In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 01-463V

Filed: February 7, 2012

JOSEPH HEGARTY, administrator of the estate of JOSEPH MICHAEL HEGARTY, Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	)	NOT TO BE PUBLISHED Thimerosal; Hepatitis B Vaccine; Vaccine Injury; Atypical Kawasaki Disease; Death; Dismissal for Insufficient Proof and Failure to Prosecute

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for Petitioner.
Ryan D. Pyles, United States Dep't of Justice, Washington, D.C., for Respondent.

DECISION[1]

On August 8, 2001, Joseph Hegarty ("Petitioner") filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program") for the death of his minor son, Joseph Michael Hegarty ("Joey").[2] Pet. at 1. Petitioner alleged that Joey died as a result of his having received a Hepatitis B booster on July 19, 1999. Id. at 2.

This case was part of a group in which petitioners alleged that thimerosal in pediatric vaccines caused, contributed to, or triggered the death of a vaccinee. The same counsel, Conway, Homer & Chin-Caplan ("CHC" or "counsel"), represented all the petitioners. On November 23, 2010, Special Master Abell issued a decision denying entitlement in Kolakowski v. Secretary of Department of Health & Human Services, No. 99-625V, 2010 WL 5672753 (Fed. Cl. Spec. Mstr. Nov. 23, 2010), the test case in the group proceeding. Mr. Kolakowski did not appeal from the decision in his case.

[1] In accordance with Vaccine Rule 18(b), petitioner has 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Redactions ordered by the special master, if any, will appear in the document as posted on the United States Court of Federal Claims' website.

[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.

Following Kolakowski, petitioners in the group were afforded more than six months in which to evaluate the effect of the decision and decide whether to proceed with their claims. On June 2, 2011, I ordered the petitioners in each case to inform the Court by July 6, 2011, whether they intended to proceed. The order stated, "If a decision is made to proceed, Petitioner must identify a theory of causation, file additional medical records, and produce an expert report. If a decision is made not to proceed, Petitioner has several options for terminating participation in the Vaccine Program." Petitioners were warned that failure to comply would result in an Order to Show Cause.

On July 6, 2011, status reports were filed in each case. In 15 of the cases, petitioners requested an additional 30 days to confer with counsel and inform the Court how petitioners wished to proceed ("Group One").[3] Respondent did not object to this request. In the remaining nine cases, petitioners stated that they intended to proceed with their claims and requested an additional 60 days, until September 5, 2011, to collect and file any outstanding medical records, and consult with a medical expert ("Group Two").[4] Respondent objected to this request. The instant case was listed in Group Two.

On July 18, 2011, I held a status conference to discuss the Group Two cases and petitioners' request for a 60-day enlargement. During the conference I questioned whether there was a viable non-thimerosal theory of vaccine causation in these cases and informed the parties that to avoid unnecessary expenditure of resources petitioners should select one case out of the nine to go forward. The remaining eight would be temporarily stayed to allow both the Court and the parties to assess their viability. On July 20, 2011, I issued an order in accordance with this discussion and gave petitioners until July 27, 2011, to select the first case for prosecution. Additionally, as to the selected case, I granted the request for enlargement to September 6, 2011, to file all outstanding medical records, obtain an expert, and file a status report setting forth the theory of causation to be alleged in the case.

On July 27, 2011, a status report was filed informing the Court that Hegarty, the above-captioned case, had been identified as the first case for prosecution. On September 6, 2011, Petitioner filed a status report notifying the Court that all medical records had been filed and setting forth his theory of causation. The theory is that the administration of the hepatitis B vaccine caused or substantially contributed to the development of atypical Kawasaki disease, which ultimately led to Joey's death.

[3] Paseka/Haynes (99-0010V), Nelson (99-0575V), Canter/Washam (99-0602V), Bakaraa (99-0652V), Gilchrist (99-0655V), Weeks (00-0348V), Underwood/Moreno (00-0357V), Goodman (00-0484V), Markum/Small (01-0569V), Minor (02-0394V), Pool (02-1389V), Benke (03-0877V), Cline (03-1164V), McManus (04-0966V), and Walker-Hertzog (05-0213V).

[4] Johnson (99-0011V), Sexton (99-0453V), Brooks (99-0675), Cozart (00-0590), Forr (01-0199V), Hegarty (01-0463), Sechrist (02-0393V), Drake (03-1303V), and Hartis (04-0128V).

Petitioner concluded his status report requesting an additional 60 days, until November 7, 2011, to file an expert report as he still had not retained a medical expert to review the case and write the report.

On September 20, 2011, I held a status conference regarding the Group One and Group Two cases. The purpose of the conference was to discuss progress in the group of cases since the last status conference (July 18, 2011), compliance with the order issued on July 20, 2011, and the request for a 60-day enlargement to file an expert report in this case. On September 27, 2011, I issued an order in accordance with this discussion requiring an amended petition be filed in each Group Two case by October 21, 2011, and granting the requested enlargement in the instant case to November 7, 2011.

On October 12, 2011, Petitioner telephonically contacted my chambers and requested an enlargement to October 24, 2011 to file an Amended Petition. I granted the unopposed oral motion the same day.

On October 24, 2011, Petitioner submitted an Amended Petition and an affidavit declaring no prior civil action. The same day, a "Response to the Court's September 27, 2011 Orders" was filed informing the Court of the status of the various cases remaining in Group One and Group Two. Response, ECF No. 100. The Response noted that an Amended Petition had been filed in the instant case.

On November 7, 2011, the day on which his medical report was due, Petitioner moved for an extension of time to December 7, 2011. The motion stated that "petitioner has retained a medical expert to review his case," but "he requires additional time to complete his review and prepare a written medical expert report." Motion, ECF No. 101. Petitioner also requested that the status conference set for November 21, 2011, be rescheduled to a time following submission of his report. I granted Petitioner's motion for an enlargement to December 7, 2011, and set a new status conference for December, 12, 2011.

On December 7, 2011, Petitioner requested another enlargement, this time until January 20, 2012, to "discuss the future proceedings of this case." Motion, ECF No. 102. Petitioner represented that his motion was unopposed.

On December 12, 2011, I convened the scheduled status conference. At the conference I asked counsel to explain the most-recent motion. Counsel stated that they had decided not to move forward with the case and had only recently informed Petitioner of their decision. The request for an enlargement, counsel stated, was to afford Petitioner time to retain new counsel or proceed pro se. I informed the parties that, in light of these developments, I would order Petitioner to show cause within 45 days why this case should not be dismissed for insufficient proof and failure to prosecute. On December 16, 2011, I denied Petitioner's motion and issued an Order to Show Cause.

On January, 30, 2012, Petitioner moved for an additional 30 days to "update the court regarding his search for alternative counsel." Motion, ECF No. 104. Petitioner stated that he "does not want to dismiss his claim voluntarily" and "is currently searching for alternative counsel to pursue his claim." Id. Petitioner's motion was denied on February 7, 2012.

I. Insufficient Proof

To receive compensation under the Program, Petitioner must prove either that (1) Joey suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or (2) Joey 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 that a petitioner has proven his case based upon "the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." § 13(a)(1). Both the Vaccine Act and the Vaccine Rules require a petitioner to submit all documentation and records relating to the vaccination. See generally § 11(c); Vaccine Rules of the United States Court of Federal Claims, Appendix B, Rule 2(c)(2) (requiring the filing of medical records and affidavits to support the allegations in the petition). Despite being afforded more than a year to provide the necessary evidence to permit this case to proceed in light of Kolakowski, Petitioner has failed to file sufficient medical records and evidence to establish entitlement. When medical records do not establish entitlement to compensation, as they do not in this case, a petitioner must submit an expert medical opinion supporting the claim. § 13(a)(1); see Lett v. Sec'y of Dep't of Health & Human Servs., 39 Fed. Cl. 259, 260-61 (1997) ("Ultimately, the petitioner must substantiate the occurrence of a compensable, vaccine-related injury with independent evidence. . . . [A] petitioner must corroborate the claims with testimony of one or more other witnesses, 'medical records or medical opinion'; the special master may not compensate a petitioner based on his claims alone."). As discussed, Petitioner has not submitted a medical opinion, affidavits, or any other persuasive evidence indicating Joey's alleged injury was vaccine-caused. See Kolakowski.

II. Failure to Prosecute

Petitioners must also prosecute their cases and comply with court orders. When petitioners fail to prosecute their cases or comply with court orders, the court may dismiss their cases. Vaccine Rule 21(b); see Tsekouras v. Sec'y of Dep't of Health & Human Servs., 26 Cl. Ct. 439 (1992), aff'd per curiam, 991 F.2d 810 (Fed. Cir. 1993) (Table); Sapharas v. Sec'y of Dep't of Health & Human Servs., 35 Fed. Cl. 503 (1996); see also Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180 (Fed. Cir. 1990) (affirming dismissal for failure to prosecute based on counsel's failure to submit pre-trial memorandum); Adkins v. United States, 816 F.2d 1580 (Fed. Cir. 1987) (affirming dismissal for failure of party to respond to discovery requests). Petitioner in this case has had more than ample time to submit the evidence necessary to permit his case to proceed in the Vaccine Program and has not done so.

Accordingly, it is clear from the record in this case that Petitioner has failed to demonstrate either that Joey suffered a "Table Injury" or that his injuries were "actually caused" by a vaccination. **Thus, this case is dismissed for insufficient proof and failure to prosecute. The Clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

s/Dee Lord
Dee Lord
Special Master