

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**  
 No. 11-271V  
 (E-Filed: May 29, 2012)

|                               |   |                       |
|-------------------------------|---|-----------------------|
| VICTORIA CAPDEVILLE           | ) |                       |
|                               | ) | UNPUBLISHED           |
| Petitioner,                   | ) |                       |
|                               | ) | HPV Series;           |
| v.                            | ) | Syncope;              |
|                               | ) | Failure to Prosecute; |
| SECRETARY OF THE DEPARTMENT   | ) | Unresolved            |
| OF HEALTH AND HUMAN SERVICES, | ) | Timeliness Issues     |
|                               | ) |                       |
| Respondent.                   | ) |                       |

Joseph Warren Rausch, Metairie, LA, for petitioner.

Ann Donohue Martin, Washington, D.C., for respondent.

**DISMISSAL DECISION**<sup>1</sup>

The undersigned previously denied respondent’s motion to dismiss petitioners’ claim for untimeliness to afford petitioner an opportunity to develop further the factual record in this case. Based on petitioner’s failure to respond to a subsequently issued order, the undersigned **DISMISSES** this case for insufficient proof and for failure to prosecute.

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<sup>1</sup> Because this decision contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. Id.

## I. BACKGROUND

On May 2, 2011, Victoria Capdeville (petitioner) filed a petition seeking compensation under the National Vaccine Injury Compensation Program (the Program).<sup>2</sup> Petitioner alleged that as a result of a series of Gardasil vaccines she received on May 7, 2007, July 6, 2007, and November 9, 2007, she suffered from shortness of breath, nausea, an inability to recognize people, slurred speech, and weakness. Pet. at 2. Petitioner claimed that the condition continued for several hours and that she has continued to suffer from syncope since May of 2008. Id.

Along with her petition, she filed a letter from Daniel Trahant, M.D., a neurologist.<sup>3</sup> Pet's Ex. 1. In his letter, dated March 18, 2011, Dr. Trahant described the post-vaccinal episodes that petitioner suffered as "somewhat of a vasovagal reaction." Id.

On October 3, 2011, respondent filed a Rule 4(c) Report, recommending against Program compensation. See Resp't's Rule 4 Report and Mot. to Dismiss. In that same filing, respondent moved for dismissal on the grounds that the claim was not filed timely and that the record evidence failed to point to a vaccine-related injury given the delayed onset of petitioner's symptoms. Id. at 18.

### 1. Timeliness of the Petition

In her motion to dismiss, respondent raised the concern that the petition might be time-barred. Citing the Federal Circuit's decision in Cloer v. Secretary of Health and Human Services,<sup>4</sup> respondent pointed to evidence in the medical records

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<sup>2</sup> The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (hereinafter "Vaccine Act" or "the Act"). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

<sup>3</sup> At counsel's request and in anticipation of the filing of petitioner's vaccine claim, Dr. Trahant examined petitioner. Although petitioner did not file Dr. Trahant's *curriculum vitae*, Dr. Trahant identified his medical specialty as "Neurology and Electromyography" in the letter he prepared on petitioner's behalf. Pet's Ex. 1 at 1.

<sup>4</sup> Cloer v. Sec'y of Health & Human Servs., 654 F.3d 1322, 1335 (Fed. Cir. 2011) (holding that the "statute of limitations begins to run on the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury recognized as such by the medical profession at large").

that petitioner suffered, in November of 2007, an episode of symptoms similar to those she claimed to have experienced nearly six months after receipt of her third HPV vaccine. The episode noted to have occurred in November of 2007 occurred during the same month in which petitioner received her third HPV vaccine. Resp't's Rule 4 Report and Mot. to Dismiss at 10-11. Respondent asserted in the motion to dismiss that if the episode in November 2007 were the first symptom or manifestation of petitioner's injury, petitioner's claim was filed more than 36 months after her symptom onset. To be timely, a claim must be filed within 36 months of the first symptom of a vaccine-related injury. See § 300aa-16(a)(2)(requiring the filing of a claim within 36 months of the first symptom of a vaccine-related injury). Pointing to Dr. Trahant's emphasis on petitioner's November 2007 symptoms, respondent asserted that the claim was not timely filed.

Alternatively, respondent argued that even if petitioner could establish that that her first episode of syncope/near-syncope occurred later--in May of 2008, she had not provided sufficient proof of vaccine causation under Althen v. Secretary of Health and Human Services., 418 F.3d 1274 (Fed. Cir. 2005). Resp't's Rule 4 Report and Mot. to Dismiss at 12-15. The third prong of the Althen standard requires proof that the timing between vaccine administration and symptom onset is medically appropriate to causally implicate the vaccine. Respondent noted that petitioner's theory of causation did not explain how the administration of her three HPV vaccine series failed to produce symptoms until May 1, 2008, nearly six months after her receipt of the last vaccine administration. Reply at 4.

Petitioner responded to the motion to dismiss on October 20, 2011, contending that respondent's motion lacked merit. Pet'r's Resp. at 2.

On December 14, 2011, the undersigned issued an order denying the dismissal motion to allow petitioner an opportunity to develop the record further and to retain an expert willing to address the identified timing issues. Id. Order, Dec. 14, 2011 at 3. The undersigned noted that in addition to establishing that her claim was timely filed, petitioner would also need to prove that the time period between the receipt of her last received HPV vaccine and the subsequent onset of her symptoms was medically appropriate and thus, supportive a finding of vaccine-related causation. Id. The undersigned directed petitioner to file an expert report on or before February 13, 2012, to address these issues.

On February 13, 2012, petitioner's counsel made a filing in response to the undersigned's Order dated December 14, 2011 (Pet'r's Resp.). Petitioner did not file an expert report, choosing instead to file medical records pertaining to her visit to the emergency room on April 4, 2007. Petitioner contended that this record supports a finding that the petition was filed timely. Pet'r's Ex. 1.

**a. The Evidence Indicates that Petitioner's Symptoms First Appeared Before May 1, 2008**

Among the filed medical records, are three different records noting, as part of petitioner's prior medical history, that she suffered an episode in November 2007 that was similar to her May 1, 2008, episode.

The first of the three records provided that on May 1, 2008, petitioner was seen in the emergency department of Ochsner Medical Center for lightheadedness, nausea, and near syncope. The examining doctor remarked that she had suffered similar symptoms "6-7 months ago," for which she was treated "here [at Oschner]." Petitioner's Exhibit ("Pet. Ex.") 3 at 2.

The second of the three records indicated that on May 7, 2008, petitioner saw Ivo Tremont, M.D., a neurologist. Pet'r's Ex. 6 at 3-4. Dr. Tremont noted:

Victoria is a 16 year old young woman who in November of 2007 was seen at Ochsner Westbank Emergency Room where she apparently had a first-time seizure related to a bladder infection. Nothing was done, no treatment was advised and the patient again had an episode where after swimming six laps last Thursday, she felt nauseated and went to the bathroom. When she returned the staff members noticed that she was incoherent and began having abnormal tonic clonic movements with posturing of both upper extremities. The patient was confused postictally, was taken to the emergency room, a CT scan was done and she was sent home with the advice to followup with her pediatrician. Since that episode the patient has been having constant headaches and dizziness.

Pet. Ex. 6 at 3 (emphasis added).

The third of the three records also referred to earlier episodes for which petitioner sought treatment. On June 3, 2008, petitioner saw John Willis, M.D., a pediatric neurologist, for evaluation of possible seizures. Pet'r's Ex. 8 at 10-11. From petitioner, Dr. Willis learned that she experienced her first seizures in November 2007. Id. at 10. Dr. Willis wrote:

I saw Victoria Gonzales Capdeville at Ochsner on June 3, 2008 for questionable seizures . . . There have been two episodes, one occurred in November 2007. At that time, she had a urinary tract infection and was feeling poorly and complained of tingling in her limbs and mouth, at which time she was reportedly hyperventilating. She remained alert, did not fall, was not incontinent, and had no tonic-

clonic movements. She was seen in the emergency room and diagnosed and treated for urinary tract infection. The second episode was observed by a swim coach, who was not available by telephone today and as of this dictation had not called me as hoped to discuss the details of an event that occurred after Victoria swam several laps. She is not in good athletic condition and stated that after swimming some several laps, she was somewhat short of breath and got out of the pool. She felt lightheaded and nauseous and somewhat weak and then sat down. It is not clear whether she actually lost consciousness or whether any other unusual activity was noted. The family is reportedly going to have the coach call me to discuss details of this event. She was seen by a physician, who treated her with Bactrim for an otitis media at that time.

Id. at 10 (emphasis added).

In addition to these references in petitioner's medical records placing the onset of her symptoms in November of 2007, the opinion letter submitted on petitioner's behalf by one of her evaluating neurologists, Dr. Trahan, also places the onset of petitioner's symptoms at a time between September 30, 2007, and November 9, 2007. Petition at 8.

In response to the undersigned's December 2011 order and to address the timeliness issue pertaining to the filing of the petition, petitioner filed an emergency room medical record dated April 4, 2007. The record was offered for the purpose of establishing that petitioner's earlier emergency room visit occurred in April 2007, and not in November 2007 as she related in her patient histories. See Pet'r's Ex. 1.

The April 2007 medical record indicates that petitioner presented to the emergency room hyperventilating and in severe abdominal pain. Id. The record makes no mention of symptoms of syncope. See Pet'r's Ex. 1. Relying on this filing, petitioner asserts that she simply provided an inaccurate date to her treating physicians regarding her emergency room visit. She further asserts that the newly filed record contradicts the history that she provided to her treaters because her April 2007 emergency room record contains no mention of a syncopal episode.

The filing of the April 2007 emergency room medical record does not cure all of petitioner's timing issues. Even if the undersigned were to find that petitioner's first episode of syncope/near-syncope occurred on May 1, 2008, petitioner has not addressed adequately the third prong of Althen v. Secretary of Health and Human Services, 418 F.3d 1274 (Fed. Cir. 2005), which requires petitioner to show that the timing between the receipt of her last HPV vaccine and

the alleged onset of her symptoms is medically appropriate to support a finding of vaccine-related causation. Order at 3.

Dr. Trahan's opinion letter states that petitioner's syncope was a HPV vaccine-related injury. He dated the onset of petitioner's symptoms at sometime between September 30, 2007, and November 9, 2007. After filing the April 2007 emergency room record, petitioner asserted that her first symptoms occurred on May 1, 2008, almost seven months after the third vaccine in her HPV series. Based on the extended period of time between the received vaccines and the onset of petitioner's symptoms, the undersigned directed petitioner to file a supplemental expert opinion from Dr. Trahan on or before April 6, 2012, addressing whether the period of time between petitioner's last HPV vaccine and her May 2008 symptom onset reflects a medically appropriate temporal relationship for vaccine-related causation. Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (2005) (identifying a showing of a proximate temporal relationship between vaccination and injury as one of the three prongs required for vaccine-related causation).

The undersigned had previously ordered the filing of a supplemental expert opinion from Dr. Trahan by Order dated February 22, 2012. Order, March 16, 2012 at 2. Because petitioner failed to do so, the undersigned issued another order and conducted a status conference with the parties on March 14, 2012 to address the subsequently issued order. Order, March 16, 2012. During the status conference, the undersigned again reviewed the timeliness issues with petitioner and the necessity of filing a supplemental opinion from Dr. Trahan who had not dated the onset of petitioner's symptoms in May 2008 but in the fall of 2007. Id. The undersigned reiterated a filing deadline of April 6, 2012, for Dr. Trahan's supplemental expert report.

On April 3, 2012, petitioner made a filing that was not responsive to the undersigned's order. See Pet'r's Resp. Petitioner did not file a supplemental expert report from Dr. Trahan. Instead, petitioner argued that "the original report provided by Dr. Trahan coupled with information readily available in the public domain satisfies the inquiry raised by the court." Id. at 1.

The undersigned issued a show cause order on April 16, 2012, directing petitioner to file a supplemental report from Dr. Trahan or otherwise show cause why her case should not be dismissed. Show Cause Order. To date, no responsive filing to the show cause order has been received by the court.

## **II. QUESTIONS PERSIST REGARDING THE TIMING ISSUE UNDERLYING PETITIONER'S CLAIM**

Petitioner has filed an emergency room record dated April 2007 in an effort to prove that she provided incorrect information to her medical providers about the date of such treatment, and thus, bolster her claim that the first symptoms of her vaccine-related injury did not appear until May 2008. Petitioner's own expert, Dr. Trahant, however, relies on an earlier date of symptom onset. The date of symptom onset on which Dr. Trahant relies would render petitioner's claim untimely under the Act's statute of limitations, and petitioner has failed to file a supplemental opinion from Dr. Trahant.

Even if the undersigned were to adopt the later date of symptom onset proposed by petitioner—and not the earlier date offered by her expert, there is no explanation in the record indicating that the 6-month period between vaccine administration and symptom onset is supportive of a finding of vaccine-related causation.

### **III. PETITIONER HAS FAILED TO PROSECUTE**

Although it is the duty of petitioner to respond to court orders, petitioner has not done so. The failure to follow court orders, as well as the failure to file sufficient medical records or an adequate expert medical opinion to substantiate the allegations set forth in the petition, can result in dismissal of the claim. See Vaccine Rule 21(b)(1) (“The special master or the court may dismiss a petition or any claim therein for failure of the petitioner to prosecute or comply with these rules or any order of the special master or the court.”). See also Sapharas v. Sec’y of Health & Human Servs., 35 Fed. Cl. 503, 505 (1996) (affirming claim dismissal where petitioner failed to comply with issued court orders); Tsekouras v. Sec’y of Health & Human Servs., No. 90-2761V, 26 Cl. Ct. 439, 443 (1992), aff’d per curiam, 991 F.2d 810 (Fed. Cir. 1993) (sustaining claim dismissal where petitioner was given two warnings and thereafter an additional opportunity to explain her noncompliance).

Petitioner has failed to respond to the undersigned's last order, and the failure to substantively respond to issued orders is deemed noncompliance with a court order. Schoenfeld v. Sec’y of Health & Human Servs., No. 3-0338V, 2012 WL 848146, at \*2 (Fed. Cl. Spec. Mstr. Feb. 21, 2012). Advised that her failure to respond to court orders would result in the dismissal of her claim, and advised of the deficiencies in her pleadings, petitioner has declined to prosecute her claim further. Accordingly, dismissal is now appropriate.

### **IV. CONCLUSION**

For the reasons detailed above, the undersigned hereby **DISMISSES** this

case for failure to prosecute. **The clerk shall enter JUDGMENT accordingly.**

**IT IS SO ORDERED.**

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