

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-0599V

Filed: May 30, 2013

Not to be Published

**COLLETTE M. RIDGE,
As Parent and Legal Representative of
CAMERON RIDGE, a Minor,**

Petitioner,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

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

DECISION¹

On September 11, 2009, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program [“the Program”],² alleging that Cameron was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14. Petitioner claims that her son, Cameron, has a mitochondrial dysfunction and developed autism as a result of “receiving a series of childhood vaccinations.” Petition at 1-3. She argues that Cameron exhibited his first symptoms of autism on October 28, 2006. *Id.* at 2-3. Respondent contends that Cameron’s first symptom of autism occurred before that date and that the petition was not timely filed. See, e.g.,

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in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

Respondent's Rule 4 (c) Report, filed Dec. 10, 2009, at 11; Respondent's Response Regarding the Factual Record, filed Jun. 25, 2010, at 2. Since the petition was filed on September 11, 2009, it is untimely filed if Cameron's first symptom or manifestation of autism occurred prior to September 11, 2006. See § 16(a)(2) (the Vaccine Act's statute of limitations).

Because Cameron missed both his 15 and 18 month old well child check-ups, his pediatric records contain little or no evidence of his developmental between his 1 year old well child check-up on October 10, 2005 and 2 year old well child check-up on October 10, 2006. See Petitioner's Exhibit ["Pet. Ex."] 2 at 50, 75. However, an intake form from First Steps Kentucky ["First Steps"] indicates that Cameron's parents noticed his speech was delayed when he was approximately 18 months old. First Steps' Records at PL00005.³ Since Cameron was born on October 1, 2004, he would have been 18 months old on April 1, 2006. See Pet. Ex. 4 at 93. The referral form for First Steps indicates Cameron was referred to First Steps by an individual at his daycare center for speech delay and contains the notation "speech delay – says no words – concerned about autism." First Steps' Records at PL00009.

On December 13, 2011, the special master formerly assigned to this case, Special Master Golkiewicz, conducted a fact hearing to determine when Cameron's first symptom or manifestation of onset of his alleged vaccine-related injury occurred and whether the facts upon which petitioner's expert, Dr. William E. Frye, based his expert opinion were valid. See Factual Ruling and Order, filed Sept. 11, 2012, at 1. Special Master Golkiewicz rejected the lay witness testimony which differed from the facts set forth in the medical records and determined that the medical records should form the factual predicate for any expert opinion. *Id.* at 17. He also concluded that "Cameron experienced symptoms of speech delay, most likely when he was 15 to 18 months of age, but definitely prior to September 11, 2006" and that the petitioner had not filed "any persuasive evidence to the contrary." *Id.* at 6.

Because "Dr. Frye relied heavily on petitioner's description of events when formulating his medical opinion, often ignoring information contained in the medical records," Special Master Golkiewicz determined that Dr. Frye's medical opinion was not valid. *Id.* As the Federal Circuit has said, an expert opinion is only as good as the facts upon which it is based. *Perreira v. Sec'y, HHS*, 33 F.3d 1375, 1377 n. 6 (Fed. Cir. 1994). Special Master Golkiewicz concluded that petitioner must file a new medical opinion from Dr. Frye or another medical expert based on the facts as presented in the medical records. *Id.* at 18. He explained that the expert report should address whether the petition was timely filed. *Id.* He ordered petitioner to file a status report informing the court how she intended to proceed. *Id.* The case was reassigned to me on September 13, 2012.

³ On April 2, 2012, petitioner filed the initial set of records from First Steps as Exhibit 1 despite the fact that she previously filed Exhibits 1-8. She labeled the pages of this exhibit as PL00001-57 and the pages of additional records from First Steps filed on April 19, 2012 as PL00058-66. I will refer to these documents as First Steps' Records and use the individual page numbers, PL00001-66.

On October 18, 2012, petitioner filed a status report indicating she intended to file an expert report from Dr. Frances Kendall. Status Report at 1. I ordered petitioner to file her expert report and granted several requests for additional time to do so. *E.g.*, Non- pdf Order, filed Jan. 23, 20103. On March 11, 2013, I ordered petitioner to file her expert report by April 15, 2013. Petitioner did not respond to that order. On April 24, 2013, I again ordered petitioner to file her expert report or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. Petitioner failed to respond to that order as well.

I. Failure to Prosecute

It is petitioner's duty to respond to court orders. Failure to respond to a court order because the petitioner has failed to stay in contact with her attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As I reminded petitioner in my April 24, 2013 order, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioner's 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).

II. Causation In Fact

To receive compensation under the Program, petitioner must prove either 1) that Cameron suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Cameron's vaccinations, or 2) that Cameron 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). Moreover, petitioner has the burden of proving the petition was timely filed. § 16(a)(2). Petitioner has failed to do so. Petitioner has failed to file sufficient medical records and evidence in this case.

An examination of the record did not uncover any evidence that Cameron suffered a "Table Injury." Further, the record does not contain a medical opinion based on the facts as found by Special Master Golkiewicz or any other persuasive evidence indicating that Cameron's autism spectrum disorder was vaccine-caused. Finally, there is preponderant evidence that this case was not filed before the expiration of the Vaccine Act's statute of limitations and petitioner has not demonstrated any extraordinary circumstances warranting equitable tolling.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that Cameron suffered a “Table Injury” or that Cameron’s injuries were “actually caused” by a vaccination and has failed to show the petition was timely filed. **This case is dismissed for insufficient proof and for failure to prosecute. The clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

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