

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-1403V

Filed: March 8, 2010

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RANDI RUSSUM, by Her Mother)	
and Next Friend, JANET RUSSUM,)	
)	TO BE PUBLISHED
)	Entitlement: Thimerosal; ADHD;
Petitioner,)	No petitioner's expert opinion;
)	Ruling on the record
v.)	
)	
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

Ronald C. Homer, Boston, MA, for Petitioner.

Linda S. Renzi, United States Department of Justice, Washington, DC, for Respondent.

LORD, Special Master.

DECISION¹

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Janet Russum filed a petition on June 6, 2003, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq. ("Vaccine Act"), on behalf of her daughter Randi Russum. Petitioner alleges that Randi received thimerosal-containing vaccines, including the diphtheria-tetanus-pertussis ("DPT") vaccine, that caused her attention deficit hyperactivity disorder ("ADHD"). Amended Petition ("Pet.") at 1-2. Since Petitioner did not allege and could not prove a table injury claim, she must prove actual causation.

¹ 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 is filed, the parties have 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. In the absence of timely objection, the entire document will be made publicly available.

The record in this case discloses a long history of little progress. The case history is discussed below to explain why this case is ripe for dismissal.

Going back to April 2006, Petitioner sought to obtain and file medical records in response to a series of orders from the then-assigned special master. She also engaged in unsuccessful settlement negotiations with the Secretary. In Petitioner's Response to Court's May 7, 2007 Order, filed September 5, 2007, Petitioner laid out the reasons why she was unable to submit an expert report in support of her claim, as ordered by the special master, and sought additional time. In essence, the reason was that the thimerosal experts and Petitioner's counsel were occupied with the Omnibus Autism Proceeding ("OAP"). Petitioner asked the special master to issue an order "requesting status reports every 90 days until [Petitioner's] experts have sufficient time to review her records and the relevant science without the distraction of the OAP." Petr.'s Resp. to May 7, 2007 Order, at 11.

Petitioner filed, on September 5, 2007, an article (Petr.'s Ex. 22, Thomas M. Burbacher, et al., Comparison of Blood and Brain Mercury Levels in Infant Monkeys Exposed to Methylmercury or Vaccines Containing Thimerosal) regarding brain mercury levels in infant monkeys. The article contained no information about ADHD and did not link elevated mercury levels to any injury.

On October 30, 2007, the special master issued an order noting that he had "expressed firmly" to Petitioner during a status conference that she had still not produced sufficient information to prove that thimerosal-containing vaccines caused her injury. In particular, Petitioner had not identified the manufacturer, lot number and thimerosal content of each vaccine that Randi received. The special master ordered Petitioner to "complete expeditiously the factual investigation of the claim," filing "all documentation regarding the thimerosal content of each vaccine that Randi received" no later than November 30, 2007. Order, Oct. 30, 2007. On November 29, 2007, Petitioner filed a status report in which she documented that she was unable to determine the information required by the special master concerning the vaccines.

In January 2008, the special master ordered Petitioner to (1) retain immediately an appropriate medical expert to review the case and, (2) by February 1, 2008, file the medical expert's statement indicating that the expert was able "to support the claim," and propose a date for completion of the expert's favorable opinion. Order, Jan. 2, 2008. Petitioner moved for an extension of time on February 1, 2008, on the ground that Dr. Marcel Kinsbourne, an expert in pediatric neurology, had been retained but was busy reviewing the records in two similar cases.

The special master ordered that Dr. Kinsbourne's "preliminary" opinion be filed no later than March 28, 2008. Order, Feb. 6, 2008. On March 28, 2008, Petitioner moved for another enlargement. Petr.'s Mot. for Extension of Time, Mar. 28, 2008, at ¶ 3. The special master enlarged the period for submission of the expert report to April 7, 2008. On April 7, 2008, Petitioner filed a status report and motion for extension of time, stating that Dr. Kinsbourne's work on the two other cases, as well as his participation in the OAP, required that he be provided

more time to state his opinion in this case. Petr.'s Status Report & Mot. for Extension of Time, Apr. 7, 2008, at 1-2. "Dr. Kinsbourne has filed reports in these two cases that indicate that Dr. Kinsbourne's preliminary review of the literature suggest a causal link between mercury and speech, language, and attention disorders." Id. Petitioner did not, however, place Dr. Kinsbourne's reports into evidence in this case.

Petitioner received another extension of time, until June 30, 2008, to file "a final opinion from petitioner's expert in pediatric neurology, as well as any other medical opinions." Order, Apr. 10, 2008.

Petitioner did not file an expert opinion, but instead filed a motion to consolidate this case with five other cases alleging thimerosal injuries. "The petitioner respectfully requests that the special master stay his order for an expert report in this case until the Chief Special Master has had an opportunity to consider this motion." Petr.'s Mot. to Consolidate, June 30, 2008, at 4. The Secretary opposed the motion. A newly-assigned special master in September 2008 deferred ruling on the motion to consolidate pending submission on or before October 27, 2008, of additional information.

At a status conference on December 8, 2008, "Petitioner reported . . . that she is reconsidering her motion to aggregate" the cases. The Court ordered Petitioner to file a status report or an amended motion by January 2, 2009. Order, Dec. 22, 2008. Petitioner decided to rescind her request for consolidation. Petr.'s Resp. to Ct.'s Dec. 22, 2008 Order. The motion to consolidate was accordingly denied. Order, Jan. 26, 2009. The special master noted that petitioner would "eventually" need to submit an expert report. Id.

At a subsequent status conference, Petitioner indicated she would examine the evidence and decide whether to proceed or exit the Program. Order, June 17, 2009. Again, Petitioner was advised that she would soon need to file "an expert report propounding a plausible medical theory of how the alleged injury could be vaccine related, as well as demonstrating how the propounded biologic mechanism was at work in the instant case." Id.

On June 22, 2009, this case was transferred to the undersigned. In an order following a status conference on June 30, 2009, the undersigned special master noted that no expert opinion had been filed despite numerous extensions of time and that, given the age of the case, no additional time for submission of an expert report would be granted "absent a showing of extraordinary circumstances." Show Cause Order, June 30, 2009. Petitioner was ordered to show cause by July 13, 2009, why the Petition should not be dismissed. Id.

Petitioner responded on June 30, 2009, that "counsel had decided to no longer litigate" the case, and required additional time to contact Petitioner "regarding the future prosecution of her case." Petr.'s Resp. to Ct.'s June 30, 2009 Show Cause Order, at 1. Counsel requested an additional 30 days "to contact the petitioner and file her motion to dismiss her case from the Vaccine Program, or in the alternative, withdraw as her counsel of record. Id.

Another motion for extension of time (unopposed), in which Petitioner’s counsel represented that Petitioner had been contacted but more time was needed “to confer with the petitioner as to how to proceed with her case,” was granted. Petr.’s Mot. For Extension of Time at 1. Petitioner’s counsel was ordered to file on or before August 28, 2009, a motion to dismiss the above-captioned case or a motion to withdraw as counsel.” Order, Aug. 25, 2009.

Petitioner responded on August 27, 2009, stating that counsel had been “unable to reach Randi’s mother” to discuss the future proceedings. Petr.’s Resp. to Ct.’s Aug. 25, 2009 Order, at 1. Counsel asked for “guidance” as to how counsel should now proceed. Id.

II. DISCUSSION

Special masters may adjudicate cases based upon the written record without conducting an evidentiary hearing. 42 U.S.C. § 300aa-12(d)(3)(B)(v); Vaccine Rule 8(b). Before deciding a case upon the written record, the special master must ensure that each party has a full and fair opportunity to present its case. Hovey v. Sec’y of Dep’t of Health & Human Servs., 38 Fed. Cl. 397, 400-01 (1997) (affirming special master’s decision denying petitioners’ request for an evidentiary hearing).

Pursuant to the Vaccine Act petitioners may be compensated for injuries caused by certain vaccines. See generally §§ 300aa-10 to 34. To receive compensation, a petitioner must prove that either: 1) she suffered a “Table Injury”– that is, an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) she suffered an “off-Table” injury that was actually caused by or “caused-in-fact” by a vaccine. See §§ 300aa-13(a)(1)(A), 300aa-11(c)(1); Shalala v. Whitecotton, 514 U.S. 268, 270 (1995). In this case, Petitioner has alleged that the vaccinee suffered an off-Table injury.

To satisfy the burden of proving causation in fact, a petitioner must prove by preponderant evidence “(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. Sec’y of Dep’t of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Petitioner must show not only that but for Randi’s vaccinations, she would not have been injured, but also that the vaccinations were a substantial factor in bringing about her injury. Shyface v. Sec’y of Dep’t of Health & Human Servs., 165 F.3d 1344, 1352 (Fed. Cir. 1999). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec’y of Dep’t of Health & Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991).

A petitioner may not be given a Vaccine Program award based on the petitioner’s claims alone. § 300aa-13(a)(1). Rather, the petition must be supported by either medical records or by the opinion of a competent physician. See id.; Grant v. Sec’y of Dep’t of Health & Human Servs., 956 F.2d 1144, 1148-49 (Fed. Cir. 1992).

In this case, despite many opportunities to submit support for her Petition over a period of nearly seven years, Petitioner has not provided sufficient evidence to satisfy Althen. Petitioner has not submitted medical evidence or a reliable medical opinion supporting any medical theory or cause connecting Randi's condition to a vaccine. It is clear from this record that Petitioner cannot establish a prima facie case that Randi's vaccinations caused her ADHD. Therefore, the special master must deny this Petition. See § 300aa-13(a)(1).

III. CONCLUSION

Careful review of the record as a whole shows that Petitioner is unable to establish that the vaccinee suffered a "Table Injury" or that her injuries were "actually caused" by a vaccination. Therefore, the Petition is dismissed with prejudice for insufficient proof of causation. See § 300aa-13(a)(1). The Clerk shall enter judgment accordingly.²

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master

² Vaccine Rule 11(a) provides for expedited entry of judgment if each party files a notice stating that the party will not seek review.