# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
No. 06-067V
February 1, 2007
Not to be Published

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| DIANE NOLTE, | * | |
| | * | |
| Petitioner, | * | |
| | * | |
| v. | * | Entitlement; failure |
| | * | to respond to Order to |
| SECRETARY OF THE DEPARTMENT OF | * | Show Cause why case |
| HEALTH AND HUMAN SERVICES, | * | should not be dismissed; |
| | * | insufficient evidence filed |
| Respondent. | * | |

Diane Nolte, Madison, WI, for petitioner (pro se).
Michael P. Milmoe, Washington, DC, for respondent.

**MILLMAN, Special Master**

## DECISION[1]

[1] Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this decision on the United States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 or designated substantive order 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.

Petitioner filed a petition dated January 17, 2006 for herself, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that a tetanus vaccination she received on October 18, 2005 caused her constant swelling, numbness and persistent hardening of her muscles. Petition, page 1.

On February 23, 2006, petitioner filed a copy of the letter of the Department of Health and Human Services to her, dated January 25, 2006 and filed previously on Feb. 2, 2006, with her notations in the margin with samples of Prednisone.

On March 28, 2006, the undersigned issued an Order recounting a history of attempts to contact Ms. Nolte. Having Ms. Nolte's e-mail address, but not her telephone number, the law clerk of the undersigned e-mailed the parties on March 6, 2006 to set a date and time for an initial status conference. Ms. Nolte did not contact the undersigned or provide the court with a current telephone number where she could be reached. The undersigned selected a date for this status conference, April 6, 2006, at 11:30 a.m. Ms. Nolte never called the court or provided a phone number. The April 6th conference did not take place.

There were e-mail messages transpiring from the clerk of the court to Ms. Nolte and return messages from her, filed on March 27, 2006.

On April 12, 2006, the undersigned issued another Order recounting a history of attempting to contact Ms. Nolte. On April 6, 2006, the law clerk of the undersigned sent out another e-mail message asking Ms. Nolte to contact the court with her current telephone number. Using a telephone number that respondent's counsel had found on a reverse address search, the law clerk and respondent's counsel called the person who had that telephone number who informed them that Ms. Nolte could be reached at that number.

On April 10, 2006, Ms. Nolte called the undersigned's law clerk and explained that she had received the orders and e-mails but she did not have a telephone number where she could be reached and intended to maintain contact by e-mail. The undersigned set a future status conference (to be the initial status conference) in this case for April 24, 2006, at 2:00 p.m. and requested Ms. Nolte call the undersigned's law clerk with an appropriate telephone number.

The April 24, 2006 status conference never occurred because Ms. Nolte did not call in with an appropriate telephone number.

On April 25, 2006, nine months ago, the undersigned issued an Order to Show Cause why this case should not be dismissed and gave Ms. Nolte until May 31, 2006 to respond. Ms. Nolte has never cooperated with the undersigned in having a conference to discuss the items of proof that Ms. Nolte needs to file including complete medical records and an expert medical report in support of her allegations. Ms. Nolte did not respond to the undersigned's Order to Show Cause.

On June 27, 2006, the undersigned issued another Order noting that Ms. Nolte did not respond to the Order to Show Cause and did not contact the undersigned's law clerk to explain her reasons for noncompliance or to schedule a status conference. The undersigned gave Ms. Nolte until July 28, 2006 to respond to the undersigned's Order to Show Cause or, in the alternative, to contact the court to schedule a telephonic status conference. If petitioner failed to do so, the undersigned would dismiss this case by July 31, 2006. That was six months ago. Petitioner has not contacted the court. It is time to end this litigation for petitioner's failure to prosecute and to make a prima facie case.

**DISCUSSION**

Petitioner's injury may be a Table injury (brachial neuritis) if she actually had this injury. If that is the case, petitioner need not prove causation in fact. However, until petitioner provides complete medical records, it is impossible to know if that is the illness she has.

To satisfy her 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[.]"

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. Hasler v. US, 718 F.2d 202, 205 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984).

Petitioner must show not only 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 of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

A failure to prosecute her case will lead to dismissal. Sapharas v. Secretary of HHS, 35 Fed. Cl. 503 (1996); Tsekouras v. Secretary of HHS, 26 Cl. Ct. 4439 (1992); and, outside the Vaccine Program context, Claude E. Atkins Enters., Inc. v. US, 899 F.2d 1180 (Fed. Cir. 1990);

Adkins v. US, 816 F.2d 1580, 1583 (Fed. Cir. 1987); and Kadin Corp. v. US, 782 F.2d 175, 177 (Fed. Cir. 1986)).

Section 11(c)(1) of the Vaccine Act requires petitioner to file an affidavit and supporting documentation that shows she has a Table injury or, if she does not have a Table injury, that the vaccine caused in fact her illness.

Section 13(a)(1) of the Vaccine Act does not permit the special master to make a finding on compensation in favor of petitioner based on the claims of the "petitioner alone, unsubstantiated by medical records or by medical opinion."

Repeatedly, petitioner has refused to cooperate in proving her allegations. She would not file the appropriate medical records, participate in status conferences, file an affidavit, and file an expert report (this latter if she has a non-Table case). She would not contact the court after numerous requests she do so. She has, in fact, abandoned her claim.

This petition is dismissed for failure to file a prima facie case.

**CONCLUSION**

This petition must be 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.[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.