

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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WILLIAM HORACE PARKER, SR., \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH \*

AND HUMAN SERVICES, \*

Respondent. \*

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No. 08-571V  
Special Master Christian J. Moran

Filed: May 19, 2010

entitlement, hepatitis A, allegedly  
expired vaccination, emotional  
distress, proximate and  
intervening cause

William Horace Parker, Sr., Portland, Oregon, pro se,  
Michael P. Milmo, United States Department of Justice, Washington, D.C., for respondent.

**PUBLISHED DECISION DENYING COMPENSATION\***

Mr. Parker filed a petition seeking compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006). Mr. Parker alleged that a hepatitis A vaccination caused him emotional distress because Mr. Parker saw information indicating that the dose of the hepatitis A vaccine that he received was expired. The expiration information seen by Mr. Parker was actually wrong. Mr. Parker seeks compensation for an injury that is not foreseeable, and, therefore, not compensable in that an intervening event (a mistake in data entry) caused his harm. Therefore, Mr. Parker is not entitled to compensation through the Vaccine Program.

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\* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it 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).

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 or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before 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 delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

## I. Facts<sup>1</sup>

On July 16, 2008, Mr. Parker sought treatment at the Veterans Affairs Hospital in Baltimore, Maryland. The record from this facility indicates that Mr. Parker suffers from a chronic hepatitis C infection, has a history of post traumatic stress disorder, and has a history of depression. Mr. Parker was encouraged to be vaccinated against hepatitis A. Exhibit E attached to Petition.

The next day, on July 17, 2008, Mr. Parker received a dose of the hepatitis A vaccine. The record from that visit indicates that the lot from which Mr. Parker's dose of the hepatitis A vaccine was drawn expired on March 30, 2008. Exhibit G attached to Petition. Thus, according to this information, the vaccine was expired by approximately four months.

The Veterans Affairs record contains mistaken information about the expiration date. It is more likely than not that the dose of the hepatitis A vaccine that Mr. Parker received was, actually, not expired. Respondent produced information from the manufacturer of the hepatitis A vaccine that demonstrated, by a preponderance of the evidence, that the vaccine expired in 2010, not 2008. See Resp't Exhibits A, B and C.<sup>2</sup>

At some time, Mr. Parker saw the information showing that the dose of the vaccination he received had expired. This discovery, according to Mr. Parker's petition, caused "mental, psychological and emotional stresses." Mr. Parker seeks compensation for the emotional distress that he suffered.<sup>3</sup>

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<sup>1</sup> Mr. Parker encountered some difficulty filing medical records. However, neither party has requested a delay in adjudicating Mr. Parker's case to obtain more medical records.

<sup>2</sup> In an October 5, 2009 status conference, Mr. Parker appeared to indicate that he agreed that the vaccination, in fact, was not expired.

<sup>3</sup> Mr. Parker's petition also alleges that the evening after receiving the vaccination, he felt uneasy and had "sleep deprivation, dizziness, stiffness, itching, [and] dry mouth." Mr. Parker sought treatment for these conditions on July 25, 2008. However, Mr. Parker did not file any medical record that documented his treatment. Mr. Parker did not submit any statements from a doctor who explained that the vaccine caused Mr. Parker to suffer "sleep deprivation, dizziness, stiffness, itching, [and] dry mouth."

Without more evidence, Mr. Parker may not receive compensation for "sleep deprivation, dizziness, stiffness, itching, [and] dry mouth." For these conditions, Mr. Parker did not satisfy the Althen factors. Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). He also did not demonstrate that these conditions lasted more than six months. See 42 U.S.C. § 300aa-11(c)(1)(D).

Mr. Parker supports his claim of emotional distress with a May 25, 2009 letter, written by Dr. Deanne Defontes. Dr. Defontes states that Mr. Parker “currently suffers with ongoing apprehension bordering on paranoia regarding past medical care that purportedly included a hepatitis A vaccine that was outdated. He has no current evidence of physical harm related to that incident, but has suffered emotionally due to the incident and to his perception of follow-up care being unsupportive and his health providers being unforthcoming.” Exhibit A to Pet’r July 9, 2009 filing.

Respondent maintains that Mr. Parker is not entitled to compensation because Mr. Parker failed to satisfy the factors set forth in Althen. See Resp’t Rep’t, filed Aug. 3, 2009. Whether Mr. Parker satisfies the Althen test is not resolved because Mr. Parker, for reasons explained in the following section, cannot demonstrate that the vaccine was the proximate cause of his injury.

## II. Analysis

To receive compensation under the Program, a petitioner must establish, among other elements, that a vaccine caused an injury. To establish causation, a petitioner may use one of two methods. The easier one is to establish a “Table injury,” in which causation is presumed. Mr. Parker, however, does not allege a Table injury.<sup>4</sup> Therefore, he must use the second method. A petitioner, who does not allege a Table injury, may receive compensation by establishing that he “sustained . . . any illness . . . which was caused by a vaccine.” 42 U.S.C.

§ 300aa–11(c)(1)(C)(ii)(I) (emphasis added); see also Moberly v. Sec’y of Health & Human Servs., 592 F.3d 1315, 1322 (Fed. Cir. 2010) (discussing the causation standard).

Mr. Parker’s case presents a question about what the term “caused by” means. Guidance about the meaning of “cause” in the Vaccine Program can be found in the Restatement (Second) of Torts. Shyface v. Sec’y of Health & Human Servs., 165 F.3d 1344, 1352 (Fed. Cir. 1999) (citing Restatement (Second) of Torts § 430-32). In accord with the Restatement, Shyface held that “an action is the ‘legal cause’ of harm if that action is a ‘substantial factor’ in bringing about the harm, and that the harm would not have occurred but for the action.”

According to the Restatement, an actor whose conduct satisfies a “but for” test of causation may not always be liable for that conduct. Restatement (Second) of Torts § 431. For example, an actor will not be liable when an intervening cause supersedes the actor’s conduct. See id. at §§ 440-453. Traditionally in such a case, the actor is said not to be the “proximate cause” of the injury. See Richard W. Wright, Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 Vand. L.R. 1071 (2001).

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<sup>4</sup> Hepatitis A was added to the Table in 2004. 69 Fed. Reg. 69945 (Dec. 1, 2004).

Here, the principles of proximate cause and intervening cause preclude an award of compensation to Mr. Parker.<sup>5</sup> The Secretary of Health and Human Services, who administers the Vaccine Injury Trust Fund, is responsible for compensating people who are injured by a “vaccine.” 42 U.S.C. § 300aa–11(c)(1)(C)(ii)(I) (emphasis added). In doing so, the Secretary steps into the shoes of the vaccine manufacturer and the vaccine administrator. See Lowery v. Sec’y of Health & Human Servs., 189 F.3d 1378, 1381 (Fed. Cir. 1999) (stating “the statutory respondent is the Secretary of the Department of Health and Human Services . . . rather than the manufacturer”). It is difficult to see how the vaccine manufacturer did anything to produce Mr. Parker’s emotional distress. The compounds constituting the vaccine did not cause Mr. Parker to suffer an adverse physical reaction, such as anaphylaxis or an immune-mediated reaction. Likewise, it is difficult to see how the person who decided to administer the vaccine harmed Mr. Parker. The act of vaccination did not cause Mr. Parker an adverse reaction, such as developing an infection at the injection site.

The immediate cause of Mr. Parker’s emotional distress was his discovery of erroneous information that the dose of the hepatitis A vaccine was expired. Dr. Defontes confirms this distinction between the hepatitis A vaccine and the information about the expired dose. Dr. Defontes states that Mr. Parker “currently suffers with ongoing apprehension bordering on paranoia regarding past medical care that purportedly included a hepatitis A vaccine that was outdated. He has no current evidence of physical harm related to that incident, but has suffered emotionally due to the incident.” Exhibit A to Pet’r July 9, 2009 filing.

Mr. Parker’s purely emotional reaction is not a reaction to the vaccine, but is a reaction to false information about the hepatitis A vaccine. As such, the hepatitis A vaccine does not constitute a “legal cause” of Mr. Parker’s emotional distress. Cf. King Instrument Corp. v. Perego, 65 F.3d 941, 948 n.3 (Fed. Cir. 1995) (stating that “if the patentee’s mother died of a heart attack due to the shock of discovering an infringing product at the supermarket, the Act would not authorize damages for wrongful death or emotional distress. The unfortunate death would not be economic harm, nor the direct and foreseeable result of infringement.”).

A hypothetical analogy may help to illustrate why the hepatitis A vaccine is too far removed from the injury suffered by Mr. Parker to be considered the legal cause. Imagine a situation in which a parent brought her daughter to a doctor’s office for the sole purpose of receiving a vaccination. While driving home from the doctor’s office where the child received a vaccination, the family is injured by a person who does not stop his car at a red light. In this hypothetical situation, “but for” the vaccination, the girl would not have been in a position to be injured by the negligent driver. Despite this “but for” sequence of steps connecting the girl’s

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<sup>5</sup> Mr. Parker’s case presents an example of “but for” causation. “But for” the hepatitis A vaccination, Mr. Parker would not have seen the mistaken information about the date his vaccine expired, and without seeing the expiration date, Mr. Parker would not have suffered emotional distress. Therefore, a sequence of steps leads logically from the vaccination to Mr. Parker’s injury.

vaccination to her injury, the vaccine would not be the “legal cause” of the girl’s injury. Mr. Parker’s case is not meaningfully different from this hypothetical.

Finding that Mr. Parker’s alleged injury (emotional distress) is too far removed from the vaccine resolves the case. Examining whether Mr. Parker’s evidence satisfies the three-part test set forth in Althen, 418 F.3d at 1278, is not necessary. The Althen test is designed to establish a structure to determine whether the vaccine “causes” an injury. The Althen test does not address the question raised by Mr. Parker’s petition, which is when the vaccine may be considered the “legal cause” of an injury. Under the facts of Mr. Parker’s case, the vaccine cannot be the “legal cause” of Mr. Parker’s emotional distress.

### **III. CONCLUSION**

Mr. Parker presents a theory in which the vaccine is not the proximate cause of his injury. Therefore, his petition is DENIED. In the absence of a motion for review, the clerk is directed to enter judgment accordingly.<sup>6</sup>

IT IS SO ORDERED.

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Christian J. Moran  
Special Master

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<sup>6</sup> See Vaccine Rule 23.