

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-365V

Filed: October 10, 2012

Not to be Published

CASON SKYE JOHNSON, a minor, by his *
Parents and natural guardians, ROBERT *
DIRK JOHNSON and CLAUDIA JOHNSON *

Petitioners, *

v. *

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

Respondent. *

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

DECISION¹

On June 5, 2009, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that Carson was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

Thereafter, on March 1, 2011 petitioners were ordered to provide the court within 30 days a statement identifying their theory of how they believe vaccines caused their child’s injury. Petitioners were further ordered to file within 60 days all available medical

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, § 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, I agree that the identified material fits within this definition, I will delete such material from public access.

² 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.

records not previously filed. The Order filed March 1, 2011 was returned to the court as undeliverable.

On February 15, 2012, petitioners contacted the court and provided the following updated address: 456 Elm Ave., Long Beach, CA, 90802. Petitioners were advised that they should file a notice of change of address with the court. Petitioners failed to do so.

On May 16, 2012, petitioners were ordered to file a statement indicating their address of record, their theory of causation, and the required medical records. Petitioners were advised that full and timely compliance with all court orders is required and that failure to file a timely response to that order would lead to the dismissal of their claim. The May 16, 2012 was sent to petitioners' address of record and the address petitioners orally provided the court on February 15, 2012. No response was received to the order sent to the address of record. The order sent to the address petitioners provided the court on February 15, 2012 was returned to the court as undeliverable on August 6, 2012.

On July 13, 2012, an Order to Show Cause was filed again requiring petitioners to file a statement indicating their address of record, their theory of causation, and the required medical records; or Show Cause why this claim should not be dismissed for failure to prosecute. The Order to Show Cause was sent to petitioners' address of record and the address petitioners orally provided the court on February 15, 2012, by certified mail. The copy of the order sent to petitioners' address of record was returned to the court as undeliverable. No response was received from order sent to the address petitioners provided the court on February 15, 2012, although the United States Postal Service tracking service shows that it was delivered. However, as the court's previous order sent to this address was returned as undeliverable the court endeavored to locate an alternative address for petitioners and one was identified.³

On August 29, 2012, petitioners were again ordered to file the required information or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. The order was sent to petitioners' address of record by certified mail as well as to the additional address provided by petitioners and the alternative address identified by the court. The copy of the order sent to petitioners' address of record was returned to the court as undeliverable. Petitioners failed to respond to the copies of the order sent to the additional addresses.

³ **The Clerk of the Court is directed to send the instant Decision to petitioners at the following addresses as well as at petitioners' address of record.**

Robert and Claudia Johnson
456 Elm Ave.
Long Beach, CA, 90802

Robert and Claudia Johnson
8922 Clipper Drive
Huntington Beach, CA 92646

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.⁴

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 (Fed. Cir. 2010); *Snyder*, 2009 WL 332044, *aff’d*, 88 Fed. Cl. 706 (2009).⁵ 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.

II. Failure to Prosecute

It is petitioners’ duty to respond to court orders. As I reminded petitioners in my August 29, 2012 order, failure to follow court orders, as well as failure to file medical

⁴ 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).

⁵ Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

records or an expert medical opinion, shall result in dismissal of petitioners' 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, petitioners must prove either 1) that Cason suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Cason's vaccinations, or 2) that Cason suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-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." § 300aa-13(a). Petitioners have failed to file sufficient medical records and evidence in this case. An examination of the record does not support a finding that Cason suffered a "Table Injury." Nor does the record contain a medical opinion or any other persuasive evidence indicating that Cason's autism spectrum disorder was vaccine-caused.

On the record in this case, it is clear that petitioners have failed to demonstrate either that Cason suffered a "Table Injury" or that Cason's injuries were "actually caused" by a vaccination. **This case is dismissed for insufficient proof and for failure to prosecute. The clerk shall enter judgment accordingly.**⁶

IT IS SO ORDERED.

George L. Hastings, Jr.
Special Master

⁶ This document constitutes my final "Decision" in this case, pursuant to § 12(d)(3)(A). If petitioners wish to have this case reviewed by a Judge of the United States Court of Federal Claims, a motion for review of this decision must be filed within 30 days. After 30 days the Clerk of this Court shall enter judgment in accord with this decision. If petitioners wish to preserve whatever right petitioners may have to file a civil suit (that is a law suit in another court) petitioners must file an "election to reject judgment in this case and file a civil action" within 90 days of the filing of the judgment. § 21(a).