

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: August 14, 2006)

DO NOT PUBLISH

KARL ITTMANN and KELLY MCCORD,)	
parents and natural guardians of their daughter,)	
NEAVE ITTMANN,)	
)	
Petitioners,)	
)	
v.)	No. 01-0564V
)	Decision on the record;
SECRETARY OF)	Dismissal
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

DECISION¹

Petitioners, Karl Ittmann and Kelly McCord (Mr. Ittmann and Ms. McCord), as natural guardians of their daughter, Neave Ittmann (Neave), seek compensation under the National Vaccine Injury Compensation Program (Program).² Mr. Ittmann and Ms. McCord filed a Program petition on October 1, 2001. *See generally* Petition (Pet.). They alleged that Neave suffered an encephalopathy after she received a Hepatitis B vaccination on April 29, 1999. Pet. ¶¶ 4-5.

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

On October 3, 2001, Chief Special Master Gary J. Golkiewicz assigned the case to Special Master Laura D. Millman. *See Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. Oct. 3, 2001). On December 7, 2001, Special Master Millman noted dichotomies between information contained in Neave's medical records and allegations in the petition. *See Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Special Master (Fed. Cl. Spec. Mstr. Dec. 7, 2001). Special Master Millman directed Mr. Ittmann and Ms. McCord to clarify their claim. *See id.* In addition, Special Master Millman directed Mr. Ittmann and Ms. McCord to submit their affidavits. *See id.* Further, Special Master Millman directed Mr. Ittmann and Ms. McCord to "obtain a medical expert and file his or her report as soon as possible." *Id.* at 2.

On March 20, 2002, Mr. Ittmann and Ms. McCord filed Mr. Ittmann's affidavit. *See* Petitioners' exhibit (Pet. ex.) 15 (refiled on April 20, 2006, as Pet. ex. 20).

On April 3, 2002, Special Master Millman directed Mr. Ittmann and Ms. McCord to "file a medical expert report and accompanying CV" before a status conference scheduled for May 23, 2002. *Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Special Master ¶ 2 (Fed. Cl. Spec. Mstr. Apr. 3, 2002). Special Master Millman rescheduled the May 23, 2002 status conference two times. *See Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Special Master (Fed. Cl. Spec. Mstr. May 8, 2002); *Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Special Master (Fed. Cl. Spec. Mstr. May 14, 2002). Special Master Millman convened eventually a status conference on June 10, 2002. *See Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Special Master (Fed. Cl. Spec. Mstr. June 12, 2002). Following the June 10, 2002, Special Master Millman deferred additional status conferences until Mr. Ittmann and Ms. McCord were "prepared to provide expert testimony." *See id.* ¶ 2; *see also Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Special Master (Fed. Cl. Spec. Mstr. Feb. 24, 2003).

On April 26, 2004, Ronald C. Homer, Esq. (Mr. Homer), entered his substitution as Mr. Ittmann's and Ms. McCord's attorney of record. *See* Motion for Substitution of Counsel of Record, filed April 26, 2004.

On August 11, 2004, Chief Special Master Golkiewicz transferred the case to Special Master Margaret M. Sweeney. *See Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. Aug. 11, 2004).

On October 27, 2005, Chief Special Master Golkiewicz transferred the case to this special master. *See Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. Oct. 27, 2005). This special master reviewed the petition and the exhibits. This special master convened an informal, yet substantive, status conference on February 21, 2006, to discuss further proceedings, "particularly, a medical expert's preliminary evaluation of the claim." *Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. Feb. 21, 2006). Following the February 21, 2006 conference, this special master directed Mr. Ittmann and Ms. McCord to file by no later than April 29, 2006, "an amended petition identifying clearly" the "theory of the case." *Id.* This special master contemplated also the submission of a

status report regarding Mr. Ittmann's and Ms. McCord's "progress in obtaining all updated medical records" and in obtaining "a medical expert's opinion supporting the amended petition." *Id.*

On April 19, 2006, Mr. Ittmann and Ms. McCord proffered several thousand pages of medical records. *See* Notice of Filing of Compact Disc, filed April 19, 2006, Pet. ex. 15-19.

On May 1, 2006, Mr. Ittmann and Ms. McCord filed a status report. *See* Petitioner's [sic] Status Report, filed May 1, 2006. They represented that they were awaiting receipt of several outstanding records. *See id.* ¶ 2. They stated that they would draft their amended petition and engage a medical expert after obtaining the outstanding records. *See id.* ¶ 3.

On May 4, 2006, this special master enlarged to June 30, 2006, Mr. Ittmann's and Ms. McCord's time within which to file the outstanding medical records, an amended petition and a status report regarding the medical investigation of the claim. *See Ittmann v. Secretary of HHS*, No. 01-0564V, Order of the Special Master (Fed. Cl. Spec. Mstr. May 4, 2006).

Mr. Ittmann and Ms. McCord did not file by June 30, 2006, any outstanding medical records, an amended petition and a status report regarding the medical investigation of the claim. Rather, on July 26, 2006, they moved for a ruling on the record. *See* Petitioner's [sic] Motion for a Ruling on the Record (Motion), filed July 26, 2006. They maintain that based upon his review of "petitioner's exhibits in this case," this special master "may now resolve the issue of whether the hepatitis B vaccinations administered on April 29, 2006[,] [sic] and on June 25, 1999, more likely than not, caused [Neave] to suffer mercury toxicity resulting in developmental delays and seizure disorder." *Id.* at 2.

A petitioner bears at least two burdens in Program proceedings: the burden of production and the burden of persuasion. The statute governing the Program requires initially a petitioner to submit with a petition particular items supporting the claim to compensation. *See* § 300aa-11(c). Then, the statute governing the Program requires a petitioner to *demonstrate* "by a preponderance of the evidence the matters" contained "in the petition." § 300aa-13(a)(1)(A). In a case involving the actual causation standard, a petitioner must adduce "a medical theory causally connecting the vaccination and the injury;" describe "a logical sequence of cause and effect showing that the vaccination was the reason for the injury;" and mount "a showing of a proximate temporal relationship between vaccination and injury." *Althen v. Secretary of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

By proffering medical records, educational records, therapy records and an affidavit from Mr. Ittmann, Mr. Ittmann and Ms. McCord have met at least in part their burden of production. *See* § 300aa-11(c). But, they have not expressed in a single document a complete, coherent basis for their Program claim. In their petition, they asserted, without detailed factual contentions, that Neave sustained an encephalopathy after the administration of a Hepatitis B vaccination on April 29, 1999. *See* Pet. ¶¶4-5. Although they have not amended their petition as two special masters have required,

they assert apparently now, without detailed factual contentions, that Neave sustained “mercury toxicity” from vaccination. Motion at 2.

Mr. Ittmann and Ms. McCord cannot expect surely this special master to divine the intricacies of potentially complex factual, medical and legal issues in the case absent their presentation of an explanation of their evidence in the context of legal precedents. Nevertheless, this special master has canvassed the record as a whole. Congress prohibited special masters from awarding compensation “based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” § 300aa-13(a). Numerous cases construe § 300aa-13(a). The cases reason uniformly that “special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone.” *Raley v. Secretary of HHS*, No. 91-0732V, 1998 WL 681467, at *9 (Fed. Cl. Spec. Mstr. Aug. 31, 1998); *see also Camery v. Secretary of HHS*, 42 Fed. Cl. 381, 389 (1998). At the outset, this special master notes that Neave’s medical records—augmented by Mr. Ittmann’s affidavit—reflect many essentially irreconcilable medical histories, preventing the special master from identifying the likely date of onset of Neave’s devastating neurological condition. *See Althen*, 418 F.3d at 1278 (“a proximate temporal relationship between vaccination and injury” is necessary for causation to exist). Next, the special master finds that Neave’s voluminous medical records do not contain the slightest hint that any physician has associated ever Neave’s devastating neurological condition with “mercury toxicity” from vaccination. Finally, Mr. Ittmann and Ms. McCord must concede that they have not advanced a medical expert’s opinion attributing Neave’s devastating neurological condition to “mercury toxicity” from vaccination.

This special master determines that Mr. Ittmann and Ms. McCord have not met at all their burden of persuasion. *See* § 300aa-13(a)(1)(A). Therefore, this special master rules that Mr. Ittmann and Ms. McCord have not established that they are entitled to Program compensation. In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

s/John F. Edwards
John F. Edwards
Special Master