

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 99-675

(Filed: January 15, 2013)

* * * * *

JAMES L. BROOKS and ELLEN M. AVERY, *
co-administrators of the estate of *
SEAN AUSTIN BROOKS, deceased, *

Petitioners, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

* * * * *

UNPUBLISHED

Chief Special Master
Campbell-Smith

Thimerosal; Ethyl and Methyl
Mercury; Failure to Prosecute;
Failure to Follow Court Orders;
Dismissal

Sean Austin Brooks, Elm City, NC, pro se Petitioner

Ryan Daniel Pyles, Washington, DC, for Respondent

DECISION¹

On August 6, 1999, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that the DTP,

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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

IPV, Hib, and Hep B vaccinations Sean received on September 2, 1997, led to his eventual death.

On November 28, 2012, a digitally-recorded status conference was held to discuss petitioners' request for an enlargement of time to file an expert report, in light of respondent's objections. During that conference Mr. Brooks, who is divorced from Sean's mother, indicated that in recognition of the current state of the science and because he was eager to enjoy time with his surviving son, he was prepared to move for a dismissal of the claim.

Accordingly, on December 4, 2012, the undersigned issued an order directing petitioners to file, on or before January 7, 2013, the appropriate documents to exit the Vaccine Program. That order also reminded petitioners of their obligation to comply with all court orders and advised that the failure to respond, would result in the dismissal of their claim. Petitioners failed to respond to that order.

I. Failure to Prosecute

It is the duty of the petitioners to respond to all court orders. Failure to respond to a court order is deemed noncompliance, and noncompliance is not favorably considered. As the undersigned reminded petitioners in her December 4, 2012, order,³ failure to follow court orders, as well as the failure to file medical records or an expert medical opinion, will 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).

II. Causation In Fact

To receive compensation under the Program, petitioners must prove that Sean's death was caused by the receipt of a vaccine. See §§ 13(a)(1)(A) and 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, unsubstantiated by medical records or by medical opinion." § 13(a). Petitioners have failed to file sufficient medical records and evidence in this case. An examination of the record has not uncovered any evidence that Sean suffered a "Table Injury." Nor does the record contain a medical opinion or other persuasive evidence indicating that Sean's death was vaccine-caused.

³ This was not the first time petitioners were warned of the consequences of failing to respond to court orders. See the February 3, 2012, Order and the December 19, 2011, Order to Show Cause. See also the August 10, 2012, Order warning petitioners that if they failed to file an expert report their case would be dismissed.

Clearly from the record in this case, petitioners have failed to demonstrate that Sean's death was "actually caused" by a vaccination. **Accordingly, this case is dismissed for insufficient proof and for failure to prosecute. The clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Chief Special Master