

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-264V

Filed: March 25, 2009

Not for publication

VALIENTE ESCALANTE, *

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Petitioner, *

*

v. *

Order to Show Cause; Interpretation of
Substantial Aggravation

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SECRETARY OF THE DEPARTMENT *

OF HEALTH AND HUMAN SERVICES, *

*

Respondent. *

*

ORDER TO SHOW CAUSE¹

On April 11, 2008, petitioner filed the above-captioned petition alleging that he sustained Brachial Plexitis following receipt of a diphtheria-tetanus ("DT") vaccination in his left arm on April 9, 2005.

On August 22, 2008, respondent filed a Motion to Dismiss the petition on the ground that petitioner filed his claim for compensation after the expiration of the statutorily-prescribed

¹ Because this Order contains a reasoned explanation for the special master's action in this case, the special master intends to post this decision 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 substantive orders 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 constitute a clearly unwarranted invasion of privacy. When such an 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.

limitations period, set forth in Section 16(a)(2) of the Vaccine Act. On August 26, 2008, the undersigned issued an Order, requiring petitioner to file a response to respondent's Motion to Dismiss by September 12, 2008. Petitioner did not respond to the undersigned's September 12 deadline. On September 13, 2008, the undersigned issued another Order requiring petitioner to respond to respondent's Motion to Dismiss by October 17, 2008.

On October 17, 2008, the undersigned received by facsimile Petitioner's Opposition to Dismissal, accompanied by a Motion to File petitioner's Opposition to Dismissal by leave of the Court. The undersigned granted petitioner's Motion and petitioner's Opposition was filed on October 20, 2008.

In petitioner's Opposition, filed October 17, 2008, petitioner proposes that before an April 13, 2005 emergency room admission and evaluation, petitioner was experiencing a "mild reaction" to his April 9, 2005 vaccination. Petitioner alleges that only on the date of his admission to the hospital on April 13, 2005, was there "significant aggravation" of his injury. Pet'r's. Opposition at 1. Specifically, petitioner maintains that "[u]ntil the significant aggravation there was insufficient injury to pursue a claim in this Court," and that he "sustained injury from the 'significant aggravation' onset that required him to seek medical help . . . on April 13, 2005. *That is the date this Court should take as the date the clock started running for purpose [sic] of the 36[sic]month time limit.*" *Id.* at 1-2 (*emphasis added*).

Respondent filed a Reply to Petitioner's Opposition to Dismissal on October 27, 2008, asserting that petitioner misinterpreted and misapplied the statutory definition of "significant aggravation" so that the actual date of onset of petitioner's alleged vaccine injury (April 9, 2005) would not apply here. Respondent notes that the Vaccine Act defines significant aggravation as "any change for the worse in a *preexisting condition* which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." 42 U.S.C. § 300aa-33(4)(*emphasis added*). "Preexisting" means before the vaccination. Further, respondent maintains that the argument advanced by petitioner is the same theory that the Federal Circuit rejected in Brice v. Sec'y of HHS, 240 F.3d 1367, 1369 n.1 (Fed. Cir. 2001). In that case:

[t]he Brices initially argued before the special master that Tilghman suffered a significant aggravation of his condition in September 1994, when the Brices discovered that Tilghman's condition was worse than it initially seemed. The Court of Federal Claims held that 'where, as here, a petitioner alleges that a vaccine caused an injury and that later there was a significant aggravation of that same injury, the petitioner must file a petition within 36 months of the first symptom or manifestation of the onset of the injury.' Brice v. Sec'y of HHS, 36 Fed. Cl 474, 476 (1996). The Brices now apparently agree that the statute of limitations began to run on May 9, 1992, and in any case *we agree with the analysis of the Court of Federal Claims, i.e., that the statute began to run with the manifestation of Tilghman's first symptoms on May 9, 1992.*

240 F.3d 1367, 1369 n.1 (Fed. Cir. 2001), cert. denied, 534 U.S. 1040 (2001). Respondent further alleges that petitioner's erroneous interpretation of the term "significant aggravation," also misinterprets the interpretation of the U.S. Court of Federal Claims, which has stated:

There can be no question that the reference . . . to “significant aggravation” is to the action of the vaccine on a pre-existing condition, i.e., a condition not precipitated by the vaccination in question. This is made clear by the definition of the phrase “significant aggravation” as “any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health.” 42 U.S.C. § 300aa-33(4).

Childs v. Sec’y of HHS, 33 Fed. Cl. 556, 559 (1995). Resp’t’s Resp. at 3. Respondent also notes that this Program has held that “[p]etitioners may alternatively plead, prove, and argue either (1) that the vaccine caused a new injury, medically separate and distinct from a condition that preexisted the vaccine, or (2) that the vaccine caused a significant aggravation of the preexisting condition that worsened it substantially.” Resp’t’s Resp. at 3, quoting Holtzman v. Sec’y of HHS, No. 07414, 2008 WL 4489619, at *1 (Fed. Cl. Spec. Mstr. Sept. 22, 2008).

On November 24, 2008, the undersigned issued an Order giving petitioner until January 16, 2009, to file an expert report stating that he had a vaccine injury which was significantly aggravated, and a basis for the opinion.

On January 15, 2009, petitioner’s counsel sent the undersigned a facsimile requesting additional time to file an expert report. On January 30, 2009, the undersigned issued an Order granting petitioner until February 20, 2009, to file an expert report addressing the issue of significant aggravation of a pre-existing condition. Petitioner failed to respond to the undersigned’s February 20th Order.

Petitioner characterizes the “significant aggravation” onset as the date of his emergency room visit on April 13, 2006. Petitioner’s own statement indicates he experienced a mild reaction to the DT vaccination he received on April 9, 2005, *prior to* his admission to the emergency room on April 13, 2005. Petitioner’s medical records indicate that on the evening of April 9, 2005, petitioner visited Dr. Susan Hunter-Joerns, M.D., a neurologist, who noted that petitioner “didn’t feel right” the evening he received his DT vaccination. Pet’r’s Recs. from Susan Hunter-Joerns at 1. The records further indicate that on April 10, 2005, petitioner “developed gradual onset of ache in the [left] anterior chest, which was slightly worse with deep breathing without radiation.” Pet’r’s Valley Med. Recs. at 1.

The Vaccine Act requires a petition to be filed prior to “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 injury.” 42 U.S.C. § 300aa-16(a)(2). Further, the Federal Circuit explained in Brice that the 36-month statute of limitations “begins to run upon the first symptom or manifestation of the onset of injury.” Brice, 240 F.3d at 1373. Petitioner has not provided an explanation as to why his case is factually distinct from Brice discussed above. Moreover, petitioner has not provided evidence of an injury or condition that preceded his vaccination that would allow him to proceed successfully on the theory of significant aggravation of a *pre-existing condition or injury*. And, even if he could do so, the onset of his alleged vaccine injury occurred on the evening petitioner received his DT vaccination, April 9, 2005, more than 36 months before he filed his petition on April 11, 2008. In order to have timely filed his petition, petitioner had to file his petition by April 9, 2008, not April 11, 2008.

By Friday, May 1, 2009, the undersigned hereby ORDERS petitioner to show cause why

this case should not be dismissed for failure to file a petition within 36 months of the “significant aggravation” of the vaccine injury alleged.

IT IS SO ORDERED.

Dated: Mar. 25, 2009

Laura D. Millman

Laura D. Millman
Special Master