

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No.[REDACTED]V

Originally Filed: August 31, 2010

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Not to be published

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JANE DOE/84 and JOHN DOE/84 \*  
Natural Parents and Guardians for \*  
CHILD DOE/84, a minor, \*

Petitioners, \*

v. \*

SECRETARY OF THE DEPARTMENT OF \*  
HEALTH AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

Thomas P. Gallagher, Somers Point, NJ, for petitioners.  
Althea W. Davis, Washington, DC, for respondent.

Onset of neurologic symptoms  
one month after vaccinations;  
petitioners have no expert and  
move for a ruling on the record

**MILLMAN, Special Master**

## DECISION<sup>1</sup>

Petitioners filed a petition dated May 14, 2010, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that DTaP, hepatitis B, HiB, Prevnar, and

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<sup>1</sup> Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this 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, petitioners have 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.

Rotavirus vaccinations administered on September 19, 2007 to their son CHILD DOE/84 (hereinafter, "CHILD DOE/84") caused him to have encephalopathy and infantile spasms whose onset was one month after vaccination.

On August 27, 2010, petitioners filed a Motion for Judgment on the Existing Record, stating that "Petitioner's [sic] counsel in this matter cannot find a credible expert to support the allegations that the vaccines administered on September 19, 2007 injured Petitioners' son." The Motion also states: "Petitioners' counsel was notified by Dr. Marcel Kinsbourne that he could not render an expert report supporting the contentions of the Petitioners." Motion, p. 1.

### **FACTS**

CHILD DOE/84 was born on May 15, 2007.

On May 18, 2007, he received his first hepatitis B vaccine. Med. recs. at Ex. 3, p. 66(a).

On July 18, 2007, he received DTaP, his second hepatitis B, HiB, and Rotavirus vaccines. Med. recs. at Ex. 3, p. 1.

On September 19, 2007, he received his second DTaP, second HiB, third hepatitis B, Prevnar, and Rotavirus vaccines. Id.

On October 17, 2007, CHILD DOE/84 was brought to Dr. Jennifer McDonald because of possible convulsions. Med. recs. at Ex. 4, p. 91. He was staring and lethargic. His problem started on October 14<sup>th</sup> when he hit his head on the floor. Two hours later, his eyes rolled back. He had croup the prior week. Med. recs. at Ex. 4, p. 92; also Ex. 7, p. 41.

### **DISCUSSION**

To satisfy their burden of proving causation in fact, petitioners 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 1317, 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.

Petitioners must show not only that but for the vaccines, CHILD DOE/84 would not have had encephalopathy and infantile spasms, but also that the vaccines were substantial factors in bringing about his encephalopathy and infantile spasms. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

In the instant action, CHILD DOE/84's onset of encephalopathy and infantile spasms was one month after his vaccinations, but two hours after a fall on his head. Under the Federal Circuit's rulings in Knudsen, Althen, and Capizzano, petitioners must prove a biologically

plausible medical theory connecting causally the vaccinations and the illness, a logical sequence of cause and effect, and a medically appropriate time frame between vaccinations and onset. They have not provided any evidence satisfying these three prongs and state they cannot find an expert to do so. Moreover, they consulted with a pediatric neurologist, Dr. Marcel Kinsbourne, who has appeared frequently for other petitioners in the Vaccine Program, and he declined to support petitioners' allegations in this case.

Petitioners' Motion for Judgment on the Existing Record is granted. Petitioners have failed to make a prima facie case and this petition must be DISMISSED.

### **CONCLUSION**

This petition is dismissed. 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.<sup>2</sup>

**IT IS SO ORDERED.**

August 31, 2010  
DATE

s/Laura D. Millman  
Laura D. Millman  
Special Master

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<sup>2</sup> 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.