are aware that the undersigned has stricken Dr. Partington’s report since he is not a medical doctor, and Dr. Tuchman’s report certainly confirms how much more superior in the area of medical diagnosis a neurologist is than a psychologist, even assuming a psychologist were competent to engage in medical diagnosis. If the undersigned were to change her mind about having stricken Dr. Partington’s report and receive it into evidence, his assumption of the onset date of autism as the date when he diagnosed Dakota’s autism is legally wrong. Moreover, his emphasis of temper tantrums as the cause of Dakota’s failure to respond to his name, lack of interactivity, and speech delay is not credible, particularly in light of Dr. Tuchman’s opinion.

Petitioners may feel it is unfair to start the statute of limitations running before Dakota was diagnosed with autism. But the case law is clear that onset starts with the first symptom or

manifestation of onset and there is no equitable tolling of the statute of limitations under the Vaccine Act. The United States Court of Appeals for the Federal Circuit in Brice v. Secretary of HHS, 240 F.3d 1367, 1370-71 (Fed. Cir. 2001), cert. denied sub nom Brice v. Thompson, 534 U.S. 1040 (2001), addressed this very issue. When a petitioner states that he or she has really tried to follow the rules, but just could not do so, the petitioner is still bound by the statute of limitations. That means that even in cases where the parents are very sympathetic, if they wait longer than 36 months after the first symptom or manifestation of onset of their child's illness, the statute of limitations has run and the special master has no subject matter jurisdiction in the case. Their case must be dismissed.

On March 20, 2008, the undersigned ordered petitioners to obtain Dr. Morales' answers to questions about the onset of Dakota's autism (was it at nine months of age or at 18 months of age). Dr. Morales' responses are less than helpful. Ex. D, filed April 18, 2008. (Petitioners' Notice of Compliance with the Court's Order of March 20, 2008 and Request for Reconsideration, Based upon Supplemental Record, During the Next Telephonic Status Conference to be held on May 21, 2008). She wrote that Dakota's aunt told Dakota's mother that he was not responding to his name and did not seem interactive at nine months. He did not have a social smile and he had language delay prior to 18 months. She says his autism did not begin at 18 months but she does not answer whether it began at nine months. She just lists a series of symptoms. P. Ex. D.

The undersigned has read the Marino Center records (P. Ex. 11) and finds them not helpful to the resolution of the issue of first symptom or manifestation of onset of autism. Petitioners refer to Dr. Tuchman's diagnosis of autism as if the date of his diagnosis of autism is

the date of its onset. It is not. The date of onset of autism is the date the first symptom or manifestation of onset occurs, not the date of diagnosis.

In an Order dated March 20, 2008, the undersigned ordered respondent to file Dr. John MacDonald's expert report by April 28, 2008. Petitioners should be aware that Dr. MacDonald is a pediatric neurologist. If he writes in his report that Dakota's first symptom or manifestation of onset of autism was when he was nine months of age (November 2002) or at any time prior to July 15, 2004, petitioners will have filed their petition after the statute of limitations expired. That means that the undersigned would have no subject matter jurisdiction over this case and petitioners and their counsel would not receive fees and costs.

If Dr. MacDonald's opinion is that Dakota's failure to respond to his name and lack of interactivity at nine months of age or speech delay at 18 months is the onset of his autism, petitioners will have the option of finding a doctor who will offer an opinion that these symptoms are independent of his later-diagnosed autism, which is not likely since Dr. Tuchman in P. Ex. 11 emphasizes Dakota's aloofness and language delay in diagnosing Dakota as having autistic spectrum disorder.

The next status conference is still May 21, 2008 at 11:00 a.m. (EDT).

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master