

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 5-237V

(Filed: February 19, 2013)

* * * * *

KATHLEEN HARVEY and
MICHAEL HARVEY, parents of
LUKE HAEVEY, a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

* * * * *

Robert Krakow, New York, NY, counsel for Petitioners

Heather Pearlman, Washington, D.C., counsel for Respondent

DECISION¹

On February 22, 2005, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that Luke

¹ Because this decision contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this decision on the website of the United States Court of Federal Claims 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)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. Id.

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.*

was injured by a vaccine or vaccines listed on the Vaccine Injury Table. *See* § 14.

On November 16, 2012, the undersigned issued an order instructing petitioners to file a response to respondent's Motion to Dismiss by no later than November 30, 2012. On November 30, 2012, petitioners' counsel filed an Unopposed Motion for an extension of time in which to file petitioners' response to respondent's Motion to Dismiss. That motion was granted the same day. Petitioners were instructed to file their response by December 14, 2012, but failed to do so. On January 15, 2013, the undersigned issued a show cause order giving petitioners a final chance to respond to respondent's Motion to Dismiss. Petitioners were ordered to file their response by February 15, 2013. Petitioners failed to respond to that order as well.

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.

(hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

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).

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 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 follow court orders.

II. Failure to Prosecute

It is petitioners' duty to respond to court orders. As the undersigned reminded petitioners in the January 15, 2013, order, 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 Luke suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Luke's vaccinations, or 2) that Luke 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). Petitioners have failed to file sufficient medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that Luke suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Luke'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 Luke suffered a "Table Injury" or that Luke'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.**⁵

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

⁵ This document constitutes the undersigned's final "Decision" in this case, pursuant to § 12(d)(3)(A). If petitioners wish to have this case reviewed by a Judge of the United

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master

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 right 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. § 21(a).