

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-47V

January 10, 2011

Not for Publication

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SCOTT ALLAN SCHOLTEN, *

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Petitioner, *

*

v. *

*

SECRETARY OF THE DEPARTMENT *

OF HEALTH AND HUMAN SERVICES, *

*

Dismissal based on petitioner's request to dismiss the case;

hepatitis B vaccine; alleged aches, pains, dizziness, sinusitis

*

Respondent. *

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* * * * *

Scott Allan Scholten, Skiatook, OK, for petitioner pro se.

Glenn A. MacLeod, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition on January 22, 2010, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that hepatitis B vaccine which he received on December 11, 2006 caused him a myriad of symptoms, including rhinitis, upper respiratory

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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

infection, fatigue, fever, chills, weakness, malaise, headache, dizziness, aching, arthritis, constipation, diarrhea, palpitations, and lupus-like syndrome.

The first telephonic status conference was held on March 10, 2010 and the undersigned provided petitioner in an Order dated March 11, 2010 a list of attorneys who practice in the Vaccine Program so that he might avail himself of counsel. The undersigned set the next status conference for May 5, 2010, but this was cancelled. Petitioner was instructed to contact the undersigned's law clerk by July 6, 2010, but he failed to do so.

On January 7, 2011, the undersigned's law clerk contacted petitioner to set up a status conference. Petitioner orally moved to dismiss the case. The undersigned grants petitioner's motion.

FACTS

Petitioner was born on August 21, 1971.

On March 18, 2002, petitioner complained at Conoco Phillips of head congestion, productive brown/green cough for three days, malaise, and aches and chills. He was diagnosed with pharyngitis and upper respiratory infection. Med. recs. at Ex. A, p. 61.

On April 26, 2002, petitioner complained at Conoco Phillips of stomach cramping, insomnia due to severe body aches, vomiting, diarrhea, cramps, and fatigue. *Id.*

On December 10, 2002, petitioner complained to Dr. Patrick W. Gray, an internist, of daily chest pain whose onset was two months previously. Med. recs. at Ex. B, p. 104.

On April 30, 2004, petitioner complained to Dr. Gray of constant abdominal pain for two weeks. Med. recs. at Ex. B, p. 103.

On June 23, 2004, petitioner complained at Conoco Phillips of a sinus headache and upper respiratory infection for five days. Med. recs. at Ex. A, p. 60.

On January 12, 2005, petitioner complained at Conoco Phillips of three days of malaise and loose stools. Med. recs. at Ex. A, p. 59.

On January 27, 2005, petitioner complained of head pain in the morning for one hour and shooting pains. Med. recs. at Ex. A, p. 58.

On March 29, 2006, petitioner complained of trouble breathing. Med. recs. at Ex. A, p. 54.

On December 11, 2006, petitioner received his first hepatitis B vaccination. Med. recs. at Ex. A, p. 2.

On January 9, 2007, petitioner saw Dr. Gray, complaining of vertigo and nausea for a little less than one month. Changing positions aggravated it greatly. Dr. Gray diagnosed petitioner with vertigo and labyrinthitis which he felt might be allergy-related. Dr. Gray prescribed Antivert. Med. recs. at Ex. B, pp. 102, 103.

On January 17, 2007, petitioner received his second hepatitis B vaccination. Med. recs. at Ex. A, p. 3.

On February 28, 2007, petitioner saw Dr. John Holden, complaining of vertigo since before December 2006. He had a productive and dry cough, sore throat, sinus pain, headaches, sneezing, and decreased sleep for seven days. Dr. Holden diagnosed petitioner with allergic rhinitis, acute sinusitis, and atopic dermatitis. Med. recs. at Ex. B, p. 34.

On June 12, 2007, petitioner saw physician's assistant Melody Yozzo at Conoco Phillips, complaining of sinus tachycardia, all over aching, and hurt joints for a few days. Other family

members had similar symptoms. Petitioner took Singulair for seasonal allergies. His temperature was normal. He had facial puffiness with eye swelling and red sclera. His right tympanic membrane was gray with normal light reflex. His left tympanic membrane was gray and dull. He had tonsilar swelling and erythema and cervical lymphadenopathy. The diagnosis was tonsillitis and possible strep throat. He was prescribed Amoxicillin and Tylenol. Med. recs. at Ex. A, p. 38.

On June 21, 2007, petitioner received his third hepatitis B vaccination. Med. res. at Ex. A, p. 4.

On August 22, 2007, petitioner saw Dr. Holden complaining of pain. Dr. Holden diagnosed sinusitis. Med. recs. at Ex. B, p. 31.

On September 11, 2007, petitioner saw Dr. Holden, who diagnosed him with acute sinusitis and cervical sprain/strain. Med. recs. at Ex. B, p. 28.

On September 20, 2007, petitioner saw Dr. Holden, who diagnosed him with chronic maxillary sinusitis. Med. recs. at Ex. B, p. 25.

On October 3, 2007, petitioner went through a diagnostic checklist and recounted too many tick bites in the last seven years to count. Med. recs. at Ex. B, p. 68.

On October 9, 2007, petitioner saw Dr. Holden, who diagnosed him with glandular fever and labyrinthitis. Med. recs. at Ex. B, p. 22.

On October 15, 2007, petitioner saw Dr. W. Robert Howard, an otolaryngologist, who opined that petitioner had sensorineural hearing loss probably from noise exposure. He had no central or peripheral otologic problem on ear, nose, and throat examination causing his vertigo. Med. recs. at Ex. B, p. 64.

On October 29, 2007, petitioner saw Dr. Holden, who diagnosed him with labyrinthitis.

Med. recs. at Ex. B, p. 19.

On November 7, 2007, petitioner had an MRI done of his brain which showed mild sinus inflammatory disease in the ethmoid air cells and no demyelinating disease. Med. recs. at Ex. B, p. 55.

On November 27, 2007, petitioner saw Dr. S.V. Vaidya, a neurologist. Petitioner said he had had symptoms since winter 2006-2007. During December 2006, he had dizziness persisting two to three months. He felt confused. The dizziness was a mild vertiginous feeling. He did not have double vision, blurred vision, or loss of vision. His extremities did not tingle or feel numb. His vision never changed. He felt he was uncoordinated. The symptoms disappeared over three months without treatment. Petitioner stated his hands were tremulous at that time. Eating made his sensation better. In July 2007, after a flu-like illness, the prior symptoms recurred. He saw Dr. John Holden. He was positive for Epstein Barre virus, and had lymphadenopathy in his neck but he had been putting in a fence on a hot day and had mowed his lawn. He saw a chiropractor three days later when dizziness returned. He had generalized fatigue and a hot sensation over the outer border of his right leg. He did not have memory disturbances but he lacked concentration. A flickering computer monitor at work aggravated his dizziness. He did not have bladder or bowel symptoms. A local anesthetic for a cut to his middle finger caused intensely violent neck spasms. A brain MRI revealed mild inflammatory sinus disease involving ethmoid air cells but no evidence of demyelinating disease. In October, he was noted to have mild leukocytosis. He used to consume excessive caffeine but went off caffeine a few months ago and felt better. However, in the last few weeks, he started to consume caffeine again. He takes Singulair,

multivitamins, and glucosamine. His blood pressure was 140/75. He did not have lymphadenopathy. His mini-mental status examination was normal. Dr. Vaidya's impression was that petitioner did not have any focal sensory or motor deficit. He had mild intention tremor of the left upper extremity. His ophthalmological/ear, nose, throat examination was normal. Petitioner might have cervical disk disease or a viral syndrome. He might have a migraine variant. He chewed tobacco. Dr. Vaidya recommended petitioner discontinue caffeine and nicotine intake. Med. recs. at Ex. B, pp. 70, 71.

On November 28, 2007, petitioner had an MRI done of his cervical spine which showed a few small protrusions. Med. recs. at Ex. B, p. 57.

On December 14, 2007, petitioner complained to PA Yozzo at Conoco Phillips of sinus congestion, thick green/yellow nasal discharge which started with congestion around Thanksgiving when petitioner ran out of Singulair. Now he felt achy with a dull headache. He had taken Amoxicillin in the past for sinus infections. PA Yozzo diagnosed petitioner with sinus congestion and possible infection. She prescribed Amoxicillin. Med. recs. at Ex. A, p. 33.

On December 31, 2007, petitioner complained to nurse Terryle L. Heyer that the Amoxicillin did not work and he still felt miserable. Med. recs. at Ex. A, p. 32.

On January 2, 2008, petitioner saw Dr. Holden, who diagnosed him with acute sinusitis. Med. recs. at Ex. B, p. 16.

On August 4, 2008, petitioner saw PA Simon O. Cano, stating he played softball one week previously and injured his left forearm when he slid, causing an abrasion, and also twisted his left ankle. Med. recs. at Ex. A, p. 32.

On April 7, 2008, petitioner saw Dr. Holden, who diagnosed him with acute bronchitis and bronchiolitis. Med. recs. at Ex. B, p. 13.

On November 5, 2008, petitioner saw Dr. Holden, who diagnosed him with an unspecified viral infection and constipation. Med. recs. at Ex. B, p. 10.

On November 24, 2008, petitioner saw Dr. Holden, who diagnosed him with an unspecified viral infection and constipation. Med. recs. at Ex. B, p. 7.

On February 10, 2009, petitioner saw Dr. Holden complaining of chest pain. Med. recs. at Ex. B, p. 4.

On March 12, 2009, petitioner saw Dr. Michael A. Scherlag, a cardiologist, complaining of chest pain, shortness of breath, and allergies. Dr. Scherlag diagnosed petitioner with atypical chest pain, probably musculoskeletal. Med. recs. at Ex. B, p. 58.

DISCUSSION

This is a causation in fact case. To satisfy his 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 hepatitis B vaccine, he would not have had headaches, dizziness, sinusitis, chest pain, aches, fatigue, constipation, and the other illnesses about which he complained, but also that the vaccine was a substantial factor in causing these myriad symptoms. 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 hepatitis B vaccine caused her rheumatoid arthritis. 440 F.3d at 1326. In the instant action, none of petitioner's doctors attributed his myriad symptoms to hepatitis B vaccine. In fact, most if not all of the symptoms which petitioner alleged hepatitis B vaccine caused he had already experienced before he ever received hepatitis B vaccine. There is not a single medical record in support of petitioner's allegations. Moreover, petitioner has not filed a medical expert report in support of his 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 hepatitis B vaccine caused his myriad symptoms.

Petitioner recognizes that he cannot meet his burden of proving that hepatitis B vaccine caused his myriad symptoms and moves for dismissal. The undersigned grants his 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

IT IS SO ORDERED.

DATE

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.