

# **In the United States Court of Federal Claims**

## **OFFICE OF SPECIAL MASTERS**

No. 02-1714V

Filed: April 16, 2012

Not to be Published

**RICHARD KERNS and KELLY KERNS,  
parents of KAYLEE KERNS, a minor**

**Petitioners,**

**v.**

**SECRETARY OF HEALTH AND HUMAN  
SERVICES**

**Respondent.**

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

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

On November 26, 2002, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),<sup>2</sup> alleging that Kaylee was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

On July 8, 2011, petitioners were ordered to inform the court whether petitioners

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<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 Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), 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.

<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.

intended to proceed with this case and file an amended petition, or to file the appropriate documents to exit the Vaccine Program. Petitioners have yet to file either an amended petition or the appropriate exiting documents.<sup>3</sup> Petitioner's counsel has requested and the court has granted additional time to do so. See Orders filed on September 8, 2011, October 11, 2011, November 15, 2011 and January 3, 2012. On February 2, 2012, an Order to Show Cause was filed in this case. Petitioners were again ordered to inform the court whether petitioners intend to proceed with this case or otherwise show cause, within thirty days, why this case should not be dismissed for failure to prosecute.

Petitioners' counsel has indicated to the court that petitioner, Kelly Kerns, has not been responsive to counsel's attempts to communicate with her. Petitioner, Richard Kerns, has reported that any information in support of this claim, if it exists, is in the possession of petitioner, Kelly Kerns. See Status Report filed March 5, 2012. Petitioners' counsel requested additional time to communicate with petitioners.

I find that counsel has had ample opportunity to attempt to communicate with petitioners regarding their intent to proceed with this claim. Petitioners have failed to respond to the court's orders and there has been no indication that petitioner, Kelly Kerns, is at all responsive to counsel's efforts to contact her or aid counsel in the prosecution of her claim. Further, petitioner, Richard Kerns, has indicated that he does not have any information that may assist in the prosecution of this case.

#### 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.<sup>4</sup>

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<sup>3</sup> The undersigned notes a status conference was first held on February 2, 2011 to apprise petitioners' counsel of the need to contact all his OAP clients as expeditiously as possible and determine if his clients wished to proceed with their claims. Additionally, petitioners were advised in the court's January 3, 2012 Order that an amended petition must be filed within 180 days of the filing of the initial order on July 8, 2011 or this claim would be dismissed for failure to prosecute. Counsel was reminded that his amended petition could be supplemented once filed as necessary. It is now well past 180 days since the filing of my July 8, 2011 Order.

<sup>4</sup> 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

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).<sup>5</sup> 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. The petitioners in this case have failed to inform the court how they intend to proceed.

## II. Failure to Prosecute

It is petitioners' duty to respond to court orders. Failure to respond to a court order because petitioners have failed to stay in contact with their attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As I reminded petitioners in my February 2, 2012 Order, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioner's 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 Kaylee suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Kaylee's vaccinations, or 2) that Kaylee suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A) and 11(c)(1). Under

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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).

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

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.” § 13(a). Petitioners have failed to file sufficient medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that Kaylee suffered a “Table Injury.” Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Kaylee’s autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that Kaylee suffered a “Table Injury” or that Kaylee’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.**

**IT IS SO ORDERED.**

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