

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 07-792V

Filed: March 29, 2012

Not to be Published

**MATTHEW R. GALLOWAY, Parent of  
MATTHEW GALLOWAY, II, a Minor,**

**Petitioners,**

**v.**

**SECRETARY OF HEALTH AND HUMAN  
SERVICES**

**Respondent.**

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

### DECISION<sup>1</sup>

On November 13, 2007, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),<sup>2</sup> alleging that Matthew was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

On May 12, 2011, petitioner was ordered to file a second amended Petition succinctly stating petitioner’s counsel’s current theory of causation in this matter if petitioner intended to proceed in the prosecution of this claim. In response, petitioner’s counsel filed a Motion to Substitute Attorney in this matter on June 10, 2011 indicating

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, the undersigned intends to post this decision on the United States Court of Federal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), 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, the undersigned agrees that the identified material fits within this definition, the undersigned will delete such material from public access.

<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.

that petitioner had failed to respond to counsel's numerous attempts to contact him and requesting that the court substitute petitioner, an attorney, as counsel of record in this case.

On June 14, 2011 the undersigned denied petitioner's counsel's Motion to Substitute Attorney and again ordered petitioner to inform the court whether he intended to proceed with this case and file an amended Petition or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute.

On July 13, 2011 petitioner's counsel filed a Response to the Order to Show Cause and indicated petitioner had not responded to counsel's attempts to communicate with him and requested that the "[c]ourt render a decision on the record." On December 13, 2011 the undersigned ordered petitioner to identify the evidence in the record on which petitioner relies to support his claim for compensation. On January 30, 2012 petitioner's counsel filed a status report indicating counsel continued to be unable to communicate with petitioner regarding petitioner's desire to proceed with the prosecution of this claim. Counsel further averred in his status report filed January 30, 2012, that the record in this case "establishes only that this child developed his condition after vaccinations."

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

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

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<sup>3</sup> 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).

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).<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. 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 he intends to proceed.

## II. Failure to Prosecute

It is petitioner's duty to fully respond to court orders. Failure to respond to a court order because petitioner has failed to stay in contact with his attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As I reminded petitioner in my June 14, 2011 Show Cause Order, 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 Matthew suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Matthew's vaccinations, or 2) that Matthew 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 evidence in this case. Thus, an examination of the record did not uncover any evidence that Matthew suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Matthew's autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that Matthew suffered a "Table Injury" or that Matthew's injuries were "actually caused" by a vaccination. **This case is dismissed for insufficient**

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

**proof and for failure to prosecute. The clerk shall enter judgment accordingly.**

**IT IS SO ORDERED.**

s/Gary J. Golkiewicz  
Gary J. Golkiewicz  
Special Master