

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS  
No. 11-440V  
Filed: November 16, 2011**

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CAROL BENDER and MARK BENDER, \*  
as the Natural Parents and Guardians \*  
of KYLE BENDER, an infant \*

Petitioners, \*

v. \*

Failure to Prosecute; Failure to  
Follow Court Orders; Dismissal

SECRETARY OF HEALTH \*  
AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

**DECISION**<sup>1</sup>

On July 7, 2011, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),<sup>2</sup> alleging that their son, Kyle Bender, was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

Petitioners were initially ordered to file medical records and affidavits by July 29, 2011. Medical records were filed on July 29, 2011 and August 12, 2011. On August 16, 2011, I granted petitioners’ request for an extension until September 12, 2011 to file their affidavits.

I held the initial status conference in this case on August 17, 2011 and ordered petitioners to file their affidavits by September 12, 2011, all outstanding medical records by September 16, 2011, and an expert report by November 15, 2011.

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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.

<sup>2</sup> 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”).

On September 12, 2011, petitioners filed a status report, in which their counsel indicated he had been unable to make contact with them, and thus was requesting a thirty-day extension. I granted the request, and extended the affidavit deadline to October 12, 2011.

On September 23, 2011, petitioners' counsel, Mark Sadaka, filed a Motion to Withdraw as Attorney. He again stated that petitioners have failed to return his calls or respond to letters, and that with their lack of cooperation he is unable to continue representing them. Since this case pertains to the interests of a minor child, I wanted to afford petitioners additional time to contact their attorney before acting on the Motion to Withdraw, and thus did not immediately grant it.

On October 13, 2011, after petitioners missed the extended affidavit deadline, I issued a show cause order instructing petitioners to file their affidavits and outstanding medical records, or otherwise show cause why this case should not be dismissed for failure to prosecute, by no later than November 14, 2011.

On November 11, 2011 petitioners filed some additional medical records and a response to my show cause order. In the response, petitioners' counsel indicated that petitioners remain out of contact with his office and he re-iterated his desire to be relieved as counsel of record. The response also explained that petitioners' counsel is unable to comply with the November 15, 2011 expert report deadline because his clients' failure to cooperate has prevented him from generating the entire medical record required for an expert to opine on causation.

It is petitioners' duty to respond to court orders. Failure to respond to a court order because 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 October 13, 2011 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).

**This case is dismissed for failure to prosecute. The clerk shall enter judgment according.**

**IT IS SO ORDERED.**

**/s Denise K. Vowell**  
Denise K. Vowell  
Special Master