

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS**

**No. 04-891V**

**Filed: May 24, 2012**

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MARJORIE GUTIERREZ \*  
Individually and as Next Friend of, \*  
Kayden Anne Vargas, a minor, \*  
Petitioner, \*

v. \*

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

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES \*  
Respondent. \*

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

On May 21, 2004, petitioner filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*<sup>2</sup> [the “Vaccine Act” or “Program”], on behalf of Kayden Anne Vargas [“Kayden”].

On January 11, 2012, I granted petitioner’s former attorney’s motion to withdraw from this case, and ordered pro se petitioner Marjorie Gutierrez to contact my chambers by February 1, 2012 to schedule a status conference. Petitioner failed to respond to my order, and on February 2, 2012, I issued an order reminding pro se petitioner, Marjorie Gutierrez, of the need to schedule a status conference and ordered her to do so by February 21, 2012. Petitioner again failed to respond to my order.

On February 24, 2012, I issued an order to show cause.<sup>3</sup> Ms. Gutierrez was

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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 Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in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), petitioners have 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> National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986). Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

<sup>3</sup> Two copies of the order were sent to Ms. Gutierrez. The copy sent by certified mail was returned to the court as unclaimed. However, the copy sent by regular mail was not returned, and presumably was received by Ms. Gutierrez.

ordered to contact my chambers, or show cause why this case should not be dismissed for failure to prosecute, by no later than March 26, 2012. To date, Ms. Gutierrez has failed to contact my chambers or file anything with the court.

#### 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.<sup>4</sup>

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).<sup>5</sup> 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.

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<sup>4</sup> 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).

<sup>5</sup> Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

## II. Failure to Prosecute

It is petitioner's duty to respond to court orders. As I reminded petitioner in both my February 2, 2012 and February 24, 2012 orders, 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 Kayden suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Kayden's vaccinations, or 2) that Kayden 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 that petitioners have proven their case by a preponderance of the evidence based upon "the claims of petitioners alone, unsubstantiated by medical records or by medical opinion." § 13(a).

Petitioner has failed to file sufficient medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that Kayden suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Kayden's autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that Kayden suffered a "Table Injury" or that Kayden'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.**

**IT IS SO ORDERED.**

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**Denise K. Vowell**  
Special Master