OFFICE OF SPECIAL MASTERS

No. 97-836V

(Filed: October 28, 2005)

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JOHN WALLACE and MARGARET WALLACE,	*	
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Petitioners,	*	
	*	TO BE PUBLISHED
v.	*	
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SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
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* *		

John Wallace, Pro Se, for Petitioners.
Vincent Matanoski, Esq., United States Depart of Justice, Washington, D.C., for Respondent.

ENTITLEMENT DECISION[1]

ABELL, Special Master:

On 8 December 1997, Petitioners filed a claim for compensation under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)[2] which alleges that contact with their daughter, Aimée,[3] who received OPV, MMR, DPT and Hib vaccinations and allegedly died as a

[1] Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Rule 18(b)(2) of the Vaccine Rules of this Court, within fourteen days of this decision, they may object to the public disclosure of any material that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."

[2] The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. §§ 300aa-10 *et seq*. (West 1991 & Supp. 2002). Reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

[3] A petition brought on behalf of their daughter, Aimée, ultimately was dismissed by this Court. Wallace v. Secretary of HHS, No. 96-0188V (Fed. Cl. Spec. Mstr. Nov. 20, 2003). Though represented by competent counsel, Petitioner chose to pursue an appeal *pro se* which was unsuccessful as it was untimely filed. Wallace v. Secretary of HHS, 101 Fed. Appx. 340 (Fed. Cir. June 4, 2004). Petitioner has since threatened to sue this Special Master and has requested my recusal in the case at bar. Specifically, Petitioner indicates that he is "planning to exercise Federal causes of action against Special Master Richard Abell for the unlawful circumstances surrounding the dismissal of

result, caused the death of two children and a reduction in the health of Petitioners and their eleven surviving children. Petition at 1.

According to the Vaccine Act, one must meet certain requirements in order to file a petition for compensation. § 11(b)(1)(A). Germane to this particular case, the Act requires that one have either "received a vaccine set forth in the Vaccine Injury Table or, if such person did not receive such a vaccine, contracted polio, directly or indirectly, from another person who received an oral polio vaccine." § 11(c)(1)(A).

On 21 February 2001, Special Master Lavon French, lately retired from this Court, dismissed this case. The dismissal notes that Petitioners had not properly brought the petition since they were not recipients of a Table vaccine neither did the petition allege that they had contracted polio from an oral polio vaccine ("OPV") recipient.

Judgment entered on that decision. However, on 13 April 2001, Special Master French granted Petitioners' Motion for Relief from Judgment Pursuant to Rule 60(b) by vacating that judgment. In their Motion for Relief, Petitioners first raised the speculation that the injuries alleged were related to the polio virus. The special master held, "Inasmuch as the Petitioners are filing *pro se* and given the new allegations raised by Petitioners' Motion for Relief from Judgment, the court feels constrained to offer them additional time to prove that the OPV vaccine caused an injury set forth in the Vaccine Injury Table." Decision at *2. Therefore, she ordered Petitioners to file medical expert evidence or an opinion from a qualified medical expert in support of their claim by 12 June 2001.

In response to Special Master French's order requesting additional filings, Mr. Wallace essentially notes that although none of the medical records indicate "specific causative agents, such as the polio virus, as the basis for Petitioner's reduction in health ... there is reference made to a virus as being a likely possibility as the causative agent." Petitioners' Motion for Continuance (hereinafter "Continuance"), filed 29 June 2001, at 2. Mr. Wallace, himself a man of science, although of an unrelated discipline, believes the polio virus to be the likely culprit and claims that certain of their symptomatolgy is similar to polio. Id. at 2, 4, 5. However, Petitioners were unable to pursue what they believe to be suitable medical testing to substantiate their theory due to a lack of financial resources. Id. at 3. Estimates for such testing range from $5,000 to $40,000 per person for thirteen persons. Id. at 5. Therefore, Petitioners requested an indefinite continuance. Id. at 6.

More than four years have passed since Special Master French issued the order requesting

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96-188V." Petitioner's Petition for Reassignment at 2. Mr. Wallace further indicates that "multiple causes of action against State Court Judges have arisen at all three levels of the State Court." Id. at 8. However, seeing no such requirements in the rules of judicial ethics or in the circumstances surrounding the handling of this case, the Court declines to recuse itself.

additional filings and nearly eight years since the petition was first submitted,[4] yet Petitioners have failed to file *any* evidence in addition to the scant records provided with the original petition. Finally, on 17 February 2005, the Court contacted the Petitioners to schedule a status conference to discuss this case. Petitioners **declined** to schedule that conference call. The Court then issued an Order to Show Cause noting that, since 12 June 2001, Petitioners have failed to file an expert report or any sort of medical expert testimony in support of their claim.

In response to this Court's Order to Show Cause, Mr. Wallace reiterated his claim that close proximal contact with their daughter Aimée "infected" the family with "polio strain virus problems." Plaintiff's Petition to Show Cause, filed June 7, 2005, at 2. However, he provides no further evidence beyond his own speculation and conjecture regarding the alleged causal mechanism.

ANALYSIS

In general, a decision should issue within 240 days of the receipt of a petition absent specific suspensions of time allowable under the Act including a one time suspension for 30 days on the motion of either party and thereafter on motions for suspensions that are reasonable and necessary "for an aggregate period not to exceed 150 days." § 12(d)(3)(A)(ii), (C)(ii). If a decision is not issued within 240 days, absent suspensions, the special master should send Formal Notice to the petitioners allowing them to withdraw from the Program. § 12(g) and 21(b). In the present case, on review of the docket it was discovered that Petitioners never received the Formal Notice required by subsection 12(g). Formal Notice was issued on 18 August 2005. Within thirty days, a petitioner may elect to withdraw from the program. No such election was filed, so it is assumed that Petitioners wish their case to remain before this Court. It is often the case that petitioners elect to remain in the Program rather than exiting after the 240 day notice. In some instances, a particularly complicated case might then stretch out over several years. However, in this case, Petitioners have advanced no farther from when they first filed the case in 1997. They have been given ample opportunity to pursue their case. However, to allow a case to linger interminably in the hope or expectation that Petitioners may someday undergo the medical testing proposed, testing which may or may not support their concepts, is at odds with "Congress's objective in the Vaccine Act to settle claims quickly and easily." Brice v. Secretary of HHS, 240 F.3d 1367, 1373 (Fed. Cir. 2001).

Petitioners aver that they cannot prove their case because they lack the financial wherewithal to bear the costs associated with the proposed medical testing. Were they entitled to compensation, such compensation would include *reasonable* diagnostic tests. § 15(a)(1)(B)(iii). However, it is important to remember that, in Vaccine Act cases, there is no discovery as a matter of right. R.C.F.C. Appendix B Rule 7. Put another way, "There may be no discovery in a proceeding on a petition other than the discovery required by the special master." § 12(d)(3)(B). When faced with costly or unique discovery requests, such as the one presented in this case, a common tact utilized

[4] In no way should Special Master French's relief be construed as an "indefinite stay." However, it certainly does appear that this petition was stayed pending a decision in the underlying case, 96-0188V, after which it was transferred to the present special master. Additional time was then permitted for Petitioners to present their case.

by the Office of Special Masters is to ascertain whether the information is reasonably attainable and whether it will assist the Court in answering the medical causation questions presented. Id.

In the present instance, Petitioners have presented no objective evidence, no literature, no expert opinion, nothing other than their unadorned assertions, that the proposed testing is in fact reasonable or, to rephrase, whether and to what extent it would assist the Court in answering the medical causation questions presented. Neither have Petitioners demonstrated that the cost of such testing is reasonable. Petitioners aver that the testing may cost anywhere from $5,000 to $40,000 per person for thirteen family members at a total cost of $65,000 to $520,000. The Court has no way of knowing whether that cost estimate is reasonable; however, presumably that information could be discovered. Regardless, the Court would be loathe to approve of such potentially costly testing without adequate assurances from qualified experts indicating that the tests would, in fact, do what Petitioners claim they will do. Petitioners have proffered no such assurances. Moreover, the Court is not authorized by the Vaccine Act to pay for medical testing up front; rather, if Petitioners prove by a preponderance of the evidence that they suffered a compensable vaccine-related injury, such compensation may include *reasonable* past unreimbursable medical expenses. § 15(a)(1)(A). *Per contra*, if Petitioners paid for the testing but were unable to prove that they "contracted" polio from exposure to their daughter, an OPV recipient, the Court would be unable to compensate them as they could not have brought the petition in the first place. § 11(c)(1)(A). In short, the existing record presents no legitimate reason to pursue these tests or to delay ruling on this case.

It is axiomatic to say that Petitioners bear the burden of proof in Vaccine Cases. In order to prevail, Petitioners must "demonstrate by a preponderance of the evidence the matters required by section 300aa-11(c)(1) of this title." § 13 (a)(1)(A). Subsection 11(c)(1) requires that one have either received a vaccine set forth in the Vaccine Injury Table or contracted polio, directly or indirectly, from an OPV recipient. § 11(c)(1)(A). Moreover, a special master may not find in favor of Petitioners based on their claims alone, unsubstantiated by medical records or by medical opinion. § 13 (a)(1).

In the present case, Petitioners have presented no expert medical opinion which corroborates the claim that their injuries were caused by the "polio virus strain" or that they ever "contracted" such an infection. Neither are their claims directly supported by the medical records. To date, Petitioners have submitted no evidence from which this Court can determine whether the petition was properly filed in accordance with the requirements of subsection 11(c)(1), much less decide whether compensation is due.

In the final analysis, Petitioners have offered no evidence from which this Court can conclude whether they in fact "contracted" polio from an OPV recipient. No literature or medical expert opinion has been filed nor any other evidence that the Petitioners or their children contracted polio from exposure to their daughter, an OPV recipient, or that their injuries were related to a polio strain virus. Therefore, it is questionable whether this Court can even hear this case. Assuming that it can, Petitioners have proffered no evidence that their medical theory – implicating the polio virus with the injuries alleged – is plausible. Althen v. Secretary of HHS, 418 F.3d 1274, 1281 (Fed. Cir. 2005)

("[R]equiring that the claimant provide proof of medical plausibility . . . is merely a recitation of this court's well established precedent."). Nor have they demonstrated that the proposed testing is reasonable, in and of itself, or that the costs associated therewith are reasonable. Even if the testing and costs were reasonable, the Court cannot front the money for the testing nor can it guarantee, were Petitioners to bear those costs, that compensation would be forthcoming. In fact, were the testing negative, inconclusive, or non-dispositive, it is entirely likely that the Court would not be authorized by the Vaccine Act to compensate Petitioners for such testing out of the public fisc.

In fine, this petition has progressed neither a jot nor tittle from the date it was reinstated. In general, the Court makes every effort to accommodate *pro se* petitioners, but the timing is once again propitious for a dismissal.

CONCLUSION

Accordingly, this petition is **DISMISSED**. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.

Pro se Petitioners are reminded that they may file a Motion for Reconsideration with this Court within 21 days of this decision if, for instance, they have additional evidence of which the Court was unaware at the time of this decision. Regardless, even if one files a Motion for Reconsideration, if one wishes the Court of Federal Claims to review this decision **one *must* file a Motion for Review within 30 days of this decision** regardless of whether a Motion for Reconsideration is pending. If Petitioners have any questions, they may contact my law clerk at (202) 357-6351. In addition, the Vaccine Rules are available to the public online at www.uscfc.uscourts.gov.

IT IS SO ORDERED.

s/ Richard Abell

Richard B. Abell
Special Master