

2022-2119

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

W. J., BY HIS PARENTS AND LEGAL GUARDIANS, R.J. AND A.J.,
Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

Appeal from a judgment of the United States Court of Federal Claims
in No. 1:21-vv-01342-KCD, Judge Kathryn C. Davis

**CORRECTED BRIEF OF RESPONDENT-APPELLEE
SECRETARY OF HEALTH AND HUMAN SERVICES**

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STATEMENT OF RELATED CASES

No appeal of this case has been before this or any other appellate court. To the knowledge of Respondent-Appellee, there is no same or similar case, filed pursuant to the National Childhood Vaccine Injury Act of 1986 (“Vaccine Act”), 42 U.S.C. § 300aa-1 to -34, pending before the Supreme Court, this Court, or any other Circuit Court of Appeals.

STATEMENT OF THE ISSUE

Did the Special Master apply the correct legal standards and properly exercise her discretion in determining that Petitioner-Appellant filed an untimely claim under the Vaccine Act?

STATEMENT OF THE CASE

I. Statutory Framework: The National Childhood Vaccine Injury Act

Petitioners filed a claim under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (“Vaccine Act” or “Act”), *as amended*, seeking compensation for injuries that allegedly resulted from the administration of a Measles, Mumps, and Rubella (“MMR”) vaccine.

In 1986, Congress passed the Vaccine Act, establishing a program administered by the Secretary of Health and Human Services to increase the safety and availability of vaccines. *See* 42 U.S.C. § 300aa-1; *Terran v. HHS*, 195 F.3d

1302, 1307 (Fed. Cir. 1999). The Vaccine Act created the National Vaccine Injury Compensation Program, through which claimants could petition to receive compensation for vaccine-related injuries or death. *See* 42 U.S.C. § 300aa-10(a). To adjudicate vaccine injury claims, the Vaccine Act establishes an Office of Special Masters within the United States Court of Federal Claims (“CFC”) to issue decisions on petitions for compensation (42 U.S.C. §§ 300aa-12(c)(1), 300aa-12(d)(3)(A)), provides for review of a special master’s decision by the CFC (42 U.S.C. § 300aa-12(e)), and allows appeal of the CFC’s rulings to this Court. 42 U.S.C. § 300aa-12(f).

Section 16(a)(2) of the Vaccine Act limits the time in which a claim for an alleged vaccine-related injury may be filed. That section provides that:

[In the case of] a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after 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 such injury.

42 U.S.C. § 300aa-16(a)(2). This Court has held that the Vaccine Act’s statute of limitations is subject to equitable tolling under “extraordinary” circumstances.

Cloer v. HHS, 654 F.3d 1322, 1343-44 (Fed. Cir. 2011) (en banc).

II. Procedural History

On May 7, 2021, R.J. and A.J. (“petitioners”) filed a vaccine injury claim on behalf of their minor child, W.J.¹ *See* Appendix 44 (hereinafter referred to as “Appx”). Petitioners alleged that an MMR vaccine administered on February 24, 2005, caused W.J. to suffer chronic encephalopathy, immunodeficiencies, immune-related blood disorders, severe eczema, and allergies. *Id.*

On June 3, 2021, Special Master Nora Beth Dorsey convened an initial status conference and addressed the threshold question of the statute of limitations. Later that day, she issued a written Order directing the Secretary of the Department of Health and Human Services (“respondent”) to file his Rule 4(c) Report outlining his position in the case, along with any accompanying Motion to Dismiss. Appx185-186. Special Master Dorsey set a deadline for petitioners’ response. *Id.*

Respondent filed a Rule 4(c) Report and a Motion to Dismiss on August 2, 2021. Appx073, 075. On September 30, 2021, petitioners filed a response to the Motion to Dismiss. Appx088. Petitioners also submitted additional evidence and

¹ W.J. was born on February 8, 2004. Appx045. Thus, he is no longer a minor. Petitioners have been appointed guardians of W.J.’s person and are authorized to make health care decisions on his behalf. *See* Appx126. Petitioner R.J. has averred that he is W.J.’s legal guardian.

literature in support of their claim. *See* Appx024. Respondent filed a reply to petitioners' response on October 28, 2021. *See id.*

On February 16, 2022, the Special Master issued her Decision. The Special Master reviewed each of W.J.'s alleged vaccine injuries and ultimately concluded that, "even if petitioners were able to establish W.J. suffered [a vaccine-related injury], petitioners filed their claim beyond the statute of limitations." Appx034-037. After concluding that petitioners' claim was untimely, the Special Master then addressed whether equitable tolling could apply in this case. Here, the Special Master considered W.J.'s mental capacity, along with petitioners' claims that the government engaged in fraudulent concealment and violated W.J.'s Fourteenth Amendment rights. Appx037-042. The Special Master found no basis upon which to apply equitable tolling. Accordingly, the Special Master granted respondent's Motion and dismissed petitioners' claim for failure to timely file their petition within the statute of limitations. Appx043.

On March 14, 2022, petitioners timely moved for review of the Special Master's Decision before the Court of Federal Claims ("CFC"). Appx006. On June 21, 2022, Judge Kathryn C. Davis affirmed the Special Master's decision. Appx002. Judge Davis concluded that the Special Master "acted rationally, within her discretion, and in accordance with law in finding Petitioners' claims time-barred by the statute of limitations." *Id.* Judge Davis noted that the "issue of

timeliness was apparent from the face of the Petition, and the Special Master did not force Respondent to adopt a particular legal strategy or position.” *Id.* Moreover, “the Special Master applied the correct legal standard for a motion to dismiss by rejecting legal conclusions and determining that the pleaded facts, even accepted as true, did not justify equitable tolling.” *Id.* To the extent that the Special Master included factual discussion in her decision that touched on the merits of petitioners’ vaccine injury case, such discussion did not form the basis for her opinion, and her “decision was properly limited to the statute of limitations question.” *Id.* Based on all of these factors, Judge Davis upheld Special Master’s decision to dismiss petitioners’ vaccine injury claim as untimely. *Id.* This appeal followed.

STATEMENT OF THE FACTS

Special Master Dorsey and Judge Davis summarized the factual history of this case in their respective decisions. Respondent adopts the history outlined in the Special Master’s Decision and CFC Opinion and offers a brief summary of the key facts relevant to this appeal.

W.J. was born on February 8, 2004. Appx028. On February 24, 2005, W.J. was seen by his pediatrician for a one-year check-up, where he received a pneumococcal conjugate vaccine, along with his first dose of the MMR vaccine. *See id.*

On March 7, 2006, at age two, W.J. was diagnosed with a “speech delay.” Appx028. Ten months later, W.J. was seen by a pediatric neurologist for concerns regarding development delays. *Id.* W.J.’s neurologist felt that his developmental delays warranted “intensive therapeutic programs.” *Id.*

W.J. received his second dose of the MMR vaccine on March 15, 2008, at age four. Appx028. At age five, W.J. was diagnosed with autism spectrum disorder. Appx003.

W.J. continued to attend yearly follow-up visits with his pediatrician. Appx029. In addition to his diagnosis of moderate-to-severe autistic spectrum disorder, W.J. suffered from “unstable atopic dermatitis” and various environmental allergies. *Id.* On April 4, 2014, at age ten, W.J. underwent a variety of lab tests, including genetic screening. *Id.* He exhibited a normal blood panel, normal platelet count, and normal levels of heavy metals; genetic testing revealed a MTHFR homozygous A1298C mutation. *Id.* On February 22, 2019, at age fifteen, W.J. underwent further testing, which revealed a duplication on the Xq28 chromosome “of uncertain clinical significance” but “likely benign.” *Id.* at 030.

SUMMARY OF THE ARGUMENT

Special Master Dorsey did not abuse her discretion in determining that petitioners failed to file a timely petition under the Vaccine Act. The Special Master had authority to dismiss petitioners' claim under Rule 12(b)(6). She did not exceed her legal authority by addressing the statute of limitations at the outset of the case, or by considering the facts presented in the medical record. Petitioners have not established a basis for equitable tolling of the statute of limitations, or a violation of W.J.'s Constitutional rights. Accordingly, the Opinion of the CFC sustaining the Special Master's Decision should be affirmed.

STANDARD OF REVIEW

The Court may set aside a special master's findings of fact or conclusions of law only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 300aa-12(e)(2)(B). Findings of fact receive deferential review under an "arbitrary and capricious" standard; legal conclusions are reviewed *de novo*; and discretionary rulings are reviewed for "abuse of discretion." *Munn v. HHS*, 970 F.2d 863, 870 n.10 (Fed. Cir. 1992). It is within the special master's discretion to weigh evidence and "reversible error is 'extremely difficult to demonstrate'" unless the special master has failed to consider the relevant evidence of record, drawn implausible inferences, or failed to provide a rational basis for the decision. *Lampe v. HHS*, 219 F.3d 1357, 1360

(Fed. Cir. 2000) (citation omitted); *see also Munn*, 970 F.2d at 870 (noting that the arbitrary and capricious standard is “well understood to be the most deferential possible”).

ARGUMENT

I. The Special Master Did Not Abuse Her Discretion in Raising the Issue of Timeliness and Setting a Deadline for Respondent’s Pleadings.

Petitioners argue that “the Special Master, in breach of the separation-of-powers doctrine, ordered the Secretary to file a motion to dismiss our Petition.” Pet. Br. at 18. Moreover, petitioners argue that Judge Davis compounded this error by making “incorrect interpretations of the June 3, 2021 [status conference] transcript” and reaching the “clearly erroneous conclusion that the Special Master didn’t actually order the Secretary to file any motion to dismiss at all.” *Id.* at 19.

The Special Master acted appropriately. As the Special Master noted in her Decision, the issue of timeliness is a “threshold question” which must be addressed before a petitioner can proceed on the merits of his claim. Appx024. In petitioners’ case, the question of timeliness was readily apparent from the outset. Indeed, it was *petitioners* who first raised the issue in their petition. Appx055-063. (claiming that, “Equitable Tolling of the Statue of Limitation is Warranted in this Matter”).

Approximately one month after petitioners filed their petition for compensation, Special Master Dorsey held an initial status conference, where she raised the issue of timeliness. Appx024. At this June 3, 2021 status conference and in a subsequent written order, the Special Master “explained that respondent [would] file [his] Rule 4(c) Report with a Motion to Dismiss regarding [the] statute of limitations or other legal motion in sixty (60) days.” Appx185.

Petitioners’ efforts to turn this perfectly ordinary interaction regarding setting a briefing schedule to address a threshold legal question into a separation of powers issue is entirely without merit.² The Special Master did not coerce or unduly influence respondent’s legal strategy by broaching the topic and setting a deadline for respondent’s “Rule 4(c) Report with Motion to Dismiss regarding [the] statute of limitations *or other legal motion*.” Appx185 (emphasis added). To the contrary, as the transcript of the status conference makes clear, the Special Master solicited respondent’s position regarding her proposed briefing schedule, and respondent’s counsel agreed that it was “an appropriate plan.” Appx068-069. Likewise, petitioners agreed that it “sound[ed] fair.” *Id.*

² This argument also fails for the simple reason that the Court of Federal Claims is an Article I court. 28 U.S.C. § 171.

As Judge Davis’s Opinion noted, although the Special Master could have first asked whether respondent intended to raise a statute of limitations argument and *then* ordered briefing, “that she reasonably anticipated Respondent’s position does not rise to the level of an abuse of discretion.” Appx011 (citing *Cottingham on Behalf of K.C. v. HHS*, 971 F.3d 1337, 1345 (Fed. Cir. 2020) (“An abuse of discretion occurs if the decision is clearly unreasonable, arbitrary, or fanciful; is based on an erroneous conclusion of law; rests on clearly erroneous fact findings; or involves a record that contains no evidence on which the [special master] could base [her] decision.”)).

Ultimately, the content of respondent’s Rule 4(c) Report and Motion to Dismiss was dictated by respondent. Moreover, the Special Master afforded petitioners ample opportunity to present arguments in favor of their position. In addition to presenting arguments in their initial petition, petitioners filed a response to respondent’s Motion to Dismiss (Appx088), along with literature and evidence, which the Special Master carefully considered in her Decision. *See* Appx024.

The Special Master acted within her discretion and did not err in raising this threshold issue and gave both parties ample opportunity to present evidence and legal arguments. Her scheduling Order is therefore not a basis for overturning her Decision.

II. The Special Master Had Authority to Dismiss Petitioners' Claim Under RCFC 12(b)(6).

Petitioners contend that the Special Master dismissed their claim “without any authority from Congress to do so.” Pet. Br. at 17. Contrary to petitioners’ assertions, the Special Master had well-established authority to rule on respondent’s Motion to Dismiss, and she applied the correct legal standard in doing so.³

While the Vaccine Rules contemplate dispositive motions, they do not contain an explicit provision regarding motions to dismiss. *See* 42 U.S.C. §§ 300aa-12(d)(2)(C)–(D); Vaccine R. 8(d) (providing that “[t]he special master may decide a case on the basis of a written motion[,] . . . [which] may include a motion for summary judgment,” but not specifically mentioning a motion to dismiss). However, Vaccine Rule 1(b) provides that, “[i]n any matter not specifically addressed by the Vaccine Rules, the special master may regulate applicable practice, consistent with these rules and with the purpose of the Vaccine

³ The Special Master committed no error. Moreover, petitioners failed to raise this argument before the Special Master or the Court of Federal Claims, waiving any right to raise it here on review. As this Court has held, “[a]rguments not properly preserved are forfeited.” *Greene v. HHS*, 841 F. App’x 195, 201 (Fed. Cir. 2020) (citing Vaccine Rule 8(f)(1) (“Any fact or argument not raised specifically in the record before the special master will be considered waived and cannot be raised ... on review of a special master’s decision.”)).

Act, to decide the case promptly and efficiently.” Vaccine R. 1(b). And Vaccine Rule 1(c) provides that the Rules of the United States Court of Federal Claims (“RCFC”) may apply to the extent they are consistent with the Vaccine Rules. Vaccine R. 1(c).

Thus, special masters “have entertained motions based upon [RCFC] Rule 12(b)(6) because the standards for pleadings in the Vaccine Program are similar to the standards for pleadings in traditional civil litigation.” *Herren v. HHS*, No. 13-1000V, 2014 WL 3889070 at *1 (Fed. Cl. Spec. Mstr. July 18, 2014). The RCFC are “nearly identical” to the Federal Rules of Civil Procedure—including Rule 12(b)(6), which is “worded the same as the Federal Rules.” *Id.* Both Rules state that a party may file a motion based on “failure to state a claim upon which relief can be granted.” *Id.*

As Special Master Dorsey noted in her Decision, “there is a well-established practice of special masters entertaining motions to dismiss in the context of RCFC 12(b)(6), which allows the defense of ‘failure to state a claim upon which relief can be granted’ to be presented via motion.” Appx031 (citing *Herren v. HHS*, 2014 WL 3889070; *Bass v. HHS*, No. 12-135V, 2012 WL 3031505 (Fed. Cl. Spec. Mstr. June 22, 2012); *Guilliams v. HHS*, No. 11-716V, 2012 WL 1145003 (Fed. Cl. Spec. Mstr. Mar. 14, 2012); *Warfle v. HHS*, No. 05-1399V, 2007 WL 760508 (Fed. Cl. Spec. Mstr. Feb. 22, 2007)). This includes cases in which respondent has

asserted a statute of limitations argument. *See, e.g., Clubb v. HHS*, 136 Fed. Cl. 255, 263 (2018); *J.H. v. HHS*, 123 Fed. Cl. 206, 215 (2015).

Following this well-established precedent, the Special Master properly used her authority under RCFC 12(b)(6) to grant respondent's motion and dismiss petitioners' claim.

III. The Special Master Properly Applied RCFC 12(b)(6) Using the Standards Announced in *Iqbal* and *Twombly*.

Assuming that the Special Master had authority to rule under RCFC 12(b)(6), petitioners contend that she improperly “drew inferences from the available evidence as part of the process of ruling on the Rule 12(b)(6) motion, and used evidence, or the purported lack thereof, as a basis for granting the motion to dismiss.” Pet. Br. at 19-20. The Special Master acted properly.

In order to determine whether a petitioner has made a “claim upon which relief can be granted,” a court “must engage in a context-specific analysis and ‘draw on its judicial experience and common sense.’” *Golden v. United States*, 137 Fed. Cl. 155, 169 (Fed. Cl. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Here, the Special Master undertook a “context-specific analysis” when deciding whether petitioners' claim was timely and whether petitioners had alleged sufficient facts to justify equitable tolling. For example, in order to assess whether petitioners had filed their claim within three years after the first symptom of an

alleged vaccine injury, the Special Master properly reviewed factual assertions to determine when W.J.'s symptoms began.

Petitioners argue that the Special Master acted “in disregard of the U.S. Supreme Court’s *Twombly/Iqbal* plausibility standard.” Pet. Br. at 19. In *Iqbal*, the Supreme Court expanded on its decision in *Twombly* and established a heightened standard for civil pleadings, noting:

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a legal conclusion couched as a factual allegation” (internal quotations marks omitted)). . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.

Ashcroft v. Iqbal, 556 U.S. at 678-79 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)) (internal citations omitted).

Special Master Dorsey relied on this precedent, noting that “on a motion to dismiss, courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” Appx032 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). She further noted that, “[i]n assessing motions to dismiss in the Vaccine Program, special masters have concluded that they ‘need only assess whether the petitioner could meet the Act’s requirements and prevail, drawing all inferences

from the available evidence in petitioner’s favor.” *Id.* (quoting *Herren*, 2014 WL 3889070, at *2 and citing *Warfle*, 2007 WL 760508, at *2).

Here, Special Master Dorsey drew all factual inferences in petitioners’ favor, but she did not accept petitioners’ legal conclusions. Rather, she concluded as a matter of law that petitioners had not asserted a plausible claim for relief under the Vaccine Act—specifically because their claim was time-barred, with no basis for equitable tolling. Because petitioners had not made a “claim upon which relief can be granted,” their petition was properly dismissed under RCFC 12(b)(6).

IV. The Special Master Did Not Exceed the Scope of Her Authority by Considering Factual Allegations.

Petitioners contend that “[d]eterminations on Rule 12(b)(6) motions are supposed to consider only the pleadings, i.e., in the instant matter, our Petition only.” Pet. Br. at 20. They argue that “evidence or the lack thereof was weighed in the determination of the court to dismiss our Petition.” *Id.*

Petitioners’ claim was not rejected on the merits; it was dismissed as untimely. To the extent that the Special Master addressed factual allegations related to W.J.’s alleged injuries, she did so in order to establish a date of onset for W.J.’s injuries and to evaluate the timeliness of petitioners’ claim. As her Decision makes clear, for the purposes of evaluating respondent’s Motion to Dismiss, she assumed that W.J. suffered the conditions alleged and that the first

manifestation of each condition was a date documented in the medical records petitioners submitted and referenced in their petition. Appx035 (finding that “even if petitioners were able to establish W.J. suffered a chronic encephalopathy injury” the date of onset was in 2006 or 2007, when W.J. was diagnosed with speech delay and autism); *id.* at 036-037 (concerning the immunodeficiency claim), *id.* at 037 (concerning claims of significant aggravation). Petitioners do not appear to dispute the inferences the Special Master drew about the date of onset of any of these conditions—including the date W.J. was first diagnosed with a speech delay at age two. Instead, they appear to argue that it was legal error for the Special Master to consider any facts at all.

Similarly, to the extent that the Special Master discussed the lack of evidence in evaluating petitioners’ equitable tolling argument, her Decision makes clear that she drew all factual inferences in petitioner’s favor and concluded as a matter of law that petitioners had not alleged a sufficient basis for equitable tolling. Appx040, 042. As noted above, the Special Master was not required to accept petitioners’ legal conclusions as true even though they were couched as factual allegations. *Iqbal*, 556 U.S. at 678-79.

After construing all facts in the light most favorable to petitioners, the Special Master correctly concluded that the statute of limitations had elapsed and that petitioners were not entitled to equitable tolling. The Special Master

committed no error in reaching these conclusions, and her Decision should be upheld.⁴

V. The Special Master Correctly Ruled That the Petition Was Untimely and That There Was No Basis for Equitable Tolling.

Petitioners appear to agree that their petition was filed outside the Vaccine Act's 36-month limitations period, but they cite two bases for equitable tolling: extraordinary circumstance and fraudulent concealment. Special Master Dorsey and Judge Davis considered petitioners' arguments, drawing all factual inferences

⁴ In the Vaccine Program, special masters have broad discretion to determine how best to manage the cases before them. Vaccine Rule 3(b) states that “[t]he special master is responsible for conducting all proceedings” and “shall determine the nature of the proceedings, with the goal of mak[ing] the proceedings expeditious, flexible, and less adversarial.” Vaccine Rule 3(b). Special masters are specifically tasked with making findings of fact and are explicitly authorized to decide cases on the basis of the written record without conducting an evidentiary hearing. Vaccine Rules 3(b)(1) and 8(d). Thus, even if the Special Master did make adverse factual findings in the course of deciding the statute of limitations issue, it would not have been legal error for her to do so. *See, e.g., Kreizenbeck v. HHS*, 945 F.3d 1362, 1365-66 (Fed. Cir. 2020) (finding that the special master did not abuse his discretion by ruling on the record and foregoing a hearing without petitioners' consent, noting, “Nothing in the language of § 300aa-12(d)(2)(D) or else-where in the Vaccine Act suggests a consent-based limitation on a special master's authority to rule on the record. To the contrary, the provision merely requires a process that includes an ‘opportunity for parties to submit arguments and evidence on the record’ 42 U.S.C. § 300aa-12(d)(2)(D).”); *see also Clubb v. HHS*, 136 Fed. Cl. at 266-67 (upholding the special master's decision to rule on the record and dismiss the petition as untimely; although the pro se petitioner missed his filing deadline by “a matter of hours,” he did not provide a basis for equitable tolling, and, “[t]ellingly, [did] not identify any medical evidence that the special master failed to consider in his motion for review.”).

in petitioners' favor, but ultimately concluded that petitioners had not established any basis for equitable tolling of the statute of limitations. These decisions were sound and should be upheld.

A. *Extraordinary Circumstances Surrounding W.J.'s Mental Capacity*

First, petitioners claim that equitable tolling is warranted based on W.J.'s mental incapacity and inability to communicate. Pet. Br. at 21. Petitioners argue that Judge Davis' Decision to uphold the dismissal was "fatally flawed" and "based on a non-existent provision of law which 'required W.J.'s parents to file a claim on his behalf regardless of his mental capacity.'" *Id.* at 21 (citing Appx017).

Petitioners misconstrue Judge Davis' findings. Under 42 U.S.C. § 300aa-11(b)(1)(A), the Vaccine Act affords parents and legal representatives the ability to file a claim on an injured party's behalf. No one is *required* to file a vaccine injury claim. However, to the extent that petitioners wished to file a claim on their son's behalf, they were required to do so within the appropriate statutory timeframe. *See* 42 U.S.C. § 16(a)(2).

Petitioners point to this Court's decision in *K.G. v. HHS*, 951 F.3d 1374 (Fed. Cir. 2020), which held that equitable tolling is available to mentally incapacitated individuals under the Vaccine Act. While the Court in *K.G.* confirmed an equitable tolling right for incapacitated individuals, nothing in the decision eliminated a legal representative's rights and responsibilities under the

Vaccine Act. A legal representative is “a parent or an individual who qualifies as a legal guardian under State law.” 42 U.S.C. § 300aa-33(2). The Vaccine Act expressly permits a legal representative to file a petition for compensation on behalf of a disabled person or a minor. 42 U.S.C. § 300aa-11(b)(1)(A). The decision in *K.G.* did not alter this provision. It merely clarified that, “The fact that the Vaccine Act expressly allows a legal guardian to bring a claim on a claimant’s behalf does not foreclose the availability of equitable tolling for claimants with mental illness.” *K.G. v. HHS*, 951 F.3d at 1381.

In determining whether a petitioner has met the burden of equitable tolling, a special master may no longer adopt a “per se rule...considering only whether [a petitioner] had a legal guardian.” *See K.G. v. HHS*, 951 F.3d at 1381. The special master must “analyze[] the facts to determine whether [the] legal guardianship alleviated the extraordinary circumstance” of the petitioner’s mental incapacity. *Id.*

K.G. was an adult petitioner who suffered from alcoholism and would “regularly isolate herself from family and drink substantial amounts of alcohol.” *K.G. v. HHS*, 951 F.3d at 1377. A state court appointed *K.G.*’s sister as a guardian and conservator, but the relationship was strained, to the point that *K.G.* refused to communicate, and *K.G.*’s sister withdrew from her role as guardian. *Id.* Under these circumstances, this Court found that the “Special Master ignored the

circumstances that prevented K.G.’s sister from making a claim [under the Vaccine Act], instead adopting an impermissible per se rule.” *See id.* at 1381.

In contrast with K.G., W.J. was two years old when his symptoms began and the timeline for vaccine litigation began to run. As parents and legal guardians, petitioners were expressly authorized to bring a claim on W.J.’s behalf and, unlike the guardian in K.G., faced no impediments in doing so. As evidenced by the medical and educational records filed in this case, petitioners regularly made medical and legal decisions on their son’s behalf and were capable of filing a Vaccine Act petition in a timely fashion. *See* Appx180 (choosing W.J.’s medication regimen); Appx181 (refusing vaccination for W.J.); Appx182-184 (participating in an IEP conference and articulating W.J.’s educational needs).

In evaluating whether “legal guardianship alleviated the extraordinary circumstance” of W.J.’s mental incapacity, Special Master Dorsey considered the record in this case, construing all factual inferences in petitioner’s favor. She found no basis for equitable tolling as a matter of law. Judge Davis properly upheld this decision, noting, “Put another way, the Special Master accepted Petitioners’ facts as true—that W.J. had a mental incapacity—but still concluded that these facts did not amount to extraordinary circumstances under the legal principles elucidated in *K.G.* because Petitioners retained the right to sue on his

behalf....This is not an erroneous application of the standard of review for a motion to dismiss pursuant to RCFC 12(b)(6).” Appx018.

B. *The Government’s “Fraudulent Concealment”*

Petitioners also contend that “[t]he Government’s public position [on the connection between vaccine and autism] has convinced the overwhelming majority of the public that children with autism or autism-like symptoms have no cause of action under the Vaccine Act.” Pet. Br. at 50. Although petitioners asserted the legal conclusion that the Government’s conduct prevented them from filing a vaccine injury claim in a timely manner, the Special Master correctly found that petitioners’ factual allegations did not support this legal conclusion. Appx041. On the contrary, in citing other Vaccine Program claims involving autism-like conditions, petitioners demonstrated that similarly-situated petitioners were not prevented from filing claims around the time that W.J. began evincing symptoms of autism.

During the timeframe when the Government’s conduct allegedly discouraged parents from filing claims, approximately 5,100 autism-related petitions were filed in the Vaccine Program. Appx039, 041. Petitioners cited these claims—collectively known as the Omnibus Autism Proceedings—in support of their claim for equitable tolling. *See* Appx103-104 (Petitioners’ brief stating: “[T]here were so many National Vaccine Injury Compensation Program cases that

involve a claim that vaccines caused autism, over five thousand of them in fact....”). Petitioners also cited three additional cases (*Banks, Poling, and Paluck*), in which individual parents timely filed ultimately successful claims alleging that their children suffered autism-like conditions as a result of vaccinations. *Id.* at 105-109. With this in mind, the Special Master correctly concluded that, even drawing inferences in petitioners’ favor, petitioners’ own factual allegations belied their legal conclusion that “respondent’s ‘categorical denials’ had the ‘effect of misleading and discouraging parents with children who have autism-like symptoms’ from filing petitions.” Appx041 (quoting Appx059).

As this Court has made clear, a petitioner bears the responsibility of due diligence in pursuing a claim. A “statute of limitations can be tolled where the government fraudulently or deliberately conceals material facts relevant to a plaintiff’s claim so that the plaintiff was unaware of their existence and could not have discovered the basis of his claim.” *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988). However, “[a]n essential element of the doctrine of fraudulent concealment...is a requirement of due diligence: A plaintiff who is not reasonably diligent in attempting to discover the basis of his claim cannot assert fraudulent concealment to toll the statute of limitations.” *Ignacio v. United States*, 135 F.3d 775 (Table), 1998 WL 21968, *2 (Fed. Cir.

1998) *cert. denied*, 524 U.S. 908 (1998) (citing *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1142 (Fed.Cir.1996)).

By their own admission, petitioners were never prevented from filing a vaccine injury claim. Instead, they insist they were “dissuaded” by the Government’s stance on vaccine-induced autism. Pet. Br. at 54. While petitioners may have felt discouraged or marginalized in their beliefs concerning vaccine-induced autism, there is no evidence that the Government deliberately concealed material facts, thereby preventing petitioners from filing a timely vaccine injury claim. Accordingly, petitioners have not articulated a basis for equitable tolling based on fraudulent concealment.

VI. Petitioners Have Not Established a Fourteenth Amendment Claim.

Last, petitioners claim that denial of equitable tolling would discriminate against W.J. on the basis of his disability because courts have previously granted such relief to other individuals, like the petitioner in *K.G. v. HHS* who suffered from alcoholism. *See K.G. v. HHS*, 951 F.3d at 1337. Petitioners argue that “granting equitable tolling because of K.G.’s temporary drug and alcohol induced mental incapacity, but not because of W.J.’s permanent mental incapacity, amounts to unlawful discrimination on the basis of permanent disability under the Fourteenth Amendment and Section 504 of the Rehabilitation Act.” Pet. Br. at 11.

As Judge Davis pointed out, “the Vaccine Act’s limitations period does not establish any classifications (suspect or otherwise) but rather treats all vaccine-injury claimants equally.” Appx020. Likewise, the availability of equitable tolling is “not dependent on any particular classification of claimants.” *Id.* at 021. Thus, rational basis review applies. *See Cloer v. HHS*, 654 F.3d at 1340;⁵ *see also Briggs v. Merit Systems Protection Board*, 331 F.3d 1307, 1317 (Fed. Cir. 2003) (“Heightened scrutiny is applicable only when a law’s classification is drawn along suspect or quasi-suspect lines, such as race, or when the law impinges upon a fundamental right.”). Applying a rational basis standard, Special Master Dorsey correctly concluded that:

[T]he Vaccine Act’s limitation period is rationally related to the dual legitimate legislative purposes undergirding the Vaccine Act: (1) the settling of claims quickly and easily, and (2) the protecting of manufacturers from uncertain liability making “production of vaccines economically unattractive, potentially discouraging vaccine manufacturers from remaining in the market. . . . The petitioners have not shown that they fall within a protected class of persons. The claims of all petitioners, regardless of the alleged injury, must be evaluated consistent with the terms of the Vaccine Act, provided the claimants have met the threshold requirement of filing the petition within the time

⁵ As Special Master Dorsey explained: “Highlighting in *Cloer* that the ‘neutral’ nature of the 36-month statute of limitations ‘treats all petitioners equally,’ the Federal Circuit appears to have affirmed, without overt discussion, the Court of Federal Claims’ use of rational basis review to conclude that the statutorily prescribed limitations period is rationally related to the ‘legitimate legislative purposes undergirding the Vaccine Act.’” Appx042.

limit prescribed by the statute. Here, petitioners have failed to file within the appropriate time frames set forth under the statute.

Appx042.

In sum, the fact that the “Special Master found the facts and circumstances of this case not to warrant equitable tolling and to be distinguishable from *K.G.* does not amount to an equal protection violation.” Appx021. The Special Master did not deny equitable tolling to petitioners because W.J. suffers from a particular type of disability. Rather, she distinguished W.J.’s case from K.G.’s equitable tolling claim on a legal basis, finding that W.J. had legal guardians who could file a timely petition on his behalf, whereas K.G. did not. This was a permissible legal conclusion and not an act of unlawful discrimination, and there is no cause for reversal on Constitutional grounds.

CONCLUSION

Petitioners have failed to demonstrate that the Special Master erred, or that her actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Therefore, her February 16, 2022 Decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, based on the line count of the word-processing system used to prepare this brief, that the brief contains 6458 words and 727 lines of text, and is, therefore, in conformity with Fed. Cir. R. 32(a).

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