

**In the United States Court of Federal Claims  
OFFICE OF SPECIAL MASTERS  
No. 99-495V  
Filed: May 29, 2007  
To be Published**

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JONATHAN CARRINGTON, a minor, by his mother and natural guardian, TAMMY CARRINGTON,	*	
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Petitioner,	*	Hepatitis B;
	*	Failure to Prosecute;
v.	*	Transfer of
	*	Claim to Omnibus
	*	Proceeding without
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	Evidence of Diagnosis
	*	
	*	
Respondent.	*	

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Clifford Shoemaker, Esq., Shoemaker & Associates, Vienna, VA, for Petitioner.

Althea Davis, Esq., U.S. Department of Justice, Washington D.C., for Respondent.

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

**VOWELL**, Special Master:

On July 26, 1999, Mrs. Tammy Carrington timely filed a petition under the National Vaccine Injury Compensation Act ["Vaccine Act" or "Program"], 42 U.S.C. §

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<sup>1</sup> Because I have designated this decision to be published, petitioner has 14 days to request redaction of any material "that includes medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be publicly available. 42 U.S.C. § 300aa-12(d)(4)(B).

300aa-10 *et seq.*<sup>2</sup> on behalf of her minor son, Jonathan, alleging that the hepatitis B vaccinations he received on August 3, 1997 and October 13, 1997 were the cause in fact of a brain injury<sup>3</sup> he suffered on December 10 or 11, 1997. Based on conflicting evidence concerning Jonathan's condition prior to his medical evacuation to Schumpert Medical Center on December 11, 1997, I conducted a factual hearing in Lufkin, TX on May 16, 2006, and issued an Onset Ruling containing findings of fact on August 31, 2006. In order to understand the current posture of this case, I have included some of those factual findings below.

In September 2006, I ordered both parties to produce expert reports on causation and set the case for a hearing in February 2007. Order, dated September 19, 2006. However, even after several enlargements of time, petitioner has been unable to produce an expert report linking Jonathan's condition to a vaccine. Further, petitioner has been unable to provide the court with a diagnosis that would support petitioner's requested transfer of Jonathan's case to the Omnibus Autism Proceeding ["OAP"].<sup>4</sup> Treating petitioner's filing of May 1, 2007, as a request for reconsideration of my previous April 19, 2007, denial of her motion to transfer the case to the OAP, I adhere to my earlier decision. **Petitioner's motion for reconsideration on the motion to transfer this case to the OAP is hereby denied.**

Petitioner failed to file an expert medical opinion showing causation by the final court-ordered deadline of May 1, 2007. **I therefore dismiss this case with prejudice for failure to prosecute.**

## I. Medical History

Jonathan was the product of an uncomplicated pregnancy and delivery. Onset

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<sup>2</sup> Hereinafter, for ease of citation, all "§" references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. 300aa (2000 ed.).

<sup>3</sup> Jonathan's injury is variously described in the medical records as a ruptured aneurysm or as an arterial-venous malformation. In the absence of any expert medical opinion further elaborating on the nature of Jonathan's injury, I will rely on the diagnosis of a ruptured aneurysm made by the majority of the treating physicians and will use that terminology to describe his injury. See Pet. Ex. 7, pp. 58, 139. See *also*, Pet. Ex. 12, p. 611.

<sup>4</sup> The OAP was created by Autism General Order #1 in July 2002 to deal with an unprecedented number of filed (and anticipated) petitions alleging that autism, autism spectrum disorder, or similar neurological conditions, were caused by vaccines. Autism General Order #12002 WL 31696785 at \*1, 2002 U.S. Claims LEXIS 365 at \*1 (Fed. Cl. Spec. Mstr. July 3, 2002); *see also* <http://www.uscfc.uscourts.gov/OSM/AutismDocket.htm>. Some 5100 such petitions have been filed, 4800 of which remain pending before the court. See Autism Updates, January 19 and March 14, 2007. Since the OAP was established, some 300 petitions have been resolved by decisions, voluntary dismissals, or involuntary dismissals because the petitions were filed outside the statute of limitations. Autism Update, November 27, 2006. The OAP is discussed in greater detail, *infra*.

Transcript ["Tr."] at 5; Petitioner's Exhibit ["Pet. Ex."] 47; Pet. Ex. 7, pp. 9-10. He weighed nine pounds, seven ounces, at his birth on July 31, 1997. His Apgar<sup>5</sup> scores of 9 and 9 indicated that he was a healthy newborn. His neonatal course was largely uneventful. Pet. Ex. 7, p. 1.

At some time between 11:00 and 11:45 A.M., on Sunday, August 3, 1997, Jonathan received his first hepatitis B vaccination and was discharged from Columbia/Woodland Heights Medical Center that same afternoon. Pet. Ex. 7, p. 18.

In the collective memory of the family members, friends, and neighbors who testified at the onset hearing, Jonathan cried more often and more robustly, from the time he left the hospital in August 1997 through December 11, 1997, than other newborns and infants. The medical records were consistent with the testimony, mentioning "colic," a term often used to describe prolonged crying in infants. Pet. Ex. 3, p. 27. The records also indicate that he would get "fussy" and "wiggly." *Id.*, p. 26. Petitioner's Exhibit 35<sup>6</sup> included an audio tape of Jonathan crying, made between August 5 and October 13, 1997.<sup>7</sup>

The evidence regarding how much Jonathan slept was conflicting. The medical records buttressed the testimony that he was a poor sleeper during the first few weeks of his life, sleeping fitfully, for periods of 15-30 minutes at a time, and for approximately four to five hours during a 24-hour period. For reasons detailed in my August 31, 2006 Onset Ruling including the contemporaneous medical records, I concluded that Jonathan's sleeping improved and by the October 13, 1997 checkup, he was sleeping through the night.

Jonathan visited his pediatrician, Dr. Nicol, on at least five occasions after his parents brought him home from the hospital. Other than a concern about constipation, the records did not reflect any specific problems regarding Jonathan's health and

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<sup>5</sup> The Apgar score is a numerical assessment of a newborn's condition, usually taken at one minute and five minutes after birth. The score is derived from the infant's heart rate, respiration, muscle tone, reflex irritability, and color, with a range from zero to two points awarded in each of the five categories. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY ["DORLAND'S"] at 1670 (30<sup>th</sup> ed. 2003). Jonathan's scores are documented at Pet. Ex. 7, pp. 1 and 7.

<sup>6</sup> This exhibit is a videotape, filed on January 20, 2006, of Mrs. Carrington holding Jonathan and discussing his condition and care, as well as her beliefs regarding the cause of his condition. I viewed the videotape in its entirety. At the conclusion of Mrs. Carrington's narrative, she played the audiotape she had made years earlier of Jonathan's crying.

<sup>7</sup> At the time of the onset hearing, it appeared that petitioner's theory of causation was primarily that Jonathan's crying was caused by a reaction to the hepatitis B vaccinations, and that the crying had triggered an aneurysm rupture. See Pet. Ex. 31, p. 121. Concluding that the audio tape was the best evidence of the nature of Jonathan's crying, I ordered that the tape be provided to any expert retained to give an opinion on causation. Onset Ruling, dated August 31, 2006.

development. He was circumcised on August 11, 1997 and received his two-month vaccinations<sup>8</sup> on October 13, 1997. Pet. Ex. 3, pp. 27, 25.

On December 11, 1997, Mrs. Carrington observed some unusual behavior in Jonathan and contacted the Children's Clinic. Jonathan had refused to nurse when he woke up at about 9:00 A.M. He vomited and exhibited some high-pitched crying or screaming and some shaking for 20-25 minutes at a time. Pet. Ex. 3, p. 25.

Doctor Nicol was unavailable and Dr. Fidone agreed to see Jonathan that morning. After a series of other medical tests did not explain Jonathan's symptoms, Dr. Fidone performed a lumbar puncture.<sup>9</sup> The spinal fluid was bloody, signifying a possible cerebral hemorrhage.<sup>10</sup> Doctor Fidone arranged for an emergent computed tomography (CT) scan,<sup>11</sup> which confirmed bleeding within Jonathan's brain. Pet. Ex. 7, p. 35.

Jonathan was admitted to the intensive care unit and intubated. Pet. Ex. 7, pp. 34-35. He was transferred by helicopter to Schumpert Medical Center in Shreveport, LA, that same evening and arrived in critical condition, after experiencing a cardiac arrest in flight. *Id.*, p. 36.

On January 15, 1998, Jonathan was transferred to the University of San Francisco Medical Center ["USFC"] where he remained until being discharged on February 18, 1998. *Id.*, p. 38. After his condition began to deteriorate, Jonathan was readmitted to USFC on February 19, 1998, and stayed there until being transferred to Schumpert Medical Center on February 23, 1998. *Id.*, p. 139. Jonathan was discharged from Schumpert and returned home on March 30, 1998. His discharge diagnoses were diffuse porencephaly, communicating hydrocephalus, spastic quadriparesis, cortical visual impairment, severe seizure disorder, and GE reflux. *Id.* None of the subsequent medical records cast any substantial doubt on those diagnoses.<sup>12</sup>

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<sup>8</sup> Jonathan received vaccinations for diphtheria, tetanus, pertussis, hemophilus influenzae type b, and polio, in addition to his second hepatitis B vaccination at this checkup.

<sup>9</sup> A lumbar puncture involves placing a needle in the subarachnoid space of the spinal column to measure pressure and to obtain cerebrospinal fluid for laboratory examination. MOSBY'S MANUAL OF DIAGNOSTIC AND LABORATORY TESTS ["MOSBY'S LABS"] at 678-79 (3d ed. 2006).

<sup>10</sup> *Id.* at 678.

<sup>11</sup> A brain CT scan is used to diagnose tumors, aneurysms, and hemorrhages in the brain. MOSBY'S LABS at 1095-96.

<sup>12</sup> In July 1999, Jonathan saw Dr. Andrew Campbell of Houston, TX, who commented that "the type of screaming described by his mother could cause the rupture of an aneurism. The screaming described following the initial vaccination is consistent with adverse hepatitis B vaccine reactions reported

After the onset hearing was concluded, counsel and I visited Jonathan at his home in Lufkin, TX, at petitioner's request. It was obvious that Mr. and Mrs Carrington are extraordinarily caring and committed parents who are devoted to Jonathan and focused on his welfare. The household revolves around meeting Jonathan's overwhelming physical needs. The home contains numerous pieces of equipment designed to stimulate and care for Jonathan and it is filled with pictures of him from birth to the present. The latest medical records (see, e.g., Pet. Ex. 31, 81, 86) filed regarding Jonathan's condition comport with my observations and his mother's onset hearing testimony regarding his current condition. Jonathan is globally developmentally delayed, cannot communicate and is cortically blind. Tr. at 40, 43-44.

## II. Issues Raised Subsequent to the Onset Hearing

After issuing factual findings on August, 31, 2006, I began moving this case towards resolution of the causation issues. After a September 18, 2006 status conference, I issued a scheduling order setting deadlines for expert reports, with petitioner's expert report due on November 27, 2006, and a hearing to be scheduled in late February 2007.

What transpired between that scheduling order and May 1, 2007, has been set forth in two published orders, dated March 26, 2007, and April 19, 2007, and I will not repeat that detailed history here. In summary, petitioner has been unable to find an expert to opine favorably on vaccine causation in this case. I granted petitioner numerous delays, beginning on November 27, 2006, and continuing until May 1, 2007, to file the report of a medical expert on causation. None has been filed.<sup>13</sup>

After a pediatric neurologist indicated that he could not opine in favor of vaccine causation, petitioner took another approach to Jonathan's case. She requested transfer of Jonathan's case to the OAP.

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in newborns." Pet. Ex. 8, p. 1. Petitioner's counsel indicated at the September 18, 2006 status conference that he was not relying on Dr. Campbell's opinion, hence my order to produce an expert medical opinion by November 27, 2006. See Order, dated September 19, 2006.

<sup>13</sup> My efforts to get petitioner to file an expert opinion relating the vaccinations to Jonathan's injury are not the first such efforts. On October 18, 2000, Chief Special Master Golkiewicz ordered petitioner to file an expert report by no later than December 4, 2000, noting that "**no extensions of time to file the expert report will be granted.**" (emphasis in original order). In an order issued on January 10, 2001, petitioner was ordered to file a status report informing the court of the expected filing date for a pleading and for expert reports. Chief Special Master Golkiewicz warned that any additional noncompliance with the court's orders would not be tolerated. On August 21, 2001, Special Master Millman, to whom petitioner's case had been reassigned, noted deficiencies in the medical opinions submitted, and ordered petitioner to correct those deficiencies by November 5, 2001. Petitioner did not respond to this order. The case was thereafter placed in the hepatitis B "holding pattern" where it remained until March 2006. See Section III, *infra*.

### III. The Omnibus Autism Proceeding

Since the inception of the OAP in July 2002, cases assigned to it have been “on hold,” just as Jonathan’s case was “on hold” for three years when it was part of the “Hepatitis B” cases, a group of cases alleging a variety of adverse consequences from hepatitis B vaccinations. Jonathan’s case was stayed from February 24, 2003, through March 31, 2006, when I lifted all previously granted stays and began moving the case to resolution, along with approximately 40 other previously stayed hepatitis B cases assigned to me.

After Autism General Order #1 was issued, any petitioner with a pending case in the vaccine program was permitted to request transfer to the OAP. Hundred of petitioners did so, but Mrs. Carrington did not request transfer of Jonathan’s case at that point. New petitions filed after the issuance of Autism General Order #1 were authorized to use a “Short Form” petition. As General Order #1 and the Chief Special Master’s discussion of such short form petitions (filed into the OAP docket on July 8, 2002) set forth, by filing such a petition, the filer averred that the petitioner suffers from an autism spectrum disorder or autism-like disorder that has persisted for longer than six months, that the petition was filed within three years of onset of that disorder, and that a vaccine listed on the Vaccine Injury Table<sup>14</sup> is the cause of the condition. Chief Special Master Golkiewicz acknowledged respondent’s concerns that the short form petitions would not permit evaluation of cases for the statutorily-required documentation, but indicated that the OAP procedures represented the most efficient method for handling an overwhelming number of cases.

The OAP has involved an extensive discovery process. The “general causation” issues in the OAP were originally scheduled for trial in March 2004 (see Autism General Order #1). Various delays ensued and a new hearing date of June 11, 2007 was established. Autism Update, dated September 7, 2006. As the date for the general causation hearing<sup>15</sup> approached, Chief Special Master Golkiewicz assigned two additional special masters to the OAP docket. I am one of those three special masters so assigned. See Notice Regarding Assignment of Autism Cases to Additional Special Masters, dated January 11, 2007.

The transfer of Jonathan’s case to the OAP would effectively delay a decision on the merits of his case for at least a year, and more likely, much longer. If Jonathan had a diagnosis of autism, autism spectrum disorder, or a similar neurologic disorder, I

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<sup>14</sup> 42 C.F.R. § 100.3.

<sup>15</sup> This hearing was originally intended to involve all theories of vaccine causation. However, at the request of the Petitioners’ Steering Committee [“PSC”], the three special masters assigned to the cases that comprise the OAP docket have agreed to a schedule involving evidence on one theory between June and September 2007, with the remaining two theories to be heard by the end of September 2008.

would have no hesitation in assigning his case to my “autism docket,” which now comprises approximately 1570 cases. The problem is that he has not been so diagnosed.

As I have advised petitioner in several orders, transfer of a pending case to the OAP requires something more than a simple request. The OAP was never intended to be a place to “park” problematic cases; it was intended to provide an efficient means of resolving a large number of petitions alleging diagnoses on the autism spectrum.

Jonathan’s case has been pending since 1999. It originally alleged that Jonathan suffered from spastic quadriplegia, a severe seizure disorder, blindness, and chronic encephalopathy caused by hepatitis B vaccinations. The petition did not mention autism. In my order of December 21, 2006, I advised that petitioner must file the statement of a medical professional that relates Jonathan’s condition to autism or a similar neurologic disorder before I would transfer this case to the OAP. To date, petitioner has failed to produce such a statement.

On April 19, 2007, I denied petitioner’s request to transfer this case to the OAP, after a recorded status conference on April 18, 2007, in which counsel presented argument on the pending motion. On May 1, 2007, petitioner renewed her request, stating that “Jonathan’s condition is certainly similar, and in fact is nearly identical” to the description of autism spectrum disorder contained in General Order #1. On May 22, 2007, respondent filed a response to petitioner’s May 1, 2007 filing.

Petitioner confuses argument and evidence. In requesting reconsideration, she failed to file any evidence that Jonathan suffers from autism or any similar neurologic disorder, arguing instead that he has similar symptoms. Petitioner would have me conclude, based solely on his symptoms, that his condition is autism-related. Autism, autism spectrum disorder, pervasive developmental delay, Asperger’s syndrome, and a number of other terms used are all medical diagnoses. While it is clear that Jonathan is unaware of much of his environment, cannot communicate, and has severe developmental delays, none of the voluminous medical records filed in this case attribute Jonathan’s deficits to autism, ASD, or a similar neurologic condition. As a condition precedent to transferring any pending case to the OAP, I have consistently required evidence that the petitioner have a diagnosis of autism, ASD, or a similar neurologic condition. Petitioner has failed to file the statement of any medical professional giving Jonathan such a diagnosis.

It is impossible to adequately convey the sympathy I have for Mr. and Mrs. Carrington. Their only child, now nearly ten years old, is profoundly disabled, with, as Mrs. Carrington has testified, the abilities of a three to six month old. Their hearing testimony and my visit to their home establish the extraordinary love and attention they lavish on Jonathan and the extent to which meeting Jonathan’s overwhelming needs affects their lives. The tragic circumstances and Jonathan’s devastating injuries do not, however, constitute acceptable reasons for further delaying resolution of this case.

#### IV. Legal Analysis

The question that remains is: where we go from here? Petitioner has not complied with my orders to either file an expert medical opinion on causation, or in the alternative, a diagnosis of autism to support her request to transfer Jonathan's case to the OAP. When a petitioner fails to comply with any order of the court, the special master may dismiss the claim with prejudice. R.C.F.C. Appendix B, Rule 21(c); see *also Wallace v. Sec'y, HHS*, 2003 WL 23218075, at \*5 (Fed. Cl. Spec. Mstr. Nov. 21, 2003).

In *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503, 505 (1996), Judge Tidwell upheld a dismissal of a petition for compensation under the program for failure to comply with an order of the Chief Special Master and a failure to substantiate the claim. See *also, Tsekouras v. Sec'y, HHS*, 26 Cl Ct. 439 (1992), *aff'd*, 991 F.2d 810 (Fed. Cir. 1993) (vaccine case dismissed for failure to prosecute when petitioner wilfully ignored court orders to substantiate the petition). The Court of Federal Claims has held a *pro se* petitioner to strict compliance with procedural rules, dismissing a motion for review filed outside the 30 day time limit. See *Baker v. Sec'y, HHS*, 61 Fed. Cl. 669 (2004).

#### VI. Conclusion

Petitioner's motion for reconsideration on her motion to transfer this case to the OAP is hereby DENIED.

This petition for compensation is DISMISSED WITH PREJUDICE for failure to prosecute. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.<sup>16</sup>

**IT IS SO ORDERED.**

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

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<sup>16</sup> 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.