

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-2161V

Filed: August 22, 2012

Not to be Published

TAMMY SHELTON,
parent and natural guardian of
ALICIA CATHREENA MORENO,
a minor,

Petitioner,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

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

DECISION¹

On September 11, 2003, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that Alicia was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

After the resolution of the Omnibus Autism Proceeding (“OAP”) test cases³, petitioner was required, by order filed January 11, 2012, to inform the Court whether

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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

³ See *infra* Part II.

she wished to proceed with her claim. Petitioner did not respond to that order. Petitioner's counsel filed a motion for an extension of time on February 10, 2012, indicating that petitioner has been unresponsive to counsel's efforts to contact her. Counsel requested an additional 30 days to respond to the court's order. The motion was granted. Petitioner was ordered to respond to the court's January 11, 2012 order by March 12, 2012. Petitioner failed to respond.

On March 14, 2012, petitioner was again ordered to inform the court whether petitioner intended to proceed with this case or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. Petitioner failed to respond to that order as well. Petitioner's counsel filed a motion for an extension of time on April 13, 2012, indicating that petitioner has advised counsel she wishes to continue with her claim and that counsel informed petitioner that he can no longer represent her and expressed his intention to withdraw. Counsel requested an additional 90 days to file the appropriate documents and response. The motion was granted. Petitioner was ordered to respond to the court's January 11, 2012 order and March 14, 2012 show cause order by July 12, 2012. Petitioner failed to respond. Petitioner's counsel filed a motion for an extension of time on July 12, 2012, reiterating the same information and request as was in the April 13, 2012 motion. The motion was denied.

On July 16, 2012, petitioner was again ordered to inform the court whether petitioner intended to proceed with this case or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. Petitioner has failed to respond. Petitioner's counsel filed a status report on August 15, 2012, indicating that petitioner has been unresponsive to counsel's efforts to contact her. Petitioner's counsel explained that he has been unable to obtain authorization to dismiss this claim or withdraw as counsel due to his inability to contact petitioner.

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.⁴

Ultimately, the Petitioners' Steering Committee ("PSC"), an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two

⁴ 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).

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).⁵ 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 petitioner in this case has failed to inform the court how she intends to proceed.

II. Failure to Prosecute

It is petitioner's duty to respond to court orders. Failure to respond to a court order because the petitioner has failed to stay in contact with her attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As the undersigned reminded petitioner in her March 14, 2012 July 16, 2012, orders, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall 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).

III. Causation In Fact

To receive compensation under the Program, petitioner must prove either 1) that Alicia suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Alicia's vaccinations, or 2) that Alicia 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). Petitioner has failed to file sufficient medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that Alicia suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Alicia's autism spectrum disorder was vaccine-caused.

⁵ Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that Alicia suffered a “Table Injury” or that Alicia’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.

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