

OFFICE OF SPECIAL MASTERS

No. 99-562V

(Filed: November 22, 2004)

LAURIE PERRIN,

*

*

*

*

*

Petitioner,

*

TO BE PUBLISHED

*

v.

*

*

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

*

*

*

Respondent.

*

*

Aaron R. Anderson, Latham, NY, for petitioner.
Michael P. Milmo, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION

Petitioner filed a petition pro se on August 3, 1999, followed by an amended petition on April 18, 2000, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that her second hepatitis B vaccination on May 2, 1997, caused severe pain in her right arm and her third hepatitis B vaccination on October 6, 1997, continued her severe pain, and caused her memory loss and chronic fatigue syndrome.

Petitioner did not obtain a medical expert for the purpose of testimony.

The undersigned did not have a hearing in this case, which is entirely within her discretion.
42 U.S.C. § 300aa-12(d)(3)(B)(v).

Doctors' Reports

Petitioner submitted a letter from Dr. Jason Kittler, Director of Neighborhood Health Center, dated May 19, 1999, to Merck Pharmaceutical Co., stating that petitioner had severe arm pain after her second shot, and severe arm and shoulder pain after her third shot as well as memory loss, generalized malaise, and symptoms similar to chronic fatigue. Work-up indicated a fibromyalgia-type picture with memory loss, muscle aches and pains, fatigue, lack of concentration, and overall disability. This temporally related to her hepatitis B vaccination and Dr. Kittler reported it to Merck as an adverse reaction. P. Ex. 1, p. 1. He felt she developed complicated and devastating complications from hepatitis B vaccine. Id. at p. 2. Dr. Kittler did not give any basis for his feeling that petitioner's symptoms were caused by hepatitis B vaccine except temporality.¹

Petitioner saw Dr. Byron Hyde on June 16, 2002, for an examination and evaluation. He found she had a possible nodular thyroid and required an ultrasound of the thyroid. P. Vol. III, Ex. 1, p. 5. He found her complaints and history "are consistent with Recombinant Hepatitis B immunization damage but are not diagnostic of Recombinant Hepatitis B immunization." Id. at p. 7. He stated petitioner has an abnormal immune profile consistent with immune injury seen in other post-hepatitis B immunization patients "but this anomaly should be verified on a repeat test at the same laboratory." Id. He concluded, "It is my opinion at the present time that she has typical

¹ Dr. Kittler also testified for petitioner at a workmen's compensation hearing on October 31, 2002, in which he stated that the basis for his opinion on causation was temporality. P. Vol. III, Ex. 2, p. 27. He agreed that there was some medical speculation in his diagnosis of serum sickness. Id. at p. 28. Petitioner's symptoms could be due to other causes. Id.

recombinant Hepatitis B immunization injury. However I have only seen the patient in one extended visit period and she needs to be re-evaluated and certain areas investigated in greater detail.” Id. Dr. Hyde does not give a basis for his opinion.

Dr. Hyde has testified before the undersigned in a hearing in which another petitioner alleged she had chronic fatigue and fibromyalgia after hepatitis B vaccination. Gardner-Cook v. Secretary of HHS, No. 99-480V, 2003 WL 21439667 (Fed. Cl. Spec. Mstr., April 28, 2003), aff’d, 59 Fed. Cl. 38 (July 25, 2003), motion for reconsideration denied (Fed. Cl., Aug. 20, 2003), aff’d per curiam, 97 Fed. Appx. 332, 2004 WL 1153657 (Fed. Cir., May 11, 2004). As the undersigned stated in Gardner-Cook, at *1, Dr. Hyde is not board-certified in anything and does not earn a living practicing medicine. He regards himself as an investigative physician. Id. at *2. “Dr. Hyde stated that he does not have the academic and intellectual abilities to understand what he sees among the 200 cases of adverse reactions he has seen.” Id. Dr. Hyde called himself a “technologist.” Id. at *4.

The undersigned did not find Dr. Hyde credible, holding:

Dr. Hyde is a charming and urbane person, but his medical skills are limited, his opinion is outside contemporary medical opinion ..., and he is tainted by a bias toward finding a causative nexus regardless of the facts of the individual case. He is unqualified to give an opinion here.

Id. at *10.

The undersigned has no reason to have a better opinion of Dr. Hyde’s views in this case than in Gardner-Cook.

Petitioner herein was held disabled in a Social Security decision, but none of the doctors who assisted her in obtaining this judgment proved willing to testify before the undersigned in this proceeding, particularly Dr. George Wooten whom petitioner’s counsel contacted, but who remains elusive to this date to petitioner’s request for an expert report and possible testimony. Thus, Dr.

Wooten's opinion in the Social Security proceeding that petitioner had a neurological reaction to hepatitis B vaccine due to a triggered autoimmune reaction (P. Vol. III, Ex. 3, p. 2) remains unexplained to the undersigned.

Petitioner's Social Security determination that she is disabled is not binding on the undersigned on the issue of whether hepatitis B vaccine has caused her multiple complaints. Tester Corp. v. U.S., 1 Cl.Ct. 370, 374-75 (1982) (“[I]t is a well settled principle that while administrative Board decisions concerning legal interpretations may be given some weight, they are clearly not binding on this court”). In Gardner-Cook, supra, petitioner moved for reconsideration of the denial of her appeal based on a favorable result in her Social Security disability determination, asking the Honorable Marian Blank Horn to supplement the record with the decision of the administrative law judge and a transcript of the testimony of a doctor who testified that she had an organic brain disorder. Judge Horn denied petitioner's motion, stating the ALJ's decision addressed causation only casually. In an earlier opinion, he had denied disabled status to petitioner. Slip op. at 4. Judge Horn stated:

In the first place, decisions of Social Security ALJ's [sic] are not binding on the special masters or judges of this federal court. Furthermore, decisions of Social Security ALJs regarding whether the petitioner is “disabled” under the Social Security Act are appealed to the federal District Courts. Although this court certainly gives due regard, and often deference, to the decisions issued by federal District Court judges, those decisions are not binding on judges of this court. See UMC Electronics Co. v. United States, 816 F.2d 647, 652 n.6 (Fed. Cir. 1987) (citing South Corp. v. United States, 690 F.2d 1368, 1371 (Fed. Cir. 1982), cert. denied, 484 U.S. 1025 (1988)).

Slip op. at 5.

Judge Horn went on to describe the different roles of the Social Security ALJ and the officers of this court. A determination of Social Security disability does not require investigation and

determination of the cause of the alleged injuries. The focus there is on whether the claimant has a qualifying disability, whereas special masters under the Vaccine Act in causation in fact cases focus on determining by a preponderance of the evidence the issue of causation. Slip op. at 5, 6.

For more discussion of the “vital differentiations between the functions of judicial and administrative tribunals,” see FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 144 (1940).

DISCUSSION

To satisfy her burden of proving causation in fact, petitioner must offer "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury. A reputable medical or scientific explanation must support this logical sequence of cause and effect." Grant v. Secretary, HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992). Agarwal v. Secretary, HHS, 33 Fed. Cl. 482, 487 (1995); see also Knudsen v. Secretary, HHS, 35 F.3d 543, 548 (Fed. Cir. 1994); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, supra, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Hasler v. US, 718 F.2d 202, 205 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984).

Petitioner must not only show that but for the vaccine, she would not have had the injury, but also that the vaccine was a substantial factor in bringing about her injury. Shyface v. Secretary, HHS, 165 F.3d 1344 (Fed. Cir. 1999).

In this case, petitioner has failed to provide an expert witness who is capable of not only offering an opinion of causation from hepatitis B vaccine, but also substantiating his opinion with a credible basis. Dr. Kittler relied solely on temporal relationship, a basis which is legally

insufficient. See Hasler, supra. Dr. Hyde has testified previously before the undersigned in a case in which petitioner also alleged hepatitis B vaccine caused her mental problems as well as chronic fatigue and/or fibromyalgia, and the undersigned found him not credible as well as biased and inadequate as a medical doctor. See Gardner-Cook, supra. Dr. Wooten provided assistance to petitioner at a Social Security hearing to help her attain a decision that she was disabled, but he has not been cooperative with petitioner's counsel's numerous efforts to have him write and submit a report to this court or to testify.

Without credible medical expert proof of causation in fact, which requires not only the statement of causation but a legally sufficient basis therefor, petitioner has failed to prove a prima facie case. The undersigned must dismiss her petition.

CONCLUSION

This case 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.

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master