

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 02-1946V

Filed: October 23, 2012

Not to be Published

**DEBORAH HANEY, Parent of
ALLISON HANEY, a Minor,**

Petitioner,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

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

DECISION¹

On December 23, 2002, Deborah Haney (“petitioner”) filed a petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that Allison was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

On May 25, 2011, petitioner was ordered to inform the court whether petitioner intended to proceed with this case. Petitioner did not respond to that order but indicated that Allison was undergoing testing for mitochondrial dysfunction and that petitioner

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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

would inform the court if she was continuing with her claim after reviewing the results of the testing. Response, filed June 23, 2011. Petitioner requested and received several motions for additional time but also was ordered to file results of Allison's mitochondrial testing. See, e.g., Order filed Aug. 22, 2011.

On December 16, 2011, petitioner's counsel filed a motion for interim fees and costs and a motion to withdraw as counsel. I entered a decision awarding interim fees and costs on May 9, 2012 and granted counsel's motion to withdraw on May 14, 2012. Petitioner was ordered to contact my chambers to schedule a telephonic status conference so I could discuss the next steps in this case now that petitioner was proceeding as a pro se petitioner. See Order, filed May 14, 2012, at 2.

On June 15, 2012, I held a telephonic status conference with the parties. Petitioner was ordered to file a causation statement identifying her theory of how Allison's vaccinations caused her autism and medical records pertaining to Allison's mitochondrial disorder by July 16, 2012, and the results of the DNA analysis by August 14, 2012. Petitioner failed to respond. On July 30, 2012, petitioner was again ordered to file a causation statement and medical records. Petitioner failed to respond to that order as well. On September 7, 2012, petitioner was ordered to inform the court whether petitioner intended to proceed with this case or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. Petitioner has failed to respond.

I. The Omnibus Autism Proceeding.

This case is one of more than 5,400 cases 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 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

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).

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 whether to pursue their cases, and submit new evidence on causation, or take other action to exit the Program. The petitioner in this case has failed to inform the court how she intends to proceed.

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 7, 2012, 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 In Fact.

To receive compensation under the Program, petitioner must prove either 1) that Allison suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Allison's vaccinations, or 2) that Allison 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). An examination of the record did not uncover any evidence that Allison suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Allison's autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioner has failed to

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

demonstrate either that Allison suffered a “Table Injury” or that Allison’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.

Denise K. Vowell
Special Master