

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-107V

Filed: November 22, 2011

CHRIS N. WILKS,)	
)	NOT TO BE PUBLISHED
Petitioner,)	
)	Tetanus-diphtheria (Td); Respondent's
v.)	Motion to Dismiss; Show Cause Order;
)	Dismissing the Petition for Insufficient
)	Proof of Causation; Vaccine Act
SECRETARY OF)	Entitlement; Denial Without Hearing
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

Barrett J. Clisby, Barrett J. Clisby, PLLC, Oxford, M.S., for Petitioner.

Ann D. Martin, United States Dep't of Justice, Washington, D.C., for Respondent.

DECISION¹

On February 12, 2010, Chris N. Wilks (Petitioner) filed a Petition For Vaccine Compensation in the National Vaccine Injury Compensation Program (the "Program").² Petitioner alleged that he developed Guillain-Barre Syndrome ("GBS") as a result of a tetanus-diphtheria ("Td") vaccination he received on June 15, 2008. Pet. at 1-2. The information in the record, however, does not show entitlement to an award under the Program.

On May 13, 2010, Respondent filed her Rule 4(c) Report and a Motion to Dismiss. Respondent moved to dismiss because she asserted that Petitioner failed to establish that he suffered residual effects of his alleged vaccine-injury for more than six months. Resp't's Report & Mot. Dismiss at 5; see § 11(c)(1)(D)(i).

On May 24, 2010, Petitioner requested a 45-day enlargement, until July 12, 2010, to respond to the Motion to Dismiss. This request was granted. On July 7, 2010,

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.

Petitioner filed supplemental medical records, but no written brief. On September 21, 2010, I issued an order instructing Petitioner to file a response to the Motion to Dismiss by October 25, 2010. On November 15, 2010, Petitioner filed additional medical records, but no written brief.

On November, 16, 2010, I convened a status conference with the parties. During the status conference, I discussed with the parties Respondent's pending Motion to Dismiss. I noted that Petitioner's response to this motion had been outstanding since July 12, 2010. I afforded Petitioner until December 16, 2010, to file his response to Respondent's Motion to Dismiss. In an order issued after the status conference, I stated, "This will be Petitioner's final enlargement of time to file a response to the Motion to Dismiss. Petitioner's failure to file a response by the deadline may result in dismissal of the case." Order, Nov 16, 2010, ECF No. 15. The deadline passed without response.

After the November 16, 2010, status conference and order, Petitioner submitted no filings in this case until May 19, 2011, when Petitioner responded to the April 19, 2011, 240-day Order, indicating he wished to remain in the Vaccine Program.

I scheduled a status conference for June 21, 2011. When my chambers called Petitioner's counsel's office for the status conference, counsel was unavailable to participate. Later that day, Petitioner's counsel called my chambers and apologized for missing the status conference. Counsel requested 60 days to file additional medical records, a second affidavit, and a response to the Motion to Dismiss. Petitioner's counsel represented that Respondent had no objection to the proposed deadline. On June 22, 2011, Petitioner filed a "Motion for Leave to Respond to Motion to Dismiss" requesting 45 days to file a response.

On June 22, 2011, I issued an Order to Show Cause, affording Petitioner until August 8, 2011, to submit his response. In the order, I informed Petitioner that I do not permit cases to linger indefinitely on my docket without progress toward resolution, nor do I permit counsel to ignore filing deadlines. Order, June 22, 2011, ECF No. 19 at 2. If a deadline cannot be met, counsel must seek timely and appropriate relief. Id.

On August 5, 2011, Petitioner filed a timely response to the Order to Show Cause. Petitioner apologized for the missed deadlines, assuring the Court that "its directives and deadlines are held to the highest degree of importance," and explaining that "this embarrassing event [was] an anomaly" caused by the case file being "inadvertently not docketed as required" following personnel changes at his firm. Pet'r's Resp. to Order, Aug. 5, 2011, ECF No. 20 at 3. Petitioner then conceded that "[t]here appears to be no further sufficient evidence to prove the required [six month] duration," and requested the Court "conclude this matter by adjudication due to insufficient

evidence and not otherwise.” Id. at 3, 4. Petitioner stated that he wished to “preserve his right to pursue the cause outside this court.” Id. at 4.³

To receive compensation under the Program, Petitioner must prove either that 1) he suffered a “Table Injury” – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) he 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 Petitioner suffered a “Table Injury.” Further, the record does not contain a medical expert’s opinion or any other persuasive evidence indicating that Petitioner’s alleged injury was vaccine-caused.

Under the Act, a petitioner may not be given a Program award 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, because there are insufficient medical records supporting Petitioner’s claim, a medical opinion must be offered in support. Petitioner, however, has offered no such opinion.

Accordingly, it is clear from the record in this case that Petitioner has failed to demonstrate either that he suffered a “Table Injury” or that his injuries were “actually caused” by a vaccination. **Thus, this case is dismissed for insufficient proof. The Clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

s/Dee Lord
Dee Lord
Special Master

³ To preserve his right to file a civil action, Petitioner must, within 90 days after the entry of judgment under Vaccine Rule 11, “file with the clerk an election . . . to file a civil action for damages for the alleged injury or death.” Vaccine Rule 12(a)(2); see also Vaccine Rule 12, in its entirety.