

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-306V

Filed: April 8, 2011

MADISON DERIBEAUX, a minor, by her)	
parents and natural guardians, GUS)	
DERIBEAUX and KIMBERLY BURSHEIM,)	NOT TO BE PUBLISHED
)	
Petitioners,)	
)	
v.)	
)	
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

ORDER¹

On April 6, 2011, I convened a status conference to discuss Petitioners' oral motion to reschedule the hearing currently set for Thursday and Friday, May 5-6, 2011, due to a conflict in Petitioners' counsel's schedule (Mr. Shoemaker stated that he has an oral argument scheduled before the Federal Circuit on May 5th). During the status conference, Mr. Shoemaker renewed Petitioners' request to postpone the hearing, stating that he felt Petitioners would be prejudiced because he would be unable to prepare adequately for the hearing. Counsel for Respondent had no objection to the request to continue the hearing. I hereby cancel the hearing, for the reasons outlined below.

By way of background: this case was assigned to Special Master Millman when the Petition was filed in March 2005. After proceeding through the pre-hearing phase, the case was heard on September 20, 2007, and a decision finding entitlement to compensation was issued on December 17, 2007. On March 6, 2008, after the decision on entitlement was issued and while the case was in the damages phase, Petitioners filed additional medical records that were pertinent to entitlement. These records showed that Madison suffered from a genetic seizure disorder, diagnosed as Dravet's Syndrome. According to the belatedly-filed medical records, Madison tested positive for a spontaneous mutation of the DNA sequence variant of the SCN1A gene on December 31, 2005. See Pet. Ex. 15 at 8. This was eight months after the Petition was filed and two years before Special Master Millman's entitlement decision was issued. A number of additional medical records noted the diagnosis of Dravet's Syndrome. See Pet. Ex.

¹ The undersigned intends to post this decision on the United States Court of Federal Claims's 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)). 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 ruling will be available to the public. Id.

10 at 14, 17, 28; Pet. Ex. 11 at 8, 22, 26; Pet. Ex. 12 at 4, 15; Pet. Ex. 13 at 26; Pet. Ex. 14 at 5; Pet. Ex. 15 at 5-6, 15-17. None of these records was filed before the hearing and entitlement decision by Special Master Millman.

On January 16, 2009, Respondent filed a motion to re-open the issue of entitlement. Petitioners responded to the Motion on January 30, 2009. Petitioners were ordered to file a supplemental report from their medical expert and did so on June 11, 2009. On June 22, 2009, the case was transferred to me.²

The parties requested an additional hearing. I denied the request initially and ordered briefing on certain legal issues. See Order dated March 18, 2010. Following briefing, I set a hearing for January 27, 2011.³ Although I recognized that there might be an issue concerning the manner in which Petitioners' case had been litigated when it was before Special Master Millman, I hoped that if the case could be decided promptly on its merits there would be no need to delve into other matters.

As it turned out, Mr. Shoemaker notified my chambers in mid-December 2010 that his expert witness had a personal matter that would preclude his participation at the January 2011 hearing. The hearing was rescheduled for May 5-6, 2011. In late March 2011, Mr. Shoemaker notified my chambers that he had a scheduling conflict due to the oral argument before the Federal Circuit and requested an additional continuance of the hearing, to the late summer or fall of 2011.

To avoid delaying the hearing for a second time, I conducted several status conferences and offered the parties some options for going forward. I suggested that the start time of the first day of the hearing on May 5th be delayed to allow Mr. Shoemaker time to complete his oral argument and then conduct the hearing. Mr. Shoemaker rejected this option, stating that he felt Petitioners would be prejudiced because he would not have time to prepare adequately for both a hearing and oral argument.

I also inquired whether another attorney at Mr. Shoemaker's firm, Ms. Gentry, was available to conduct the hearing. Mr. Shoemaker stated that he had already made this inquiry, but that Ms. Gentry was unavailable.

I also requested that counsel for both parties consult with their respective clients to determine whether the parties would be willing to stipulate to be bound by the result in Stone v. Sec'y of Health & Human Servs., No. 04-1041V, 2010 WL 1848220 (Fed. Cl. Spec. Mstr. Apr.

² So far as appears from the record, the motion to re-open the case has not been ruled upon.

³ Meanwhile, on April 15, 2010, Special Master Golkiewicz issued a decision in Stone v. Sec'y of Health & Human Servs., No. 04-1041V, 2010 WL 1848220 (Fed. Cl. Spec. Mstr. Apr. 15, 2010), holding that the SCN1A genetic mutation, which (according to the belatedly-filed medical records) Madison has, constitutes an alternative cause under section 42 U.S.C. §300aa-13(a)(1)(B), precluding a finding of causation in fact. Following a remand in which Special Master Golkiewicz determined that the SCN1A mutation was the sole cause of the vaccinee's seizures, the Stone case again was appealed and is pending before Judge Margolis. Oral argument in Stone is set for May 4, 2011. Special Master Golkiewicz reached the same result in Hammitt v. Sec'y of Health & Human Services, No. 07-170V, 2010 WL 3735705 (Fed. Cl. Spec. Mstr. Aug. 31, 2010). His original decision in that case was filed August 31, 2010, and his decision on remand was filed March 4, 2011. Hammitt has again been appealed and is pending before Judge Wheeler.

15, 2010). As noted above, Stone involves the same genetic defect with which Madison was diagnosed. While this option would entail additional delay, it seemed to me that it would ultimately eliminate the need to hold another hearing, followed by another entitlement decision, and therefore result in the quickest possible disposition of this case.

At the status conference on April 6, 2011, Mr. Shoemaker responded that his client would entertain such a stipulation. Counsel for Respondent, however, stated that his client was not willing to be bound by the ultimate result in Stone, as Respondent did not want to “set a precedent.”

Having exhausted the possibility of promptly conducting a new hearing and rendering a new decision on entitlement, I turn to the road not previously traveled. Specifically, I will determine why the records showing the diagnosis of Madison’s genetic disorder were not filed until after the hearing and decision by Special Master Millman. Based on the results of that effort, I will determine whether the matter should be re-opened, whether a new hearing should be conducted, and under what conditions.⁴ Accordingly, it is ORDERED that:

Petitioners shall file a status report by **Friday, May 6, 2011**, containing the following items:

- (1) a detailed explanation as to how and when the records regarding Madison’s genetic condition and genetic testing were obtained and why these records were not filed until after the hearing was held and a decision was issued;
- (2) a detailed affidavit or declaration from Mr. Shoemaker stating his firm’s procedure for requesting, obtaining and filing medical records; and
- (3) a detailed affidavit or declaration from Petitioners setting forth their knowledge of the records regarding Madison’s genetic condition and testing, including the location of these records (and any copies) from December 2005 through the time of the hearing in September 2007 and, if known, why these records were not produced and filed until after the hearing was held and entitlement was decided.

The hearing scheduled for May 5-6, 2011, is hereby CANCELLED. The scheduling order regarding deadlines for pretrial submissions shall be held in abeyance until further notice.

A status conference is set for **Friday, May 13, 2011, at 11:00 A.M. Eastern Time**. The Office of Special Masters will initiate the call.

Any questions regarding this Order, and any notice required herein, may be directed to Francina Segbefia at (202) 357-6348.

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master

⁴ Section 300aa-12(d)(3)(B) states that “in conducting a proceeding on a petition a special master . . . may conduct such hearings as may be reasonable and necessary.”