

OFFICE OF SPECIAL MASTERS

June 5, 2006

VERONICA PEUGH, Administratrix *
of the Estate of JUSTIN PEUGH, *

Petitioner, *

v. * No. 99-638V

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

ORDER¹

Because decedent Justin Peugh died of hypertension, the undersigned issued an Order to Show Cause, dated March 15, 2006, directing petitioner to provide evidence that the cause of Mr. Peugh's death was causally related to his vaccine injury, which the undersigned held in an Order dated April 21, 2006, was GBS with spinal cord involvement. By Order of May 31, 2006,

¹ Because this order contains a reasoned explanation for the special master's action in this case, the special master intends to post this order 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 clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete 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 delete such material from public access.

petitioner is to file an expert report causally linking the hypertension to Mr. Peugh's vaccine injury by June 28, 2006.

The undersigned calls to the parties' attention to two cases: Shyface v. Secretary of HHS, 165 F.3d 1344, 1353 (Fed. Cir. 1999), and Zatuchni v. Secretary of HHS, No. 94-58V, 2006 WL _____ (Fed. Cl. Spec. Mstr. May 10, 2006). In Shyface, the Federal Circuit stated that, where there is more than one factor involved in causing a vaccine injury and death (Cheyenne Shyface died after experiencing 110° fever as a consequence of both DPT vaccine and E. coli infection), petitioners need prove only that the vaccine was a substantial, not a predominant, factor in causing the injury and death, and that, but for the vaccination, the injury and death (at that time) would not have occurred.

In Zatuchni, special master George Hastings initially dismissed the case, but the Honorable Thomas Wheeler reversed, holding that MMR vaccine caused E. Barbara Snyder's joint pain and fibromyalgia. Unknown to the special master, Ms. Snyder died before the hearing. Ms. Zatuchni is the executor of her estate. Judge Wheeler remanded the case to the special master to decide if the vaccine injury was causally related to Ms. Snyder's death. Ms. Snyder was not subject to an autopsy. Her treating physician filled out the death certificate and testified before the special master that the primary cause of Ms. Snyder's death was chronic bronchitis and chronic obstructive pulmonary disease leading to cardiorespiratory arrest due primarily to smoking, but also to other significant conditions (post-rubella vaccine syndrome and fibromyalgia) which prevented Ms. Snyder from exercising, and that she would not have died when she did if she did not have those other conditions. Slip op. at 6.

Respondent submitted two expert reports from a rheumatologist and a pulmonologist, neither of whom the special master found more credible than Ms. Snyder's treating physician.

Unlike in Shyface where the evidence showed the two factors (DPT vaccination and E. coli infection) to be in equipoise, in Zatuchni, the special master found that the known factor unrelated to the vaccination (smoking) was the predominant factor, but petitioner still prevailed because she had proved by preponderant evidence that the post-rubella vaccine syndrome and fibromyalgia were substantial factors in causing the death (by preventing Ms. Snyder from exercising) and these factors were vaccine-related per Judge Wheeler's opinion.

In the instant action, the undersigned has already held that hepatitis B vaccine caused Mr. Peugh's GBS with spinal cord involvement. Although the primary cause of his death, according to the death certificate, was hypertension, the secondary causes were TM (a reflection of his spinal cord involvement) and chronic pain. Although petitioner will still have to file an expert report linking the vaccine injury to Mr. Peugh's death, the parties should be aware that the case law looks favorable for petitioner.

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master