In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-0883V

Filed: 8 May 2009

BRIAN L. DOBBEN, Parent of LEVI A. DOBBEN, a Minor,	*	
Petitioner,	*	
v.	*	**UNPUBLISHED DECISION**[1]
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Brian L. Dobben, Esq., Chicago, Illinois, *Pro Se*;
Voris Johnson, Esq., United States Department of Justice, Washington, D.C., for Respondent.

AMENDED[2] DECISION ON ENTITLEMENT BASED UPON THE WRITTEN RECORD AND ORDER STRIKING THE UNAMENDED DECISION

ABELL, Special Master:

On 17 December 2007, the Petitioner filed a "short form autism petition" for compensation under the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act" or "Act"),[3] alleging that his son, Levi, suffered from Autism, and that such was related to the administration of certain

[1] This opinion constitutes my final "decision" in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Therefore, unless a motion for review of this decision is filed within 30 days after the time given herein to Petitioner to make such filing has elapsed, the Clerk of this Court shall enter judgment in accord with this decision. Moreover, Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of decision within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

[2] The unamended decision in this matter was filed on 1 May 2009, but bore certain scrivener's errors, which counsel dutifully brought promptly to the Court's attention.

[3] The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 et seq. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

unspecified vaccinations. Petition (Pet.). As an alleged vaccine-related injury, Petitioner demanded compensation for unreimbursable expenses for past or future treatment, pain and suffering, and attorney's fees and costs. This Court is jurisdictionally invested with the task of determining whether Petitioner is entitled to compensation. Due to the lack of substantiating proof of the types statutorily-required and amounting to a preponderance of the evidence, the Court denies compensation.

I. PROCEDURAL HISTORY

Petitioner represented himself ably, and filed some of the medical records pertaining to this case, but likely not all of them. See Petitioner's Exhibits ("Pet. Ex.") 1-3. Respondent filed its Report, pursuant to Rule 4(c), on 13 February 2008, denying compensation and noting that insufficient medical records had been filed to adequately evaluate the Petition, among other objections. Respondent moved the Court on 24 April 2008 to dismiss the Petition for lack of timely filing, and Petitioner filed a memorandum in opposition to the motion on 2 July 2008. The Court has not ruled on Respondent's motion contesting the timely filing of this Petition, but rules upon Petitioner's instant motion to dismiss the Petition on different grounds.[4] Petitioner moved on 12 January 2009 for a ruling on the written record, and the Court hereby grants that motion by ruling below, as set forth herein.

II. FACTUAL RECORD

Petitioner, in his "Statement Regarding Onset" filed on 12 March 2008, relates that Levi was born 15 July 1999, and was administered over the course of his life the MMR, DTP, DTaP, Hepatitis B, and Hib vaccines. The same filing adds that the first medical diagnosis of language/communication problems, made by David Ritacco, M.D. on 23 May 2006. *Id*., citing Pet. Ex. 3.

After describing Levi's then-current condition in a letter dated 23 May 2006, Dr. Ritacco summarized that Levi was "a 6½ -year-old with language and communication problems in the autistic spectrum," and that, even if Levi did not meet "the strict criteria for autism," at least "he fell into the category of pervasive developmental disorder." Pet .Ex. 3 at 2. His analysis therein is almost purely descriptive and narrative, limited in actual observation to one or a few visits without

[4] If Petitioner moves for attorneys' fees and/or costs, pursuant to § 15(e) of the Vaccine Act, the Court would need to revisit the issue of timely filing as it remains Respondent's position that a lack of timely filing is a jurisdictional defect, and the decisional law is clear that attorneys' fees may only be recovered where the Court held jurisdiction over the underlying petition. *See Brice v. Secretary of HHS*, 358 F.3d 865, 869 (Fed. Cir. 2004). Also, recovery of attorneys' fees and costs in cases that do not prevail on entitlement is contingent upon a factual showing that the petition was filed upon a reasonable basis with good faith. § 15(e)(1).

a continued course of examination, and in it the doctor did not opine on aetiology, and certainly did not link the symptoms observed to the administration of a vaccine. *See* Pet. Ex. 3.

III. DISCUSSION

This Court is given jurisdiction to award compensation for claims where the medical records or medical opinion have demonstrated by preponderant evidence that either a listed Table Injury occurred within the prescribed period or that an injury was actually caused by the vaccination in question. § 13(a)(1). For certain categories of vaccines, the Vaccine Injury Table lists specific injuries and conditions, which, if found to occur within the period prescribed therein, create a rebuttable presumption that the vaccine(s) received caused the injury or condition. §14(a). Petitioner has not alleged a Table Injury, nor even specifically alleged which vaccine he believes to have caused the injury (generally) alleged. 42 C.F.R. § 100.3(a).

Here, the medical records filed do not patently support a causative connection between the vaccinations administered to Levi (*see* Pet. Ex. 2) and the injuries suffered under an actual causation burden of proof. Pet. Ex. 1-3. Under the statute, the Court cannot grant a petitioner compensation based solely on the petitioner's asseverations. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. 42 U.S.C. § 300aa-13(a)(1). Here, because the medical records do not manifestly support the petitioner's claim of vaccine causation, a medical opinion must be offered in support. No medical expert opinion report was filed by Petitioner to support the claims of causation within the Petition to a preponderance of the evidence, and Petitioner therefore did not surmount the standard set by the settled law on this point. Accordingly, the information on the record extant does not show entitlement to an award under the Program.

A petition may prevail if it can be demonstrated to a preponderant standard of evidence that the vaccination in question, more likely than not, actually caused the injury or condition complained of. *See* § 11(c)(1)(C)(ii)(I) & (II); *Grant v. Secretary of HHS*, 956 F.2d 1144 (Fed. Cir. 1992); *Strother v. Secretary of HHS*, 21 Cl. Ct. 365, 369-70 (1990), *aff'd*, 950 F.2d 731 (Fed. Cir. 1991). The Federal Circuit has indicated that, to prevail, every petitioner must:

> show a medical theory causally connecting the vaccination and the injury. Causation in fact requires proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury. A reputable medical or scientific explanation must support this logical sequence of cause and effect.

Grant, 956 F.2d at 1148 (citations omitted); *see also Strother*, 21 Cl. Ct. at 370.

Furthermore, the Federal Circuit recently articulated an alternative three-part causation-in-fact analysis as follows:

> [A petitioner's] burden is to show by preponderant evidence that the vaccination brought about [the] injury by providing: (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. Secretary of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

Under this analysis, while Petitioner is not required to propose or prove definitively that a specific biological mechanism can and did cause the injury leading to Petitioner's condition, he must still proffer a plausible medical theory that causally connects the vaccine with the injury alleged. *See Knudsen v. Secretary of HHS*, 35 F.3d 543, 549 (1994).

Of importance in this case, it is part of Petitioner's burden in proving actual causation to "prove by preponderant evidence both that [the] vaccinations were a substantial factor in causing the illness, disability, injury or condition and that the harm would not have occurred in the absence of the vaccination." *Pafford v. Secretary of HHS*, 451 F.3d 1352, 1355 (2006) (emphasis added), citing *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1352 (Fed. Cir.1999). This threshold is the litmus test of the cause-in-fact (a.k.a. but-for causation) rule: that the injured party would not have sustained the damages complained of, *but for* the effect of the vaccine. *See generally Shyface, supra*.

Here, Petitioner has not filed medical records or offered medical expert testimony to proffer, let alone explain, a "medical theory causally connecting the vaccination [to] the injury." Certainly absent was a detailed analysis of the Record to indicate a "logical sequence of cause and effect showing that the vaccination was the reason for the injury." As such, Petitioner has not offered a theory of causation as such, but this is certainly not due to lack of opportunity to present a medical expert opinion, *Q.E.F.* There has not been demonstrated to the Court a "a logical sequence of cause and effect showing that the vaccination was the reason for the injury," *Q.E.D. See Althen, supra*.

In short, Petitioner has not met the burden of proof set forth in the Act.[5] Petitioner has presented none of the evidence required by the Act in the form of corroborative medical records, and failed to account for the contrary explanations set forth in the medical records that contradicted their contentions.

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[5] *See Raley v. Secretary of HHS*, No. 91-0732, 1998 WL 681467 (Fed. Cl. Spec. Mstr. Aug. 31, 1998) (stating "[t]he requirement that [a] petitioner['s] claims must be supported either by medical records or medical expert opinion simply addresses the fact that the special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone"); *Bernard v. Secretary of HHS*, No. 91-1301, 1992 WL 101097 (Fed. Cl. Spec. Mstr. Apr. 24, 1992) ("The medical significance of the facts testified to by the lay witnesses must be interpreted by a medical doctor, who, in turn, expresses the opinion either that a compensable Table injury has occurred or that the vaccine in question actually caused the injury complained of. If such an opinion appears in the medical records, then it is unnecessary to call a retained expert witness in order to establish a prima facie case; if, on the other hand, the medical records do not provide such substantiation, then a petitioner must retain a medical doctor who, upon review of the entire record, concludes that it is more likely than not that a compensable injury has occurred.").

IV. CONCLUSION

Therefore, in light of the foregoing, no alternative remains for this Court but to **DISMISS** this petition with prejudice. In the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 within 30 days of this date, the clerk shall forthwith enter judgment in accordance herewith.

Also, the Court hereby **STRIKES** the previously filed, unamended decision filed in this matter on 1 May 2009.

IT IS SO ORDERED.

Richard B. Abell
Special Master