

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-683V

November 15, 2011

Not to be Published

DeSHANNA BATISTE and BRAD ANTHONY *
BATISTE, SR., as parents and natural guardians *
of BRENNAN ANTONIO BATISTE, *

Petitioners, *

v. *

Failure to prosecute; dismissal

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

DeShanna and Brad Batiste, St. James, LA, for petitioners (pro se).

Darryl R. Wishard, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access.

On October 9, 2009, petitioners filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10–34 (2006), alleging that Rotavirus vaccine caused their son Brennan intussusception, the onset of which occurred two months later.

Initially, petitioners were represented by counsel. On June 28, 2010, petitioners' counsel filed a Motion to Withdraw as Counsel. On July 7, 2010, the undersigned granted petitioners' counsel's motion, and petitioners became pro se after petitioners orally stated they did not object to their counsel's motion to withdraw. Included with this order was a list of vaccine attorneys whom petitioners could contact to obtain new legal representation.

On April 8, 2011, the undersigned held a telephonic status conference with Mr. Batiste and respondent's counsel. Mr. Batiste stated he received the list of vaccine attorneys and contacted vaccine attorneys. But he had not retained new counsel.

On May 9, 2011, the undersigned held another status conference with Mr. Batiste and respondent's counsel. Mr. Batiste requested the undersigned send him the vaccine attorney list again because he lost the first one. The undersigned sent him another list.

On June 7, 2011, the undersigned held another status conference with Mr. Batiste and respondent's counsel. Mr. Batiste said he received the second vaccine attorney list, but had not looked at it. The undersigned set another status conference with the parties with their approval for July 12, 2011. Mr. Batiste did not appear for the July 12, 2011 status conference. The undersigned issued an order dated August 26, 2011, directing petitioners to contact the undersigned's law clerk by September 26, 2011.

On September 27, 2011, the undersigned's law clerk both called and e-mailed petitioners, requesting that they contact her to schedule a status conference. Petitioners did not contact the undersigned's law clerk.

On October 5, 2011, respondent filed a Motion for an Order to Show Cause, giving petitioners 30 more days to obtain new counsel and proceed with this case or the case will be dismissed for failure to prosecute. On October 12, 2011, the undersigned granted respondent's motion and issued an Order to Show Cause, giving petitioners until November 14, 2011 to contact the undersigned's law clerk. Petitioners again failed to contact the undersigned's law clerk.

This case is dismissed for lack of prosecution.

DISCUSSION

To satisfy their burden of proving causation in fact, petitioners must prove by preponderant evidence "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." Althen v. Sec'y of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Sec'y of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[.]" the logical sequence being supported by "reputable medical or scientific explanation[.]" *i.e.*, "evidence in the form of scientific studies or expert medical testimony[.]"

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Id. at 1148.

Petitioners must show not only that but for the vaccine, their son Brennan would not have had intussusception, but also that the vaccine was a substantial factor in bringing about his

intussusception. Shyface v. Sec’y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999). Petitioners did not file an expert report in support of their allegations and there is no treating physician who opined in the medical records that Rotavirus vaccine caused Brennan’s intussusception two months later. The Vaccine Act, 42 U.S.C. § 300aa-13(a), prohibits special masters from deciding in favor of petitioners based solely on petitioners’ unsubstantiated allegations: “The special master or court may not make such a finding [in favor of petitioners] based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.”

CONCLUSION

Petitioners’ petition is **DISMISSED** for failure to prosecute and for failure to make a prima facie case. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party’s filing a notice renouncing the right to seek review.