

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 11-228 V

Filed: August 17, 2012

Not for Publication

SHARON SEASE,

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Petitioner,

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v.

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Dismissal; Failure to Prosecute

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

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Respondent.

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Sharon Sease, East Canton, OH, for petitioner (pro se).

Jennifer L. Reynaud, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

On April 11, 2011, petitioner's mother filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10 to -34 (2006), alleging that Gardasil vaccine caused her daughter neurological injuries. On October 23, 2011, petitioner, having reached the age of majority, was substituted for her mother as petitioner.

On August 16, 2011, the undersigned held a telephonic status conference with the parties. Petitioner's counsel requested 90 days within which to file an expert report. The undersigned granted petitioner's counsel's request and set a new status conference for November 28, 2011.

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

On November 14, 2011, petitioner moved for an extension of time within which to file a status report until December 14, 2011, regarding the progress of her search for an expert. Once she obtained an expert willing to review her case, she requested an additional 60 days to file her expert report. The undersigned issued an Order on November 15, 2011, granting petitioner's motion and setting a new status conference for February 16, 2012.

On December 13, 2011, petitioner moved for a second extension of time within which to file a status report until January 17, 2012 "regarding the future proceedings in her case" and for a suspension of the deadline to submit an expert report. The undersigned issued an Order on December 14, 2011, granting petitioner's motion and keeping the telephonic status conference previously scheduled for February 16, 2012.

On January 17, 2012, petitioner filed a third motion for an extension of time until February 17, 2012 to file a status report regarding future proceedings in the case. She also requested the rescheduling of the February 16, 2012 telephonic status conference. The undersigned issued an Order dated January 18, 2012, granting petitioner's motion, noting that petitioner had been searching for an expert to review the case since August 2011. The undersigned rescheduled the status conference for February 23, 2012.

On February 17, 2012, petitioner's counsel filed a status report, informing the court that counsel did not intend to proceed further with the case. Petitioner's counsel had spoken with petitioner by telephone on January 25, 2012, and petitioner said she would update counsel prior to February 17, 2012. Despite follow-up calls on February 10 and February 14, 2012, counsel was unable to reach petitioner to discuss further proceedings in the case. The undersigned held a status conference on February 27, 2012, during which petitioner's counsel stated that she attempted to reach her client once more but was unsuccessful.

On February 28, 2012, the undersigned issued an Order to Show Cause. The undersigned explained that petitioner had not provided evidence to make a prima facie case, either by way of medical records or medical expert opinion, and ordered petitioner to show cause why this case should not be dismissed by March 29, 2012.

On March 29, 2012, petitioner's counsel filed petitioner's response to the Order to Show Cause. Petitioner's counsel contacted petitioner on March 5, 2012 and informed counsel that she did not want her case to be dismissed and would seek representation from another attorney.

During a status conference held on April 3, 2012, the undersigned set a schedule for filing an application for interim fees and costs as well as a motion to withdraw. Petitioner's counsel filed a motion to withdraw on June 8, 2012, which the undersigned granted on June 11, 2012. In the Order granting the motion, the undersigned directed petitioner to call her law clerk by June 29, 2012 to schedule a telephonic status conference. Petitioner did not contact the undersigned's law clerk.

On July 9, 2012, the undersigned issued a second Order to Show Cause. Once again, the

undersigned detailed petitioner's medical records and explained that petitioner needed to provide expert medical opinion supporting causation in order to make a prima facie case. The undersigned ordered petitioner to contact her law clerk by August 9, 2012 to schedule a telephonic status conference or to advise the law clerk that she has retained counsel, or her case would be dismissed for failure to prosecute and failure to make a prima facie case.

To date, petitioner has not contacted the undersigned's law clerk.

FACTS

Petitioner was born on August 16, 1993.

On April 17, 2008, she received Gardasil vaccine. Med. recs. Ex. 3, at 11; Ex. 6, at 7. On the same day, petitioner went to Stark County Health Department, complaining of occasional chest tightness. She was referred to the pediatric cardiology clinic which diagnosed her with hypercholesterolemia and referred her to the pediatric pulmonary clinic for exercise-induced asthma. Med. recs. Ex. 6, at 1-2.

Almost two months after she received Gardasil vaccine, petitioner went to Aultman Hospital Emergency Department on June 11, 2008 with a syncopal episode which was diagnosed as headache. Dr. Timothy Cooley suspected petitioner had migraine. Med. recs. Ex. 5, at 12, 17.

On June 16, 2008, petitioner went to the emergency department for a follow-up and complained of left-sided headache with photophobia and nausea. She said that she could not breathe, had tingling around her lips, the left side of her body was numb, and could not talk. She stated she had lost consciousness (which was unwitnessed). Her arm was shaking and she was weak and tired. She said that the constellation of her symptoms started in mid-April after she received Gardasil and she had daily nausea. The ER diagnosed her with migraine headaches and syncopal episodes secondary to hyperventilation. Dr. Briana Yee- Providence considered the suggestion by petitioner's mother that her symptoms started after she received the Gardasil vaccine. Dr. Yee-Providence stated that she reviewed the literature, that there did not appear to be any reported cases of these symptoms with the Gardasil vaccine, and that approximately two months had passed since petitioner received the vaccine. Med. recs. Ex. 2, at 9-10.

On June 18, 2008, petitioner had an EEG and chest x-rays. The EEG was normal, and no epileptiform activity was detected. The chest x-rays were unremarkable. Med. recs. Ex. 5, at 1-2.

On June 25, 2008, Nurse J. Patrick filled out a VAERS Report, stating petitioner's onset of symptoms was June 11, 2008 when she woke up weak and dizzy with breathing problems, passed out, had severe headache, was confused, and fell several times. Med. recs. Ex. 6, at 15.

On July 7, 2008, petitioner had a follow-up appointment with Dr. Yee-Providence. Petitioner's mother complained that petitioner continued to suffer from loss of consciousness, fatigue, and shortness of breath. Dr. Yee-Providence noted that petitioner appeared to be

lethargic, sleepy, had a decreased appetite, and was not herself. Petitioner did report that she felt somewhat depressed. Dr. Yee-Providence performed a physical examination and reported that the results from her CBC, EEG, and chest x-ray were all unremarkable. Dr. Yee-Providence concluded that she could find no medical reason for petitioner's fatigue and considered whether the symptoms were due to her depression. Med. recs. Ex. 2, at 9.

On July 30, 2008, petitioner saw Dr. Blaise L. Congeni, an infectious diseases specialist at Akron Children's Hospital. Dr. Congeni stated that on physical examination, petitioner was alert and active. He ordered a CBC, sedimentation rate blood test, and complete metabolic panel, which were all normal. He wrote to her primary care physician that he "believe[s] that there is potential here that this is vaccine related, although it is not clear exactly what the nature of the illness at this time is. I think for further clarification, we may need an additional neurologic evaluation" Med. recs. Ex. 8, at 15.

On September 23, 2008, petitioner had a consultation with a neurologist, Dr. Abdalla Abdalla. Petitioner described her symptoms beginning on April 17, 2008 when she received the vaccine and experienced left-sided numbness and pain around the injection site. Petitioner said that she experienced intermittent episodes of shortness of breath, chest tightness, and blurred vision. Petitioner also described her syncopal episode which occurred on June 18, 2008. After an examination, Dr. Abdalla wrote that petitioner's headaches do not satisfy the criteria for migraine headaches. In his consideration, he wrote "while symptoms that occurred in April might well be secondary to Gardicil [sic] but I'm not sure I would reconcile [the] recent onset of headaches to that vaccination." Med. recs. Ex. 8, at 11-12.

On October 9, 2008, at the request of Dr. Abdalla, petitioner had a Sleep Deprived, Awake/Sleep EEG performed. The awake and sleep EEG were normal. Med. recs. Ex. 8, at 26.

On November 17, 2008, petitioner had a follow-up appointment with Dr. Abdalla. Petitioner complained of having headaches several times a week but had no further syncopal episodes. Dr. Abdalla noted that petitioner's mother still believes that the symptoms are secondary to the Gardasil vaccine and suggested that the mother approach the infectious diseases doctor about her concerns. Med. recs. Ex. 8, at 5.

DISCUSSION

To satisfy her burden of proving causation in fact, petitioner must prove by preponderant evidence: "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." Althen v. Sec'y of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Sec'y of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by "proof of a logical sequence of cause and effect showing that the vaccination was the

reason for the injury[.]” the logical sequence being supported by “reputable medical or scientific explanation[.]” i.e., “evidence in the form of scientific studies or expert medical testimony[.]”

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Id. at 1148.

Petitioner must show not only that but for the vaccine, she would not have had whatever condition she has, but also that the vaccine was a substantial factor in bringing about her alleged injury. Shyface v. Sec’y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Since petitioner filed her petition, she has not provided evidence to make a prima facie case. She alleges neurological injuries from the vaccine but has not produced medical records or medical expert opinion to substantiate her allegation that she has a neurological injury or that her neurological injury is vaccine-caused. Instead, the medical records show that petitioner’s treating doctors considered whether the Gardasil vaccine played a role in bringing about petitioner’s symptoms and then rejected the theory. See Med. recs. Ex. 2, at 9–10 (Dr. Yee-Providence, emergency department physician); Ex. 8, at 11–12 (Dr. Abdalla, petitioner’s neurologist). The Vaccine Act does not permit the undersigned to rule in favor of petitioner based only on her allegations unsupported by medical records or medical opinion. 42 U.S.C. § 300aa-13(a)(1).

Additionally, petitioner did not comply with the undersigned’s July 9, 2012 Order to Show Cause. This was the second Order to Show Cause issued in this case, yet petitioner did not contact the law clerk to inform the court how she would like to proceed with her case. Finally, the undersigned specifically stated in her Order to Show Cause that if petitioner did not contact the law clerk by August 9, 2012, then her case would be dismissed.

CONCLUSION

Petitioner’s petition is **DISMISSED** for failure to prosecute and failure to make a prima facie case. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

Dated: _____

Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party’s filing a notice renouncing the right to seek review.