

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-877V

Filed: September 13, 2011

_____)	
CRAIG BENKE and SHERRY BENKE,)	
As Parents and Legal)	
Representatives of the Estate of,)	
ABIGAIL BENKE, deceased)	UNPUBLISHED
)	
Petitioners,)	
)	
v.)	Motion for Dismissal Decision;
)	Thimerosal
)	
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

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

DECISION¹

LORD, Special Master.

On May 2, 2003, Craig Benke and Sherry Benke ("Petitioners") filed a petition pursuant to the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 et seq. (2006) ("Vaccine Act"). Petitioners alleged that their minor daughter, Abigail, died on May 6, 2001, as a result of receiving thimerosal-containing vaccines on May 4, 2001. Pet. at 1.

After filing, Petitioners' case became part of an omnibus proceeding "regarding whether thimerosal in pediatric vaccines could cause, contribute to, or trigger the death of a vaccinee." See Order, June 2, 2011, ECF No. 79.² One case from the group, Kolakowski v. Sec'y of HHS, was "selected as the 'test case,' to consider the theoretical mechanism of injury, by which the injury alleged (death) could be caused[.]" Kolakowski v. Sec'y of HHS, No. 99-625V, 2010 WL 5672753, at *1 (USCFC Spec. Mstr. Nov. 2010).

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.

² See Order, Aug. 17, 2004, ECF No. 21 ("Because of the common claim, the cases will proceed together until otherwise specified.").

On November 23, 2010, a decision was issued in Kolakowski v. Sec'y of HHS. In the decision, Special Master Abell denied entitlement to the petitioners, finding that they had failed to prove that thimerosal-containing vaccines could cause death in infant vaccinees and that they had failed to prove thimerosal-containing vaccines actually caused the death of Thomas Kolakowski, the vaccinee. Id. at *140. In light of the decision, each of the remaining omnibus proceeding petitioners must decide to continue or terminate participation in the Vaccine Program.

On June 2, 2011, the Court ordered petitioners in the omnibus proceeding to file a status report declaring whether each petitioner wished to proceed with adjudication of the claim or wished to exit the Vaccine Program. See Order, June 2, 2011, ECF No. 79. To proceed in the program, Petitioners must “identify a theory of causation, file additional medical records, and produce an expert report.” Id. at 1.

On September 6, 2011, Petitioners filed a Motion for a Decision Dismissing the Petition. In their motion, Petitioners stated that they do not wish to proceed with their claim in the Vaccine Program. Pet’r Mot. at 2. Accordingly, Petitioners requested that the undersigned dismiss the above-captioned petition. Id.

To receive compensation under the Vaccine Act, Petitioners must prove either 1) that Abigail suffered a “Table Injury” – i.e., an injury falling within the Vaccine Injury Table – corresponding to her vaccinations, or 2) that Abigail 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 Abigail suffered a “Table Injury.” Furthermore, the record does not contain a medical expert’s opinion or any other persuasive evidence indicating that Abigail’s death 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). In this case, the medical records are insufficient to establish entitlement to compensation. Therefore, the Petitioners, as ordered by the Court, must identify a theory of causation, file additional medical records, and produce an expert report. Petitioners, however, have declined to offer such evidence and opinion.

Therefore, the only alternative remains to **DENY** this petition. **Thus, 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.

Dee Lord
Special Master