

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

No. 02-791V
Filed: February 11, 2011
Unpublished

JOHN and ELIZABETH SETNES, as parents and *
natural guardians, on behalf of their minor son, *
AUSTIN J. SETNES, *

Petitioners, *

v. *

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Denial of compensation; Brain,
nervous system and immune system
damage, autism spectrum disorder;
Thimerosal

DECISION¹

On July 15, 2002, petitioners filed a Petition (hereinafter “Pet.”), on behalf of their son, for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10 to -34 (hereinafter “Vaccine Act” or “the Act”). Petitioners allege that as a result of exposure to thimerosal contained in certain childhood vaccinations, their son sustained brain, nervous system and immune system damage, leading to his development of autism spectrum disorder (hereinafter “ASD”). See Pet. Petitioners requested and were subsequently designated part of the Omnibus Autism Proceeding. Notice to Defer and Order, filed August 5, 2002.

On October 15, 2002, respondent moved for dismissal based upon petitioners’ claim being filed beyond the thirty-six month statute of limitations, § 16(a)(2). R Motion to Dismiss, filed October 15, 2002. Petitioners responded to this Motion on November 4, 2002. On January 31, 2003, the Petition was dismissed by the then-assigned special master. Decision Dismissing Case, filed January 31, 2003. This Decision discussed petitioner’s allegation that they noticed

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, the undersigned intends to post this decision on the United States Court of Federal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.

significant changes in their son after his fifteen month vaccinations on September 11, 1998. The special master found that onset of their son's alleged injury was, at latest, December 15, 1998. Decision Dismissing Case at 2. On petitioners' Motion for Review, Judge Futey of the Court of Federal Claims found the Petition to be timely filed based on the clearly apparent manifestation of petitioners' son's autism in July 1999. Setnes v. Sec'y of the Dept. of Health & Human Servs., 57 Fed. Cl. 175 (Fed. Cl. June 13, 2003).

On remand, proceedings were halted as the case was to be processed along with other autism petitions following movement of the Omnibus Autism Proceeding ["OAP"]. Order, filed November 24, 2003. On March 7, 2007, respondent again moved for dismissal of this petition as untimely filed, based on the ruling in Markovich v. Sec'y of the Dept. of Health & Human Servs., 477 F.3d 1353 (Fed. Cir. 2007). Petitioners filed a response on May 18, 2007, and respondent filed a reply on June 1, 2007. Briefing was extended to allow the parties to argue whether the law of the case doctrine affected resolution of respondent's second Motion to Dismiss. Order at 4, filed January 11, 2008. On January 11, 2008, the then-assigned special master held that he was unable to reconsider Judge Futey's decision regarding timeliness and requested clarification from Judge Futey regarding the scope of the remand. Id. On January 22, 2008, Judge Futey denied the request for clarification. Order, filed January 22, 2008. On January 30, 2008, respondent's second Motion to Dismiss was denied. Order, filed January 30, 2008. Again, proceedings halted in light of the proceedings in the OAP.

A Motion for Interim Fees was filed on November 2, 2010, and a response in opposition was filed on November 16, 2010. A status conference was held on January 6, 2011, wherein the parties discussed petitioners' case and their Motion for Interim Fees. Also on January 6, 2011, the undersigned denied petitioners' Motion for Interim Fees. Decision on Motion for Interim Fees and Costs and Scheduling Order, filed January 6, 2011. The Decision stated that although Avera v. Sec'y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), allows awards of interim fees, interim fees were not appropriate in this case given its posture. The undersigned explained:

Based on recent decisions involving the Omnibus Autism Proceeding ("OAP") "test cases," finding that petitioners failed to prove that vaccines caused ASD, the claims remaining in the OAP, such as the case *sub judice*, will be ordered to either dismiss their case or move forward with proof, including a reliable, supportive expert report.

The decisions in the test cases are not binding on petitioners who claim that vaccines cause ASD. However, unless petitioners have different evidence or theories not presented in the test cases, the results in the test cases indicate that this claim is unlikely to be successful, as discussed. If petitioners in this case choose to conclude their Petition, the case will be ripe for a motion for final attorney fees and costs. If petitioners choose to continue their Petition, providing an amended petition and a reliable medical

theory, the issue of the interim attorney fees and costs award will be ripe for resolution.

Decision on Motion for Interim Fees and Costs and Scheduling Order at 1-2. The Decision also set a schedule for petitioners to file a statement informing the court of whether petitioners intended to proceed with this claim. On January 7, 2011, petitioners filed a statement stating, “[p]etitioners do not wish to pursue their claim for compensation further and . . . they respectfully request a decision on the record as it now stands.” P Statement Pursuant to Court Order of 1/6/2011, filed January 7, 2011.

Pursuant to the Act, the petitioners must demonstrate, among other requirements, that their son received a vaccine covered by the Act and that he sustained an injury that was caused-in-fact by the vaccine or had an injury significantly aggravated by the vaccine. 42 U.S.C. 300aa-11(c). Petitioner must prove his case “by a preponderance of the evidence,” 42 U.S.C. 300aa-13(a)(1)(A), and a finding cannot be made based upon unsupported claims of the petitioner alone. 42 U.S.C. 300aa-13(a)(1).

Based upon the record as it stands, petitioners have failed to provide preponderant proof, in the form of medical records or medical opinion, § 13(a)(1), that their son’s vaccination caused him to sustain brain, nervous system and immune system damage, leading to his development of ASD. **Unfortunately, in accordance with 42 U.S.C. 300aa-11(c)(1)(C)(ii), the undersigned must deny compensation.**

The Clerk of the Court is directed to enter judgment accordingly.²

IT IS SO ORDERED.

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

² 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. Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.