

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 6-692V
Filed: March 7, 2011
Not to be Published

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HALEH NIAZMAND, as parent and legal representative of her minor son, Keyon Ellis,	*	
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	*	
	*	
Petitioner,	*	
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Petitioner's Motion for a Decision On the Record; Insufficient Proof of Causation; Vaccine Act Entitlement
	*	
	*	
Respondent.	*	
	*	

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DECISION¹

Vowell, Special Master:

On October 5, 2006, Haleh Niazmand filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program [“the Program”],² on behalf of her son, Keyon Ellis [“Keyon”]. The Petition alleges that various vaccinations injured Keyon. On March 4, 2011, petitioner filed a request that this case be decided on the record as it now stands. Because the information in the record does not show entitlement to an award under the Program, this case is dismissed.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in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), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

I. The Omnibus Autism Proceeding

This case is one of more than 5,000 cases filed under the Program in which it has been alleged that disorders known as “autism” or “autism spectrum disorder” [“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 more than 5,000 petitions filed in this court, 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.³

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 [“MMR”] vaccine could cause ASDs [“Theory 1”]. 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).⁴ 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 to pursue their case, and submit new evidence on causation, or take other action to exit the Program. The petitioner in this case has requested a ruling on the record as it now stands.

³ 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).

⁴ Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

II. The Medical Records

Keyon was born August 21, 2002. Petitioner's Exhibit ["Pet. Ex."] 1. He received routine childhood immunizations from September 4, 2002, through at least February, 12, 2004. Pet. Ex. 5, p. 1. He experienced routine childhood illnesses, and he suffered jaundice shortly after birth. *E.g.*, Pet. Exs. 5, pp. 7, 27; 8, p. 2.

The pediatrician's records reflect that petitioner reported some reactions after Keyon received vaccinations. She reported that he cried and screamed "as if in pain" the day of his two month vaccinations in October, 2002. Pet. Ex. 5, p. 20. Petitioner then reported that after Keyon's December 31, 2002 vaccinations, "he got very tender on his legs." Pet. Ex. 5, p. 34. On August 26, 2004, the pediatrician then noted that Keyon had "no reaction to his last immunizations," which were administered on February 12, 2004. Pet. Ex. 5, p. 51. In her affidavit, petitioner also notes that "shortly after" his two month vaccinations, Keyon developed acid reflux. Pet. Ex. 6 at 1. Petitioner described a reaction after Keyon received his MMR vaccination on October 9, 2003. She notes that "shortly after" he received the MMR, "Keyon became more quiet, using his small vocabulary far less frequently and vocalizing the vowels and consonants even less....by 16 months or so, most [of] his vocalization disappeared and he became inattentive" to his parents. Pet. Ex. 6 at 2. No reaction is reported or described in the pediatrician's records after Keyon's MMR on October 9, 2003. See Pet. Ex. 5, pp. 36-37.

Keyon's pediatrician began noting language delay in January of 2004. Pet. Ex. 5, p. 40. Keyon was diagnosed with "Autistic Disorder" by Dr. Ingrid Leckliter, psychologist, on January 11, 2006. Pet. Ex. 15, p. 6. No physician noted a link between Keyon's diagnosis and his vaccinations, although petitioner repeatedly expressed concern about vaccines generally. See, *e.g.*, Pet. Ex. 5, pp. 24, 30, 34. After Keyon was diagnosed with an autism spectrum disorder, petitioner often gave a history of autism caused by vaccines. See, *e.g.*, Pet. Exs. 12, p. 4; 16, p. 3; 18, p. 5.

III. Causation in Fact

To receive compensation under the Program, petitioner must prove either 1) that Keyon suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) that Keyon suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). An examination of the record did not uncover any evidence that Keyon suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Keyon's autism spectrum disorder was vaccine-caused. The evidence produced in the OAP test cases does not support petitioner's allegation of vaccine causation; rather it indicates that vaccines are unlikely to cause autism spectrum disorders.

A petitioner may not receive 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. § 300aa-13(a)(1). In this case, because there are insufficient medical records supporting petitioner's claim, a reliable medical opinion must be offered in support. Petitioner, however, has offered no such opinion.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that Keyon suffered a “Table Injury” or that his injuries were “actually caused” by a vaccination. **Thus, this case is dismissed for insufficient proof. The clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

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