

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-693V

Filed: July 1, 2011

NAHALEY FORTENBERRY, by ERICH A.)	
FORTENBERRY, Administrator of the)	NOT TO BE PUBLISHED
Estate of NAHALEY FORTENBERRY,)	
)	
Petitioner,)	
)	
v.)	Motion for dismissal decision;
)	Death; encephalopathy;
)	Insufficient proof
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

Elaine W. Sharp, Whitfield, Sharp & Sharp, Marblehead, MA, for Petitioner.
Chrysovalantis P. Kefalas, U.S. Dep't of Justice, Washington, D.C., for Respondent.

AMENDED DECISION¹

LORD, Special Master.

On October 5, 2006, Petitioner, Erich A. Fortenberry, filed a petition pursuant to the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10 et seq. (2006) ("Vaccine Act"). Petitioner alleged that, as a result of receiving certain vaccinations between April 10, 2003, and February 5, 2004, his daughter, Nahaley Fortenberry, suffered an encephalopathy, intracranial and intestinal injury, and death on October 6, 2004. No affidavits, treating physician or pathologist statements, or supporting medical expert reports were filed with the petition.

Over the next two and a half years, Petitioner attempted to collect the necessary medical records and medical evidence. On February 9, 2009, Respondent filed a motion to dismiss the case for failure to prosecute and to present sufficient evidence to

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request the redaction "of any information furnished by that party (1) that is trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of a timely objection, the entire document will be made publicly available.

prove a prima facie case of entitlement to compensation, or alternatively, to order Mr. Fortenberry to show cause why his petition should not be dismissed.

On February 10, 2009, in response to Respondent's motion to dismiss, the special master issued an order to show cause. In the order, the special master stated that "[t]he Court stops short of granting Respondent's motion to dismiss, to provide Petitioner one last opportunity to file the materials necessary to complete the record." Order, Feb. 10, 2009, at 1.

At a status conference on March 27, 2009, Respondent renewed her request to dismiss the case for failure to prosecute. Petitioner opposed the motion. Petitioner was ordered to send the pathology slides to the expert witnesses and to file a status report regarding "the progress of the slides, their chain of custody, and their current custodial status and whereabouts." Order, Apr. 13, 2009, at 1.

On June 10, 2009, a status conference was held. Petitioner was able to provide the pathology slides to his experts, and Petitioner was ordered to file a report from these expert witnesses by September 11, 2009. See Order, June 17, 2009, at 1.

This case was reassigned to me on June 22, 2009. On September 10, 2009, Petitioner filed a motion noted on the docket as Petitioner's "First Motion for Extension of Time until October 13, 2009" to file an expert report. Respondent did not oppose this motion and a 30-day extension was granted.

On October 20, 2009, Petitioner filed a "Second Motion for Extension of Time until 12/18/2009 to Filing Expert Reports." Respondent opposed this motion and renewed her motion to dismiss the case. See Objections to Mot. to Expand and Renewed Mot. to Dismiss, Oct. 20, 2009, at 1. On November 3, 2009, Petitioner filed the expert reports and a response to the motion to dismiss. Respondent filed her expert report on April 19, 2010.

There was a hiatus in the progress of the case. Following a show cause order issued April 13, 2011, Petitioner's counsel requested and was granted 60 days to discuss with her client how he wished to proceed.

On June 24, 2011, Petitioner filed a "Motion for a Decision Dismissing Her Petition." Petitioner informed the court that he had decided not to pursue this case further, but that he wanted to preserve his right to file a civil suit. Petitioner requested a decision dismissing his petition.

To receive compensation under the Vaccine Act, Petitioner must prove either 1) that Nahaley suffered a "Table Injury" -- i.e., an injury falling within the Vaccine Injury Table -- corresponding to one of his vaccinations, or 2) that Nahaley suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). An examination of the record did not uncover any evidence that Nahaley suffered a

“Table Injury.” Further, the record does not contain a legally sufficient medical expert’s opinion or any other persuasive evidence indicating that Nahaley’s injury was caused by a vaccination.

Under the Vaccine Act, a petitioner may not be awarded compensation based solely on the petitioner’s claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. § 300aa-13(a)(1). Based on my review of the record, the evidence presented by Petitioner is legally insufficient to establish a prima facie case of entitlement to compensation under Althen v. Sec’y of Dept. of Health & Human Servs., 418 F.3d 1274 (Fed. Cir. 2005).

Accordingly, I grant Petitioner’s motion and **DENY** this petition. This case is **DISMISSED** for insufficient proof. In the absence of a motion for review, the Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master