

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-802V

Filed: January 20, 2012

_____)	
MARCY E. PELL and AARON C. PELL)	
parents and natural guardians of)	
a minor child, JAKE B. PELL)	
)	NOT TO BE PUBLISHED
Petitioners,)	
)	Measles-mumps-rubella (MMR);
v.)	Respondent's Motion to Dismiss;
)	Dismissing the Petition for Insufficient
)	Proof of Causation and Failure to
SECRETARY OF)	Prosecute; Denial Without Hearing
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

David E. Marmelstein, David Marmelstein Esq., Enfield, C.T., for Petitioners,
Darryl R. Wishard, United States Dep't of Justice, Washington, DC, for Respondent.

DECISION¹

On November 20, 2009, Marcy and Aaron Pell ("Petitioners"), parents of Jake Pell ("Jake"), filed a Petition For Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program").² Petitioners allege that Jake suffered an aggravation of a prior seizure disorder as a result of receiving the second dose of the measles-mumps-rubella ("MMR") vaccine on June 5, 2007. Pet. at 2.

On May 17, 2010, after Petitioners had filed all necessary medical records, Respondent filed her Rule 4(c) report. Respondent argued that entitlement should be denied and the petition dismissed because Petitioners "have insufficient evidence on causation under all three prongs of Althen." Resp't's Report 12, ECF No. 9 (citing Althen v. Sec'y of Dep't of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005)).

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.

On June 1, 2010, I ordered Petitioners to submit a medical expert report by August 30, 2010. The deadline passed, however, without submission of a report or any other filing.

On October, 25, 2010, I ordered Petitioners to file a status report by November 12, 2010, informing the Court of when they expected to file their medical expert report. In a timely filing, Petitioners reported that they expected to file an expert report within 60 days. On November 15, 2010, I ordered Petitioners to file an expert report by January 11, 2011. Petitioners failed to meet this deadline and did not move for an enlargement.

On March 29, 2011, my chambers conducted a status conference with the parties to discuss Petitioners' missed deadline for filing the expert report. During the conference Petitioners stated they were still in the process of locating an expert, but hoped to retain one and to file an expert report within 60 days. I ordered Petitioners to file an expert report and affidavits in support of their petition by May 31, 2011.

On June 1, 2011, Petitioners moved for a 60 day enlargement of the deadline to submit their expert report. I granted their motion, affording Petitioners until August 1, 2011, to file an expert report and affidavits.

On August 4, 2011, Petitioners requested another 60 days in which to file their expert report and affidavits. In their motion, Petitioners stated that they have been "unable to locate an expert and [are] still in the process of obtaining [one]." Mot., ECF No. 18.

On August 22, 2011, I convened a status conference to discuss the pending motion. At the conference Petitioners represented that they would not prosecute their case further if an expert could not be located within 60 days. I granted Petitioners' request for enlargement but informed Petitioners that if an expert was not identified within 60 days, I would dismiss the case. I ordered Petitioners to file a status report by October 21, 2011, "identifying an expert and supported by an affidavit from the expert specifying a date certain for the expert to submit a report." Order, Aug. 24, 2011, ECF No. 19. This deadline passed without submission of an expert report, affidavit, or any other filing.

On November 2, 2011, Respondent filed a Motion to Dismiss based on Petitioners' failure to prosecute their petition. Resp't's Mot. to Dismiss, ECF No. 20.

I. Insufficient Proof

To receive compensation under the Program, Petitioners must prove either that (1) Jake suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or (2) Jake 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." §

13(a)(1). Despite being afforded more than a year, Petitioners have failed to provide the necessary evidence to permit their case to proceed. 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). 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.”). As discussed, Petitioners have not submitted a medical opinion, affidavits, or any other persuasive evidence indicating Jake’s alleged injury was vaccine-caused.

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 Jake suffered a “Table Injury” or that his injuries were “actually caused” by a vaccination. **Thus, this case is dismissed for insufficient proof and failure to prosecute. The Clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

s/Dee Lord
Dee Lord
Special Master