

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

No. 5-227V

Filed: May 31, 2011

CHARMIAN NEARY and GERARD
GARDINER, parents of Charles Russell
Gardiner, a minor,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

*
*
*
* Petitioners' Motion for a Decision
* Dismissing their Petition;
* Insufficient Proof of Causation;
* Vaccine Act Entitlement; Denial
* Without Hearing

DECISION¹

On February 16, 2005, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ["the Program"],² alleging that Charles Russell Gardiner was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 300aa-14. The information in the record does not show entitlement to an award under the Program.

On May 26, 2011, petitioners moved for a decision on the merits of the petition, acknowledging that insufficient evidence exists to demonstrate entitlement to compensation.

To receive compensation under the Program, petitioners must prove either 1)

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), petitioners have 14 days to identify and move to delete medical or other information, that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

that Charles suffered a “Table Injury” – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) that Charles suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). An examination of the record did not uncover any evidence that Charles suffered a “Table Injury.” Further, the record does not contain a medical expert’s opinion or any other persuasive evidence indicating that Charles’s alleged injury was vaccine-caused.

Under the Act, petitioners may not be given a Program award based solely on the petitioners’ claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. § 300aa-13(a)(1). In this case, the record does not contain medical records or a medical opinion sufficient to demonstrate that the vaccinee was injured by a vaccine. **For these reasons, in accordance with § 300aa-12(d)(3)(A), petitioners’ claim for compensation is denied and this case is dismissed for insufficient proof. The Clerk shall enter judgment accordingly.**³

IT IS SO ORDERED.

s/Denise K. Vowell

Denise K. Vowell

Special Master

³ If petitioners elect to file a Petition for Fees and Costs pursuant to § 300aa-15(e), based on current law petitioners will need to first establish proof of vaccination and the timely filing of the Petition for Vaccine Compensation, see § 300aa-16(a)(2) and 16(b), prior to any award for attorneys’ fees and costs being granted. See Brice v. Secretary of Health and Human Services, 358 F.3d 865, 869 (Fed. Cir. 2004), citing Martin v. Secretary of Health and Human Services, 62 F.3d 1403, 1406 (Fed. Cir. 1995).