

qualified experts testified that the hepatitis B vaccine does not cause T1D. Acknowledging that this case involves the HPV vaccine, I referred petitioner's counsel to a Program decision in which I addressed the issue of vaccine causation of T1D in general.³

On November 27, 2012, petitioner filed a motion for a dismissal decision.⁴ Believing that she will be unable to prove causation if she proceeds in the Program, petitioner requests that her case be dismissed. Further, as indicated in petitioner's motion, the parties have agreed to bear their own costs.⁵

Under the Act, a petitioner may not be given a Program award based solely on the petitioner's claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. § 13(a)(1). To receive compensation under the Program, a petitioner must prove either 1) that she suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of her vaccinations, or 2) that she suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A) and 11(c)(1). Actual causation must be demonstrated under the rubric set forth in *Althen v. Sec'y, HHS*, 418 F.3d 1274, at 1278. Because the vaccine alleged to be causal in this case is not associated with a Table Injury, petitioner cannot demonstrate a Table case. Further, as petitioner acknowledges in her motion, the record does not contain preponderant evidence sufficient to demonstrate that petitioner's alleged injury was vaccine-caused. As discussed during the November 6, 2012 status conference, petitioner's case falls short of the *Althen* requirements.

³ See *Hennessey v. Sec'y, HHS* No. 01-190V, 2009 WL 1709053 (Fed. Cl. Spec. Mstr. May 29, 2009) *review denied, decision aff'd*, 91 Fed. Cl. 126 (Fed. Cl. 2010).

⁴ Petitioner has titled her motion: "Petitioner[s] Motion for Voluntary Dismissal." As filed, this motion does not clearly indicate the method by which petitioner intends to exit the program. Furthermore, the desired method of exit cannot be gleaned from the statements within the motion. Under Vaccine Rule 21(a), there are two ways in which a petitioner may voluntarily dismiss her case. A petitioner may file "a notice of dismissal at any time before service of respondent's [Rule 4] report." Vaccine Rule 21(a)(1)(A). This option, resulting in a "dismissal decision," preserves a possible right to file a civil suit in another court. Alternatively, the parties may stipulate to a dismissal. Vaccine Rule 21(a)(1)(B). This second option, resulting in an "order concluding proceedings," may foreclose a petitioner from filing a civil action in another court. Here, petitioner's counsel indicates in petitioner's motion that she has informed petitioner "that a voluntary dismissal will not preserve [her] right to file a tort suit." This suggests that petitioner intends to voluntarily dismiss her case via a stipulation of dismissal. The motion, however, has not been signed by "all parties who have appeared in the action" as required by Vaccine Rule 21(a)(1)(B), nor does its title contain the word "stipulation."

Due to the confusion over petitioner's chosen form of voluntary dismissal, my law clerk contacted petitioner's counsel. After he referred petitioner's counsel to Vaccine Rule 21(a) and the "Guidance to Petitioners on How To Exit the Vaccine Program" (available on the Court of Federal Claims website), petitioner's counsel sent an e-mail to my chambers on November 28, 2012, stating petitioner's intention to "proceed with this claim by filing a motion for a dismissal decision" to preserve petitioner's "right to file a future civil suit."

⁵ Although no reason is given for this concession, it appears as though the claim may have been untimely filed.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that she suffered a “Table Injury” or that her injuries were “actually caused” by a vaccination. **Thus, this case is dismissed for insufficient proof. The Clerk shall enter judgment accordingly.**⁶

IT IS SO ORDERED.

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

⁶ To preserve whatever right petitioner may have to file a civil action in another court, she must file an “Election to File a Civil Action” which rejects the judgment from this court within 90 days of the date judgment was filed.