

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-887V

Filed: July 25, 2013

* * * * *		UNPUBLISHED
JAMIE PELLOQUIN and PATRICK WAYNE	*	
AUTHEMENT, as Conservator and	*	Special Master Dorsey
Administrator of the Estate of the Deceased	*	
CHLOE AUTHEMENT,	*	
	*	Dismissal decision;
Petitioners,	*	Order to Show Cause;
	*	failure to prosecute;
v.	*	insufficient proof.
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
* * * * *		

William Dobreff, Dobreff & Dobreff, Clinton Township, MI, counsel for petitioners.
Darryl R. Wishard, United States Department of Justice, Washington, DC, counsel for respondent.

DECISION¹

On December 28, 2009, Jamie Pelloquin and Patrick Wayne Authement, as conservators and administrators of the estate of the deceased Chloe Authement (petitioners), filed a petition pursuant to the National Vaccine Injury Compensation Program (“the Act”).² 42 U.S.C. §§

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, the undersigned intends to post this decision on the United States Court of Federal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), a party 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, the undersigned agrees that the identified material fits within the requirements of that provision, such material will be deleted from public access.

² The National Vaccine Injury Compensation Program is set forth in 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-1 to -34 (2006) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

300aa-1 to -34 (2006). Petitioners alleged that Chloe received a vaccine containing diphtheria, tetanus and pertussis (DTP) on December 20, 2007, and within 72 hours, “began suffering the first neurological injuries, including an anoxic encephalopathy which resulted in death on December 24, 2007.” Petition (Pet.) at 2. The information in the record, however, does not show entitlement to an award under the Act.

I. Procedural History

This case was initially assigned to Special Master Sandra Lord on December 28, 2009. Petitioners filed medical records on January 12, 2010. An initial status conference was held on March 8, 2010, and a scheduling order was issued on the same day ordering petitioners to file the outstanding medical records and for respondent to file the Rule 4 report by May 13, 2010. Petitioners filed additional medical records on April 21, 2010. Respondent filed a Rule 4 report on May 13, 2010. In the Rule 4 report, respondent stated that the circumstances surrounding Chloe’s death did not meet the definition of a Vaccine Table encephalopathy. Further, respondent stated that petitioners had not provided evidence that the vaccinations caused or significantly aggravated Chloe’s condition and caused her death. Respondent stated that petitioners had provided insufficient evidence of causation under all three prongs of Althen v. Sec’y of Health & Human Servs., 418 F.3d 1274, 1278 (2005). Respondent’s Report at 11.

On April 14, 2011, petitioners filed an expert report from Dr. Robert Shuman who opined that Chloe had “an acute Pertussis Encephalopathy,” 30 hours after her third pertussis vaccine on December 20, 2007. Exhibit 8 at 8.

Respondent filed a responsive expert report from Dr. Hart Lidov, a neuropathologist and pediatric neurologist, on January 30, 2012. Dr. Lidov stated that the autopsy slides of Chloe’s brain showed no evidence of anything except hypoxic-ischemic injury and that there was no evidence of encephalitis. Dr. Lidov concluded that this was a case of an infant who suffered respiratory arrest and that there had been an antecedent vaccination, “but in the current state of medical and scientific knowledge there is no basis for ascribing causality.” Exhibit A at 4.

This case was then set for a hearing on February 25-26, 2013. However, on August 28, 2012, the case was transferred to Special Master Denise Vowell. On January 14, 2013, the case was transferred again to the undersigned.

A status conference was held on January 30, 2013. Due to a scheduling conflict with petitioners’ counsel’s schedule, the hearing scheduled for February 25-26, 2013, was cancelled. The parties were to contact the court by February 15, 2013, after they had consulted with their experts and witnesses to determine a new date for the hearing. In addition, petitioners were ordered to file a list of missing records and updated affidavits from petitioners, as identified in the Order no later than April 1, 2013.

Petitioners did not provide a new date for the hearing or file these documents on February 15, 2013, nor did petitioners seek an extension of the deadline. On May 3, 2013, the undersigned issued a second order extending the deadline for petitioners to file the outstanding records to May 28, 2013. The order also directed the parties to contact the court by July 15, 2013, to set a

hearing date. Counsel for petitioners was also advised in this order that continued failures to follow court orders may lead to a dismissal of petitioners' claim.

Petitioners' counsel failed to file the outstanding records again on May 28, 2013. The undersigned's law clerk emailed the parties on May 31, 2013, to inquire of petitioners' status in filing the outstanding records. No response was received to this email.

On June 13, 2013, the undersigned issued an Order to Show Cause ordering petitioners to file a response by July 15, 2013, as to why their case should be not be dismissed for failure to prosecute.

On July 7, 2013, counsel for petitioners did not file a response to the Order to Show Cause, but rather, filed a few of the outstanding medical records as requested in the January 30, 2013, March 12, 2013, and May 3, 2013 orders, including the Chloe's pediatric records, the results of the newborn genetic screening tests and some of the prenatal, labor and delivery records. Still outstanding are the billing records associated with the Chloe's medical visits, daycare records from the pertinent time period, an updated affidavit from petitioners providing additional information about the time leading up to the Chloe's death, a complete set of hospital records, and a certification from the custodian of records for each the listed healthcare providers. There has been no indication from petitioners' counsel that these records would be forthcoming.

The parties were also ordered to report back to the court by July 15, 2013, with available dates that the parties were available to reschedule the hearing. See Orders dated March 12, 2013, and May 3, 2013. On July 3, 2013, counsel for respondent sent an email (a copy of which was sent to petitioners' counsel's email address) providing the court with dates that were available for respondent's counsel and her witnesses. Petitioners provided no response.

II. Analysis

When a petitioner fails to comply with Court orders to prosecute her case, the Court may dismiss the case. Sapharas v. Sec'y of Health & Human Servs., 35 Fed. Cl. 503 (1996); Tsekouras v. Sec'y of Health & Human Servs., 26 Cl. Ct. 439 (1992), aff'd, 991 F.2d 819 (Fed. Cir. 1993) (table); Vaccine Rule 21(c); see also Claude E. Atkins Enters., Inc. v. United States, 889 F.2d 1180, 1183 (Fed. Cir. 1990)(affirming dismissal of case for failure to prosecute for counsel's failure to submit pre-trial memorandum); Adkins v. United States, 816 F.2d 1580, 1583 (Fed. Cir. 1987)(affirming dismissal of cases for failure of party to respond to discovery requests). Petitioners' failure to file the required documents, even after the undersigned extended the deadlines *sua sponte*, and petitioners failure to provide alternative hearing dates, indicates a disinterest in pursuing their claim. Thus, the undersigned finds it appropriate to dismiss this case for failure to prosecute.

Additionally, to receive compensation under the Act, a petitioner must prove either (1) that she suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of her vaccinations, or (2) that she 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 the Chloe suffered a "Table Injury". Further, although

the parties filed numerous medical records and expert witness reports, without a hearing or additional evidence submitted by petitioners, the undersigned finds that the record does not contain preponderant evidence demonstrating that the Chloe's alleged vaccine injury and subsequent death was vaccine-caused.

Thus, this case is dismissed for failure to prosecute and for insufficient proof. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

s/Nora Beth Dorsey
Nora Beth Dorsey
Special Master