

OFFICE OF SPECIAL MASTERS

(Filed: July 7, 2006)

DO NOT PUBLISH

LANCE FLAGG,)	
)	
Petitioner,)	
)	
v.)	No. 01-0395V
)	Decision on the record; Involuntary
SECRETARY OF)	dismissal
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

DECISION¹

Petitioner, Lance Flagg (Mr. Flagg), seeks compensation under the National Vaccine Injury Compensation Program (Program).² Mr. Flagg filed a Program petition on July 6, 2001.³ He alleged that he “suffered neurological injuries” after he received a Hepatitis B vaccination on June 30, 1998. Petition (Pet.) at 1; Pet. ¶¶ 2-3. Mr. Flagg did not provide with his petition any of the medical, educational and therapeutic records required by § 300aa-11(c)(1) & (2) and by Vaccine Rule 2(e).

Chief Special Master Gary J. Golkiewicz monitored the initial development of the claim, directing the submission of periodic status reports until Mr. Flagg completed the petition. *See, e.g., Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr.

¹ 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 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” will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

³ As Mr. Flagg was a minor in 2001, his mother, Kristal Flagg (Ms. Flagg), initiated the case on his behalf.

July 12, 2001). On November 7, 2001, Chief Special Master Golkiewicz transferred the case to Special Master Laura D. Millman. *See Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. Nov. 7, 2001). On November 8, 2001, and on January 7, 2002, Mr. Flagg notified Special Master Millman that he continued efforts to obtain all outstanding medical records and necessary affidavits. *See* Petitioner's Status Report, filed November 8, 2001; Petitioner's Status Report, filed January 7, 2002.

Mr. Flagg filed an amended Program petition on May 7, 2002. He alleged that he "suffered Chronic Fatigue Syndrome" after he received a Hepatitis B vaccination on June 30, 1998. Amended Petition (Am. Pet.) at 1. Mr. Flagg proffered four sets of medical and educational records, as well as two affidavits from Ms. Flagg, with the amended petition.

On January 23, 2003, Special Master Millman stayed the case pending Mr. Flagg's notice that he was "prepared to proceed." *Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Special Master (Fed. Cl. Spec. Mstr. Jan. 23, 2003); *see also Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Special Master (Fed. Cl. Spec. Mstr. Feb. 24, 2003).

On August 11, 2004, Chief Special Master Golkiewicz transferred the case to Special Master Margaret M. Sweeney. *See Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. Aug. 11, 2004).

On October 27, 2005, Chief Special Master Golkiewicz transferred the case to this special master. *See Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. Oct. 27, 2005). This special master reviewed the amended petition and Mr. Flagg's exhibits. This special master convened an informal, yet substantive, status conference on December 1, 2005, to discuss further proceedings. During the conference, this special master expressed his legitimate concern that a number of medical histories that Ms. Flagg provided to several of Mr. Flagg's treating physicians suggested fairly that the onset of Mr. Flagg's condition occurred more than 36 months before July 6, 2001, implicating the statute of limitations contained in § 300aa-16(a)(2). Nevertheless, this special master directed additional factual development, including the submission of updated medical, educational and therapeutic records. *See Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Special Master (Fed. Cl. Spec. Mstr. Dec. 20, 2005).

Throughout February and March 2006, Mr. Flagg proffered additional medical, educational and therapeutic records. *See, e.g.*, Notice of Filing Document(s), filed February 2, 2006; Notice of Filing Document(s), filed February 24, 2006; Petitioner's Response to Respondent[']s Request for Additional Information, filed March 21, 2006.

On March 21, 2006, this special master convened an informal, yet substantive, status conference. He expressed again his legitimate concern that a number of medical histories that Ms. Flagg provided to several of Mr. Flagg's treating physicians suggested fairly that the onset of Mr. Flagg's condition occurred more than 36 months before July 6, 2001, implicating the statute of limitations contained in § 300aa-16(a)(2). Respondent echoed this special master's concern.

Therefore, this special master directed Mr. Flagg to “review the medical records.” *Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. Mar. 22, 2006). This special master required Mr. Flagg to file by no later than April 14, 2006, “a status report” proposing to this special master “a date for the submission of a comprehensive statement of facts addressing the chronology of the injury in the case or” inviting “respondent’s motion to dismiss based upon the statute of limitations contained in” § 300aa-16(a)(2). *Id.* On April 25, 2006, Mr. Flagg informed this special master that Mr. Flagg would “submit a comprehensive statement of facts addressing the chronology of the injury in the case” by June 6, 2006. Petitioner’s Status Report, filed April 25, 2006, at 1.

Mr. Flagg did not file on June 6, 2006, a comprehensive statement of facts addressing the chronology of the injury, as this special master contemplated in his March 22, 2006 order. *See Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. Mar. 22, 2006); *see also Flagg v. Secretary of HHS*, No. 01-0395V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. Apr. 27, 2006). Instead, on June 5, 2006, Mr. Flagg moved for a ruling on the record. *See* Petitioner’s Motion for a Ruling on the Record (Motion), filed June 5, 2006. Mr. Flagg asserts that based upon this special master’s “opportunity to review the petitioner’s exhibits in this case,” this special master “may now resolve the issue of whether” Mr. Flagg sustained a vaccine-related injury. Motion at 2.

Vaccine Rule 21(b) states:

For failure of the petitioner to prosecute or comply with the Vaccine Rules or any order, the special master or the court may dismiss a petition or any claim therein.

The record as a whole provides two related bases for this special master to dismiss the petition. First, Mr. Flagg has failed wholly to comply appropriately with this special master’s March 22, 2006 order. Given the procedural history of this case, any reasonable person would understand that this special master’s March 22, 2006 order was not simply a silly exercise. Rather, any reasonable person would understand that this special master’s March 22, 2006 order represented this special master’s effort to identify potential legal impediments to the petition and to narrow issues for resolution. *See* Vaccine Rule 3(b); *see also* Rule 5. Second, Mr. Flagg’s failure to comply appropriately with this special master’s March 22, 2006 order reflects certainly that Mr. Flagg has failed wholly to prosecute his claim.

Even if this special master is incorrect in dismissing the petition under Vaccine Rule 21(b), this special master determines still that Mr. Flagg has not *established* that he is entitled to Program compensation. A petitioner bears at least two burdens in Program proceedings: the burden of production and the burden of persuasion. The statute governing the Program requires initially a petitioner to submit with a petition particular items supporting the claim to compensation. *See* § 300aa-11(c). Then, the statute governing the Program requires a petitioner to *demonstrate* “by a preponderance of the evidence the matters” contained “in the petition.” § 300aa-13(a)(1)(A). At the

outset, a petitioner must show that the special master possesses jurisdiction over the petition. And, as in this case involving the actual causation standard, a petitioner must adduce “a medical theory causally connecting the vaccination and the injury;” describe “a logical sequence of cause and effect showing that the vaccination was the reason for the injury;” and mount “a showing of a proximate temporal relationship between vaccination and injury.” *Althen v. Secretary of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

By proffering medical records, educational records, therapy records and an affidavit from his mother, Mr. Flagg has met at least in part his burden of production. *See* § 300aa-11(c). But, Mr. Flagg cannot expect surely the special master to divine the intricacies of potentially complex factual, medical and legal issues in the case absent Mr. Flagg’s presentation of an explanation of Mr. Flagg’s evidence in the context of legal precedents. Thus, the special master finds that Mr. Flagg has not met at all his burden of persuasion. *See* § 300aa-13(a)(1)(A).

The special master finds that Mr. Flagg has failed to comply with the special master’s March 22, 2006 order. *See* Vaccine Rule 21(b). As a consequence, the special master finds that Mr. Flagg has failed to prosecute his case. *See* Vaccine Rule 21(b). In the alternative, the special master finds that Mr. Flagg has not established that he is entitled to Program compensation.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Mr. Flagg’s copy of this decision to Mr. Flagg by overnight express delivery.

John F. Edwards
Special Master