

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 11-283 V

Filed: June 14, 2012

Not for Publication

BRITTANY M. CROFT, *

Petitioner, *

v. * Dismissal; Failure to Prosecute

SECRETARY OF HEALTH *

AND HUMAN SERVICES, *

Respondent. *

Stephen C. Maxwell, Fort Worth, TX, for petitioner.

Chrysovalantis P. Kefalas, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

On May 5, 2011, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10 to -34 (2006), alleging that Gardasil vaccine, which she received on May 6, 2008, caused her seizures and fainting episodes.

During a telephonic status conference held on June 22, 2011, petitioner's counsel informed the undersigned that he was working with a pediatric neurologist, Dr. Warren Marks at Cook Children's Medical Center in Fort Worth, Texas. At that time, there were many missing

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 banned categories listed above, the special master shall redact such material from public access.

medical records which petitioner had ordered from Baylor All Saints Medical Center, Harris Methodist Hospital, John Peter Smith Hospital, and Texas Health Arlington Memorial Hospital. Petitioner filed medical records from these providers on September 12, 2011.

On November 7, 2011, the undersigned held a telephonic status conference during which petitioner's counsel recognized that the references to seizure disorder in the medical records were within the patient history sections rather than diagnoses by the treating physicians. Petitioner's counsel stated that he requested medical records from two additional providers. On December 3, 2011, petitioner filed medical records from Dr. Elisabeth A. Wagner and Dr. Suchita D. Reddy.

During a status conference held on February 9, 2012, petitioner's counsel informed the undersigned that Dr. Marks planned to examine petitioner and perform an EEG study to ascertain whether petitioner actually has a seizure disorder. Petitioner was supposed to contact Dr. Marks to schedule an appointment for her examination within the next few weeks.

On March 26, 2012 during a status conference, petitioner's counsel stated that he was unable to contact his client. His client had not returned his calls and had not responded to the letters counsel sent to her. Petitioner had not scheduled an appointment with Dr. Marks either. Petitioner's counsel stated that he would send another certified letter to petitioner as well as petitioner's boyfriend's mother, who provided an affidavit for petitioner.

The undersigned held a telephonic status conference on May 9, 2012. Petitioner's counsel sent a letter by certified mail informing petitioner he would withdraw from the case if petitioner did not contact him by a given deadline. Petitioner's counsel did receive a return receipt, confirming that petitioner received his letter. Petitioner did not respond to the letter.

On May 10, 2012, the undersigned issued an Order to Show Cause, ordering petitioner to contact her counsel by June 7, 2012 to proceed with a consultation with her expert or risk dismissal of her case. Petitioner's formal response to the Order to Show Cause was due by June 11, 2012. Petitioner's counsel sent the Order to Show Cause to petitioner along with a letter urging petitioner to contact him immediately. Counsel sent the letter via certified mail, return receipt requested.

On June 14, 2012, the undersigned held a telephonic status conference. Petitioner's counsel reported that his client did sign for the letter but that she had not contacted him.

FACTS

Petitioner was born on February 15, 1990.

On May 6, 2008, she received Gardasil vaccine. Med. recs. Ex. 1, at 1. Petitioner's boyfriend's mother, Ms. Kymisha Franko, provided an affidavit. Ms. Franko stated that approximately 10 days after the vaccination, petitioner began to feel dizzy and hot, and then

suddenly her eyes rolled back into her head and she fainted. Franko Aff. Ex. 2, at 1. Petitioner remained unconscious for a period of time. Id. In petitioner's affidavit, petitioner states that other than a febrile seizure she had when she was eight months old, she did not experience seizures or suffer from a seizure disorder. Pet'r's Aff. Ex. 12, at 1.

On June 24, 2008, petitioner was admitted to John Peter Smith Hospital. Med. recs. Ex. 3, at 20. Petitioner complained that she passed out that day at 11:00 a.m. while on the computer. She woke up in the ambulance and was probably unconscious for more than an hour. Her grandmother said that petitioner convulsed in the ambulance for one second prior to awakening. Petitioner reported that she had these episodes about four times a day where she experiences numbness and pain in her left arm before passing out. Sometimes, these episodes were witnessed by her boyfriend. Id. Ms. Franko also reported that petitioner experienced these episodes approximately once a week and that they were getting progressively worse. Med. recs. Ex. 3, at 81.

A CT angiogram was performed which confirmed a pulmonary embolus. During her hospital stay, she experienced two episodes which the treating physician noted were more like panic attacks. Petitioner was diagnosed with a right lower lobe pulmonary embolus, anxiety, and panic attacks, and was given Coumadin to treat her embolus and Klonopin to help with the anxiety and any seizure activity. Med recs. Ex. 3, at 21, 83.

During a consult on June 25, 2008, Dr. Jorge Pinilla wrote that petitioner had several syncopal episodes over the last few weeks, some of which were witnessed by her boyfriend. Med. recs. Ex. 3, at 100.

On June 27, 2008, Dr. Hetal Rana wrote that petitioner experienced depression, panic attacks, and possible generalized anxiety disorder. Dr. Rana spoke with petitioner's grandmother, who conveyed that petitioner had been through multiple stressful events since February 2008. Med. recs. Ex. 3, at 98.

Petitioner was discharged on June 28, 2008. Med. recs. Ex. 3, at 20. The treating physician recommended petitioner follow up with the neurology clinic in four weeks to have an EEG performed on an outpatient basis. Med. recs. Ex. 3, at 22.

On August 16, 2008, petitioner was admitted to Baylor All Saints Hospital for abdominal pain and a seizure during transport. Med. recs. Ex. 5, at 1. Petitioner complained of abdominal pain which started the day before and pain with urination. Med. recs. Ex. 5, at 5. She was diagnosed with a miscarriage two weeks before and had not expelled anything yet. During the ambulance transport, petitioner started seizing and was unresponsive. The EMT gave 2 milligrams of Versed, and the seizure stopped. Med. recs. Ex. 6, at 3 (ambulance records).

On September 11, 2008, petitioner was admitted to Baylor All Saints Medical Center. Petitioner complained of chest pain and shortness of breath and was diagnosed with syncope and a urinary tract infection. Med. recs. Ex. 7, at 4. Petitioner reported that she had a Gardasil shot

on May 6, 2008 and experienced seizures since the vaccination. Med. recs. Ex. 7, at 5.

On September 22, 2008, petitioner was taken by ambulance to the emergency room at Arlington Memorial Hospital. Petitioner complained of seizures and loss of consciousness which occurred prior to her arrival to the ER. Petitioner's family members stated that petitioner had seizures three times a week, that she saw a neurologist who said that it is anxiety, and that she had an EEG performed at All Saints. Med. recs. Ex. 9, at 6. Petitioner was released and told to follow up with a neurologist. Med. recs. Ex. 9, at 7.

Petitioner states that she suffered from additional seizures which required transportation to Harris Methodist Hospital on January 1, 2009 and Arlington Memorial Hospital on May 31, 2009. Pet'r's Aff. Ex. 12, at 2; see also Med. recs. Ex. 18, at 5; Ex. 46, at 1, 3. On May 31, 2009, Dr. Reddy noted in the medical records that petitioner has a seizure disorder and is taking Dilantin. Med. recs. Ex. 46, at 15, 16.

Petitioner also experienced a seizure in late April of 2010. Pet'r's Aff. Ex. 12, at 2.

When petitioner sought care during her pregnancy in 2010 from Dr. Elizabeth Wagner, Dr. Wagner wrote that petitioner has a seizure disorder and the date of her last seizure was June 11, 2009. Med. recs. Ex. 44, at 65. On April 29, 2010, Dr. Rebecca Reyes also noted that petitioner's last seizure was one year ago. Med. recs. Ex. 44, at 98.

The additional medical records from Baylor All Saints Medical Center, filed as Exhibit 14, relate to petitioner's pregnancy, labor, and delivery of her child. The medical records from Texas Health Harris Methodist Hospital, filed as Exhibit 16, relate to an incident when petitioner was thrown from a horse. The medical records from JPS Health Network, filed as Exhibit 17, also relate to the accident when petitioner was thrown from a horse.

DISCUSSION

To satisfy her 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. 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.

Petitioner must show that she has a seizure disorder, that but for the Gardasil vaccine, she would not have a seizure disorder, and that the vaccine was a substantial factor in bringing about her seizure disorder. Shyface v. Sec'y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Since petitioner filed her petition, she has not provided evidence to make a prima facie case. She alleges that she suffers from a seizure disorder, but most of the references to seizures in the medical records are anecdotal, within patient history sections or statements from family members about petitioner's history of seizures. Only Dr. Wagner and Dr. Reddy refer to a seizure disorder in their respective assessments. See Med. recs. Ex. 44, at 65; Ex 46, at 15, 16. Petitioner has not been diagnosed with a seizure disorder by a neurologist, however. Nor has petitioner produced an expert opinion supporting causation-in-fact.

Moreover, despite receiving two certified letters and a copy of this court's Order to Show Cause, petitioner has refused to contact her attorney. Petitioner's counsel cannot prove that petitioner has a seizure disorder or causation-in-fact without expert opinion, yet petitioner will not contact counsel to schedule an appointment with her expert. Finally, the undersigned specifically stated in her May 10, 2012 Order to Show Cause that if petitioner did not contact her attorney by June 7, 2012 and respond to the Order by June 11, 2012, then her case would be dismissed.

CONCLUSION

Petitioners' petition is **DISMISSED** for failure to prosecute and failure to make a prima facie case. 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.

Dated: June 14, 2012

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.