

United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

Filed: December 6, 2011

No. 03-504V

CHARLES and RISA BENTLEY,)	
parents of)	UNPUBLISHED DECISION
JOHN HARRISON BENTLEY, a minor,)	
)	Autism; Failure to Prosecute;
Petitioners,)	Failure to Follow Court Orders;
)	Dismissal
v.)	
)	
SECRETARY OF THE DEPARTMENT)	
OF HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

DECISION¹

On March 4, 2003, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program [“the Program”],² on behalf of John. In effect, the petition alleges that various vaccinations injured John.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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 National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

On September 28, 2011, the undersigned conducted a digitally-recorded status conference with Mrs. Bentley. On September 29, 2011, the undersigned issued an order directing petitioners to file a report from a retained medical expert or an opinion from one of John's treating physicians on or before October 17, 2011. Order, Oct. 17, 2011. That same order reminded petitioners that failure to follow a court order will be interpreted as either a failure to prosecute this claim or an inability to provide supporting documents for this claim. *Id.* Petitioners were informed that in either event, their claim on behalf of John would be dismissed. *Id.*

On October 21, 2011, the undersigned issued a decision in this case, which she struck from the record by order dated October 28, 2011. Order, Oct. 28, 2011. The undersigned issued the October 21, 2011 decision because she believed petitioners' had missed a filing deadline for petitioners' expert report. However, the order that issued on September 29, 2011, misstated the filing deadline for petitioners' expert report as October 17, 2011. The filing deadline for petitioners' expert report was actually established as November 28, 2011, in the status conference on September 28, 2011.

The order issued by the undersigned on October 28, 2011, also corrected the filing deadline for petitioners' expert report as Monday, November 28, 2011. To date, no filing has been received, and petitioners' claim must be dismissed.

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

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).

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 (2010); *Snyder*, 2009 WL 332044, *aff'd*, 88 Fed. Cl. 706 (2009).⁴ 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 petitioners' duty to comply with filing deadlines and comply with court orders. Failure to respond to a court order is deemed noncompliance with a court order, and noncompliance will not be tolerated. As I reminded petitioners in orders dated September 29, 2011, and October 28, 2011, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioners' 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, petitioners must prove either 1) that John, suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) that John suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). Under the Vaccine Act, a special master cannot find petitioners have proven their case by a preponderance of the evidence based upon "the claims of a petitioner alone,

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

unsubstantiated by medical records or by medical opinion.” 42 U.S.C. § 300aa-13(a) (2006). Petitioners have failed to file sufficient evidence of vaccine-related causation in this case. An examination of the record does not uncover any evidence that John suffered a “Table Injury.” Further, the record does not contain a medical opinion or any other persuasive evidence indicating that John’s autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that John, suffered a “Table Injury” or that his 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.**⁵

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Chief Special Master

⁵ This document constitutes my final “Decision” in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). If petitioners wish to have this case reviewed by a Judge of the United States Court of Federal Claims, a motion for review of this decision must be filed within 30 days. After 30 days the Clerk of this Court shall enter judgment in accord with this decision. If petitioners wish to preserve whatever rights petitioners may have to file a civil suit (that is a law suit in another court) petitioners must file an "election to reject judgment in this case and file a civil action" within 90 days of the filing of the judgment. 42 U.S.C. § 300aa-21(a).