

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-765V

Filed: January 4, 2012

Not to be Published

**ANNA PRESS, Parent of MICHAEL
PRESS, a minor,**

Petitioner,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

**Autism; Failure to Prosecute; Failure
to Follow Court Orders; Dismissal**

DECISION¹

On April 10, 2003, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that Michael was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

On June 2, 2011, petitioner was ordered to inform the court whether petitioner intended to proceed with this case and file an amended petition, or to file the appropriate documents to exit the Vaccine Program. Petitioner has yet to file either an

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 *et seq.* (hereinafter “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

amended petition or the appropriate exiting documents.³ Petitioner's counsel has requested and the court has granted additional time to do so. See Orders filed on July 5, 2011, August 18, 2011, and October 6, 2011. On November 15, 2011, an Order to Show Cause was filed in this case. Petitioner was again ordered to inform the court whether petitioner intended to proceed with this case or otherwise show cause, within thirty days, why this case should not be dismissed for failure to prosecute.

Petitioner's counsel has indicated to the court that petitioner, though previously responsive to counsel, has for unknown reasons not been responsive to counsel's attempts to communicate with her over the last several months. It appears counsel last communicated with petitioner in September of 2011. See Petitioner's Status Report and Motion for Extension of Time filed December 15, 2011 at 2. Petitioner's counsel requested a new deadline on December 15, 2011 of December 29, 2011, to respond to the June 2, 2011 order. I did not rule on that motion, and petitioner failed to file a response by her proposed deadline. As such that motion is moot. In the alternative, petitioner's counsel requested he be permitted to withdraw as counsel at this time. I **deny** counsel's request to withdraw as counsel, as there is no indication petitioner will proceed with this case as a *pro se* or with new counsel when she has failed to proceed with the aid of current counsel, or respond to counsel's communications and court orders. I find counsel has had ample opportunity to attempt to communicate with petitioner regarding her intent to proceed with this claim. There has been no indication in several months that petitioner is at all responsive to counsel's efforts to contact her or aid counsel in the prosecution of her claim.

I. The Omnibus Autism Proceeding

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as "autism" or "autism spectrum disorders" ["ASD"] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP, was set forth in the six entitlement decisions issued by three special masters as "test cases" for two theories of causation litigated in the OAP and will not be repeated here.⁴

³ The undersigned notes a status conference was first held on February 2, 2011 to apprise petitioners' counsel of the need to contact all his OAP clients as expeditiously as possible and determine if his clients wished to proceed with their claims.

⁴ The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

Ultimately, the Petitioners' Steering Committee ["PSC"], an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of ASDs. The first theory alleged that the measles portion of the measles, mumps, rubella vaccine could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant's brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional test cases during several weeks of trial in 2008.

Decisions in each of the three test cases pertaining to the PSC's first theory rejected the petitioners' causation theories. *Cedillo*, 2009 WL 331968, *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst*, 2009 WL 332306, *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder*, 2009 WL 332044, *aff'd*, 88 Fed. Cl. 706 (2009).⁵ Decisions in each of the three "test cases" pertaining to the PSC's second theory also rejected the petitioners' causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer*, 2010 WL 892250; *King*, 2010 WL 892296; *Mead*, 2010 WL 892248. Thus, the proceedings in these six test cases are concluded. Petitioners remaining in the OAP must now decide whether to pursue their cases, and submit new evidence on causation, or take other action to exit the Program. The petitioner in this case has failed to inform the court how she intends to proceed.

II. Failure to Prosecute

It is petitioner's duty to respond to court orders. Failure to respond to a court order because petitioner has failed to stay in contact with her attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As I reminded petitioner in my November 15, 2011 Order, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioner's claim. *Tsekouras v. Sec'y, HHS*, 26 Cl. Ct. 439 (1992), *aff'd per curiam*, 991 F.2d 810 (Fed. Cir. 1993); *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b).

III. Causation In Fact

To receive compensation under the Program, petitioner must prove either 1) that Michael suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Michael's vaccinations, or 2) that Michael suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A) and 11(c)(1). Under the Vaccine Act, a special master cannot find a petitioner has proven her case by a preponderance of the evidence based upon "the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." § 13(a). Petitioner has failed to file sufficient

⁵ Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

medical records and evidence in this case.⁶ Thus, an examination of the record did not uncover any evidence that Michael suffered a “Table Injury.” Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Michael’s autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that Michael suffered a “Table Injury” or that Michael’s injuries were “actually caused” by a vaccination. **This case is dismissed for insufficient proof and for failure to prosecute. The clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

s/George L. Hastings, Jr.
George L. Hastings, Jr.
Special Master

⁶ Petitioner has failed to file the medical records required under the Vaccine Act and first ordered to be filed by the court on June 17, 2008. It is noted that petitioner has also filed to provide the records to counsel despite being requested to do so for many years. See Petitioner’s Status Report and Motion for Extension of Time filed December 15, 2011 at 4.