In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 01-569V

Filed: November 3, 2011

WENDY SMALL, as legal representative of the estate of TAYLOR MACKENZIE MARKUM Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	)	NOT TO BE PUBLISHED Thimerosal; Dismissal for Insufficient Proof and Failure to Prosecute

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.

DECISION[1]

On October 2, 2001, Wendy Small ("Petitioner"), as legal representative of the estate of Taylor Mackenzie Markum ("Taylor"), filed a Petition for Compensation in the National Vaccine Injury Compensation Program ("the Program") alleging that Taylor, her minor granddaughter, was injured by a diphtheria-tetanus-pertussis ("DTP") vaccine she received on December 21, 2000.[2] Specifically, it is alleged that Taylor suffered "shock-collapse with acute complication or sequelae of death." Pet. at 1. Taylor died on December 23, 2000.

This case was grouped with others in which petitioners alleged that thimerosal in pediatric vaccines caused, contributed to, or triggered the death of a vaccinee. The petitioners in this group currently are represented by Conway, Homer & Chin-Caplan ("CHC" or "counsel"). On November 23, 2010, Special Master Abell issued a decision denying entitlement in Kolakowski v. Sec'y of Dep't of Health & Human Servs., No. 99-625V, 2010 WL 5672753 (Fed. Cl. Spec. Mstr. Nov. 23, 2010), the test case in the

[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.

group. Special Master Abell found that the petitioners failed to prove that thimerosal-containing vaccines can cause death in infant vaccinees and that they failed to prove thimerosal-containing vaccines caused Thomas Kolakowski's death. The decision was not appealed.

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 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, counsel filed a status report in each case. In 15 of the cases, counsel requested an additional 30 days to confer with the petitioners and inform the Court how they wished to proceed ("Group One").[3] Respondent did not object to this request. In the remaining nine cases, counsel declared petitioners' intent to proceed with their claim 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] The instant case was listed in Group One.

On July 8, 2011, I issued an order granting counsel's request for an enlargement to August 8, 2011, to file a status report declaring whether each petitioner in Group One wished to proceed or exit the Vaccine Program.

On August 8, 2011, counsel filed a second status report stating that initial contact had been made with petitioners, but counsel required an additional 30 days, until September 8, 2011, to discuss how each petitioner would like to proceed and to file another status report. Counsel represented that Respondent had no objection. This request was granted.

On September 6, 2011, Petitioners in Benke (03-0877V), a case in Group One, moved for a decision dismissing their petition. I issued the requested decision on September 13, 2011.

On September 8, 2011, counsel filed a third status report, again requesting a 30-

[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).

day enlargement. The status report stated that counsel was continuing attempts to establish contact with each petitioner via mail, phone, or e-mail, but required more time.

On September 20, 2011, a status conference was convened. I denied CHC's request for additional time to consult with their clients in Group One, informing counsel that they had expended enough time in their attempts to contact the parties. I noted that there appeared to be no reasonable basis on which to pursue these claims at this time. CHC indicated that counsel did not intend to continue to litigate these cases.

On September 27, 2011, each of the remaining 14 petitioners in this group, including Petitioner herein, was ordered specifically to show cause within 30 days why their claims should not be dismissed in light of Kolakowski. In response to the show cause order, two petitioners dismissed their claims voluntarily. [5] On October 24, 2011, counsel informed the Court that the remaining 12 petitioners in this group, including Petitioner in this case, have not provided counsel with written confirmation regarding how they wish to proceed. Counsel indicated that several of the petitioners have not responded to inquiries by counsel, and that others have indicated that they do not wish to voluntarily dismiss their claims, but have not retained alternative counsel.

In none of these remaining cases has the Court received an adequate and appropriate response from any of the 12 petitioners, including Petitioner herein.

I. Failure to Prosecute

Petitioners must 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 Rules of the U.S. Court of Federal Claims, Appendix B, Rule 21(b); 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).

II. Causation In Fact

To receive compensation under the Program, Petitioner must prove either that (1) Taylor suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of her vaccinations, or (2) Taylor suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A)-(B) 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] Paseka/Haynes (99-0010V) and Pool (02-1389V).

§ 13(a). Despite being afforded nearly a year to provide the necessary evidence to permit this case to proceed, Petitioner has failed to file sufficient medical records and evidence to establish entitlement. An examination of the record did not uncover any evidence that Taylor suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Taylor's alleged injury was vaccine-caused. See Kolakowski.

Accordingly, it is clear from the record in this case that Petitioner has failed to demonstrate either that Taylor suffered a "Table Injury" or that her 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