

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 02-1137V

Filed: June 6, 2012

Not to be Published

**KELLY KERNS, parent of ANDREW
KERNS, a minor**

Petitioner,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

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

DECISION¹

On September 9, 2002, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that Andrew was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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.

On February 3, 2011, petitioner was ordered to inform the court whether petitioner intended to proceed with this case and file an amended petition, or to file the appropriate documents to exit the Vaccine Program. Petitioner has yet to file either an amended petition or the appropriate exiting documents.³ On April 16, 2012, an Order to Show Cause was filed in this case. Petitioner was again ordered to inform the court whether petitioner intends to proceed with this case or otherwise show cause, within thirty days, why this case should not be dismissed for failure to prosecute.

Petitioner's counsel filed a Status Report on May 21, 2012 indicating to the court that petitioner, Kelly Kerns, has not been responsive to counsel's numerous attempts to communicate with her over multiple months. Counsel further indicates he has spoken with petitioner's spouse, Richard Kerns, and informed him of the status of this claim. Petitioner's counsel moves the court allow him to withdraw his representation in this matter. Petitioner's counsel's motion to withdraw is denied.

I find that counsel has had ample opportunity to attempt to communicate with petitioner regarding her intent to proceed with this claim. Petitioner has 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. Nor is there any indication that petitioner would respond to further court orders if the court granted counsel's motion to withdraw.

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

³ The undersigned notes a status conference was first held on February 2, 2011 to apprise petitioner's 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. While counsel did not represent petitioner in the instant claim at that time, counsel did represent petitioner in a claim involving Andrew's sibling, Kaylee Kerns, which was dismissed for failure to prosecute on April 16, 2012 after counsel was likewise unable to communicate with petitioner regarding her intent to proceed with that claim despite repeated attempts to do so.

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).

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. The petitioner in this case has failed to inform the court how she intends to proceed.

II. Failure to Prosecute

It is petitioner's duty to respond to court orders. Failure to respond to a court order because petitioner has failed to stay in contact with her attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As I reminded petitioners in my April 16, 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, petitioner must prove either 1) that Andrew suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Andrew's vaccinations, or 2) that Andrew suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A) and 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

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

medical records or by medical opinion.” § 13(a). Petitioner has failed to file sufficient medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that Andrew suffered a “Table Injury.” Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Andrew’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 Andrew suffered a “Table Injury” or that Andrew’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