

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

No. 04-87V

(Filed: January 15, 2013)

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BLAKE EDMONDS, a minor by his parents and guardians
MARK EDMONDS and KIMBERLY KELLEY

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

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* UNPUBLISHED
*
* Chief Special Master
* Campbell-Smith
*
* Autism; Failure to
* Prosecute; Failure to
* Follow Court Orders;
* Dismissal
*
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Mark Edmonds and Kimberly Kelley, Clifton Park, NY, pro se Petitioners

Voris E. Johnson, Washington, D.C., counsel for the Respondent

DECISION¹

On January 23, 2004, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that Blake was injured by a vaccine or vaccines listed on the Vaccine Injury Table. *See* § 14.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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

On March 22, 2012, the undersigned issued a decision granting interim attorney's fees and costs to petitioners' former counsel. March 22, 2012, Decision at 22-23. In that decision the undersigned put petitioners on notice as to the importance of responding to court orders and informed petitioners that she would be issuing a show cause order in the near future.³ The undersigned issued the promised show cause order on October 4, 2012, giving petitioners until November 6, 2012, to file a statement identifying their theory of causation and until January 7, 2013, to file a medical expert's report. Petitioners were again warned that failure to fully and timely comply with all court orders would lead to the dismissal of their claim. Petitioners did not respond to either of the deadlines in that order.⁴

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

³ The undersigned warned petitioners that by receiving a courtesy copy of her March 22, 2012 Decision, petitioners were:

put on notice that once counsel's motion to withdraw [was] granted, they [would] be given a firm deadline by which to show cause why the claim should not be dismissed.[□] In response to this show cause order, petitioners [should] identify their theory regarding how Blake's vaccinations caused his autism spectrum disorder and identify what evidence, including any expert opinion, supports that theory. To prevail on their claim, petitioners must present a theory that has not been considered and rejected already or alternatively, petitioners must present previously unconsidered evidence on a prior theory. The theory must be persuasive and scientifically reliable. If petitioners fail[ed] to comply with the established deadlines for filings or fail to file sufficient evidence to establish vaccine causation, their claim [would] be dismissed for either failure to prosecute or failure to prove entitlement to Program compensation.

March 22, 2012, Decision at 19-20.

⁴ Petitioners already had been given notice about the consequences of their failure to respond to all court orders. See the August 29, 2011, Order and the October 24, 2011, Order to Show Cause.

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.⁵

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).⁶ 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 petitioners in this case have failed to respond to the court’s orders.

II. Failure to Prosecute

It is the duty of the petitioners to respond to court orders. Failure to respond to court orders is deemed noncompliance, and noncompliance is not favorably considered. As I reminded petitioners in my October 4, 2012, order, failure to follow court orders, as

⁵ 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).

⁶ Petitioners in Snyder did not appeal the decision of the U.S. Court of Federal Claims.

well as failure to file medical records or an expert medical opinion, will result in the 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 Blake suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Blake's vaccinations, or 2) that Blake 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 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 Blake suffered a "Table Injury." Nor does the record contain a medical opinion or other persuasive evidence indicating that Blake's autism spectrum disorder was vaccine-caused.

Clearly from the record in this case, petitioners have failed to demonstrate either that Blake suffered a "Table Injury" or that Blake'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.

Patricia E. Campbell-Smith
Chief Special Master