

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-0422V

Filed: August 8, 2011

Not to be Published

BETH A. MULHOLLAND and
KENNETH L. MULHOLLAND,
as parents and natural guardians,
on behalf of their minor son,
CONNOR DAVID MULHOLLAND

Petitioners,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

Petitioners' Motion for a Decision
On the Record; Insufficient Proof
of Causation; Vaccine Act
Entitlement

DECISION¹

Golkiewicz, Special Master.

On June 9, 2008, Beth and Kenneth Mulholland (“petitioners”) filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that various vaccinations injured Connor Mulholland (“Connor”).

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in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, 116 Stat. 2899, 2913 (Dec. 17, 2002). **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. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing.** Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

On June 19, 2008, petitioners were ordered to file the statutorily required medical records. 42 U.S.C. § 300aa-11(c)(2). In response, petitioners filed medical records on August 18, 2008. On September 24, 2010, petitioners were informed that the Omnibus Autism Proceeding (“OAP”) test cases had been decided and were ordered to file a statement within 30 days informing the court if petitioners wished to proceed with their claim. On October 25, 2010, petitioners filed a request that their case be decided on the record as it now stands. Because the information in the record does not show entitlement to an award under the Program, this case is dismissed.

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 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 (2010); *Snyder*, 2009 WL 332044, *aff’d*, 88 Fed. Cl. 706.⁴ 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

³ 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).

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

cases, and submit new evidence on causation, or take other action to exit the Program. The petitioners in this case have requested a ruling on the record as it now stands.

II. Medical Records⁵

Connor was born on January 13, 1998 after an uneventful pregnancy. Petitioners' Exhibit ("P Ex.") 1-4. He received routinely administered childhood vaccinations from January 13, 1998 until July 12, 1999. P Ex. 6. Shortly after his birth Connor became ill with a runny nose and cough which he most likely contracted from his older sibling when she visited him. P Ex. 5 at 1. According to the office notes of Connor's primary care physician, Dr. Lee G. Kissell, Connor recovered quickly from that illness. P Ex. 5 at 3. At Connor's two month well child check-up, Dr. Kissell noted that Connor did seem to have "some inward deviation of the left eye". P Ex. 5 at 4. In a later note, dated May 19, 1998, Dr. Kissell wrote that Connor had seen Dr. Schwarz, who I assume is an Ophthalmologist, "who did think he had any significant eye problems". P Ex. 5 at 6. The fact that the note does not make sense as written, along with the fact that there is no further mention of any eye problem in Connor's medical records, indicates that Dr. Kissell meant to write that Dr. Schwarz did **not** think Connor had any significant eye problems. Connor's medical records show that he experienced normal childhood illnesses none of which appear to be connected in any way to the vaccinations which he received. See, e.g., P Ex. at 15. (Because Connor developed a rash and possible sore throat which were noted by Dr. Kissell on the same day that he received his July 22, 1998 vaccinations, it is clear there is no connection between the two.)

On October 28, 1998, Connor's Mother reported she was "concerned because he [was] not doing quite as much developmental[ly] as other kids" but Dr. Kissell wrote that he found him to be a "completely normal" child who "developmentally at this time appears normal". P Ex. 5 at 20. In his office notes following Connor's 18 month well child check-up on July 12, 1999, Dr. Kissell wrote that Connor did appear to have some "developmental delay". P Ex. 5 at 30. Connor was diagnosed with Autism on May 5, 2000, by Gabrielle du Verglas, Ph.D., a clinical psychologist. P Ex. 7 at 6. She recommended certain care programs and further evaluations, but she did not address any cause of Connor's Autism. The medical records never mention a possible link between Connor's vaccinations and his diagnosis of Autism.

III. Causation in Fact

To receive compensation under the Program, petitioners must prove either 1) that Connor suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) that Connor 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 Connor suffered a "Table Injury." Further, the record does not contain a medical opinion or any other

⁵ I will not discuss the medical records in detail in this decision; however I have reviewed and considered all of the medical records and evidence filed by petitioners.

persuasive evidence indicating that Connor's autism spectrum disorder was vaccine-caused.

The Act at 42 U.S.C. § 300aa-13(a) provides that the special master "may not make a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." In this case, because there are insufficient medical records supporting petitioners' claim, a reliable medical opinion must be offered in support. Petitioners, however, have offered no such opinion. Thus, this Petition remains unsupported by either medical records or medical opinion. In accordance with section 13(a), the undersigned has no option but to **deny** petitioners' claim for want of proof.

Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that Connor suffered a "Table Injury" or that his 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.

Gary J. Golkiewicz
Special Master