

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-551V

April 21, 2008

\*\*\*\*\*

TROY AMAR STORY, SR., as Parent and \*  
Legal Representative of TROY AMAR STORY, \*  
JR., a Minor, \*

Petitioner, \*

v. \* Autism; statute of limitations

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

Respondent. \*

\*\*\*\*\*

## ORDER<sup>1</sup>

---

<sup>1</sup> 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 July 19, 2007, petitioner 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 his son Troy Amar Story, Jr. (hereinafter, “Troy Jr.”).

On January 11, 2008, respondent filed a Motion to Dismiss this petition on the ground that Troy Jr.’s onset of autism was more than 36 months before petitioner filed his 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 Troy’s autism occurred before July 18, 2004, petitioner’s petition would be time-barred for his failure to file the petition within 36 months of the onset of Troy Jr.’s autism. Autism begins at its first symptom or manifestation of onset, not when the autism is diagnosed. See Markovich v. Secretary of HHS, 477 F.3d 1353, 1357 (Fed. Cir. 2007).

Petitioner states that he noticed a rapid decline in Troy Jr.’s behavior between April 22, 2004 and June 30, 2004. Filing of Nov. 20, 2007, page 2. Petitioner states that after April 22, 2004, he noticed Troy Jr. rapidly decline in language skills, refuse to make eye contact, and become very hyperactive. It was as though Troy Jr. were going backward. Petitioner states that this was why Troy Jr. was taken to his pediatrician on June 30, 2004. *Id.*

At Exhibit 7, p. 65, is a medical record dated June 30, 2004 stating Troy Jr. had no speech at all at the age of two. This is reiterated on page 63 for the June 30, 2004 visit. Speech delay is a symptom of autism. Even on February 16, 2004, at Troy Jr.’s 18-month visit, he was noted not to speak 5-10 words, indicating possible speech delay. Ex. 7, p. 76.

April 22, 2004 to June 30, 2004 is a time period occurring before July 18, 2004 which is 36 months before petitioner filed his petition. That means the onset of Troy's autism was more than 36 months before petitioner filed his petition.

Petitioner responded on March 6, 2008 to respondent's Motion to Dismiss, stating he had tried very hard to be timely, and his and his wife's life with Troy Jr. was very difficult. The undersigned interprets petitioner's response as a motion for equitable tolling of the statute of limitations, that is, the statute of limitations should not run because it would be unfair. 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. There is no equitable tolling under the Vaccine Act. That means that even in cases where the parents are very sympathetic, if they wait longer than 36 months after the 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.

Ordinarily, the next step would be for petitioner to obtain a medical expert report stating that the onset of Troy Jr.'s autism was not between April 22, 2004 and June 30, 2004. But since petitioner is proceeding in forma pauperis, the undersigned does not want to impose any costs on petitioner, particularly since, if the undersigned does not have subject matter jurisdiction over this case, petitioner would not be reimbursed for that cost.

Therefore, the undersigned orders respondent to have a DVIC doctor write a report answering the question whether Troy Jr.'s autism began between April 22, 2004 and June 30, 2004. Respondent shall file this report by **May 30, 2008**.

**IT IS SO ORDERED.**

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Laura D. Millman  
Special Master