

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 04-1491V

Filed: January 11, 2012

Not to be Published

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STEVEN BURGNER and  
CATHI BURGNER,  
Guardians ad Litem for  
TYLER BURGNER, a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND  
HUMAN SERVICES

Respondent.

Autism; Dismissal; Insufficient Proof of  
Causation; Attorneys' Fees and Costs

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**DECISION DISMISSING PETITION AND AWARDING ATTORNEYS' FEES AND COSTS <sup>1</sup>**

On September 24, 2004, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program"),<sup>2</sup> alleging that Tyler

<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, § 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 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I 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.

was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14. The information in the record does not show entitlement to an award under the Program.

On January 11, 2012, the petitioners moved for a decision on the merits of the petition, acknowledging that insufficient evidence exists to demonstrate entitlement to compensation.

To receive compensation under the Program, petitioners must prove either 1) that Tyler suffered a “Table Injury” – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Tyler’s vaccinations, or 2) that Tyler suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A) and 11(c)(1). Examination of the record does not disclose any evidence that Tyler suffered a “Table Injury.” Further, the record does not contain a medical expert’s opinion or any other persuasive evidence indicating that Tyler’s alleged injury was vaccine-caused.

Under the Vaccine Act, a petitioner may not be awarded compensation based on the petitioner’s claims alone. Rather, the petition must be supported by either the medical records or by a medical opinion. § 13 (a)(1). In this case, the record does not contain medical records or a medical opinion sufficient to demonstrate that the vaccinee was injured by a vaccine. For these reasons, in accordance with § 12(d)(3)(A), the **petitioners’ claim for compensation is denied and this case is dismissed for insufficient proof.**

The petitioners have also filed an unopposed motion for an award of attorneys’ fees and costs in this case. Petitioners are entitled to reasonable attorneys’ fees and costs pursuant to §§ 15(b) and (e)(1). Respondent has reviewed the motion and does not object. §§ 13(a)(1)(A) and 11(c)(1). In lieu of filing a General Order # 9 statement, petitioners’ counsel noted the out of pocket costs that petitioners personally incurred.

**The request for attorneys’ fees and costs is granted.** Petitioners are awarded reasonable attorneys’ fees and costs pursuant to §§ 15(b) and (e)(1), as I find that the petition was brought in good faith and upon a reasonable basis, and the amounts requested are reasonable and appropriate.

Accordingly, I hereby award the **total of \$6,500.00**. This total represents \$150.00 in petitioners’ personal costs, and \$6,350.00 in attorney fees and costs. The payment shall be:

- 1. a lump sum of \$6,350.00, in the form of a check payable jointly to petitioners, and petitioners’ counsel, Gallagher and Gallagher Law Firm LLC, for attorney fees and costs; and**
- 2. a lump sum of \$150.00, in the form of a check payable to petitioners, for out-of-pocket expenses personally incurred by petitioners.**

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.<sup>3</sup>

**IT IS SO ORDERED.**

s/George L. Hastings, Jr.  
George L. Hastings, Jr.  
Special Master

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<sup>3</sup> Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. See Vaccine Rule 11(a).