

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-833V

December 17, 2010

Not for Publication

CHANTELLE MARCELLO,

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Petitioner,

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v.

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Dismissal based on petitioner's
request for a ruling on the record
to dismiss the case; Gardasil; GBS
six months later after viral illness

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SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

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Respondent.

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Diana L. Stadelnikas, Sarasota, FL, for petitioner.

Debra A. Filteau Begley, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition on December 4, 2009, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that Gardasil vaccine which she received on December 14, 2006 caused her Guillain-Barré syndrome (GBS) which she alleges began within two weeks of vaccination. Petitioner filed an amended petition on June 4, 2010 alleging that she

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 clearly be an unwarranted invasion of privacy. When such a decision is filed, petitioner has 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.

received both Gardasil and Menactra vaccines on December 14, 2006, had aching and shooting pains in her legs and throughout her body in the beginning of January 2007, and was diagnosed with GBS on June 8, 2007.

There are a number of problems with the allegations in this case. First, although petitioner alleges in both her petition and amended petition that she began to have the symptoms of GBS in early January, the medical records which include repeated histories reflect the onset of symptoms of GBS in early June soon after petitioner had a viral illness manifested by aches, pains, and frequent vomiting. Secondly, petitioner did visit a hospital on February 12, 2007, but only to complain of a sore throat, cough, and pharyngitis. She did not complain of pains in her legs and throughout her body, and aching which started in early January 2007. Thirdly, petitioner was in school at the time her alleged GBS symptoms began in early January 2007, yet all of her complaints to the school nurse from January until early June 2007 concerned sore throats, headaches, and sinus pressure.

On December 15, 2010, petitioner made a Motion for Ruling on the Record “as the proper means to dismiss this matter.” The undersigned grants petitioner’s Motion.

FACTS

Petitioner was born on April 24, 1990.

On December 14, 2006, she received Gardasil and Menactra vaccines. Med. recs. at Ex. 2, p. 40. (The doctor’s notes for that date reflect only Menactra, but the vaccine record appears to reflect both vaccinations. Med. recs. at Ex. 2, p. 25.)

On January 10, 2007, at 10:35 a.m., petitioner reported to the school nurse at Rubin A. Cirillo High School, complaining of not feeling well. Her temperature was 97.5° and she

complained of sinus pressure and congestion. She returned to class at 11:00 a.m. Med. recs. at Ex. 4, p. 6.

On January 22, 2007, at 11:50 a.m., petitioner reported to the school nurse, complaining of not feeling well. Her temperature was 99.2° and she complained of a headache, and congestion, but no cough. Petitioner received Motrin and returned to class. *Id.*

On February 6, 2007, at 9:15 a.m., petitioner reported to the school nurse, complaining of a sore throat. Her temperature was 97.2° and she told the nurse that she had babysat over the weekend for a child who was positive for strep throat. Petitioner's throat was unremarkable. She had nasal congestion, rested for 20 minutes, and returned to class. At 12:35 p.m., petitioner returned to the nurse and was sent home by bus. *Id.*

On February 12, 2007, petitioner went to Rochester General Hospital, complaining of a sore throat, cough, and pharyngitis. She was not in acute distress and her strep test was negative. She was diagnosed with a viral illness. Med. recs. at Ex. 2, p. 26.

On April 19, 2007, petitioner went to the school nurse, complaining of being tired. She rested 10 minutes, said she felt better, and returned to class. She had a headache. Med. recs. at Ex. 4, p. 6.

On June 1, 2007, petitioner went to the school nurse, complaining of bad leg pain. She had allergy symptoms and took medicine that morning. Petitioner was limping. She had no muscle strength to her right leg. Her mother picked her up and took her to the doctor. *Id.*

On June 4, 2007, petitioner went to Rochester General Hospital, complaining of body aches, headache, and vomiting intermittently for one week. She was not eating and now appeared fatigued. She was diagnosed with a headache. Med. recs. At. Ex. 2, p. 27.

On June 14, 2007, Dr. Prasad Penmetsa at Rochester General Hospital diagnosed petitioner with GBS caused by viral gastritis. Med. recs. at Ex. 2, p. 47.

On July 6, 2007, petitioner was at Strong Memorial Hospital where Dr. Cole Robinson noted petitioner was in her usual state of health until about six weeks prior to admission when she developed diffuse upper and lower extremity body aches and had trouble walking. About a week into her aches and pains, she developed frequent emesis, according to petitioner's mother. Her primary medical doctor diagnosed her with a viral illness. The Rochester General Hospital Emergency Department diagnosed her with GBS. Petitioner's mother stated petitioner was very healthy until this illness. She had no chronic illness. Petitioner's mother also stated that petitioner had Gardasil vaccine one week prior to the onset of her symptoms. Med. recs. at Ex. 1, p. 5.

On July 9, 2007, petitioner saw Dr. David Herrman at Strong Memorial for an EMG. Petitioner's parents told Dr. Herrman that the onset of petitioner's symptoms was at the beginning of June. Med. recs. at Ex. 1, p. 3.

DISCUSSION

This is a causation in fact case. To satisfy her burden of proving causation in fact, petitioner must offer "(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. Secretary of HHS, 418 F. 3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Secretary 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[.]”

In Capizzano v. Secretary of HHS, 440 F.3d 1274, 1325 (Fed. Cir. 2006), the Federal Circuit said “we conclude that requiring either epidemiologic studies, rechallenge, the presence of pathological markers or genetic disposition, or general acceptance in the scientific or medical communities to establish a logical sequence of cause and effect is contrary to what we said in Althen...”

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

Petitioner must show not only that but for the vaccines, she would not have had GBS, but also that the vaccines were substantial factors in bringing about her GBS. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

The Federal Circuit in Capizzano emphasized the opinions of petitioner’s four treating doctors in that case in concluding causation of rheumatoid arthritis from hepatitis B vaccination. 440 F.3d at 1326. In the instant action, none of petitioner’s doctors attributed her GBS to Gardasil vaccine. Dr. Penmetsa attributed petitioner’s GBS to viral gastritis. There is not a single medical record in support of petitioner’s allegations.

Section 300aa-13(a)(1) of 42 U.S.C. states:

The special master or court may not make such a finding [awarding compensation to petitioner] based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.

Here, there is no medical record or medical opinion supporting petitioner's claim that Gardasil caused her GBS. The fact that petitioner's mother told Dr. Robinson that petitioner's symptoms began a week after she received Gardasil does not prove this was so. She received her vaccinations in mid-December 2006. The onset of her neurological symptoms was early June 2007. That is not one week. That is six and one-half months.

Petitioner has not provided an opinion from a medical expert in support of her allegations. Petitioner recognizes that she cannot meet her burden of proving that Gardasil caused her GBS and moves for a ruling on the record as a proper means to dismiss this matter. The undersigned grants her motion.

CONCLUSION

Petitioner's petition is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.² The status conference set for January 7, 2011 at 12:30 p.m. is cancelled.

IT IS SO ORDERED.

December 17, 2010
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.