

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

May 31, 2012

No. 03-2850V

**PAUL CHARLES MARTINEZ, JR.,  
a minor by his parents and natural  
guardians, JACQUELINE MARTINEZ  
and PAUL MARTINEZ, SR.,**

**Petitioners,**

**v.**

**SECRETARY OF HEALTH AND HUMAN  
SERVICES**

**Respondent.**

UNPUBLISHED

Autism; Petitioners' Construed Motion  
for a Decision Dismissing the  
Insufficient Petition; Proof of Causation;  
Vaccine Act Entitlement; Denial Without  
a Hearing

Jacqueline and Paul Martinez, Huguenot, NY, pro se petitioners.

Ann Donohue Martin, United States Department of Justice, for respondent.

## **DISMISSAL DECISION**<sup>1</sup>

On December 23, 2003, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

Program”),<sup>2</sup> alleging that various vaccinations injured Paul. The information in the record, however, does not show entitlement to an award under the Program.

For the reasons discussed more fully below, the undersigned hereby **DISMISSES** this case at petitioners’ request because they cannot establish vaccine-related causation.

## I. 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.<sup>3</sup>

Ultimately, the Petitioners’ Steering Committee [“PSC”], an organization formed by attorneys representing petitioner 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.

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<sup>2</sup> 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.

<sup>3</sup> The Theory 1 cases are Cedillo v. Sec’y of Health & Human Servs., No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Hazlehurst v. Sec’y of Health & Human Servs., No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Snyder v. Sec’y of Health & Human Servs., No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are Dwyer v. Sec’y of Health & Human Servs., No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); King v. Sec’y of Health & Human Servs., No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); Mead v. Sec’y of Health & Human Servs., 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).<sup>4</sup> 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.

## **II. Procedural Background**

Petitioners' claim was effectively stayed pending the outcome of the OAP cases. After the test cases were concluded, counsel for petitioner moved to withdraw his representation of petitioner on September 19, 2011. Petitioner's counsel's motion was granted on February 7, 2012.

A digitally recorded status conference was conducted on Wednesday, March 7, 2012. The purpose of the call was to provide Mrs. Martinez with information on how to proceed with her autism claim in light of the recent withdrawal by her counsel. Petitioners' claim is currently included among the pending claims in the court's Omnibus Autism Proceeding (OAP). Based on recent decisions involving the OAP "test cases," all claims in the OAP, such as this one, will be moved toward resolution.

During the status conference, the undersigned established a filing deadline of April 9, 2012, for the filing of an amended petition and for the identification of an expert. Order, March 8, 2012. Petitioners did not respond to that order. On April 11, 2012, the undersigned issued a show cause order directing petitioners to inform the court how they wished to proceed with this case, or otherwise indicate, why this case should not be dismissed for failure to prosecute. See Order to Show Cause. The deadline for petitioners to respond to the show cause order was May 11, 2012.

On May 8, 2011, Mrs. Martinez contacted the undersigned's chambers and indicated that she was unable to find a physician who was prepared to offer a detailed medical opinion about the causal link, if any, between Paul's received

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<sup>4</sup> Petitioner in Snyder did not appeal the decision of the U.S. Court of Federal Claims.

vaccinations and his subsequent development of Asperger's syndrome.<sup>5</sup> Mrs. Martinez further indicated that petitioners would like to exit the Vaccine Program. The undersigned construes the call from Mrs. Martinez as a motion for a decision on the merits of the petition, acknowledging that insufficient evidence exists to demonstrate entitlement to compensation.

To receive compensation under the Program, petitioners must prove either 1) that Paul suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Paul's vaccinations, or 2) that Paul suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). An examination of the record did not uncover any evidence that Paul suffered a "Table Injury." Further, the record does not contain a medical expert's opinion or any other persuasive evidence indicating that Paul's alleged injury was vaccine-caused.

Under the Act, petitioners may not be given a Program award based solely on the petitioners' claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. § 300aa-13(a)(1). In this case, because there are insufficient medical records supporting petitioners' claim, a medical opinion must be offered in support. Petitioners, however, have indicated that they are unable to offer such an opinion.

Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that Paul suffered a "Table Injury" or that Paul's injuries were "actually caused" by a vaccination. **Thus, this case is dismissed for insufficient proof. The Clerk shall enter judgment accordingly.**

**IT IS SO ORDERED.**

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Patricia Campbell-Smith  
Chief Special Master

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<sup>5</sup> Mr. Ryan Pyles attended this call for respondent.