

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-0285V

Filed: December 19, 2012

Not to be Published

**JEFFREY BARBER and
TARA BARBER, parents of
MIKAYLA BARBER, a minor,**

Petitioners,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

**Autism; Failure to Prosecute; Failure
to Follow Court Orders; Dismissal**

DECISION¹

On May 5, 2009, petitioners filed a filed a Short-Form “Petition for Vaccine Compensation”² in the National Vaccine Injury Compensation Program [“the Vaccine

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² By electing to file a Short-Form Autism Petition for Vaccine Compensation, petitioners allege that:

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccine in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the “thimerosal” ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B (HIB) vaccinations; or by some combination of the two.

Program”],³ alleging that Mikayla was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14. The case was included among the pending claims in the court’s Omnibus Autism Proceeding [“OAP”].⁴ Subsequent to the resolution of the OAP “test cases,”⁵ the court began contacting petitioners to determine if they wished to proceed with their claim or exit the Vaccine Program.

Because petitioners’ counsel in this case is not a member of the bar of the United States Court of Federal Claims, the special master to whom the case was assigned ordered petitioners’ counsel on April 16, 2012 and July 30, 2012, to become a bar member or to file contact information for petitioners so they could be treated as *pro se* petitioners. The case was reassigned to me on August 28, 2012. On September 5, 2012, petitioners filed a notice providing their addresses and indicating that they have elected to be treated as *pro se* petitioners.

On October 1, 2012, I ordered petitioners to inform me, by written filing, whether they wished to proceed with this claim or exit the Vaccine Program. If they wished to proceed with their claim, petitioners were ordered to contact my chambers by November 1, 2012, to schedule a status conference. Petitioners failed to respond to that Order. On November 6, 2012, petitioners were again ordered⁶ to inform the court whether

Autism General Order #1, filed July 3, 2002, Exhibit A, Master Autism Petition for Vaccine Compensation at 2.

³ 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.

⁴ The Omnibus Autism Proceeding consists of a large group of petitions alleging that certain childhood vaccinations cause or contribute to the development of a serious neurodevelopmental disorder known as “autism spectrum disorder” or “autism.”

⁵ The Theory 1 cases are *Cedillo v. Sec’y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 89 Fed. Cl. 158 (2009), *aff’d*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec’y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 473 (2009), *aff’d*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec’y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 706 (2009). Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims. The Theory 2 cases are *Dwyer v. Sec’y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec’y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec’y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The petitioners in each of the three Theory 2 cases chose not to appeal.

⁶ Copies of the Order to Show Cause were sent to petitioners’ counsel and to each petitioner at the addresses they provided by certified mail and a second copy by regular mail. The copy of the Order to Show Cause which was sent to Tara Barber by certified mail was returned to the court as unclaimed on December 7, 2012. The copy of the Order to Show Cause which was sent to petitioners’ counsel by certified mail was delivered on November 8, 2012. The copy of

petitioners intended to proceed with this case or exit the Vaccine Program and to contact my chambers if they intended to proceed or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. Petitioners have failed to respond to that order as well.

I. The Omnibus Autism Proceeding

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as “autism” or “autism spectrum disorders” [“ASD”] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP, was set forth in the six entitlement decisions issued by three special masters as “test cases” for two theories of causation litigated in the OAP and will not be repeated here.⁷

Ultimately, the Petitioners’ Steering Committee [“PSC”], an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of ASDs. The first theory alleged that the measles portion of the measles, mumps, rubella vaccine could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant’s brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional test cases during several weeks of trial in 2008.

Decisions in each of the three test cases pertaining to the PSC’s first theory rejected the petitioners’ causation theories. *Cedillo*, 2009 WL 331968, *aff’d*, 89 Fed. Cl. 158 (2009), *aff’d*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst*, 2009 WL 332306, *aff’d*, 88 Fed. Cl. 473 (2009), *aff’d*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder*, 2009 WL 332044, *aff’d*, 88 Fed. Cl. 706 (2009).⁸ Decisions in each of the three “test cases” pertaining to the PSC’s second theory also rejected the petitioners’ causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer*, 2010 WL 892250; *King*, 2010 WL 892296; *Mead*, 2010 WL 892248. Thus, the proceedings in these six test cases are concluded. Petitioners remaining in the OAP must now decide whether to pursue their cases, and submit new evidence on causation, or take other action to exit the Program. The petitioners in this case have failed to inform the court how they

the Order to Show Cause which was sent to Jeffrey Barber by certified mail was delivered on November 16, 2012. The additional copies which were sent by regular mail were not returned as undeliverable.

⁷ The Theory 1 cases are *Cedillo v. Sec’y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec’y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec’y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are *Dwyer v. Sec’y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec’y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec’y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

⁸ Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

intend to proceed.

II. Failure to Prosecute

It is petitioners' duty to respond to court orders. Failure to respond to a court order because the petitioners have failed to stay in contact with their attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As I reminded petitioners in my November 6, 2012, order, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioners' claim. *Tsekouras v. Sec'y, HHS*, 26 Cl. Ct. 439 (1992), *aff'd per curiam*, 991 F.2d 810 (Fed. Cir. 1993); *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b).

III. Causation In Fact

To receive compensation under the Program, petitioners must prove either 1) that Mikayla suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Mikayla's vaccinations, or 2) that Mikayla suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A) and 11(c)(1). Under the Vaccine Act, a special master cannot find a petitioner has proven her case by a preponderance of the evidence based upon "the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." § 13(a). Petitioners have failed to file sufficient medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that Mikayla suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Mikayla's autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that Mikayla suffered a "Table Injury" or that Mikayla's 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.**

The Clerk of the court shall forward a copy of this Decision to petitioners' counsel at his address of record and a copy to each petitioner at the following addresses:

**Jeffrey Barber
P.O. Box 7797
San Diego, CA 92167**

**Tara Barber
3955 Orchard Ave
San Diego, CA 92107**

IT IS SO ORDERED.

Denise K. Vowell
Special Master