

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-0744V

Filed: October 24, 2013

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RICHARD CURLEY and \*
THERESA CURLEY, parents of \*
THOMAS CURLEY, a minor, \*

Petitioners, \*

v. \*

SECRETARY OF HEALTH \*
AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

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

Robert J. Krakow, Esq., Law Office of Robert J. Krakow, New York, NY, for petitioners.
Lynn E. Ricciardella, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION1

Vowell, Chief Special Master:

On July 11, 2005, Richard Curley and Theresa Curley ["petitioners"] filed a claim
for compensation pursuant to the National Vaccine Injury Compensation Program
["Vaccine Program" or "the Program"]2 on behalf of their son, Thomas Curley
["Thomas"]. Petitioners filed the short-form petition authorized by Autism General Order
#1,3 thereby joining the Omnibus Autism Proceeding ["OAP"].4

1 Because this unpublished decision contains a reasoned explanation for the action in this case, I intend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 (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 National Vaccine Injury Compensation Program ["Vaccine Program" or "the Program"] is set forth in
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. (2006) ["Vaccine Act" or "the Act"]. All citations in this Order
to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

3 Autism General Order #1 adopted the Master Autism Petition for Vaccine Compensation for use by
petitioners filing claims intended to be part of the OAP. By electing to file a Short-Form Autism Petition for

## I. Procedural History.

While causation hearings in the test cases were held and entitlement decisions were issued,<sup>5</sup> petitioners were ordered to file the medical records necessary to establish that their case was timely filed. See Order, issued May 15, 2008, at 1, 5. Petitioners filed their medical records on October 10, 2008. See Petitioners' Exhibits ["Pet. Exs."] 1-46.

Following resolution of the OAP test cases,<sup>6</sup> petitioners were ordered to inform the court whether they wished to proceed with their claim or exit the Vaccine Program. See Order, issued Aug. 4, 2011, at 3. If petitioners wished to continue with their claim, they were ordered to file "an amended petition that is fully compliant with § 300aa-11(c) and which clearly explains the theory of vaccine causation in this case." *Id.* After several extensions of time, petitioners filed additional medical records on December 18, 2011 (see Pet. Ex. 47) and an amended petition on December 19, 2011.

On January 25, 2012, the special master formally assigned to this case held a digitally recorded status conference and ordered petitioners to file "a statement of completion or a status report regarding the progress of medical record collection" by February 17, 2012 and an expert report supporting their theory of causation by May 17,

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Vaccine Compensation petitioners alleged that:

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the "thimerosal" ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B(HIB) vaccinations; or by some combination of the two.

Autism General Order # 1. The text of Autism General Order #1 can be found at <http://www.uscfc.gov/sites/default/files/autism/Autism>. ["Autism Gen. Order # 1"], 2002 WL 31696785 (Fed.CI.Spec.Mstr. July 3, 2002).

<sup>4</sup> A detailed discussion of the OAP can be found at *Dwyer v. Sec'y, HHS.*, No. 03-1202V, 2010 WL 892250, at \*3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

<sup>5</sup> 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 Autism Spectrum Disorders ["ASDs"].

<sup>6</sup> The Theory 1 cases are *Cedillo v. Sec'y, HHS.*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec'y, HHS.*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec'y, HHS.*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 706 (2009). Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims. 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). The petitioners in each of the three Theory 2 cases chose not to appeal.

2012. Order, issued Jan. 26, 2012, at 1. Petitioners filed a status report on February 17, 2012, indicating there were outstanding medical records created after 2008 which needed to be filed. Status Report at 1. They requested additional time to collection and file these records. *Id.* at 1-2.

In April and May 2012, petitioners filed additional medical records. See Pet. Exs. 48-49. Although they indicated that medical records from two providers still were outstanding, they stated the record was sufficient “to proceed with formal evaluation of the case by a medical expert.” Status Report, filed May 11, 2012, at 2. Petitioners indicated they had sent the records to their medical expert for review but would require additional time to file their expert report. *Id.* The special master formally assigned to the case granted several extensions of time. See, e.g., Order issued Jan. 17, 2013.

After the case was reassigned to me, I held a telephonic status conference with the parties. During the call, I expressed my concerns regarding the temporal relationship between Thomas’ injuries and the vaccines he received. See Order, issued Mar. 27, 2013, at 1. I partially granted petitioners’ request for additional time to file their expert report, allowing them 60 additional days instead of the 90 days requested. *Id.* at 1-2. I specified that petitioners’ expert report should address whether a proximate temporal relationship existed between Thomas’ injuries and the vaccines he received. *Id.* at 2. During the next five months, I granted petitioners’ requests for additional time while the pediatric neurologist they retained, Dr. Marcel Kinsbourne, reviewed the evidentiary record. See, e.g., Motion, filed May 1, 2013, at 2.

On August 26, 2013, petitioners informed me that although their claim has been reviewed by Dr. Kinsbourne, they “are not able . . . to produce an expert report.” Motion at 1. Petitioners requested additional time “to confer with their counsel and to take dispositive action with respect to the petition.” *Id.* at 2. I granted petitioners’ request and ordered them to file a status report, indicating how they wished to proceed. Order, issued Aug. 27, 2013, at 1.

On September 16, 2013, petitioners filed a status report, reiterating the fact they were unable to produce an expert report. Status Report at 1. Despite claiming counsel had conferred at length with both petitioners and their medical expert by telephone and email, petitioners maintained they required additional time to confer with counsel and for counsel to confer with petitioners’ medical expert to make certain all the facts and circumstances of the case were considered. *Id.* at 2. Petitioners informed me “they [did] not feel . . . sufficiently informed regarding [the] basis of the expert review . . . to determine whether or not they should proceed with prosecution of the petition or take other action.” *Id.*

On September 17, 2013, I ordered petitioners to file an expert report regarding vaccine causation of Thomas’ injuries or show cause why this case should not be dismissed for failure to prosecute. I warned petitioners that only an expert report on vaccine causation would cure the Show Cause Order and that failure to file a response to this Show Cause Order would be interpreted as either a failure to prosecute this claim or as an inability to provide supporting documents for this claim.

On October 17, 2013, petitioners filed a motion for an extension of time, again admitting that they were unable to produce an expert report but requesting additional time to confer with counsel. Motion at 1. Petitioners reiterated their claim “that they do not feel they are sufficiently informed regarding the basis of the expert review of the case and its consideration of its complex medical record to determine whether or not they should proceed with prosecution of the petition or take other action.” *Id.* at 1-2.

## **II. 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 September 17, 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).

## **III. Causation.**

To receive compensation under the Program, petitioners must prove either 1) that Thomas suffered a “Table Injury” – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Thomas’ vaccinations, or 2) that Thomas 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). Petitioners have failed to file sufficient medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that Thomas suffered a “Table Injury.” Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Thomas’ autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that Thomas suffered a “Table Injury” or that Thomas’ 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.**

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