

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**

No. 09-43V  
Filed: January 3, 2012  
Unpublished

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HELAINÉ SEARLE, and  
WILLIAM SEARLE,  
as best friends of their son,  
CODY JAMES SEARLE,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

Respondent.

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Motion for decision on the record;  
Denial; DTaP, Hib, Pneumococcal,  
MMR, Varicella, Hep A; Pervasive  
developmental delay, PDD-NOS

*John F. McHugh, Law Office of John McHugh, New York, NY, for Petitioners.*  
*Voris E. Johnson, U.S. Department of Justice, Washington, D.C., for Respondent.*

**DECISION**<sup>1</sup>

**GOLKIEWICZ, Special Master.**

On January 21, 2009, a Petition in this matter was filed alleging that petitioners’ son ultimately suffered from PDD-NOS<sup>2</sup> due to the vaccinations he received on February 2, 2006.<sup>3</sup> Petition [“Pet.”] at 1, filed Jan. 21, 2009. Medical records were filed with the Petition and

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<sup>1</sup> The undersigned intends to post this decision on the website for the United States Court of Federal Claims, 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.**

<sup>2</sup> PDD-NOS stands for Pervasive Developmental Disorder – Not Otherwise Specified, and is considered to be on the autistic spectrum. See, e.g., Mead v. Sec’y of the Dept. of Health & Human Servs., No. 03-215V, 2010 WL 892248, at \*18 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

<sup>3</sup> On February 2, 2006, petitioners’ son received the following immunizations: DTaP, Hib, Pneumococcal, MMR, Varicella, and Hep A. Pet. at 2; P Ex B at 8.

respondent filed her Rule 4(c) Report on April 21, 2009, which recommended against awarding compensation. Respondent's Rule 4(c) Report, filed Apr. 21, 2009 ["R Report"]. The Rule 4(c) Report noted numerous missing records, R Report at 2, questioned whether the Petition was timely filed, R Report at 6, and further challenged that petitioners failed to provide a reliable medical theory showing the vaccinations could have caused their son's injuries or a logical sequence of cause and effect showing a causal relationship. R Report at 9. Thereafter, petitioners attempted to complete the record. See, e.g., Scheduling Order, filed May 19, 2009; Scheduling Order, filed Nov. 5, 2009. Additional medical records were filed on December 29, 2009. Respondent filed a Status Report and Supplemental Rule 4(c) Report on February 25, 2010 ["R Supp. Report"]. Respondent noted several records that were still missing from the case. R Supp. Report at 3-4. However, respondent noted that an objection to the Petition on jurisdictional grounds, whether the Petition was timely filed, would not be made. Id. at 4.<sup>4</sup> Respondent's position still contested entitlement to compensation. Id. at 4-5. Additional records were filed on April 15, 2010.

Petitioners thereafter sought to engage an expert or treating physician regarding causation. Scheduling Order, filed Jun. 11, 2010; P Status Report, filed Sept. 9, 2010. Because of the nature of the injuries alleged and a potential physician assisting in the case who also testified in the Omnibus Autism Proceeding ["OAP"], petitioner was put on notice in the undersigned's Order, filed November 4, 2010, that an expert opinion proffered in this case should differ from the theories previously tested in the OAP.<sup>5</sup> On December 2, 2010, petitioners stated they had engaged an expert. P Status Report, filed Dec. 2, 2010; see also P Status Report, filed Jan. 4, 2011. Petitioners reported later that their expert was unwilling to testify. P Status Report, filed Feb. 4, 2011. Since that time, some additional medical records were filed.

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<sup>4</sup> Respondent did note that if it was found that petitioners' son's delays began before the February 2, 2006 vaccinations, "respondent will obviously argue that fact as a defense on the issue of causation." R Supp. Report at 4.

<sup>5</sup> 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. 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). 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 ASD. The first theory alleged that the measles portion of the measles, mumps, rubella ("MMR") vaccine could cause ASD. 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). Petitioners in Snyder did not appeal the decision of the U.S. Court of Federal Claims. 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.

Finally, other than the filing of medical records, the case was essentially stayed in light of petitioners' theory being "tested" in another Vaccine Act case. Order, filed Dec. 21, 2011. Petitioners were directed to file a status report by February 14, 2012, regarding the progress of the "test" case. Id.

In an about-face, on December 28, 2011, petitioners filed a Motion for Decision on the Record. P Motion for Decision on the Record, filed Dec. 28, 2011 ["Motion" or "P Mtn for Decision"]. Petitioners note their efforts to complete the record in this case. Further, they state, "this is an autism case" and "[a] review of the records we do have reveals no theory on which to proceed which has not been decided adversely to petitioners by this Court in other cases." P Mtn for Decision at 1. "Therefore, based upon the dearth of medical records and reports, we must ask for a decision on the record as it stands which we must reject to preserve the child's state law rights such as they are." Id. at 2. Respondent filed a response on December 29, 2011, stating respondent does not object to petitioners' request for a decision dismissing the petition." R Response to Petitioners' Motion for a Decision on the Record, filed Dec. 29, 2011.

Upon petitioner's admission and a review of the record, petitioners fail to provide preponderant evidence that the vaccinations their son received on February 2, 2006, caused his alleged injuries. Specifically, as admitted, petitioners are unable to provide "a medical theory causally connecting the vaccination and the injury." Althen v. Sec'y of the Dept. of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Further, 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." Currently, this Petition remains unsupported by either medical records or medical opinion. Thus, in accordance with section 13(a) the undersigned has no option but to **deny** petitioner's claim for want of proof.

The Clerk of the Court is directed to enter judgment accordingly.

**IT IS SO ORDERED.**<sup>6</sup>

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

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<sup>6</sup> This document constitutes a final "decision" in this case pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision.