

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**  
(E-Filed: May 31, 2007)

ANTHONY LAMBERTI,	)	
	)	PUBLISH
Petitioner,	)	
	)	
v.	)	No. 99-507V
	)	
SECRETARY OF THE DEPARTMENT OF	)	Motion for Judgment on the
HEALTH AND HUMAN SERVICES	)	Record; No Expert Opinion
	)	Offered for Program Claim;
	)	Motion to Dismiss for Lack of
	)	Jurisdiction; No Vaccination
Respondent.	)	Records; No Proof that Injury
	)	Lasted more than Six Months;
	)	Denial of Compensation
	)	

Clifford Shoemaker, Arlington, VA, for petitioner.

Catharine Reeves, with whom were Peter D. Keisler, Assistant Attorney General, Timothy P. Garren, Director, and Mark W. Rogers, Deputy Director, Department of Justice, Civil Division, Torts Branch, Washington, DC, for respondent.

**DECISION DENYING COMPENSATION**<sup>1</sup>

On July 26, 1999, Anthony Lamberti filed a petition pursuant to the National

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<sup>1</sup> Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless the decisions contain trade secrets or commercial or financial information that is privileged or confidential, or the decisions contain medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. Within 14 days of the filing of a decision or substantive order with the Clerk of the Court, a party may identify and move for the redaction of privileged or confidential information before the document's public disclosure.

Vaccine Injury Compensation Program<sup>2</sup> (the Act or the Program) seeking compensation for injuries allegedly sustained as a result of the hepatitis B vaccination<sup>3</sup> he received on March 8, 1998.<sup>4</sup> Petition (Pet.) ¶ 3. Mr. Lamberti alleges that he experienced an adverse reaction to this inoculation.<sup>5</sup> Id. Petitioner further alleges that he suffered “residual effects [from his vaccination] for more than six months.” Pet. ¶ 5.

On March 29, 2002, Mr. Lamberti filed Exhibits 1-6. See Petitioner’s Exhibits (Petr’s Exs.) 1-6. Exhibits 1-5 are medical records. See Petr’s Exs. 1-5. Exhibit 6 of petitioner’s filings is the Final Order issued on January 2, 2001, by a judge of compensation claims for the State of Florida’s Department of Labor and Employment Security Compensation. Petr’s Ex. 6. Further to evidentiary proceedings, the compensations claims judge found: (1) that petitioner was required to receive a three shot hepatitis B series as a condition of his employment as a firefighter with the City of Coral Springs; and (2) that petitioner satisfied his burden of proving, “by clear evidence, and by objective medical findings, a causal connection between his injury. . . and his employment.” Pet’r Ex. 6 at 5.

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<sup>2</sup> The National Vaccine Injury Compensation Program is set forth in 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.A. § 300aa-10-§ 300aa-34 (West 1991 & Supp. 2002) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

<sup>3</sup> The hepatitis B vaccine is “a noninfectious viral vaccine derived by recombination from hepatitis B surface antigen and cloned in yeast cells; administered intramuscularly for immunization of children and adolescents and of persons at increased risk for infection.” Dorland’s Illustrated Medical Dictionary 1999 (30th ed. 2003).

<sup>4</sup> A discrepancy exists between the date alleged in the petition for petitioner’s third Hepatitis B vaccination and the date of the alleged vaccination provided in the Final Order issued in his worker’s compensation claim, which was filed in this case as Exhibit 6. See Pet’r Ex. 6. In the petition filed in this case, petitioner alleges March 8, 1998 as the date of vaccination. See Pet. ¶ 3. However, the worker’s compensation order states that he was vaccinated on March 9, 1998. Pet’r Ex. 6. Because the resolution of this factual discrepancy is not material to the outcome of this decision, the undersigned does not determine the actual date of petitioner’s third hepatitis B vaccination.

<sup>5</sup> Petitioner does not specifically describe his injury as a result of his hepatitis vaccination in the petition. However, in the filed Rule 4 Report, respondent characterizes petitioner’s claimed injuries as a result of his hepatitis vaccinations to be polyarthritis, hepatitis, and weakness. Resp’t Report at 1. We need not address whether this characterization of petitioner’s injury is accurate because no opinion causally connecting any injury to his received vaccination.

On July 2, 2004, Mr. Lamberti filed Exhibits 7-12. See Petr's Exs. 7-12. Exhibit 7 is petitioner's employment file from the Coral Springs Fire Department. Pet'r Ex. 7. Exhibits 8-12 are additional medical records. On August 20, 2004, Mr. Lamberti filed, as Exhibit 13, more medical records from Coral Springs Medical Center, as a supplement to the medical records that were filed as Exhibit 1 from the medical center. See Pet'r Ex. 13.

On September 11, 2006, nearly two years after the filing of petitioner's medical records, petitioner's counsel filed a Motion for Judgment on the Record (Petr's Mot.) requesting "a short decision stating that the Petitioner has indicated that he does not believe that he can prove causation[,] . . . that he cannot find an expert to support causation in his case, and that . . . he has asked for a Judgment on the Record." Petr's Mot. at 1. On November 7, 2006, respondent filed a Rule 4 Report/Motion to Dismiss (Resp't Report), pursuant to Vaccine Rule 4(c).

In its responsive filing, respondent agreed that "[o]n the existing record, petitioner has failed to provide preponderant evidence in support of the petition for compensation." Resp't Report at 10. Respondent stated that petitioner "has not offered a reputable medical or scientific theory persuasively connecting H[epatitis]BV[accination] to his alleged injury, nor has petitioner shown a logical sequence of cause and effect between vaccination and injury." Id. at 11.

In the responsive filing, respondent also moved for the dismissal of petitioner's claim, contending that petitioner has failed to satisfy the jurisdictional prerequisites of the Act because petitioner "has not filed an immunization record, as required by 42 U.S.C. §§ 300aa-11(c)(1)(A) and -13(a)(1)(A)." Resp't Report at 2. Respondent points out that in contravention of the Act, "the date of immunization is based upon petitioner's allegations, rather than a medical record." Id. Additionally, respondent argued, petitioner's case should be dismissed because "it appears that petitioner did not suffer the residual effects or complications of his vaccine injury for more than six months after the administration of the H[epatitis]BV[irus] vaccine, as required by section 11(c)(1)(D)(iii) of the Act." Id.

On December 13, 2006, petitioner's counsel filed a Response to [Respondent's] Motion to Dismiss Due to Lack of Jurisdiction (Petr's Resp.). Petitioner stated that although he requested his vaccination records from the medical center "where [he] received his vaccinations," there is no vaccination record in the filed medical records. Petr's Resp. at 1. Although he "concur[red]" with respondent that proof of vaccination is a jurisdictional prerequisite under the Act, petitioner asserted that the many record references to his hepatitis B vaccinations by his health care providers establishes, by preponderant circumstantial evidence, that he received a covered vaccine under the Act. See id. at 4-5. The arguments in petitioner's reply brief are limited to the issue of proof of vaccination.

See generally *id.* Petitioner does not address the second ground for dismissal urged by respondent, specifically, the issue of whether petitioner suffered residual effects from the alleged vaccination for longer than six months.

Petitioner's motion for judgment on the record is now ripe for decision.

## **I. DISCUSSION**

### **A. The Factual Record**

Mr. Lamberti was born on July 17, 1973. Pet'r Ex. 1 at 25. Between 1993 and 1998, Mr. Lamberti saw Dr. Pancheta Wilson, his primary care doctor, for cold symptoms, regular physicals and other medical concerns. See generally Pet'r Ex. 5. Mr. Lamberti's medical records reflect that during this period of time he suffered from jaw pain and recurrent infections, including pneumonia, bronchitis, sinusitis, pharyngitis, and infectious mononucleosis. Pet'r Ex. 5 at 1-4, 9-21, 34-47; Pet'r Ex. 13 at 9.

On October 28, 1997, a little more than four months prior to petitioner's receipt of the vaccination at issue in this case, petitioner saw Dr. Wilson for a physical examination. Pet'r Ex. 5 at 3. Although Dr. Wilson made no note of "present" medical complaints by petitioner, she did question whether petitioner had been exposed to tuberculosis (TB) and also questioned whether petitioner suffered from an immune deficiency disorder. See *id.* Dr. Wilson recommended a measles-mumps-rubella vaccine ("MMR") and a tetanus toxoid vaccine. *Id.* During that office visit, she administered a flu vaccine to Mr. Lamberti. *Id.* (notes referencing "Fluzone," a type of flu vaccine). Two days later, on October 30, 1997, Mr. Lamberti had a TB skin test, which was negative. *Id.* On October 31, 1997, Mr. Lamberti received MMR and tetanus vaccinations. *Id.* at 4.

According to Mr. Lamberti's unrefuted testimony during his Worker's Compensation proceeding, he "was required to undergo a series of three shots to complete the vaccination for Hepatitis B" as a condition of his employment with the Coral Springs Fire Department, and he received his last hepatitis B injection on March 9, 1998. Pet'r Ex. 6 at 3. On March 26, 1998, nearly two weeks after receiving the third hepatitis B vaccination, Mr. Lamberti presented to Dr. Wilson with complaints of stomach pains and fatigue. Pet'r Ex. 5 at 5, Pet'r Ex. 6 at 3. He also reported that he had no appetite, his urine was dark, his head was "stuffy," and he was "feeling drained." Pet'r Ex. 5 at 5. Dr. Wilson's notes reflect that Mr. Lamberti reported that his symptoms had begun a few days earlier. *Id.* Dr. Wilson opined that petitioner was suffering from a viral syndrome, noting a "[p]ossible infection [with] mono[nucleosis] [versus] chronic fatigue [syndrome]." *Id.* Dr. Wilson also questioned whether petitioner might be suffering from hepatitis. *Id.*

Also appearing in the medical records from Dr. Wilson is a chart note dated March 30, 1998, stating that petitioner's mother called to inform the doctor's office that petitioner had a hepatitis vaccine "prior to last visit x 2 wks." Pet'r Ex. 5 at 6. Based on petitioner's abnormal liver tests, it was Dr. Wilson's impression that petitioner had hepatitis. Id. During petitioner's subsequent office visit to Dr. Wilson on April 2, 1998, Dr. Wilson again noted in her records that her impression was "hepatitis," but she failed to specify an etiology. Id. at 7.

Five days later, on April 7, 1998, Mr. Lamberti was admitted to the Coral Springs Medical Center Emergency Department with severe right hip pain and fever. Pet'r Ex. 1 at 1. The medical records reflect that Mr. Lamberti "had hepatitis vaccine within past two weeks. Then developed fever, weakness. Lab work showed + E[pstein]B[arr]V[irus],<sup>6</sup> sl[ightly] elevated LFTs (liver function tests)."<sup>7</sup> Id. Dr. Howard Gelb, an orthopedist, examined petitioner's right hip during this hospital admission and diagnosed petitioner with probable synovitis involving the hip (inflammation of the hip joint). Id. at 5-6. Dr. Gelb noted that his clinical examination did not suggest septic arthritis. Id. at 6. Dr. Gelb recommended that petitioner undergo an MRI of the hip joint to evaluate for lesions and fluid. Id. Petitioner's MRI revealed a small effusion and petitioner's lab work, subsequently performed on April 17, 2007, indicated negative results for bacterial blood cultures and certain viral infections, but was positive for CMV [cytomegalovirus] IgG [immunoglobulin G].<sup>8</sup> Pet'r Ex. 1 at 29. Petitioner's lab work also showed an elevated

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<sup>6</sup> Epstein-Barr virus is "a virus of the genus Lymphocryptovirus that causes infectious mononucleosis and is associated with Burkitt's lymphoma and nasopharyngeal carcinoma." Dorland's Illustrated Medical Dictionary, supra note 2, at 2044.

<sup>7</sup> Transaminase, also called an aminotransferase, is a sub-subclass of enzymes. Dorland's Illustrated Medical Dictionary, supra note 2, at 1934. Two transaminases, alanine aminotransferase ("ALT") and aspartate aminotransferase ("AST"), are found in the liver. American Association for Clinical Chemistry, Lab Tests Online: Liver Panel, at [http://www.labtestsonline.org/understanding/analytes/liver\\_panel/glance.html](http://www.labtestsonline.org/understanding/analytes/liver_panel/glance.html) (last modified Mar. 27, 2004). During his hospitalization, Mr. Lamberti's ALT and AST levels were elevated. Pet. Ex. 5 at 11.

<sup>8</sup> CMV refers to cytomegalovirus. Dorland's Illustrated Medical Dictionary, supra note 1, at 380, 469. Cytomegalovirus disease is

any of a group of diseases caused by cytomegalovirus infection, marked by characteristic inclusion bodies in enlarged infected cells. The classic disease is congenital, being acquired in utero from the mother . . . Most infected infants are asymptomatic, but in some there may be hepatosplenomegaly, jaundice, chorioretinitis, purpura, microcephaly, cerebral calcifications, and severe central

sedimentation (“sed”) rate, ANA, RF and elevated liver enzymes. Id. at 24- 35.

On April 14, 1998, petitioner saw Dr. Barry Waters, a rheumatologist, who observed swelling of petitioner’s right wrist, knee and joints of the right hand. Pet’r Ex. 2 at 19. Dr. Waters opined that the timing of the onset of symptoms suggested a correlation with petitioner’s hepatitis B vaccination, and he noted that petitioner suffered from an “acute hypersensitivity reaction secondary to that vaccine.” Id. at 19. Dr. Waters prescribed a dosage of prednisone to be tapered over time, prescribed Doxycycline to treat petitioner’s joint pain, and recommended further blood testing. Id. at 20.

Two days later, on April 16, 1998, petitioner saw Dr. Deutsch, a gastroenterologist, regarding his abnormal blood work and a five pound weight loss within one week. Pet’r Ex. 3 at 10. Dr. Deutsch’s notes from this visit indicate that Mr. Lamberti received a hepatitis B vaccination two weeks prior to the start of his symptoms. Id. Dr. Deutsch ordered lab work which showed elevated serum liver enzymes and normal bilirubin assays. Pet’r Ex. 3 at 1-9.

On April 30, 1998, petitioner returned to Dr. Wilson with complaints of recurrent pain, weakness, and fever. Pet’r Ex. 5 at 8. Petitioner informed Dr. Wilson that he had discussed his symptoms with Dr. Andrew Campbell, Director of the Medical Center for Immune and Toxic Disorders in Spring, Texas. Id. at 48. Petitioner reported that his arthralgia symptoms had returned with the tapering of his prednisone dosage. Id. at 8. Petitioner also reported dizziness that another of his medications was causing; Dr. Wilson prescribed a different medication for petitioner. Id. at 8, 48. Dr. Wilson wrote that petitioner might be suffering from a neuromuscular disorder or demyelinating disorder. Id. at 48.

On May 1, 1998, Mr. Lamberti requested a leave of absence from the Coral Springs Fire Department for the period of time from May 1, 1998 through May 31, 1998. Pet’r Ex. 7 at 16. Mr. Lamberti’s stated reason for the requested leave was “illness due to hepatitis vaccine.” Id.

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nervous system sequelae with blindness, deafness, quadriplegia, and mental retardation. . . . The group also includes cytomegalovirus mononucleosis; in immunocompromised patients there may be a disseminated, sometimes fatal, infection as well as specific syndromes such as cytomegalovirus encephalitis, cytomegalovirus pneumonia, or cytomegalovirus retinitis.

Id. at 531.

On May 5, 1998, petitioner returned to Dr. Wilson for a scheduled follow-up visit and reported that he was [still] experiencing joint pain, especially in the evening, but that his dizziness had subsided. Pet'r Ex. 5 at 49. Dr. Wilson noted no abnormal clinical findings and attributed his symptoms to arthralgia. Id.

On May 11, 1998, Mr. Lamberti again visited Dr. Wilson because he had been "doing work over weekend. Had a lot of joint pain and could hardly walk." Id. at 50. Dr. Wilson noted that both of Mr. Lamberti's knees were "swollen and painful" and that he "[h]ad to use crutches to get around at home. Id. at 50. According to the medical records, it was Dr. Wilson's impression that petitioner was suffering from a neuromuscular disorder and serum sickness. Id. at 51.

One week later, during a May 18, 1998 office visit to Dr. Wilson, petitioner informed Dr. Wilson that two days earlier, he had begun treatment with intravenous immunoglobulin at home with a nurse. Id. at 52. Dr. Wilson's notes from that same visit, reflect her opinion that Mr. Lamberti was suffering from arthralgia and "post hepatitis vaccine." Id. at 53.

On June 29, 1998, when Mr. Lamberti returned to Dr. Wilson, he informed Dr. Wilson that he had recently "finished total of 6 gamma glob[ulin] injections" and "feels fine except for palpitations off and on [that] do[] not last long." Pet'r Ex. 9 at 60. During his next visit to Dr. Wilson on July 13, 1998, approximately five months after his third hepatitis B vaccination, Mr. Lamberti was "feeling great" and "want[ed] to get back into the fire department." Id. at 59.

On August 13, 1998, Dr. Wilson wrote two letters. Pet'r Ex. 7 at 35-36. The first stated that Mr. Lamberti was "medically clear to resume active duties" at the fire department. Id. at 35. The second letter stated that petitioner was "medically clear to resume training" at the fire department. Id. at 36.

On July 26, 1999, petitioner filed his claim for compensation under the Vaccine Program. See Pet. at 1.

On March 23, 2000, petitioner began seeing Dr. Fawaz Alfarra as his primary care physician. Pet'r Ex. 9 at 48. Dr. Alfarra noted that Mr. Lamberti had a "systemic reaction to Hepatitis B vaccine (#3)" in March 1998. Id. The filed medical records show that Mr. Lamberti continued to see Dr. Alfarra for various cold symptoms through August 13, 2002. Pet'r Ex. 9 at 37.

On January 2, 2001, Mr. Lamberti received a worker's compensation award based

on the compensation claim judge's acceptance of Dr. Wilson's testimony that a causal link existed between the third hepatitis B vaccine that Mr. Lamberti received on March 9, 1998, and Mr. Lamberti's injuries. See Pet'r Ex. 6.

Subsequent references in petitioner's medical records indicate that petitioner has continued to work as a firefighter.

## B. Legal Analysis and Discussion

### 1. Jurisdiction

Respondent contends that petitioner's claim must be dismissed because petitioner has failed to meet the jurisdictional prerequisites for asserting a Program claim. Because jurisdiction is a "threshold" issue, it must be addressed first in a proceeding. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (internal quotation omitted) ("The requirement that jurisdiction be established as a threshold matter ... is 'inflexible and without exception.'"); see also Barnett v. Brown, 83 F.3d 1380, 1383 (Fed. Cir. 1996) (stating that a "statutory tribunal must ensure that it has jurisdiction over each case before adjudicating the merits") (emphasis added). A potential jurisdictional defect that is identified, by either the tribunal or a party, at a later stage of a proceeding also requires adjudication. See Barnett, 83 F.3d at 1383 (stating that a "potential jurisdictional defect may be raised by the court or tribunal, sua sponte or by any party, at any stage in the proceedings, and once apparent, must be adjudicated"). A tribunal may refrain from addressing jurisdiction as an independent issue, however, if the jurisdictional question is "inexplicably intertwined" with the merits question. See Nippon Steel Corp. v. United States, 219 F.3d 1348, 1353 (Fed. Cir. 2001) (construing the Steel Co. decision to permit a tribunal to bypass the jurisdictional question and decide the merits when "the jurisdictional issue and the merits are inextricably intertwined, and the former cannot be resolved without considering and deciding (at least in part) the latter.").

The issue of whether jurisdiction exists under the Vaccine Act is a question of law. Aull v. Sec'y of Health & Human Servs., 462 F.3d 1338, 1342 (Fed. Cir. 2006). "Parties cannot, by agreement, confer upon a tribunal jurisdiction that it otherwise would not have." United Pac. Ins. Co. v. Roche, 380 F.3d 1352, 1356-57 (Fed. Cir. 2004); Dunkleberger v. Merit Systems Protection Bd., 130 F.3d 1476, 1480 (Fed. Cir. 1997) ("[N]o actions of the parties can confer subject-matter jurisdiction on a tribunal and the principles of estoppel do not apply to vest subject-matter jurisdiction where Congress has not done so."). Thus, although Mr. Lamberti "concur[s] and has never argued to the contrary" that "proof of vaccination is a jurisdictional requirement under the Act," Petr's Resp. at 2, the court must conduct an independent inquiry. See Hines v. Sec'y of Health & Human Servs., 940 F.2d

1518, 1522 (Fed. Cir. 1991) (in which case the Federal Circuit considered, on its own, a jurisdictional issue under the Vaccine Act).

In determining whether, as respondent asserts in its motion to dismiss, proof of a received vaccination and proof of an injury sustained for more than six months are “jurisdictional prerequisites” under the Act, see Resp’t Report at 1, 7, the undersigned turns first to the language of statute. See Norman A. Singer, 2A Sutherland Statutory Construction § 46.1 (6th ed. 2000) (“[T]he meaning of the statute must, in the first instance, be sought in the language in which it is framed . . . .”) (internal citations omitted). The Vaccine Act provides, in pertinent part that

any person who has sustained a vaccine-related injury . . . may, if the person meets the requirements of subsection (c)(1) of this section, file a petition for compensation under the Program.

42 U.S.C. § 300aa-11(b)(1)(A). The referenced “subsection (c)(1)” addresses the mandatory contents of a petition for compensation under the Program. 42 U.S.C. § 300aa-11(c)(1) (describing what “[a] petition for compensation under the Program for a vaccine-related injury or death shall contain”) (emphasis added). In accordance with the “requirements of subsection (c)(1),” a petition filed for Program compensation must be filed together with an affidavit and supporting documentation, demonstrating that the person who suffered the alleged vaccine-related injury or death: (1) received a vaccine set forth in the Vaccine Injury Table; (2) received the vaccine in the United States or in its trust territories; (3) sustained, or had significantly aggravated, an illness, disability, injury, or condition listed on the Vaccine Injury Table or, if not listed, caused by a listed vaccine; (4) suffered the residual effects or complications of such illness, disability, injury, or condition for more than six months after the administration of the vaccine or died from the administration of the vaccine; and (5) did not previously collect an award or settlement of a civil action for damages for such vaccine-related injury or death. 42 U.S.C. § 300aa-11(c)(1).<sup>9</sup>

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<sup>9</sup> Section 11(c)(1) of the Vaccine Act states, in full:

A petition for compensation under the Program for a vaccine-related injury or death shall contain--

(1) except as provided in paragraph (3), an affidavit, and supporting documentation, demonstrating that the person who suffered such injury or who died--

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(A) 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,

(B)(i) if such person received a vaccine set forth in the Vaccine Injury Table--

- (I) received the vaccine in the United States or in its trust territories,
- (II) received the vaccine outside the United States or a trust territory and at the time of the vaccination such person was a citizen of the United States serving abroad as a member of the Armed Forces or otherwise as an employee of the United States or a dependent of such a citizen, or
- (III) received the vaccine outside the United States or a trust territory and the vaccine was manufactured by a vaccine manufacturer located in the United States and such person returned to the United States not later than 6 months after the date of the vaccination,

(ii) if such person did not receive such a vaccine but contracted polio from another person who received an oral polio vaccine, was a citizen of the United States or a dependent of such a citizen,

(C)(i) sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table in association with the vaccine referred to in subparagraph (A) or died from the administration of such vaccine, and the first symptom or manifestation of the onset or of the significant aggravation of any such illness, disability, injury, or condition or the death occurred within the time period after vaccine administration set forth in the Vaccine Injury Table, or

(ii)(I) sustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by a vaccine referred to in subparagraph (A), or

(II) sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine referred to in subparagraph (A),

(D)(i) suffered the residual effects or complications of such illness, disability, injury, or condition for more than 6 months after the administration of the vaccine, or (ii) died from the administration of the vaccine, or (iii) suffered such illness, disability, injury, or condition from the vaccine which resulted in inpatient hospitalization and surgical intervention, and

(E) has not previously collected an award or settlement of a civil action for damages for such vaccine-related injury or death[.]

42 U.S.C. § 300aa-11(C)(1).

The Vaccine Act mandates a Program award of compensation to a petitioner if the special master finds on consideration of the “whole” record:

(A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section 300aa-11(c)(1) of this title, and

(B) that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition.

42 U.S.C. § 300aa-13(a)(1)(emphasis added).

The statutory language requires not only that a petitioner meet the requirements of section 11(c)(1) of the Act to file a claim for compensation, but also that a petitioner prove, by a preponderance of the evidence, each of the required elements of section 11(c)(1) to establish entitlement to an award of compensation. And, proof of entitlement to compensation decides the merits of the Program claim.

In answering the question of whether the Vaccine Act’s statutory construction compels a finding that the requirements of section 11(c)(1) are jurisdictional, the undersigned is informed by the Supreme Court’s teaching in Arbaugh v. Y&H Corporation, 126 S. Ct. 1235 (2006).<sup>10</sup> In Arbaugh v. Y&H Corporation, 126 S. Ct. 1235 (2006), the Supreme Court considered whether the “employee-numerosity requirement” under Title VII of the Civil Rights Act of 1964,<sup>11</sup> which prohibits an employer from discriminating on certain defined bases, “is jurisdictional or simply an element of plaintiff’s claim for relief.” Id. at 1242. Pointing out that the “15-employee threshold” requirement appears in a statutory provision that ““does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts,”” the Supreme Court noted the “‘unfairness’ and ‘waste of judicial resources’ entailed in tying the employee-numerosity requirement to subject-matter-jurisdiction.” Id. at 1245 (alteration in original)(internal citations omitted). The Supreme Court stated:

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<sup>10</sup> The impact of Arbaugh in deciding a motion to dismiss a Program claim on jurisdictional grounds was addressed recently in Rydzewski v. Sec’y of Health & Human Services, Fed. Cl. No. 99-571, 2007 WL 949759 (Fed. Cl. Spec. Mstr. Mar. 12, 2007).

<sup>11</sup> The provisions of the Act, as amended, are set forth at 42 U.S.C. § 2000e-§ 2000e-17 (2000).

If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. The Supreme Court concluded in Arbaugh that “the threshold number of employees for application of Title VII is an element of a plaintiff’s claim for relief, not a jurisdictional issue.” Id.

\_\_\_\_\_ If, as respondent argues in this circumstance, the elements of section 11(c)(1) are “jurisdictional” prerequisites for the filing of a vaccine claim, it also appears from a reading of the Vaccine Act that the same elements of section 11(c)(1) are necessary to establishing the merits of a vaccine claim, which determines a petitioner’s eligibility for Program compensation. To the extent that the elements of section 11(c)(1) are jurisdictional limitations on the scope of the Vaccine Act’s, in the view of the undersigned, the jurisdictional aspects of the Act’s requirements, particularly, the required proof of vaccination and proof of a vaccine-related injury lasting more than six months, are not delineated with the clarity advocated by the Arbaugh Court. Nonetheless, even if the two referenced requirements are jurisdictional, the requirements are also inextricably intertwined, based on the language of the statute, with the requirements for proving the merits of a vaccine claim. Accordingly, as the Supreme Court instructed in Nippon Steel, a decision on the merits of petitioner’s claim is permitted without resolving the jurisdictional issue. For these reasons, respondent’s motion to dismiss on jurisdictional grounds are **DENIED**.

## 2. Causation

Here, Mr. Lamberti alleged in his petition that he received a vaccine covered by the Act and that he was injured as a result. Pet. at 1. Although petitioner has not filed a vaccination record in this case, the multiple medical record references in this case to his receipt of the hepatitis B vaccination series constitute adequate evidence that petitioner did in fact receive the alleged vaccinations.<sup>12</sup> See Cucuras v. Sec’y of Dept. of Health and Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993) (stating that contemporaneous medical records generally “warrant consideration as trustworthy evidence”).

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<sup>12</sup> See Pet’r Ex. 2 at 15 and 19; see also Pet’r Ex. 3 at 10; see also Pet’r Ex. 5 at 6 and 53; see also Pet’r Ex. 7 at 16; see also Pet’r Ex. 8 at 6; see also Pet’r Ex. 9 at 48, 55, 60, 61, 64, and 80; see also Pet’r Ex. 10 at 9; and see also Pet’r Ex. 13 at 44 and 47.

Mr. Lamberti further alleged that he suffered residual effects or complications from the received hepatitis B vaccinations for more than six months after the administration of the vaccines. Pet. ¶ 5. His medical records, however, indicate otherwise, see generally Petr's Exs. 1-5 and 8-13. On August 13, 1998, less than six months after petitioner received his third hepatitis B vaccination on March 9, 1998, Mr. Lamberti's primary care physician wrote two letters of release for petitioner, permitting him to return to work as a firefighter. Pet'r Ex. 7 at 35-36. Mr. Lamberti offers no argument or contrary evidence to demonstrate that his injury lasted for longer than six months.

Mr. Lamberti also declines to offer an expert opinion of causation in this case. Rather, in his motion for judgment on the record, Mr. Lamberti states that he cannot prove his case. Petr's Mot. at 1.

The Vaccine Act permits a petitioner to establish entitlement to compensation by showing that either: (1) the vaccinee suffered an injury listed on the Vaccine Injury Table within the prescribed time period, commonly referred to as an "Table" case, see § 300aa-14(a); or (2) the vaccinee suffered an injury not listed on the Vaccine Injury Table but caused in fact by the received vaccination, commonly referred to as an "off-Table" case, see § 300aa-11(c)(1)(C)(ii)(I). By either method, petitioner bears the burden of proving his claim by a preponderance of the evidence. § 300aa-13(a)(1).

In a "Table" case, petitioner benefits from a presumption of causation. See § 300aa-14(a); 42 C.F.R. § 100.3(a). The filed medical records in this case indicate that Mr. Lamberti began to experience symptoms approximately two weeks after receiving his third hepatitis B vaccination. See Pet'r Ex. 2 at 15, see also Pet'r Ex. 2 at 19. The record in this case does not support a finding that a Table injury occurred.

To establish entitlement to compensation for his "off-Table" claim, Mr. Lamberti must prove by a preponderance of the evidence that the vaccination that he received caused his subsequent medical condition. Mr. Lamberti satisfies his burden of proof "by providing: (1) a medical theory causally connecting [his] vaccination and [his] injury; (2) a logical sequence of cause and effect showing that [his] vaccination was the reason for [his] injury; and (3) a showing of a proximate temporal relationship between [his] vaccination and injury." Althen v. Sec'y of Dept. of Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005).

Here, Mr. Lamberti filed with his medical records a copy of the Final Order that issued in his worker's compensation proceeding. See Pet'r Ex. 6. The Final Order indicates that the compensation judge found, after hearing the testimony of Dr. Wilson, one of petitioner's physicians, that "the Hepatitis vaccine was the cause of [Mr. Lamberti's]

illness and symptomatology.” Id. at 4. Also, in Mr. Lamberti’s medical records filed in this action are notations by petitioner’s treating physicians, including Dr. Wilson, attributing petitioner’s medical condition to his received hepatitis B vaccinations, based, in part, on the timing of the onset of petitioner’s condition. It appears, however, that after returning to work as a firefighter and after receiving a worker’s compensation award, Mr. Lamberti appears to have elected not to pursue his vaccine claim any longer by declining to produce a medical opinion causally connecting his vaccination to his injury for the purpose of establishing entitlement to compensation under the Vaccine Program. See Pet’r Mot. at 1. Choosing not to develop the evidence in the record to establish a causal connection between his vaccination and his injury that might support a finding of entitlement, petitioner states that he is unable to find an expert to opine on causation in this case.

The Vaccine Act prohibits a special master from making a finding of a causal connection between a vaccinee’s injury and his received vaccination based on the claims of petitioner alone. See 42 U.S.C. §300aa-13(a)(1). The Act requires the substantiation of a petitioner’s claims “by medical records or by medical opinion.” Id. Here, there are notations of interest by petitioner’s treating physicians in the medical records associating petitioner’s condition with the receipt of his hepatitis B vaccinations, and in Capizzano v. Secretary of Health and Human Services, 440 F.3d 1317 (Fed. Cir. 2006), the Federal Circuit instructs that the opinions of treating physicians must be considered in the evaluation of a claim for Program compensation. But, the conclusions of treating physicians are not exempt from scrutiny. Rather, before accepting a medical opinion of causation, a special master must find that the opining expert or the treating physician formed a conclusion, based on a logical sequence of cause and effect grounded in reliable scientific evidence, concerning the cause of the patient’s injury. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 580, 590 (1993) (requiring that an expert’s opinion is grounded “in science’s methods and procedures” and requiring that an expert’s inferences or assertions are “derived by the scientific method”); see also Rules of Court of Federal Claims, Appendix B, Vaccine Rule 8(c) (tasking the special master with the responsibility for ensuring that evidence is “relevant and reliable”). The undersigned is unable to evaluate, solely on the record in this case, the bases for and the reliability of the notations in petitioner’s medical records associating his injury with his received vaccinations. Accordingly, consistent with petitioner’s request, his motion for judgment is **GRANTED**, and his claim for compensation must be **DENIED**.

### **III. CONCLUSION**

For the foregoing reasons, respondent’s motion to dismiss is **DENIED**, Mr. Lamberti’s motion for judgment on the record is **GRANTED**, and his petition for compensation is **DENIED**. The Clerk of the Court shall enter judgment consistent with

this decision.<sup>13</sup>

**IT IS SO ORDERED.**

s/Patricia E. Campbell-Smith  
Patricia E. Campbell-Smith  
Special Master

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<sup>13</sup> Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties' joint filing of notice renouncing the right to seek review.