

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 03-2649V

Filed: August 16, 2010

WARD C. BOYD, III, and TIANA L. BOYD,	)	
parents of their daughter,	)	
XELA REBECCA BOYD,	)	TO BE PUBLISHED
	)	
Petitioners,	)	Entitlement: Thimerosal;
	)	Measles-mumps-rubella;
v.	)	Diphtheria-tetanus-acellular pertussis;
	)	Hemophilus influenza type b;
SECRETARY OF	)	Hepatitis B; Mercury toxicity;
HEALTH AND HUMAN SERVICES,	)	Motion for Decision; Dismissal;
	)	Developmental disorders
Respondent.	)	
	)	

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for Petitioner.  
Lynn E. Ricciardella, United States Department of Justice, Washington, DC, for Respondent.

LORD, Chief Special Master.

### DECISION<sup>1</sup>

#### I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners Ward Boyd and Tiana Boyd filed a petition on November 10, 2003, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq. ("Vaccine Act"), on behalf of their daughter Xela Boyd. Petitioners allege that, as a result of receiving a measles-mumps-rubella ("MMR") vaccine and thimerosal-containing vaccines, including the hepatitis B, diphtheria-tetanus-acellular pertussis ("DTaP"), and Hemophilus Influenzae type b ("Hib") vaccines, Xela sustained symptoms of mercury toxicity such as speech delay and gross motor deficiencies. Amended Pet. ("Pet.") at 1. Since Petitioners have not alleged and cannot prove a table injury claim, they must prove actual causation. On July 23, 2010, Petitioners filed a motion for a decision dismissing their petition. For the reasons that follow, that motion is **GRANTED**.

The record in this case discloses a long history of little progress. The case history is discussed below to explain why this case is ripe for judgment.

<sup>1</sup> As provided by Vaccine Rule 18(b), each party has 14 days within which to request the redaction "of any information furnished by that party (1) that is 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." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of a timely motion, the entire document will be made publicly available.

This case was filed pro se on November 10, 2003. On July 22, 2004, Ronald C. Homer, Esq., of the firm of Conway, Homer & Chin-Caplan, P.C., became Petitioners' attorney of record. On December 13, 2004, the case was transferred from then Chief Special Master Golkiewicz to then Special Master Sweeney. At Petitioners' request, Special Master Sweeney had stayed a group of cases involving alleged mercury toxicity pending the resolution of discovery issues in the Omnibus Autism Proceedings ("OAP"). Petitioners' request that this case be added to that group was granted.

On December 27, 2004, Petitioners filed substantial medical records. See Petr's Exs. 1-22. On January 6, 2005, Petitioners filed an amended petition. On October 27, 2005, the case was transferred to then Special Master Edwards, who required that Petitioners begin to develop evidence to support their claims. Throughout 2006, the special master had the parties submit numerous status reports, and he held numerous status conferences with the parties.

On January 3, 2007, the special master issued an order requiring Petitioners to obtain an opinion from a medical expert. Order, Jan. 3, 2007. On January 31, 2007, Petitioners filed a status report requesting that any expert report be stayed until after a ruling was issued in the OAP on a discovery motion. Status Report, Jan. 31, 2007, at 5-6. On March 9, 2007, the special master held a status conference at which he told Petitioners to obtain a preliminary opinion from a medical expert by April 6, 2007. Order, Mar. 9, 2007. On April 6, 2007, Petitioners filed a "response" to the Court's Order. Petitioners' counsel stated that, before filing an expert report, he wanted to wait for more research to be done, and additionally, that he was unavailable to focus on this case because of the upcoming hearing in one of the OAP test cases. Resp. to Order, Apr. 6, 2007, at 7-8. The special master then set September 5, 2007 as the deadline for filing a medical expert's opinion. Order, May 10, 2007. On September 5, 2007, instead of filing an expert report, Petitioners' counsel filed a 19-page "response" to the Court's order to inform the special master that "due to the ongoing involvement of her experts in the [OAP], Xela has been unable to secure a meaningful review of her case by her potential experts." Resp. to Ct.'s Order, Sept. 5, 2007, at 2. Counsel further stated that he could not submit an expert report because the "OAP is continuing" and "new evidence will certainly surface, evidence that may well be beneficial to Xela." Id. at 7. "In other words, for Xela Boyd it will be well worth the wait, and she expressly chooses to wait." Id. at 9.

On October 9, 2007, Respondent moved the Court to issue an order to show cause as to why the case should not be dismissed because the case had been pending for four years, and Petitioners had not complied with the special master's orders to submit an expert report. On November 2, 2007, the special master denied Respondent's motion and allowed Petitioners more time to file an expert report. On November 30, 2007, Petitioners filed a status report stating that an expert opinion would be filed in 45 days. On January 15, 2008, Petitioners filed a report from Dr. Marcel Kinsbourne, in which Dr. Kinsbourne stated that he needed more time to evaluate the science and the medical record. Petr's Ex. 38. On January 17, 2008, the special master issued an order requiring Petitioners to file Dr. Kinsbourne's report by March 28, 2008. On March 28, 2008, Petitioners filed a motion for an enlargement of time, until April 7, 2008, to file the report. This motion was granted. On April 7, 2008, Petitioners, both in this case and the case of Jakymowych v. Sec'y of Dep't of Health & Human Servs., No. 05-518V, filed an expert report from Dr. Kinsbourne, in which he stated that "Though suggestive, the evidence so far still falls well short of a level that could justify a causation opinion that implicates exposure to mercury as a substantial contributing factor in the development of [Xela's] disorders." Petr's Ex. 40.

On April 10, 2008, the special master issued an order giving Petitioners until June 30, 2008, to file another expert report. Petitioners did not file an expert opinion, but instead filed a motion to consolidate this case with five other cases alleging thimerosal injuries, which were also being handled by Mr. Homer's firm. Petr's Mot. to Consolidate, June 30, 2008. On July 9, Respondent filed a response opposing the motion to consolidate. On July 17, 2008, the case was transferred to Special Master Abell. On September 3, 2008, Petitioners were ordered to file support for their motion to consolidate by October 27, 2008. On September 3, 2008, Petitioners filed a "response" to the Court's order, stating that, because all the cases involve mercury toxicity from thimerosal, one hearing on general causation should be held. At a status conference on January 9, 2009, the special master denied Petitioners' motion to consolidate, but left open the possibility that general causation evidence from other cases could be proffered in this case for the "can it" portion of the entitlement hearing. Order, Jan. 26, 2009.

At a status conference on May 7, 2009, Petitioners indicated that they would examine the record and determine whether to proceed with the case. Order, June 17, 2009. Again, Petitioners were advised that they would soon need to file "an expert report propounding a plausible medical theory of how the alleged injury could be vaccine related, as well as demonstrating how the propounded biologic mechanism was at work in the instant case." Id.

On June 22, 2009, this case was transferred to me. At a status conference on June 29, 2009, Petitioners stated that Xela was undergoing mitochondrial testing, and that Petitioners would like to see some test results before determining how to proceed. Show Cause Order, June 30, 2009. Petitioners were ordered to file all medical records showing that Xela suffered from a mitochondrial disorder and "documentation supporting counsel's statement . . . that, based on the results of mitochondrial testing to date, Xela was advised by medical personnel to undergo additional mitochondrial testing." Id.

On July 22, 2009, Petitioners' counsel filed another "response" stating that they were unable to contact Xela's doctor, and counsel requested 30 days to discuss the case with his client. On July 24, Petitioners filed a letter they had just received from one of Xela's treating physicians. Petitioners stated that it would take several months to get the results of the mitochondrial testing, and requested that they file a status report in 90 days documenting the progress of testing. Mot., July 24, 2009. On September 22, 2009, I denied Petitioners' motion and allowed Petitioners until October 25, 2009, to show why their case should not be dismissed. On October 22, 2009, Petitioners filed a motion for a 90-day enlargement. On November 24, 2009, I permitted Petitioners, over Respondent's objection, until January 25, 2010 to respond to the show cause order. On January 25, 2010, Petitioners requested another enlargement. Although this motion was not granted, no further action occurred in this case until July 2010.

On July 6, 2010, I convened a status conference. At that status conference, Petitioners' counsel stated that the results of Xela's testing were not indicative of a mitochondrial disorder. Counsel stated that he had recommended to his clients that they dismiss the case. He requested 30 days to confer with his clients on how to proceed. I allowed Petitioners' counsel 30 days to file a motion to dismiss, stating that otherwise I would dismiss the case sua sponte. On July 23, 2010, Petitioners filed a motion for a decision dismissing their petition.

## **II. DISCUSSION**

Special masters may adjudicate cases based upon the written record without conducting an evidentiary hearing. 42 U.S.C. § 300aa-12(d)(3)(B)(v); Vaccine Rule 8(b). Before deciding a

case upon the written record, the special master must ensure that each party has a full and fair opportunity to present its case. Hovey v. Sec'y of Dep't of Health & Human Servs., 38 Fed. Cl. 397, 400-01 (1997) (affirming special master's decision denying petitioners' request for an evidentiary hearing).

Pursuant to the Vaccine Act petitioners may be compensated for injuries caused by certain vaccines. See generally §§ 300aa-10 to 34. To receive compensation, a petitioner must prove that either: 1) she suffered a "Table Injury"—that is, an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) she suffered an "off-Table" injury that was actually caused by or "caused-in-fact" by a vaccine. See §§ 300aa-13(a)(1)(A), 300aa-11(c)(1); Shalala v. Whitecotton, 514 U.S. 268, 270 (1995). In this case, Petitioners have alleged that Xela suffered an off-Table injury.

To satisfy the burden of proving causation in fact, a petitioner must prove by preponderant evidence "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." Althen v. Sec'y of Dep't of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Petitioners must show not only that but for Xela's vaccinations, she would not have been injured, but also that the vaccinations were a substantial factor in bringing about her injury. Shyface v. Sec'y of Dep't of Health & Human Servs., 165 F.3d 1344, 1352 (Fed. Cir. 1999). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec'y of Dep't of Health & Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991).

A petitioner may not be given a Vaccine Program award based on the petitioner's claims alone. § 300aa-13(a)(1). Rather, the petition must be supported by either medical records or by the opinion of a competent physician. See id.; Grant v. Sec'y of Dep't of Health & Human Servs., 956 F.2d 1144, 1148-49 (Fed. Cir. 1992).

In this case, despite many opportunities to submit support for their Petition over a period of nearly seven years, Petitioners have not provided sufficient evidence to satisfy Althen. Petitioners have not submitted medical evidence or a reliable medical opinion supporting any medical theory or cause connecting Xela's condition to a vaccine. In the one expert report submitted by Petitioners, Dr. Kinsbourne opined that "Though suggestive, the evidence so far still falls well short of a level that could justify a causation opinion that implicates exposure to mercury as a substantial contributing factor in the development of [Xela's] disorders." Petr's Ex. 40. It is clear from this record that Petitioners cannot establish a prima facie case that Xela's vaccinations caused her speech delay and gross motor deficiencies. Therefore, the special master must deny this Petition. See § 300aa-13(a)(1).

### **III. CONCLUSION**

Careful review of the record as a whole shows that Petitioners have been unable to establish that Xela's injuries were caused-in-fact by her vaccinations. Therefore, Petitioners' motion is granted, and the Petition is dismissed with prejudice for insufficient proof of causation. See § 300aa-13(a)(1). The Clerk shall enter judgment accordingly.<sup>2</sup>

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<sup>2</sup> Vaccine Rule 11(a) provides for expedited entry of judgment if each party files a notice stating that the party will not seek review.

**IT IS SO ORDERED.**

s/ Dee Lord  
Dee Lord  
Chief Special Master