

**OFFICE OF SPECIAL MASTERS**

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CATHERINE M. MILLER and \*  
JOHN F. MILLER on behalf of their son, \*  
JONATHON FRANKLIN MILLER, \*

No. 06-63V  
Special Master Christian J. Moran

Petitioners, \*  
\*

v. \*

Filed: July 6, 2007

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

Respondent. \*

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**UNPUBLISHED DECISION DISMISSING PETITION<sup>1</sup>**

Pursuant to Vaccine Rule 21(b) and (c), Catherine and John Miller’s petition on behalf of their son, Jonathon Miller, filed January 24, 2006, is hereby dismissed for failure to prosecute.

**I. Procedural History**

Catherine and John Miller, parents of Jonathon Miller, filed a petition, *pro se*, on January 24, 2006, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq. In the petition, they alleged that Jonathon received the varicella vaccine on May 6, 2003, and

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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 clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and to move to delete such information before the document’s disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

started having seizures approximately two weeks later. Along with the petition, the Millers filed Jonathon's medical records, which describe his condition and treatment.

The initial status conference was held on March 2, 2006. During that initial conference, the undersigned special master discussed with petitioners the option of hiring an attorney to represent them on their claim. The Millers were also advised that some records were missing and they were subsequently ordered to gather the remaining records. Order, dated March 3, 2006.

On March 6, 2006, Mrs. Miller contacted the court and stated that she did not wish to proceed with the claim. In response, the court issued an order directing the Millers to contact the court by April 6, 2006, indicating their intent to proceed with the claim, or instead, to advise the court in writing of their intent to dismiss the petition.

The next status conference was held on April 6, 2006. During this conference, the Millers indicated that they intended to proceed with the case and that they would attempt to hire counsel. They also stated that Jonathon was currently undergoing neurological testing and that it would take approximately two months to receive the report/diagnosis. Another status conference was scheduled for July 11, 2006.

During the July 11, 2006 status conference, the Millers indicated that they had difficulty finding an attorney to take their case and they intended to continue pro se. They also indicated that they would consult Dr. Rubenstein for an expert report to support their claim. The court also advised the Millers to review information on the Court of Federal Claims website regarding the autism omnibus proceeding then before Special Master Hastings to determine if perhaps their case was appropriate to join that proceeding. Order, dated July 12, 2006.

The next status conference was held on August 22, 2006. During this conference, the

Millers stated that Jonathon's condition was improving and that they had an appointment with Dr. Rubenstein, during which they would discuss the possibility of retaining him as an expert witness. The Millers also stated that they believed that the autism proceeding was not appropriate given the circumstances of Jonathon's condition.

During the next status conference on October 22, 2006, the Millers stated that they did not intend to pursue their case and wanted to dismiss their petition. The court ordered them to file their intent to withdraw in writing.

Several months passed without receiving anything in writing from the Millers. On March 7, 2007, the court issued an order for the Millers to contact the court by April 6, 2007 to indicate their intent to proceed with or dismiss their case. No response has been received by the court.

On May 18, 2007, the court issued an order to show cause, requiring the Millers to respond to the court by June 18, 2007 as to why their case should not be dismissed. No response was received. Accordingly, the Millers petitioner is hereby DISMISSED for failure to prosecute.

## **II. Factual History**

The medical records in this matter include Mrs. Miller's prenatal records; Jonathon's labor and delivery records; Jonathon's immunization records; pediatric records from Sharonville Pediatrics; hospital records from Cincinnati Children's Hospital; records from Johns Hopkins; records from Anne Arundel Public Schools; and an evaluation from the Kennedy Krieger Institute.<sup>2</sup>

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<sup>2</sup> The records are not divided into exhibits, nor are they paginated. Accordingly, all reference to medical records will use the source of the record and date, where available.

Jonathan Miller was born on May 2, 2002. The Sharonville Pediatrics immunization records indicate that he received the Varivex and tuberculosis vaccines on May 6, 2003. The records concerning the start of his seizures are varied. According to one unlabeled record, Jonathan experienced his first seizure on May 21, 2003. The Sharonville Pediatrics record of office visits indicates that Jonathon went to the CHMN emergency room on May 21, 2003 for evaluation and possible sutures to his eyelid. His Johns Hopkins records from February 3, 2004 indicate that his first seizure was on May 27, 2003. His doctors' records first record "seizure-like episodes" on July 16, 2003.

The Sharonville Pediatrics record from July 16, 2003, appears to be a contemporaneous record from a visit to his doctor's office. That record reflects that Jonathon, "20-40 [per] day has episodes of rolling eyes back and falling backwards - occurs when sitting, standing, any position . . . started few days after 1 yr [well visit]." A record from Johns Hopkins, dated April 25, 2005, states that his mother believed that his seizures started in May of 2003 and that his last seizure was in August of 2003.

The remaining records detail his progress in school and medical treatment since the time of the vaccination. It appears that he has some developmental delays, but during the last status conference, the Millers indicated that Jonathon's condition was improving.

As indicated above, since the filing of their records and the October 22, 2006 status conference, the Millers have made no additional filings with the court, nor have they responded to the court's March 7, 2007 order.

While the medical records mention the vaccine in connection with the seizures, it appears that the relationship is purely a temporal one, based on Mrs. Miller's statements to the treaters.

The Millers have not presented a medical theory linking the causation of Jonathon's illness to the receipt of the varicella vaccine. Furthermore, the Millers have indicated that they do not intend to proceed with this case. Because of the Millers's failure to prosecute the case and to present the court with a theory linking the vaccination to the injury, this petition of hereby DISMISSED.

### **III. Discussion**

This case is deficient in two respects. First, the Millers have not prosecuted the case diligently. Second, the existing record lacks the evidence necessary to support the Millers's claim for compensation. The Millers have failed to cure these deficiencies.

After the October 22, 2006 status conference, the Millers were granted an opportunity to file a statement indicating that they do not wish to pursue their claim. After not receiving anything for several months, the court offered an additional opportunity to file a statement. See Order, dated March 7, 2007. The Millers have not done so. When petitioners (or plaintiffs) fail to comply with Court orders to prosecute their cases, the Court may dismiss their cases.

Sapharas v. Sec'y of Health & Human Servs, 35 Fed. Cl. 503 (1996); Tsekouras v. Sec'y of Health & Human Servs, 26 Cl. Ct. 439 (1992), aff'd, 991 F.2d 810 (Fed. Cir. 1993) (table); Vaccine Rule 21(c); see also Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180, 1183 (Fed. Cir. 1990) (affirming dismissal of case for failure to prosecute for counsel's failure to submit pre-trial memorandum); Adkins v. United States, 816 F.2d 1580, 1583 (Fed. Cir. 1987) (affirming dismissal of case for failure of party to respond to discovery requests).

In addition, to satisfy their burden of proving causation in fact, petitioner must offer "(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 Health & Human Servs, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

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. 42 U.S.C. § 300aa-13(a)(1). In determining whether a petitioner is entitled to compensation, the special master shall consider all material contained in the record. 42 U.S.C. § 300aa-13(b)(1). This universe necessarily includes “any . . . conclusion, [or] medical judgment . . . which is contained in the record regarding . . . causation . . . of the petitioner’s illness.” 42 U.S.C. § 300aa-13(b)(1)(A).

By failing to submit a medical theory and causal relationship between the vaccination and Jonathon’s seizures, the Millers have not established that Jonathon has an injury that is attributable to a vaccine. The medical records do not support a conclusion regarding causation and more information is needed to proceed. Despite being afforded the opportunity to do so, the Millers have not filled this evidentiary gap.

For these reasons, this petition is DISMISSED pursuant to Vaccine Rule 21 for failure to prosecute. See Tsekouras, 26 Cl. Ct. 439 (1992), aff’d, 991 F.2d 810 (Fed. Cir. 1993) (table) (affirming special master’s dismissal of petition for failure to prosecute). Therefore, in the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

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Christian J. Moran  
Special Master