

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-20V

January 31, 2012

Not to be Published

VICTORIA RESH,

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Petitioner,

*

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v.

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Petitioner moves to dismiss;
no expert support of significant
aggravation of GBS post-flu vaccine

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SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

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Respondent.

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F. John Caldwell, Jr., Sarasota, FL, for petitioners.

Lara A. Englund, 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¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 January 13, 2010, petitioner filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa–10-34, alleging that an influenza vaccination she received on October 12, 2007 caused her Guillain-Barré Syndrome (GBS).

During the first telephonic conference with the parties, the undersigned explained that the medical records show that petitioner’s GBS began the day before she received flu vaccine. Med. recs. at Ex. 1, p. 55; Exhibit 8, pp. 14, 15, 16. Petitioner could not allege that flu vaccine caused an illness whose onset occurred before the vaccination. Shalala v. Whitecotton, 514 U.S. 268, 273 (1995) (illness before vaccination cannot be due to vaccination). Petitioner’s only recourse was to prove through expert evidence that the flu vaccine significantly aggravated her preexisting GBS.

In a subsequent conference, petitioner’s counsel admitted that his retained neurologic expert could not support the allegation that flu vaccine significantly aggravated petitioner’s GBS. On January 31, 2012, petitioner’s counsel orally moved to dismiss. For the reasons stated below, the undersigned hereby orders the petition dismissed.

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 prove that her GBS was significantly worse after her flu vaccination, and that this significant worsening was due to the vaccination. The Vaccine Act defines “significant aggravation” as “any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health.” 42 U.S.C. § 300aa-33(4). The onset of petitioner’s GBS was one day before her flu vaccination. She has not proved through expert opinion that her GBS after the flu vaccination was any different than it would have been absent the flu vaccination. See Shyface v. Sec’y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999) (but for the vaccination, petitioner would not have experienced his injury).

Petitioner has failed to prove the three prongs of Althen. She has not shown that flu vaccine can significantly aggravate a preexisting GBS. She has not shown that in her case, flu vaccine did significantly aggravate her preexisting GBS. And she has not shown that receipt of flu vaccine one day after onset of GBS is an appropriate time interval to prove that flu vaccine causes significant aggravation of GBS.

For failure to make a prima facie case of causation in fact, petitioner’s petition is **DISMISSED.**

CONCLUSION

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.

January 31, 2012
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.