

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 12-110V

July 19, 2013

Not to be Published

MUNTHER ALRUBEA, Personal *
Representative of the Estate of ROUQAYA *
ALRUBEA, Deceased, *

Petitioner, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

Munther Alrubea, Dearborn, MI, for petitioner (pro se).
Tara J. Kilfoyle, Washington, DC, for respondent.

Traumatic brain injury; death;
petitioner moves for dismissal

MILLMAN, Special Master

DECISION¹

On February 16, 2013, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10-34, alleging that haemophilus B influenza (HiB), varicella, hepatitis A, and H₁N₁ influenza vaccines administered on March 22, 2010 caused his daughter

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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 constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access.

Rouqaya Alrubea (hereinafter, Rouqaya) a traumatic brain injury on March 23, 2010 from which she died. (The undersigned does not have subject matter jurisdiction over any H₁N₁ vaccination administered in the 2009-10 flu season.)²

Initially, petitioner was represented by counsel. However, by January 22, 2013, petitioner's counsel stated in a telephonic status conference that he did not feel there was any way for petitioner's medical expert to respond to respondent's experts' reports. Petitioner's counsel stated, "We do not have a sound medical theory explaining causation in this case."

On April 5, 2013, petitioner's counsel filed a Motion to Withdraw as Attorney, which the undersigned granted in an Order dated April 8, 2013. Petitioner, however, wanted to proceed and try to find another counsel to represent him.

On July 17, 2013, during a recorded telephonic status conference, petitioner stated he wanted to dismiss this case.

The undersigned **GRANTS** petitioner's motion to dismiss.

FACTS

Rouqaya was born on October 15, 2007.

On March 22, 2010, Rouqaya received HiB, varicella, hepatitis A, and H₁N₁ vaccines. Med. recs. Ex. 4, at 18, 19.

On March 23, 2010, at 9:58 p.m., the Dearborn Fire Department responded to a 911 call that a child was in respiratory arrest. Petitioner stated Rouqaya had been sick for about a week and was coughing and became unresponsive. Rouqaya was apneic and diaphoretic. She was also unconscious, unresponsive, cool, and ashen. She had a rapid pulse and was carried to the ambulance. Med. recs. Ex. 5, at 7.

On March 23, 2010, Rouqaya was brought to Oakwood Hospital and Medical Center emergency department with an altered mental state. She was found on the floor unresponsive. She had had four vaccinations the day before and recent upper respiratory symptoms: cough and runny nose. The diagnosis was respiratory arrest. *Id.* at 14-15. At 10:41 p.m., the police were contacted. *Id.* at 19. At 11:32 p.m., Rouqaya was transported to Children's Hospital. *Id.*

On March 23, 2010, at 10:30 p.m., a social worker spoke to petitioner who said he brought dinner that night and the family ate, including Rouqaya. He said Rouqaya ate well. She

² For the 2009-10 influenza season, jurisdiction over complaints for alleged injury from H₁N₁ flu vaccine fell within the Countermeasure Injury Compensation Program, not the Vaccine Act. www.hrsa.gov/cicp/coveredcountermeasures/index.html (last visited: July 18, 2013).

had had four shots two days previously. Petitioner said he left the house with his eldest daughter to visit a friend's house. Rouqaya was fine when he left. He said he had been at the friend's house only for a couple of minutes when his wife called him and said Rouqaya was not acting right and had fallen off the couch onto the floor. Petitioner stated the floor was carpeted and had a rug on top of it. Petitioner said he went home and the emergency medical service was there and brought Rouqaya to the emergency department. Per Dr. Wecker, Rouqaya had a brain bleed and her injuries were not consistent with the parents' story. Rouqaya was transferred to Children's Hospital, and petitioner's and his wife's other two children were placed temporarily with their mother's parents. The Child Protective Service was investigating. Id. at 26.

On March 23, 2010, a CT scan of Rouqaya's head was performed which Dr. James Kochkodan wrote showed diffuse right-sided subdural hematoma with involvement of the falx and adjacent effacement of the sulci within the right cerebral hemisphere secondary to edema. There were small foci of hyperdensity located at the right vertex which could have represented a small foci of intraparenchymal hemorrhage. Id. at 33.

On March 24, 2010, Rouqaya underwent an ophthalmology consultation. The doctor concluded there was an unknown mechanism of injury. Rouqaya had several retinal hemorrhages throughout her macula. He suspected she had an acute life-threatening event. Her pupils were non-reactive. Med. recs. Ex. 6, at 33. Dr. Mary Lu Angelilli wrote that x-rays showed Rouqaya had multiple subdural hematomas with homogeneous brain parynchyma suggestive of a diffuse insult. She also had bilateral retinal hemorrhages. Dr. Angelilli, apprised of the parents' history that Rouqaya had been walking with her father and older sister to the grocery earlier that evening and was walking fine, ate dinner with the family, but was fussing about her vaccination site, and then fell off the couch, stated in writing: "There is no history presented that explains the massive head trauma. The parents repeatedly said that this child was crying and crying is a known trigger for abuse. . . . There is no doubt that this injury was inflicted. This patient was discussed with Neurosurgery, Neuroradiology, and Dr. Nazer from the Child Protection Team and all of us are in agreement. . . . Abusive head trauma. . . . It was explained to the family that the injuries were secondary to severe head trauma and mother maintains that she only knows that the child fell off the couch." Id. at 35-36.

On March 24, 2010, Dr. Sandeep Sood, a surgeon at Children's Hospital of Michigan, wrote an operative report stating that Rouqaya had a history of a sudden onset of loss of consciousness. She had a subdural hematoma on the right side of her brain on CT scan. Her pupils were sluggishly reactive. She was initially brought into the hospital with a coma on the Glasgow Coma Scale of 3, and she had dilated, nonreactive pupils. Apparently, she had multiple seizures and received significant sedation. She had a decompressive craniotomy. Her dura were extremely tense and tight. An opening was made just anterior to the coronal suture region and lateral to the midline on the right side. Blood shot out under pressure. Her brain was extremely tense, tight, and bulging. Her blood pressure decreased. Id. at 44-45.

On March 24, 2010, a Report of Actual or Suspected Child Abuse or Neglect by the Michigan Department of Human Services was issued. Rouqaya became unresponsive at home at 9:45 p.m. on March 23, 2010 while her mother Zainab Al-Nawami was supervising her. Rouqaya had life-threatening injuries: subdural hemorrhage, raised intracranial pressure, and bilateral retinal hemorrhages. These findings are most consistent with non-accidental trauma. Id. at 136. The report named Rouqaya's mother as the alleged perpetrator of abuse. Id. at 138.

On March 24, 2010, an EEG was performed on Rouqaya. Dr. Hiroki Nariai stated the results were abnormal, showing minimal EEG activity suggesting severe neuronal dysfunction. Id. at 140.

On March 24, 2010, a CT scan of Rouqaya's head showed extensive cerebral edema in the frontal, temporal, and anterior parietal lobes bilaterally with absence of the normal gray-white matter interface. The obvious mass effect on the bilateral ventricles was more prominent on the right side. There was a mild midline shift to the left of six millimeters. There was an acute, hyperdense subdural hematoma along the interhemispheric fissure as well as the frontal temporal convexity. There was increased intracranial pressure. Rouqaya was developing transtentorial descending herniation. These findings were highly suggestive of a non-accidental injury. The presence of diffuse hypoattenuation within the deep cerebral white matter raised the possibility of an underlying cerebral contusion and shearing injury. Id. at 149-50.

On March 24, 2010, Social Worker David Allasio wrote a social work assessment, stating Rouqaya had intracranial bleeding, brain swelling, and bilateral retinal hemorrhages. She was in grave condition. He concluded, "These symptoms are most consistent with trauma and suspected abuse." Id. at 336.

On March 25, 2010, Dr. Mary Lu Angelilli wrote into the medical record: "I spoke to Sgt. Sabo today from the Dearborn Police Dept. He was interested in knowing if all the physicians on the team providing care are in agreement that this child suffered from inflicted injuries. I told him that Critical Care, Peds surgery, both Child Protection physicians, Neurosurgery, and the Neuroradiologist were all in agreement that the injuries to the brain were inflicted." Id. at 69.

On March 25, 2010, Dr. Jeff A. Clark wrote that Rouqaya had an abrasion posterior to the lateral canthus of her left eye. She also was having seizures, had a small right frontal and occipital subdural hemorrhage, and large retinal hemorrhages bilaterally. He wrote that the constellation of symptoms was consistent only with inflicted non-accidental trauma. He discussed the case with the investigating detective at about 3:30 a.m. There was likely a significant hypoxic-ischemic component to Rouqaya's injury and suspected abuse. Id. at 83.

On March 26, 2010, Dr. Tariq Shihabuddin wrote that Rouqaya had an altered mental status. Abusive head trauma was confirmed. Id. at 62.

On March 26, 2010, Dr. Patrick C. Hines wrote a discharge summary. Rouqaya had head trauma with an intracranial bleed, probably due to non-accidental trauma. A CT scan was significant for right frontal subdural hematoma with edema. On March 24, 2010, she underwent a decompressive craniotomy. On March 25, 2010, a perfusion scan did not show any significant cerebral flow. On March 26, 2010, at 12:17 p.m., Rouqaya was declared brain dead. Id. at 18.

On March 27, 2010, Dr. Francisco Diaz performed an autopsy. Rouqaya's cause of death was inflicted head trauma. She had massive brain edema with uncal and cerebellar tonsillar herniation. She had subdural hemorrhage, subarachnoid hemorrhage, bilateral peri-optic nerve sheath hemorrhage, and bilateral retinal hemorrhage. Dr. Diaz wrote that Rouqaya died as a result of inflicted head trauma. The opinion of the treating doctors at Children's Hospital was that her injuries were inflicted. The autopsy disclosed injuries consistent with inflicted head trauma. Dr. Diaz wrote, "The manner of death is classified as homicide." Med. recs. Ex. 8 at 1. In particular, Dr. Diaz noted massive edema characterized by effacement of the sulci and flattening of the gyri. Rouqaya's brain was bulging and portions of it oozed from the cranial cavity. She had large, bilateral, and diffuse subdural hemorrhages. She had diffuse bilateral subarachnoid hemorrhage. She had subarachnoid hemorrhage at the base of her brain. She had bilateral transtentorial and cerebellar tonsillar herniation. She had a four centimeter by four centimeter area of brain matter pulpefaction on the right frontal lobe. She had massive brain edema, a very noticeable midline shift, marked narrowing of the lateral ventricles, necrosis of the unci, necrosis of the cerebellar tonsils, bilateral peri-optic nerve sheath hemorrhage, and bilateral retinal hemorrhages grossly. Id. at 3. Microscopic examination showed multiple areas of hemorrhage in the brain matter, and multiple red bulbs in the parenchymal areas suggestive of diffuse axonal injury. Rouqaya's eyes showed retinal extravasation of blood and diffuse peri-optic nerve hemorrhage. Id. at 4-5.

On March 29, 2010, a petition issued for child protective proceedings with termination of parental rights for the two remaining children of petitioner and his wife due to battering, torture, or other severe physical abuse and life threatening injury. Med. recs. Ex. 9, at 1, 2, and 4; Resp. Ex. B, at 8-10.

Multiple days of testimony were heard before Judge Jerome Cavanagh of the Third Judicial Circuit. Resp. Exs. H-Q; Pet. Exs. 10, 12. On June 9, 2011, Judge Cavanagh issued an opinion that by clear and convincing evidence, the allegations in the Michigan Department of Health and Human Services (DHS) had been substantiated and that the termination of Ms. Al-Nawami's parental rights would be justified. Pet. Ex. B, at 1. However, Judge Cavanagh thought the interests of Ms. Al-Nawami's remaining two children would not be served best by terminating her rights. Id. Once petitioner and Ms. Al-Nawami completed a parenting class, they were assessed by a Clinic for Child Study. Resp. Exs. D, E. Ms. Al-Nawami also started an anger management class alone. Resp. Ex. F, at 2; Ex. G, at 2. On October 11, 2011, Judge Cavanagh ordered the two remaining daughters returned to their parents' home with continued individual and family therapy, couples counseling, and intensive in-home services. Resp. Ex. G, at 1.

EXPERTS

On May 24, 2012, petitioner filed an expert report dated May 23, 2012 from Dr. Julian H. Fisher, a pediatrician and neurologist, ascribing Rouqaya's death to a combination of infectious gastroenterological disease and varicella vaccine. Pet. Ex. 17, at 3-4.

On October 26, 2012, respondent filed an expert report from Dr. Michael Kohrman (Exhibit Z) and an expert report from Dr. Joan Cox Gill (Exhibit BB). Dr. Kohrman, a pediatrician, states that Rouqaya's coagulation abnormalities were the result, and not the cause, of her brain injury. Resp. Ex. Z, at 6. If coagulopathy had caused her brain bleed, there would have been other evidence of bleeding or bruising. Id. The surgeons would not have performed a decompressive craniotomy on Rouqaya if they were concerned she had a coagulation or hemorrhagic disorder. Id. Dr. Kohrman concludes, along with the treating physicians, the medical examiner on autopsy, and Judge Jerome Cavanagh that abuse caused Rouqaya's traumatic brain injury. Id. at 7.

Dr. Gill, a pediatrician and specialist in pediatric hematology/oncology, states Rouqaya did not have an adverse reaction to varicella vaccine since her onset of difficulties was only twenty-four hours after vaccination, which is too soon to react to even the wild type varicella infection, much less the varicella vaccine. Resp. Ex. BB, at 3. Rouqaya's hypoxia caused a mild elevation of her liver enzymes which was too mild to indicate liver dysfunction causing coagulopathy. Id. Dr. Gill states there is no evidence Rouqaya had a vitamin K deficiency. Id. Lastly, Dr. Gill states that the cause of subdural hematomas and bilateral retinal hemorrhages does not require other evidence of trauma. "Severe intracranial trauma can be caused by violent shaking of the child; the hallmarks of intracranial hemorrhage caused by inflicted trauma, including subdural hematomas and diffuse retinal hemorrhages, were present in Rouqaya. The intracranial hemorrhages resulting in massive brain edema were most likely caused by traumatic injury and not cerebritis." Id. Dr. Gill states the vaccines did not contribute to Rouqaya's death. Id. at 4.

On November 7, 2012, the undersigned issued an Order giving Dr. Fisher, petitioner's expert, until January 7, 2013 to respond to respondent's experts' opinions as stated in their reports.

On January 3, 2013, petitioner filed Dr. Fisher's supplemental report as Exhibit 19. Dr. Fisher states, "one cannot establish a relationship between the [varicella] vaccine and the subsequent medical events. . . ." Pet. Ex. 19, at 1.

On January 4, 2013, the undersigned issued an Order asking whether Dr. Fisher was retracting his opinion from Exhibit 17 (his initial report) that varicella vaccine caused Rouqaya's illness and death. The undersigned ordered petitioner's counsel to respond to this question during the telephonic status conference set for January 22, 2013.

On January 22, 2013, petitioner filed another supplemental report from Dr. Fisher, marked as Exhibit 20. Dr. Fisher states that the vaccinations, including varicella, contributed to “if not caused” Rouqaya’s illness and death, and he was not retracting his prior opinion. Pet. Ex. 20, at 2. Dr. Fisher states that a pre-existing illness with lung manifestations “may well have been exacerbated by one or more vaccinations and possibly febrile reaction” Id. at 1. Dr. Fisher did not respond to respondent’s experts’ opinions.

At the January 22, 2013, telephonic status conference, the undersigned discussed Dr. Fisher’s reports constituting Exhibits 19 and 20 with counsel, emphasizing that Dr. Fisher had not responded to respondent’s experts’ opinions, as the undersigned previously ordered. Petitioner’s counsel stated that he did not feel there was any way to respond to respondent’s experts, adding, “We do not have a sound medical theory explaining causation in this case.” The undersigned ordered petitioner’s counsel to put this in writing and he said he or Dr. Fisher would do so. The undersigned ordered that either petitioner’s counsel or Dr. Fisher file this statement by February 21, 2013.

On February 18, 2013, petitioner filed a third supplemental report from Dr. Fisher, marked as Exhibit 21. Dr. Fisher posits the role of varicella vaccine exacerbating a pre-existing illness and then raises a hypothesis of anaphylaxis for the first time in his four reports, stating, “Should this have been the case” it would have been “a definite possibility.” Pet. Ex. 21, at 2. Rouqaya was never diagnosed with anaphylaxis. Dr. Fisher continued not to respond to respondent’s experts’ opinions.

The undersigned issued an Order dated February 26, 2013 after another telephonic status conference, requiring Dr. Fisher to explain the basis for his diagnosis of anaphylaxis. The undersigned reiterated the requirement in the undersigned’s prior orders that Dr. Fisher respond to respondent’s experts’ opinions. The undersigned held that there was no longer a reasonable basis to proceed in this case because petitioner’s expert refused to respond to respondent’s experts’ reports but, instead, kept filing report after report changing his opinion about what might have happened to Rouqaya. February 26, 2013 Order, at 3.

On March 22, 2013, petitioner filed a fourth supplemental report from Dr. Fisher, marked as Exhibit 23. Dr. Fisher finally admits that “the neuropathology indicates that a traumatic brain injury (TBI) occurred.” Pet. Ex. 23, at 5. Dr. Fisher attributes this TBI either to Rouqaya having fallen or having had anaphylaxis. He terms these “potential causes to be considered.” Id. He admits that a fall would not result from the vaccinations, while anaphylaxis would occur only in rare situations. He concludes, “Thus while I would consider anaphylaxis, I cannot state it is at least as likely as not that the vaccination and materials were a direct cause of an anaphylactic event that lead [sic] to the child’s demise. . . . The unknowns in this case exceed the known facts and leave many aspects shrouded in uncertainty.” Id.

On April 5, 2013, petitioner’s counsel moved to withdraw, which the undersigned granted on April 8, 2013, and petitioner became pro se.

DISCUSSION

To satisfy his burden of proving causation in fact, 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 HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Secretary of Health and Human Services, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[.]" the logical sequence being supported by "reputable medical or scientific explanation[.]" *i.e.*, "evidence in the form of scientific studies or expert medical testimony[.]"

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Id. at 1148.

Petitioner must show not only that but for HiB, varicella, and hepatitis A vaccines, Rouqaya would not have had traumatic brain injury from which she died, but also that the vaccines were a substantial factor in causing her traumatic brain injury from which she died. Shyface v. Sec'y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

The Vaccine Act does not permit the undersigned to rule in favor of petitioner based solely on his allegations unsupported by medical records or credible medical opinion. 42 U.S.C. § 300aa-13(a)(1). Petitioner's expert ultimately conceded that he had no theory that would explain how or even if Rouqaya's vaccinations caused her traumatic brain injury. Dr. Fisher hypothesized that maybe she had anaphylaxis, a condition for which she was never diagnosed. He concedes as well that the unknowns are more prevalent than the knowns in this case as far as he is concerned, which means he has not stated that, more likely than not, any or all of Rouqaya's vaccinations could and did cause her TBI, and that one day is an appropriate time interval for vaccinations to cause TBI. In other words, petitioner has not satisfied the three prongs of Althen and has failed to make a prima facie case.

Petitioner moved for dismissal during a recorded telephonic status conference on July 17, 2013. His motion is **GRANTED**. This petition is hereby **DISMISSED**.

CONCLUSION

Petitioner's petition is **DISMISSED**. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.³

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

³ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.