

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(Filed: July 8, 2002)

IN RE: CLAIMS FOR VACCINE INJURIES *
RESULTING IN AUTISM SPECTRUM *
DISORDER OR A SIMILAR *
NEURODEVELOPMENTAL DISORDER *

AUTISM MASTER FILE

VARIOUS PETITIONERS,

Not for publication

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

DISCUSSION OF ISSUE OF "SHORT-FORM" PETITIONS

As noted in Autism General Order #1, the representatives of the petitioners and respondent have differed significantly with respect to one procedural point regarding the conduct of the Omnibus Autism Proceeding. The petitioners' representatives proposed that would-be petitioners who wish to elect into the Omnibus Autism Proceeding be permitted to file their petitions by filing very simple short-form "opt-in" petitions. Each such short-form petition, it was proposed, would consist basically of a petition form containing the names of the injured child and his parents or other representatives, and an agreement to opt into the Omnibus Autism Proceeding. The short-form petition would not contain a detailed account of the relevant vaccinations and the history of the vaccinee's disorder, nor would it be accompanied by the medical records of the vaccinee's injury. Respondent's representatives indicated that they cannot agree to this part of the petitioners' proposal, which would allow the filing of a "short-form" petition unaccompanied by medical records. They reference the statutory provisions calling for a Program petition to set forth a detailed account of the injury alleged, and contend that a petition must be filed along with all relevant medical records. *See* 42 U.S.C. § 300aa-11(c).

The court recognizes that respondent's concerns in this regard are serious and important. As respondent points out, § 300aa-11(c) of the statute contemplates ideally that a Program petition will set forth all details of the vaccinee's injury and be accompanied by all relevant medical records.

The instruction that a petitioner file a detailed petition with all relevant medical records was obviously designed to enable the special master to promptly evaluate and rule upon the claim. Throughout the history of the Program, the Office of Special Masters ("OSM") has strongly urged that detailed petitions accompanied by all medical records be filed whenever possible. And in situations where such complete petitions have been filed, special masters have done everything possible to speedily evaluate and rule upon such petitions.

However, the history of the Program has also shown that the ideal is not achieved in every Program case. In a great many Program cases (probably a substantial majority) petitions have been filed with some medical records, but not all of those necessary for processing the case. In those cases, processing the claim has been delayed for at least some period of time until the additional records could be obtained. Indeed, in a substantial number of cases, in which the final allowable filing date under the statutory limitations period was approaching, petitions have been filed without *any* records at all; in some such cases the petitions have also contained very little description of the injury claimed, amounting to no more than a statement that a vaccinee was injured by a vaccination. In those cases, the processing of each claim was delayed until all relevant records were obtained and the petitioner could specifically describe the alleged injury. This process sometimes has taken many months.

Yet, in these situations, it has generally not been argued, by respondent or anyone else, that petitions that were not complete when filed should be dismissed, or should not be considered as valid petitions, for that reason. The special masters have generally afforded such petitioners the time they needed to complete their petitions. Thus, the court does not interpret respondent's position to be questioning whether such a short-form petition would qualify as a valid petition, thereby invoking this Court's jurisdiction over the case and complying with the timely-filing provisions of § 300aa-16.¹

Rather, respondent seems to be raising a concern that the procedure being adopted here would not only recognize these short-form petitions as valid petitions when filed, but also would tolerate a situation in which each petitioner was *not expected to supplement* the petition as soon as possible. The adopted procedure contemplates that in most of these cases petitioners will not be required to supplement their petitions for many months, perhaps as much as two years. And it is true that in most cases over the history of the Program when incomplete petitions were filed, it was expected that the petitioners would move expeditiously to fill in the gaps in their petitions by supplying additional details and/or medical records. The procedure now being adopted in these autism cases, thus, is different from the practice in most previous Program cases. But it is not wholly unprecedented. In late 1990 and early 1991, the Program was inundated with several thousand petitions filed at the end of the deadline for the so-called "pre-Act" vaccine-related injuries occurring prior to October 1, 1988. The system was unable to promptly and simultaneously process all those

¹By filing a short-form petition, the petitioner certifies that the petition is being filed within three years after the first symptom of the vaccinee's disorder. *See* Ex. A to this General Order, para. 5. If that allegation is factually correct, the petition would be timely-filed under § 300aa-16(a)(2).

cases, and thus the cases were processed in a staggered fashion. At that time, the OSM did instruct many petitioners whose cases would not be processed immediately to delay filing their medical records until notified to so do. *See* unnumbered General Order filed November 1, 1991. As far as the OSM is aware, no one argued that that procedure, necessitated by a deluge of case filings in a short time period, was objectionable.

The Program now faces an influx of petitions that seems likely to rival in numbers the 1990-91 case filings. Depending on exactly how many cases are filed in a short period, the office of the Clerk of this Court might not be even physically able to accept, organize, file, and store these petitions, if each were accompanied by large stacks of medical records. And as now constituted (six special masters currently in active service, a maximum of eight authorized by statute), the OSM could not immediately analyze voluminous medical records in thousands of cases, even if requested to do so by petitioners. Moreover, the crucial factor is that the OSM is *not being requested* by petitioners to individually analyze the factual records in each of these cases at this time. Petitioners request, rather, that the OSM first conduct an inquiry into the *general causation issues*, and only *then* analyze the individual records if appropriate. In such circumstances--*i.e.*, petitioners do not want the OSM to analyze the individual case records at this time; the OSM does not currently have sufficient personnel to analyze the individual case records; the court's Clerk's office may not even have the capacity to accept and file the individual case records; and the individual records do not bear on the general causation issues to be decided in the Omnibus Autism Proceeding--the court sees no practical reason to require petitioners to file voluminous stacks of records in each individual case at this time.

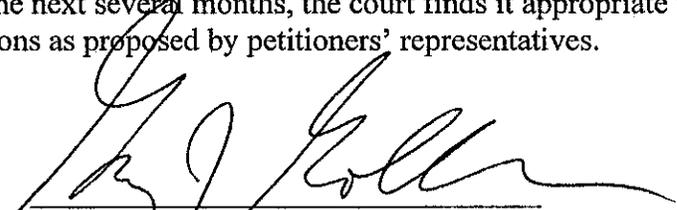
In this regard, respondent's representatives have suggested that a reason for requiring more detailed petitions and/or medical records in each case would be to enable respondent's counsel to analyze each individual case to see whether the case was *timely filed*, pursuant to the Program filing time-limitations provision. *See* § 300aa-16. As respondent points out, in the event that the general causation issue is ultimately resolved in a way that would be favorable to some of the autism cases, then the processing of individual cases at that time would be speedier if the files in each case were already complete, and if the respondent had already been able to review each case to see if it was timely filed.

Again, there is some merit in the respondent's argument, but again, viewing the entire situation with an eye toward practicality, the OSM sees the contrary view as more meritorious. To require the petitioner in each case to provide enough details in the petition and/or enough medical records to permit detailed analysis of the timeliness issue would likely require much work by the petitioner's counsel in each case. For example, to determine when the first symptom of an autistic disorder occurred is a question of fact that might be quite complex in many cases. Petitioner's counsel in each case might have to comb through voluminous medical records to find the best evidence as to what might be considered the first symptom. In any particular case, such an effort might end up being wasted, if the general causation inquiry ultimately is resolved against petitioner. Accordingly, the court sees no utility in requiring such work by petitioners' counsel in each case until it becomes clear from the general causation inquiry that there might be a prospect of entitlement to a Program award in the individual case. This is especially true since *the Program* might well end

up paying for such unnecessary work, in the form of an attorneys' fees award. (Such awards are made even if the petition is unsuccessful. *See* § 300aa-15(e)(1).)

Moreover, with the estimated filing of 3,000 to 5,000 cases, if we required detailed records to be provided with each petition, it seems doubtful that respondent would have sufficient personnel available to analyze each case. Further, even if respondent were able to analyze each case, and raised timeliness issues in a substantial number of cases, it would not be possible or desirable for the special masters to spend time resolving such timeliness issues. Recognizing the constraints of time and resources, the OSM is firmly convinced that the special masters' efforts must be dedicated to (1) resolving the general causation issues in the autism cases, and (2) processing the many non-autism cases on each special master's docket. The parties' time and resources are likewise best allocated to those two tasks, rather than to addressing timeliness issues that may prove to be moot.

In short, although the court has given full consideration to the concerns raised by respondent's counsel, in the very unusual circumstances presented by these autism cases, with the likelihood of thousands of case filings in the next several months, the court finds it appropriate to allow the filing of short-form autism petitions as proposed by petitioners' representatives.



Gary J. Golkiewicz
Chief Special Master
For the Office of Special Masters