

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-184V

November 7, 2011

Not to be Published

MITCHELL and BRANDIE BARCUS, legal *
representatives of CONNOR BARCUS, a minor, *

Petitioners, *

v. * Petitioners' motion to dismiss;

seizures; cortical dysplasia

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

C. Daniel Hayes, Pataskala, OH, for petitioners.
Jennifer L. Reynaud, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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.

On March 26, 2010, petitioners filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10-34 (2006), alleging that their son Connor suffered seizures after receiving MMR, varicella, and hepatitis A vaccines which the vaccinations caused. Initially, in respondent's Rule 4(c) Report, filed June 10, 2010, respondent conceded liability. However, a November 19, 2010 brain MRI showed that Connor had an infiltrating low-grade glioma or neuroglial tumor, or in the alternative, a malformation of cortical development or zone of dysplasia. Filing of CD, October 11, 2011, p. 32.

On September 23, 2011, the parties took the deposition of Dr. Monica Islam, Connor's treating pediatric neurologist. In a status conference held on October 3, 2011, the parties recounted Dr. Islam testifying that Connor was born with cortical dysplasia which formed in utero, involving an intermixing of white and gray matter. Dr. Islam testified that this cortical dysplasia was the cause of Connor's seizures. Respondent's counsel stated at the conference that Dr. Islam's opinion definitely affected respondent's concession of entitlement. Petitioners' counsel stated that Connor had surgery to remove the dysplasia, which improved his condition.

During a status conference on November 7, 2011, petitioners' counsel stated that he sent Connor's records and the deposition of Dr. Islam to petitioners' expert who opined that the cortical dysplasia, not the vaccinations, caused Connor's seizures. Petitioners' counsel orally moved to dismiss after conferring with his clients and obtaining their approval.

The undersigned hereby orders the petition dismissed.

DISCUSSION

To satisfy their burden of proving causation in fact, petitioners 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. Sec’y of HHS, 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.

Petitioners must show not only that but for the vaccines, Connor would not have had seizures, but also that the vaccine was a substantial factor in bringing about his seizures. Shyface v. Sec’y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

In the instant action, Connor’s treating pediatric neurologist and petitioners’ expert witness have opined that Connor’s inborn cortical dysplasia, rather than the vaccinations, is the cause of his seizures. Petitioners have asked for dismissal.

CONCLUSION

Petitioners’ 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.²

IT IS SO ORDERED.

November 7, 2011
DATE

s/Laura D. Millman
Laura D. Millman
Special Master

² 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.