

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

No. 99-495V

Filed: April 19, 2007

To Be Published

JONATHAN CARRINGTON, a minor, by his *
mother and natural guardian, TAMMY *
CARRINGTON, *
*
Petitioner, *
*
v. * Transfer of Pending Case
* to Omnibus Proceeding;
* Proof that Petitioner has
SECRETARY OF THE DEPARTMENT * Requisite Condition
OF HEALTH AND HUMAN SERVICES, *
*
Respondent. *

ORDER¹

Vowell, Special Master:

A recorded status conference was held on April 18, 2007, with Clifford Shoemaker representing the petitioner and Althea Davis and Traci Patton representing the respondent. Counsel presented argument on the issue of whether petitioner's case should be transferred to the Omnibus Autism Proceeding ["OAP"].²

Petitioner's counsel conceded that Jonathan does not currently have a diagnosis of autism or an autism spectrum disorder ["ASD"] illness, although he contended that Jonathan's symptoms are similar to many ASD symptoms. Petitioner likewise conceded that if Jonathan's current symptoms were the result of a traffic accident

¹ Because I have designated this decision to be published, petitioner has 14 days to request redaction of any material "that includes medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be publicly available. 42 U.S.C. § 300aa-12(d)(4)(B).

² See General Order #1 which established the OAP. <http://www.uscfc.uscourts.gov/OSM/OSMAutism.htm>.

involving a traumatic brain injury, he would not be contending that Jonathan suffered from autism or ASD.

Petitioner also contended that recent laboratory tests demonstrate Jonathan is “mercury toxic.”³ Assuming, *arguendo*, that the recently filed laboratory tests establish some degree of mercury toxicity, petitioner has conceded that the source of any toxicity may be difficult to link to any vaccine. See Status Report, filed November 17, 2006.⁴

Respondent argued that the decision to transfer a case to the OAP is within the discretion of the special master and that requiring a diagnosis of autism or ASD or similar neurological disorder prior to transfer is an appropriate exercise of that discretion. Respondent further argued that this standard has been used for other petitioners who have requested to transfer their cases to the OAP.

In a published order in this case filed on March 26, 2007, I detailed much of the procedural history of Jonathan’s petition for compensation. I will not reiterate that history here, other than to comment that in a scheduling order on September 19, 2006, I ordered petitioner to produce an expert report on causation by November 27, 2006. No expert report was filed, and petitioner conceded that he could not obtain one. In granting petitioner a delay to obtain urine tests for possible mercury toxicity, I extended the deadline for petitioner to obtain an expert report until Tuesday, May 1, 2007. Specifically, I advised petitioner “**that this will be the last extension given for an expert report unless an expert actually agrees to opine in this matter and the expert indicates in writing that more time to write the report is needed.**” Order dated January 22, 2007 (emphasis in original).

One could conclude from the record in this case that petitioner is attempting to serially litigate Jonathan’s claim for compensation. Having been unable to find an expert to opine that the hepatitis B vaccinations Jonathan received on August 3 and October 13, 1997 were the cause of his brain injury on December 10-11, 1997, petitioner is now proceeding under the alternative theories that mercury caused the

³ In petitioner’s November 17, 2006 status report, counsel reported that Jonathan was being tested to determine if “he has the genetic SNIPS that are associated with an inability to excrete mercury.” Petitioner’s counsel has indicated that the laboratory reports (urinary porphyrin profiles) filed as Petitioner’s Exhibits 49 and 50 indicate that Jonathan is “mercury toxic.” Although petitioner has not yet offered any evidence as to the source or nature of Jonathan’s mercury toxicity, solely for purposes of deciding the motion to transfer this case to OAP, I accept petitioner’s contention that Jonathan is “mercury toxic.” I note, however, that certain drugs, including those commonly prescribed to control seizures, may interfere with porphyrin test results. See Kathleen D. Pagona & Timothy J. Pagona, *MOSBY’S MANUAL OF DIAGNOSTIC AND LABORATORY TESTS* at 989-90, 532 (3d. ed. 2006)

⁴ In this status report, petitioner’s counsel indicated that Jonathan had received multiple possible prenatal and post-natal exposures to mercury, other than the hepatitis B vaccinations alleged to be causal in his petition for compensation. He also indicated that the pediatric neurologist who reviewed this case was unable to opine favorably on the issue of vaccine causation of Jonathan’s injury.

brain injury or that Jonathan's current condition is somehow related to autism. Unfortunately, petitioner has failed to produce any evidence related to either theory.

Petitioner's case was filed nearly eight years ago. On at least three previous occasions, I informed his counsel in written orders that either the statement of a medical professional or an expert report would be necessary before granting any additional delays in this case. Rather than focusing his efforts on obtaining evidence, counsel has chosen to reiterate his arguments that this case should be transferred to the OAP. No new arguments were presented in today's status conference.

In the absence of evidence of a diagnosis of autism or ASD, **petitioner's request to transfer this case is DENIED. The deadline of May 1, 2007 to produce an expert report on causation remains in effect.**

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master