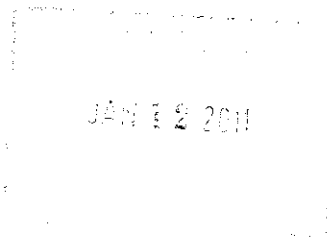


ORIGINAL

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(Filed: January 12, 2011)



IN RE: CLAIMS FOR VACCINE INJURIES *
RESULTING IN AUTISM SPECTRUM *
DISORDER OR A SIMILAR *
NEURODEVELOPMENTAL DISORDER *

 VARIOUS PETITIONERS, *

 v. *

 SECRETARY OF HEALTH AND *
 HUMAN SERVICES, *

 Respondent. *

AUTISM MASTER FILE¹

AUTISM UPDATE--JANUARY 12, 2011

This Update describes a number of recent developments in the Omnibus Autism Proceeding (“OAP”) that have occurred since the last Autism Update, issued on September 29, 2010. Since that last Update, we conducted unrecorded telephonic status conferences in the OAP on October 6 and December 8, 2010. Included in this Update are (1) a notice of disbandment of the Petitioners’ Steering Committee (see Part I below); (2) a description of “ADR” efforts to resolve fees and costs in the OAP cases (see Part II below); and (3) a lengthy description of other ongoing efforts to resolve the cases remaining in the OAP in light of the resolution of the OAP “test cases” (see part III below).

¹The Autism Master File constitutes the record of the Omnibus Autism Proceeding. The complete File is maintained by the Clerk of this court, and is available for inspection by the parties. An electronic version of the File is maintained on this court’s website. This electronic version contains a complete list of all documents in the File, along with the full contents of most of those documents; the exception is that the content of some documents has been withheld from the website due to copyright considerations or due to 42 U.S.C. § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court’s website at www.uscfc.uscourts.gov. From the court’s “Home” page, click on the “Vaccine Info” page, then on the “Autism Proceeding” page, then on the “Docket of Omnibus Autism Proceeding” page.

I

DISBANDMENT OF THE PETITIONERS' STEERING COMMITTEE

The Office of Special Masters was recently informed that the Petitioners' Steering Committee ["PSC"], established in 2002 to coordinate petitioners' efforts in the OAP, has disbanded.² The PSC representatives explained that the group effort on the OAP cases ended with the conclusion of the appeals, and the resolution of most of the attorney fees and costs applications, related to the test cases. (See p. __ below.) The remaining cases will be resolved on a firm-by-firm or individual basis, without PSC input or participation. We thus anticipate more frequent updates in an effort to communicate matters of general interest to members of the bar and *pro se* litigants.

We thank the attorneys who have participated in the PSC over the past eight years.

II

"ADR" EFFORTS TO RESOLVE FEES AND COSTS IN THE OAP CASES

Because the Vaccine Act permits the award of attorney fees and costs to unsuccessful litigants who brought their claims in good faith and upon a reasonable basis (see 42 U.S.C. § 300aa-15(e)(1)), resolving the issue of attorney fees and costs in thousands of pending OAP cases (there are still about 4700 cases pending) presents a significant logistical challenge for both parties as well as the court. Such resolution could also require considerable expense, since additional attorney and paralegal fees for time spent documenting, filing, and resolving fees and costs in each case would be necessary. For these reasons, counsel representing more than half the petitioners currently remaining in the OAP and counsel for respondent agreed to explore alternative methods for resolving the issue of fees and costs without the need for costly and time-consuming "case-by-case" adjudication. This "ADR" (alternative dispute resolution) process involves five law firms³

²On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued *Autism General Order #1* establishing the OAP. *Autism General Order #1* is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002). A group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee, was charged with obtaining and presenting evidence on the general issue of whether certain vaccines can cause autism, and, if so, in what circumstances.

³The five law firms involved in the ADR process are those with well over 100 OAP cases per firm, for a total of approximately 2500 cases, and involved firms that presented two of the OAP "test cases." Because there are over 200 law firms or solo practitioners representing OAP petitioners, it was not feasible to involve all of the firms in this pilot project. Should this process prove successful in resolving fees and costs for petitioners represented by these firms, **other firms may consider a similar approach in resolving fees and costs in their own cases.** No firm will be required to do so, however. The involved special masters are prepared to assist other firms in resolving their cases.

On December 15, 2010, two special masters issued fact rulings concerning attorney fees and costs, involving five law firms. These fact rulings were based on firm-by-firm reviews of billing records in OAP cases in various stages of case development. This review was designed to guide the parties in resolving disputes about the reasonable amount of fees and costs to be paid in OAP cases filed by those firms. These rulings may also have some utility in resolving OAP fees and costs issues in cases filed by other attorneys. We urge those attorneys with cases that will be dismissed to read these decisions carefully before filing fees and costs applications. The rulings are posted in the “Vaccine Info” section of this court’s website on the “Opinions/Decisions” page. The cases in which such rulings were filed are *Carter v. Sec’y, HHS*, No. 02-1028V; *Sampson v. Sec’y, HHS*, No. 03-943V; *Jacoby v. Sec’y, HHS*, No. 04-705V; *Whiffen v. Sec’y, HHS*, No. 03-1223V; *Fogle v. Sec’y, HHS*, No. 04-489V; *Hughes v. Sec’y, HHS*, No. 04-1115V; *Littlejohn v. Sec’y, HHS*, No. 03-1125V.

We expect to begin processing many case dismissals soon, along with payments of fees and costs, in cases filed by these five firms. We do not expect that this process will resolve all the petitions for the firms involved, as resolution of statute of limitations issues must await clarification by the Federal Circuit, but we expect the process will resolve a substantial number of the 2500 OAP petitions filed by these firms.

III

OTHER EFFORTS TO RESOLVE REMAINING OAP CASES

The Office of Special Masters has received a number of questions from attorneys who are not currently involved in this ADR process. We address some of those questions below.

1. “What is the status of the OAP cases?”

Decisions in each of the three “test cases” pertaining to the MMR vaccine rejected the petitioners’ causation theories. *Cedillo v. Sec’y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 89 Fed. Cl. 158 (2009), *aff’d*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec’y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 473 (2009), *aff’d*, 604 F.3d 1343 (2010); *Snyder v. Sec’y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff’d*, 88 Fed. Cl. 706 (2009).⁴ Decisions in each of the three “test cases” pertaining to the PSC’s thimerosal theory also rejected the petitioners’ causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer v. Sec’y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec’y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec’y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). Thus, the proceedings in these six “test cases” are concluded. Petitioners remaining in the OAP must now decide either to pursue their case by submitting new evidence on causation, or take other action to exit the Program.

⁴Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

As we indicated at the OAP status conference held during the Court of Federal Claims' October judicial conference, attorneys should begin contacting their clients, informing them of the results in the OAP test cases, and determining how their clients want to proceed. Two OAP petitioners' attorneys have prepared a letter explaining the legal issues presented, and have agreed to share that letter with other petitioners' counsel. You may contact James Ferrell of R.G. Taylor, II, P.C. & Associates, at jferrell@rgtaylorlaw.com, to obtain a copy of the letter.

Although the test cases do not constitute binding precedent, cases presenting the same theories of causation as those presented in the test cases are likely to be resolved similarly, in the absence of any new evidence of causation. Other theories of causation are being advanced in individual cases, but no new test cases are planned. Thus, petitioners who want to proceed will be expected to present their causation evidence expeditiously as a part of their individual cases. In this regard, petitioners who present expert reports or testimony that simply restate the evidence already presented and rejected in the test cases risk a determination that fees and costs for these efforts were not reasonably incurred.

2. "What should we expect from the court in the near future?"

In September 2010, we began issuing orders to *pro se* petitioners directing them to inform the court whether they intended to pursue their claim. Those *pro se* petitioners who elected to *pursue* their claims have begun receiving additional orders regarding the necessary process of identifying their theory of causation, filing any outstanding medical records, and locating and retaining expert witnesses. Reasonable requests for extensions of time have been granted. On the other hand, for those *pro se* petitioners who wish to *dismiss* their claims, our office is attempting to assist them in dismissing such claims in a manner that comports with the petitioners' desires concerning judgments and future litigation outside the Vaccine Program. In spite of our efforts to locate petitioners who have moved without providing the court a forwarding address, a number of cases have been dismissed for failure to respond to these court orders or to the earlier "Phase 1" orders to file medical and other records to document their claims.

Beginning this month, special masters will begin issuing orders to OAP petitioners represented by counsel, instructing counsel to inform the court whether their clients wish to proceed with their claim. We anticipate that such orders will be issued in all remaining OAP cases by the end of July 2011.

a. For clients who wish to pursue their claims

Those petitioners who wish to pursue their claims will be required to file ***amended petitions*** that conform to the requirements of 42 U.S.C. § 300aa-11(c)(1), setting forth which vaccines they believe were responsible and identifying a theory by which the vaccines caused or substantially aggravated an autism spectrum disorder. Additional orders establishing timelines for filing ***expert reports*** and developing the cases for causation hearings will be issued by the special master assigned.

b. For clients who want to exit the Program

Counsel should identify clients who acknowledge that they have inadequate evidence of causation to prevail upon the merits, and begin preparing those cases for dismissal decisions.⁵ Questions concerning how to exit the Program can be addressed to the OSM staff attorney or to the individual chambers involved. A motion to dismiss or motion for ruling on the record can be submitted along with an application for fees and costs.⁶

3. "I have a number of clients in the OAP. Can I work out a method to resolve my cases without having to file responses to orders in all my cases at once?"

We will not issue more than ten OAP orders to any one firm in a single month without prior coordination. We have identified the attorneys or law firms with more than ten OAP cases for special processing, recognizing that orders in many cases filed simultaneously will present special difficulties for these firms. We'll begin scheduling status conferences with firms with 22 or more cases during January-February 2011, to develop plans for identifying those cases that will be dismissed and those that will proceed to entitlement hearings. We will also stagger the orders for firms with between 11-21 cases. Although we will not grant indefinite delays in OAP cases, we will work with counsel to ensure that they are not overwhelmed by simultaneous court orders to produce documents, file amended petitions, and produce expert reports. Law firms or solo practitioners with fewer than ten cases may contact the court to discuss similar arrangements, but should do so soon.

4. "I can't find some of my clients or they are not responsive to my efforts to contact them. Should I move to withdraw as counsel?"

Motions to withdraw based on an inability to locate one's client are not routinely granted at this stage of the OAP. We suggest filing a status report detailing your efforts to locate your client, and providing documentation (such as certified mail receipts). This provides a court record that can be referenced should future claims of ineffective assistance of counsel or malpractice arise. If the clients remain unresponsive to court orders because they cannot be located or otherwise, the court may dismiss the petitioners' claims for failure to comply with court orders and failure to prosecute.

⁵See http://www.uscfc.uscourts.gov/sites/default/files/autism/OAP_filed_10_08_09.pdf for information on how to exit the Vaccine Program

⁶42 U.S.C. § 300aa-15(e)(1) permits an unsuccessful petitioner to recover compensation for reasonable attorney fees and costs, provided that the petition was filed in good faith and upon a reasonable basis.

5. “How can I file a General Order #9 Statement if I can’t find my client?”

Documenting unsuccessful attempts to locate a client will generally excuse the attorney from the obligation to file a General Order #9 statement.⁷ To the extent that the attorney knows of costs still due to a client who cannot be located, the attorney should follow his or her state bar’s guidance on disbursement of any costs paid by the court and owed to a client.

6. “I filed a Short-Form Petition on behalf of my client, but no other documentation was ever required or filed. Can I still collect fees and costs incurred in filing the petition, responding to court orders or respondent’s filings, and maintaining contact with my client over the years?”

That depends on whether documents in the attorney’s possession, or which can be obtained, can be filed that establish that the court has jurisdiction and that the claim was brought in good faith and upon a reasonable basis. For OAP cases, a petitioner must demonstrate that the petition was timely filed, that vaccines covered by the Program were administered, and that, thereafter, the vaccinee had a disorder on the autism spectrum. A vaccine record, birth certificate, and a record of diagnosis after receipt of covered vaccines should be sufficient to establish good faith and a reasonable basis. Respondent has indicated that, on a “litigative risk” basis, she will not interpose statute of limitations challenges to fees and costs in dismissed cases that were filed within 54 months of the vaccinee’s birth, because such cases present close factual questions that would be costly and time-consuming to litigate solely in the context of fees and costs. (Respondent may challenge timing in cases meeting these criteria in which causation will be litigated.)

7. “I have cases that respondent contends were untimely filed, and/or cases where I anticipate that respondent will raise a timeliness issue. How will these cases be handled by the court?”

As cases with timing issues are identified, those cases are being placed “on hold,” pending decisions of the Federal Circuit in two Vaccine Act cases.⁸ Absent unusual circumstances, we are not conducting fact hearings or issuing decisions on motions to dismiss until the apparent conflict in the Federal Circuit’s interpretation of the Vaccine Act’s statute of limitations is resolved.

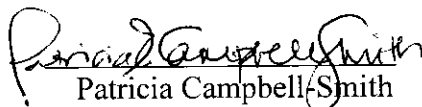
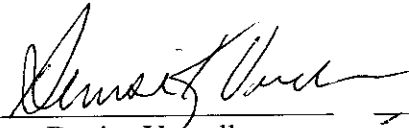
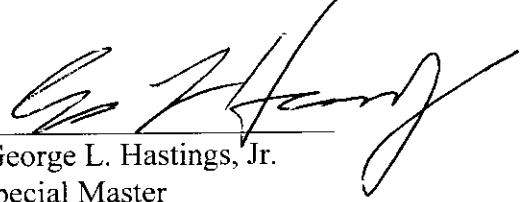
⁷See Office of Special Masters General Order #9 on this court’s website, in the “Court Orders” subsection of the “Vaccine Info” section.

⁸See *Carson v. Sec’y, HHS*, No. 02-873V, 2009 WL 2957312 (Fed. Cl. Spec. Mstr. Aug. 26, 2009), *aff’d*, slip op. at 6 (Fed. Cl. Jan. 7, 2010), *appeal docketed*, No. 10-5089 (Fed. Cl. Mar. 4, 2010) and *Cloer v. Sec’y, HHS*, 603 F.3d 1341 (Fed. Cir. 2010), *vacated*, No. 09-5052 (Fed. Cir. Oct. 25, 2010) (order granting rehearing *en banc*).

IV

FURTHER PROCEEDINGS

The undersigned special masters will continue to coordinate, among ourselves, procedures concerning OAP cases, in an effort to keep from overburdening either petitioners' or respondent's counsel. We will continue to issue these Autism Updates relevant to resolution of the autism cases. Accordingly, those interested in following the course of events in autism cases should continue to check our Autism Proceeding webpage.

		
Patricia Campbell-Smith Special Master	Denise Vowell Special Master	George L. Hastings, Jr. Special Master