

In the United States Court of Federal Claims

OFFICE OF THE SPECIAL MASTERS

No. 10-337V

Filed: May 15, 2012

_____)	
HENRY MCEVOY, a minor,)	
by his parents and natural guardians,)	UNPUBLISHED
ROBERT MCEVOY and MARTA)	
SVITELLOVA,)	
)	
Petitioners,)	
)	
v.)	Autism; Failure to Prosecute; Failure to
)	Follow Court Orders; Dismissal
)	
SECRETARY OF HEALTH AND)	
HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

Robert McEvoy and Marta Svitelova, pro se, Chappaqua, NY, for petitioners.

Heather Pearlman, U.S. Department of Justice, Washington, DC, for respondent.

DECISION¹

On June 2, 2010, 2008, petitioners filed a short-form Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),²

¹ Because this order contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this ruling 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 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b).

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

alleging that Henry was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

By Order dated December 19, 2011, petitioners were directed to file an amended petition and the balance of Henry's outstanding medical records by January 20, 2012. Petitioners responded by requesting additional time to comply with the undersigned's order. Informal Comm'n, ECF Jan. 18, 2012. By order dated January 19, 2012, the undersigned granted petitioners' request and enlarged their filing deadline for the amended petition and the outstanding medical record until March 5, 2012. Order, ECF No. 12.

On February 21, 2012, Mr. McEvoy contacted the undersigned's chambers and indicated that he would be seeking an additional enlargement of time to file the amended petition and the outstanding medical records. Informal Comm'n, ECF Feb. 21, 2012.

On March 2, 2012, petitioners filed a motion for enlargement of time requesting an extension of three years or until March 5, 2012, to comply with the undersigned's order. On March 12, 2012, the undersigned denied petitioners' request. Order at 2, March 12, 2012. The undersigned afforded petitioners an additional sixty days, until May 7, 2012, to comply with her January 19, 2012 order.

The undersigned also advised petitioners that full and timely compliance with all court orders is required and that failure to file a timely response would lead to the dismissal of petitioners' claim for failure to prosecute. Order at 2, March 12, 2012. The undersigned afforded petitioners until May 7, 2012, to file their amended petition and the balance of Henry's medical records. As of May 15, 2012, petitioners have failed to respond.

I. The Omnibus Autism Proceeding

Because petitioners have alleged that their son's autism was caused by certain administered vaccines, this claim appropriately would have been included in the Omnibus Autism Proceeding (OAP). More than 5,400 cases were 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

seq. (hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

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 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).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. The proceedings in these six test cases are now concluded.

Petitioners with pending autism claims must decide whether to pursue their cases and submit new evidence on causation, or to take other action to exit the Program. The petitioners in this case have failed to take the necessary steps to proceed with their claim.

II. Failure to Prosecute

It is petitioners' duty to respond to court orders. Failure to respond to a court

³ The Theory 1 cases are Cedillo v. Sec'y of Health & Human Servs., No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Hazlehurst v. Sec'y of Health & Human Servs., No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Snyder v. Sec'y of Health & Human Servs., No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are Dwyer v. Sec'y of Health & Human Servs., No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); King v. Sec'y of Health & Human Servs., No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); Mead v. Sec'y of Health & Human Servs., 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.

order is deemed noncompliance with a court order, and noncompliance can affect petitioners' ability to proceed with a claim. As the undersigned reminded petitioners in her March 12, 2012 Order, failure to follow court orders shall result in dismissal of petitioners' claim. Tsekouras v. Sec'y of Health & Human Servs., 26 Cl. Ct. 439 (1992), aff'd per curiam, 991 F.2d 810 (Fed. Cir. 1993); Sapharas v. Sec'y, of Health & Human Servs., 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b). Petitioners have not responded to the March 12, 2012 Order.

III. Causation In Fact

To receive compensation under the Program, petitioners must prove either 1) that Henry suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Henry's vaccinations, or 2) that Henry 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). Here, petitioners have failed to file sufficient medical records and evidence. An examination of the record has not uncovered any evidence that Henry suffered a "Table Injury." Moreover, the record does not contain a medical opinion or any other persuasive evidence indicating that Henry's autism spectrum disorder was vaccine-caused. Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that Henry suffered a "Table Injury" or that Henry'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.

Patricia E. Campbell- Smith
Chief Special Master