

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 04-0076V

Filed: January 12, 2012

Not to be Published

**MICHELLE WEAVER, parent of
WILLIAM WEAVER, a minor,**

Petitioner,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

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

DECISION¹

On January 20, 2004, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that William was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

On May 25, 2011, petitioner was ordered to inform the court whether petitioner intended to proceed with this case. Petitioner did not respond to that order. Petitioner’s counsel filed a Response on June 24, 2011 indicating that petitioner had been unresponsive to counsel’s attempts to contact her. On July 1, 2011, 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

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in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.

failure to prosecute. On August 9, 2011, petitioner's counsel filed a motion for a fourteen day extension of time stating that petitioner had contacted him and told him that she wished to exit the Vaccine Program. Petitioner's counsel indicated that he needed the additional time to obtain written confirmation from petitioner and to prepare the appropriate motion, stipulation, or notice. The motion was granted. Petitioner was ordered to respond to the court's May 25, 2011 Order by September 8, 2011. Petitioner failed to respond. Petitioner's counsel filed a Status Report on September 8, 2011 indicating that petitioner has been unresponsive to counsel's efforts to contact her. On November 21, 2011, 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 has failed to respond. Petitioner's counsel filed a Response on December 21, 2011 indicating that petitioner has been unresponsive to counsel's efforts to contact her.

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.³

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).⁴ Decisions in each of the three "test cases" pertaining to

³ 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).

⁴ Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

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 the duty of the petitioner to respond to court orders. Failure to respond to a court order because the 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 both my July 1, 2011 and November 21, 2011, orders, 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 William suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of William's vaccinations, or 2) that William 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 medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that William suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that William'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 William suffered a "Table Injury" or that William'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/Denise K. Vowell
Denise K. Vowell
Special Master