

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 02-650V

(Filed: April 29, 2013)

* * * * *

PENELOPE A. PARKER, Individually *
and as Next Friend of PATRICIA *
ANNE MERVINE PARKER, *
a minor, *

Petitioner, *
v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

* * * * *

Penelope A. Parker, Glen Burnie, MD, appearing pro se
Ryan Daniel Pyles, Washington, D.C., counsel for Respondent

UNPUBLISHED

Chief Special Master
Campbell-Smith

Autism; Failure to Prosecute; Failure to
Follow Court Orders; Dismissal

DECISION¹

On June 7, 2002, petitioner filed a Petition for Vaccine Compensation in the
National Vaccine Injury Compensation Program (“the Program”),² alleging that Patricia

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

was injured by a “series of mercury-containing vaccines” listed on the Vaccine Injury Table. Petition at ¶ 2.

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 (MMR) 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. 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. Thus, the proceedings in these six test cases are concluded.

On May 8, 2012, petitioner was informed of the outcome of the test cases, and told that while the outcome of those cases was not binding on her case, unless petitioner has different evidence or theories not presented in the test cases, the results in the test cases

³ The Theory 1 cases are *Cedillo v. Sec’y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 89 Fed. Cl. 158 (2009), *aff’d*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec’y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 473 (2009), *aff’d*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec’y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 706 (2009). Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

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).

indicate that this claim is unlikely to be successful. Petitioner chose to pursue her claim.

II. Procedural History

On July 27, 2009, respondent filed a motion to dismiss in which she asserted the petition was not timely filed, as the first symptom or manifestation of onset of Patricia's injury occurred more than thirty-six months prior to the filing of the petition. Petitioner, then represented by counsel, filed a response on August 12, 2009, disputing that the symptom relied upon by the respondent was sufficient to trigger the statute of limitations, and also arguing that equitable tolling should apply to Vaccine Act cases. Petitioner pointed to no facts to support equitable tolling. Petitioner's counsel withdrew on December 4, 2012, and petitioner is now proceeding pro se.

On February 6, 2013, the undersigned held a telephonic status conference during which respondent's pending motion to dismiss was discussed. On March 8, 2013, the undersigned issued an order affording the parties additional time in which to file evidence supportive of their respective positions, and to address the Court of Appeals for the Federal Circuit's decision in Cloer v. Sec'y of Health & Human Servs., 654 F.3d 1322 (Fed. Cir. 2011) (en banc), cert. denied, 132 S. Ct. 1908 (2012). Cloer held that while equitable tolling does apply to Vaccine Act claims, it is not available due to unawareness of a potential causal link between an injury and administration of a vaccine. Id. at 1344-45.

The government timely responded by filing a supplemental motion to dismiss, together with supporting exhibits. The petitioner did not respond. The U.S. Postal Service returned the copy of the order sent via certified U.S. mail to petitioner on March 8, 2013, with a notation in the USPS.com Track & Confirm record that notice had been left, but the envelope was unclaimed.⁴

On April 11, 2013, the undersigned issued an order directing the petitioner to contact chambers by telephone to inform the court as to whether or not she intended to offer any written response to the March 8, 2013 order. Petitioner was then informed that "she has an obligation to follow court orders, and non-compliance is not favorably considered. Failure to follow court orders **will result in the dismissal of petitioners' claim.**"

Review of the USPS.com Track & Confirm record shows that the envelope was delivered on April 13, 2013.⁵ The date for petitioner's response has passed, and petitioner has failed to contact chambers as ordered.

⁴ Certified mail receipt no. 7012 3460 0001 7791 9979

⁵ Certified mail receipt no. 7011 0470 0002 5084 7301

III. Failure to Prosecute

It is petitioner's duty to respond to court orders. As the undersigned informed petitioner in the April 11, 2013, order, failure to follow court orders shall result in dismissal of petitioner's claim. See Sapharas v. Sec'y of Dep't of Health & Human Servs., 35 Fed. Cl. 503 (1996); Tsekouras v. Sec'y of Dep't of Health & Human Servs., 26 Cl. Ct. 439 (1992), aff'd per curiam, 991 F.2d 810 (Fed. Cir. 1993); Vaccine Rule 21(b).

This case is dismissed for failure to prosecute. The clerk shall enter judgment accordingly.⁶ The undersigned requests the Clerk of Court **send this order to petitioner by certified mail.**

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Chief Special Master

⁶ This document constitutes the undersigned's final "Decision" in this case, pursuant to § 12(d)(3)(A). If petitioner wishes 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 petitioner wishes to preserve whatever right petitioner may have to file a civil suit (that is a law suit in another court) petitioner 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).