

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-1303V

Filed: December 20, 2011

ANGELA DE LA FE and)	
WAYNE JOSEPH DRAKE, SR. as)	
Legal Representatives of the Estate of)	
WAYNE JOSEPH DRAKE,)	
)	NOT TO BE PUBLISHED
Petitioners,)	
)	
v.)	Thimerosal; Death; Vaccine Injury;
)	Dismissal for Insufficient Proof
SECRETARY OF)	and Failure to Prosecute
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, M.A., for Petitioner.
Ryan D. Pyles, United States Dep't of Justice, Washington, D.C., for Respondent.

DECISION¹

On June 2, 2003, Angela De La Fe and Wayne Drake, Sr. ("Petitioners"), as legal representatives of the estate of Wayne Joseph Drake, Jr. ("Wayne"), filed a Petition for Compensation in the National Vaccine Injury Compensation Program ("the Program") for the death of their minor son, Wayne.² Pet. at 1. Petitioners allege that Wayne died as a result of his having received Diphtheria-pertussis-tetanus, Polio, Hepatitis B, and Hib immunizations on July 20, 2001. Id. Specifically, Petitioners contend that Wayne, after being vaccinated, "suffered the 'Table Injury' known as Anaphylaxis or Anaphylactic shock, and thereafter died on July 21, 2001. Id.

This case was part of a group in which petitioners alleged that thimerosal in pediatric vaccines caused, contributed to, or triggered the death of a vaccinee. The same counsel, Conway, Homer & Chin-Caplan ("CHC" or "counsel"), represented all the petitioners. On November 23, 2010, Special Master Abell issued a decision denying

¹ In accordance with Vaccine Rule 18(b), petitioner has 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Redactions ordered by the special master, if any, will appear in the document as posted on the United States Court of Federal Claims' website.

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.

entitlement in Kolakowski v. Secretary of Department of Health & Human Services, No. 99-625V, 2010 WL 5672753 (Fed. Cl. Spec. Mstr. Nov. 23, 2010), the test case in the group proceeding. Mr. Kolakowski did not appeal from the decision in his case.

Following Kolakowski, petitioners in the group were afforded more than six months in which to evaluate the effect of the decision and decide whether to proceed with their claims. On June 2, 2011, I ordered the petitioners in each case to inform the Court by July 6, 2011, whether they intended to proceed. The order stated, "If a decision is made to proceed, Petitioner must identify a theory of causation, file additional medical records, and produce an expert report. If a decision is made not to proceed, Petitioner has several options for terminating participation in the Vaccine Program." Petitioners were warned that failure to comply would result in an order to show cause.

On July 6, 2011, status reports were filed in each case. In 15 of the cases, Petitioners requested an additional 30 days to confer with counsel and inform the Court how Petitioners wished to proceed ("Group One").³ Respondent did not object to this request. In the remaining nine cases, Petitioners stated that they intended to proceed with their claims and requested an additional 60 days, until September 5, 2011, to collect and file any outstanding medical records, and consult with a medical expert ("Group Two").⁴ Respondent objected to this request. The instant case was listed in Group Two.

On July 18, 2011, I held a status conference to discuss the Group Two cases and Petitioners' request for a 60-day enlargement. During the conference I questioned whether there was a viable non-thimerosal theory of vaccine causation in these cases and informed the parties that to avoid unnecessary expenditure of resources Petitioners should select one case out of the nine to go forward. The remaining eight would be temporarily stayed to allow both the Court and the parties to assess their viability. On July 20, 2011, I issued an order in accordance with this discussion and gave Petitioners until July 27, 2011, to select the first case for prosecution. Additionally, as to the selected case, I granted the request for enlargement to September 6, 2011, to file all outstanding medical records, obtain an expert, and file a status report setting forth the theory of causation to be alleged in the case.

On July 27, 2011, a status report was filed in Hegarty (01-0463V) identifying it as the first case for prosecution. On September 6, 2011, Petitioner in Hegarty filed a

³ Paseka/Haynes (99-0010V), Nelson (99-0575V), Canter/Washam (99-0602V), Bakaraa (99-0652V), Gilchrist (99-0655V), Weeks (00-0348V), Underwood/Moreno (00-0357V), Goodman (00-0484V), Markum/Small (01-0569V), Minor (02-0394V), Pool (02-1389V), Benke (03-0877V), Cline (03-1164V), McManus (04-0966V), and Walker-Hertzog (05-0213V).

⁴ Johnson (99-0011V), Sexton (99-0453V), Brooks (99-0675), Cozart (00-0590), Forr (01-0199V), Hegarty (01-0463), Sechrist (02-0393V), Drake (03-1303V), and Hartis (04-0128V).

status report notifying the Court that all medical records had been filed and setting forth his theory of causation. The theory is that the administration of the hepatitis B vaccine caused or substantially contributed to the development of atypical Kawasaki disease, which ultimately led to Joseph Michael Hegarty's death. Petitioner in Hegarty concluded his status report requesting an additional 60 days, until November 7, 2011, to file an expert report as he still had not retained a medical expert to review the case and write the report.

On September 20, 2011, I held a status conference regarding the Group One and Group Two cases. The purpose of the conference was to discuss progress in the group of cases since the last status conference (July 18, 2011), compliance with the order issued on July 20, 2011, and the requested 60-day enlargement in Hegarty. On September 27, 2011, I issued an order in accordance with this discussion requiring an amended petition be filed in each Group Two case by October 21, 2011, and granting the enlargement in Hegarty.

On October 12, 2011, Petitioners telephonically contacted my chambers and requested an enlargement to October 24, 2011 to file the amended petitions. I granted their unopposed oral motion the same day.⁵

On October 24, 2011, Petitioners filed a "Response to the Court's September 27, 2011 Orders" informing the Court of the status of the various cases remaining in Group One and Group Two. In this filing, Petitioners in the instant case reported that counsel had recently informed them that they will not continue to litigate this case. Petitioners requested an additional 30 days, until November 23, 2011, to discuss the future of this proceeding and inform the Court as to how they wished to proceed with their claim.

On November 23, 2011, Petitioners' counsel filed a status report informing the Court that they have "been unable to establish substantive communications with the petitioner[s]" in this case. Status Report, ECF No. 89. Since this filing nothing further has been submitted to update the Court on Petitioners' intentions and CHC remains Petitioners' counsel of record.

I. Insufficient Proof

To receive compensation under the Program, Petitioners must prove either that (1) Wayne suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or (2) Wayne 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 that a petitioner has proven his case based upon "the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion."

⁵ On October 24, 2011, Petitioner in Hegarty filed an amended petition. On December 12, 2011, Petitioner in Hegarty informed the Court that CHC will not be litigating his case further. An order to show cause was issued in that case on December 16, 2011.

§ 13(a)(1). Both the Vaccine Act and the Vaccine Rules require a petitioner to submit all documentation and records relating to the vaccination. See generally § 11(c); Vaccine Rules of the United States Court of Federal Claims, Appendix B, Rule 2(c)(2) (requiring the filing of medical records and affidavits to support the allegations in the petition). Despite being afforded more than a year to provide the necessary evidence to permit this case to proceed in light of Kolakowski, Petitioners have failed to file sufficient medical records and evidence to establish entitlement. When medical records do not establish entitlement to compensation, as they do not in this case, petitioners must submit an expert medical opinion supporting the claim. § 13(a)(1); see Lett v. Sec'y of Dep't of Health & Human Servs., 39 Fed. Cl. 259, 260-61 (1997) (“Ultimately, the petitioner must substantiate the occurrence of a compensable, vaccine-related injury with independent evidence. . . . [A] petitioner must corroborate the claims with testimony of one or more other witnesses, ‘medical records or medical opinion’; the special master may not compensate a petitioner based on his claims alone.”). Although alleged by Petitioners, an examination of the record did not uncover any medical evidence that Wayne suffered a “Table Injury.” Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Wayne’s alleged injury was vaccine-caused. See Kolakowski.

II. Failure to Prosecute

Petitioners must also prosecute their cases and comply with court orders. When petitioners fail to prosecute their cases or comply with court orders, the court may dismiss their cases. Vaccine Rule 21(b); see Tsekouras v. Sec'y of Dep't of Health & Human Servs., 26 Cl. Ct. 439 (1992), aff'd per curiam, 991 F.2d 810 (Fed. Cir. 1993) (Table); Sapharas v. Sec'y of Dep't of Health & Human Servs., 35 Fed. Cl. 503 (1996); see also Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180 (Fed. Cir. 1990) (affirming dismissal for failure to prosecute based on counsel’s failure to submit pre-trial memorandum); Adkins v. United States, 816 F.2d 1580 (Fed. Cir. 1987) (affirming dismissal for failure of party to respond to discovery requests). Petitioners in this case have had more than ample time to submit the evidence necessary to permit their case to proceed in the Vaccine Program, and have not done so.

Accordingly, it is clear from the record in this case that Petitioners have failed to demonstrate either that Wayne suffered a “Table Injury” or that his 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/Dee Lord
Dee Lord
Special Master