

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS  
No. 08-927V  
Filed: February 14, 2013**

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Joseph H. Stewart, a minor , \*  
by his parents and natural guardians, \*  
JAMIE M. SWENSON and \*  
RANDY R. STEWART, \*  
Petitioners, \*

Autism; Dismissal; Failure to Prosecute

v. \*

SECRETARY OF HEALTH \*  
AND HUMAN SERVICES, \*  
Respondent. \*

\*\*\*\*\*

**DECISION<sup>1</sup>**

**Vowell**, Special Master:

On December 31, 2008, petitioners filed a Short-Form Autism Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),<sup>2</sup> on behalf of their minor child, Joseph, which adopted the Master Autism Petition for Vaccine Compensation. Thereafter, petitioners were ordered to file medical records and a statement regarding onset of symptoms. Order, issued Feb. 5, 2009.

Noting petitioners’ failure to comply with the February 5, 2009 order, on September 24, 2010, petitioners were ordered to file their medical records and a statement of completion within 30 days. On October 24, 2010, petitioners filed a motion for extension of time, requesting until November 25, 2010, to file their medical records. Petitioners filed a second motion for extension of time on November 29, 2010, requesting until January 5, 2011.

Petitioners filed twelve exhibits containing medical records on January 5, 2011, and on January 10, 2011 petitioners filed their statement regarding onset. Pursuant to the February 5, 2009 order, respondent filed her statement regarding jurisdiction and appropriateness of proceeding within the OAP on February 22, 2011.

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 Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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

<sup>2</sup> 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.

On October 13, 2011, petitioners were ordered to inform the court if they wished to continue to pursue their claim or exit the Vaccine Program. If petitioners wished to proceed, they were ordered to file an amended petition by no later than November 14, 2011. After petitioners filed five motions for extension of time to comply with the October 13, 2011 order, they were ordered to inform the court of their intentions to proceed or show cause why this case should not be dismissed for failure to prosecute by no later than May 23, 2012. Order to Show Cause, issued April 23, 2012.

On May 23, 2012, petitioners filed their show cause response. Petitioners indicated that Joseph was undergoing diagnostic testing for metabolic and mitochondrial disorders, and requested 60 days to obtain the results of the testing and inform the court if they would be continuing to pursue this claim. Although respondent objected, petitioners' request was granted, and on May 29, 2012, petitioners were ordered to inform the court how they intend to proceed by no later than July 22, 2012. If they intended to proceed, petitioners were ordered to file an amended petition. Additionally, petitioners were cautioned that no further extensions would be granted unless Joseph had a confirmed appointment with a physician to perform the desired medical testing.

Petitioners failed to comply with the May 29, 2012 order. On August 14, 2012, a second show cause order was issued. Petitioners were again ordered to inform the court how they wished to proceed or show cause why this case should not be dismissed for failure to prosecute by no later than August 28, 2012. On August 28, 2012, petitioners filed two exhibits and their show cause response. Petitioners reported that they have been in contact with Dr. Frye and were in the process of confirming an appointment date. Petitioners requested a two week extension to file an amended petition. Respondent objected to petitioners' request.

On September 11, 2012, a day before this case was reassigned to me, petitioners filed another motion for extension of time. Petitioners requested until November 24, 2012 to file their amended petition, and indicated that they intend to confer with Dr. Kendall in advance of filing their petition. Respondent objected to their extension request. I granted in part petitioners' motion. Noting that they had been under orders since October 2011 to file one, I ordered petitioners' amended petition be filed by October 15, 2012 and the medical records and testing results from Joseph's October 24, 2012 appointment with Dr. Fran Kendall be filed by November 26, 2012.

Petitioners belatedly filed their amended petition on November 26, 2012. They also filed a motion for an extension of time, until January 25, 2013, to file their medical records. On November 29, 2012, I granted petitioners an extension until December 21, 2012 to file the records from Joseph's recent appointment with Dr. Kendall.

On December 21, 2012, petitioners filed a motion for an extension of time in which to file Dr. Kendall's records. In the motion, petitioners' counsel noted that while he believes Joseph was evaluated by Dr. Kendall in October 2012, he had been unable to reach petitioners by phone or email to confirm the evaluation occurred or inquire as to the status of the records from the appointment. I granted in part petitioners' motion for an extension of time, and ordered petitioners' counsel to file a status report indicating whether he has been able to reach petitioners by no later than January 11, 2013.

In his January 11, 2013 status report, petitioners' counsel reported that despite making several attempts to reach petitioners he had not received a response from them. On January 14, 2013, I issued an order to show cause. My order noted that failure to respond to a court order because petitioners have failed to stay in contact with their attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. Petitioners were ordered to comply with my prior order and file the records from Joseph's recent appointment with Dr. Kendall by no later than February 13, 2012, or otherwise show cause for why this case should not be dismissed for failure to prosecute.

On February 13, 2013, petitioners' counsel conveyed that his clients, Jamie Swenson and Randy Stewart, continue to be unresponsive to his efforts to communicate with them and therefore he remains unable to file Dr. Kendall's records.

As summarized above, petitioners have been under orders for months to provide the court with records to support the amended petition. Petitioners have an obligation to follow court orders. A failure to do so, as well as a failure to file medical records or an expert medical opinion, is grounds for dismissal of a 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).

**This case is dismissed for failure to prosecute. The clerk shall enter judgment according.**

**IT IS SO ORDERED.**

**s/ Denise K. Vowell**  
Denise K. Vowell  
Special Master