

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-874V

October 30, 2009

Not to be Published

VIOLET SMITH, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Violet Smith, Hanford, CA, for petitioner pro se.

Chrysovalantis P. Kafalas, Washington, DC, for respondent.

Entitlement; flu vaccine followed two years later by fibromyalgia; no expert medical support for causation; failure to prosecute

MILLMAN, Special Master

DECISION¹

¹ 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, 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 December 8, 2008, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that influenza vaccine administered on January 3, 2006 caused her fibromyalgia which was diagnosed two years later.

On August 14, 2009, petitioner's counsel filed a motion to seek leave to be relieved as counsel.

On August 24, 2009, the undersigned issued an Order granting petitioner's counsel's motion and sent to petitioner a list of attorneys who participate in the Vaccine Program so that if she decided to continue her case, she could select another attorney. Petitioner did not contact the undersigned's office or have a new attorney contact the undersigned's office.

On October 7, 2009, the undersigned issued an Order reflecting the undersigned's law clerk's repeated attempts to contact petitioner by phone, all of which proved unavailing. The undersigned gave petitioner until October 23, 2009 to contact the undersigned's law clerk to set up a status conference in this case. Petitioner has not contacted the undersigned's law clerk.

FACTS

Petitioner was born on September 13, 1940.

On January 3, 2006, she received a flu vaccination. Med. recs. at Ex. 1, p. 2, and Ex. 2.

On April 28, 2006, petitioner went to Adventist Health Central Valley General Hospital, alleging that she was assaulted and knocked down one and ½ years before, and she wanted a referral to a neurologist and had contacted an attorney. Med. recs. at Ex. 1, p. 4. Petitioner is 5'2" tall and weighed 210 pounds. *Id.*

On May 19, 2006, petitioner went to Adventist with a right foot that looked swollen and was painful. She was diagnosed with a sprain. Med. recs. at Ex. 1, p. 6.

On August 24, 2006, petitioner went to Adventist, complaining of feeling hot for one week. Sometimes, she could not breathe. She was woozy and coughing, and had a sore throat and a runny nose. Her diagnosis was mild pharyngitis, weakness, and fatigue. Med. recs. at Ex. 1, p. 9.

On September 8, 2006, petitioner went back to Adventist feeling worse for the past three days. She was diagnosed with nose congestion, bronchitis, and hypertension. Med. recs. at Ex. 1, p. 10.

On September 21, 2006, petitioner returned to Adventist. She was feeling better, but not completely. She was diagnosed with bronchitis. Med. recs. at Ex. 1, p. 11.

On October 2, 2006, petitioner went for a physical therapy evaluation. Her problems began in December 2005 when she was shoved, fell down, and injured her back. She had radiating, constant pain. Med. recs. at Ex. 1, p. 15.

On October 26, 2006, petitioner went to Adventist with a breathing problem. She was asthmatic. Med. recs. at Ex. 1, p. 18.

On December 12, 2006, petitioner went to physical therapy. She said that the beginning of her problem was December 24, 2004 when her daughter knocked her down and injured her. Med. recs. at Ex. 1, p. 22.

On December 20, 2006, petitioner went to Adventist with chronic back pain. Med. recs. at Ex. 1, p. 23.

On December 26, 2006, petitioner went to Adventist with a lumbar-sacral spine tender to palpation. Med. recs. at Ex. 1, p. 19.

On April 30, 2007, petitioner went to Adventist because she was sick, dizzy, nauseated, and weak. The diagnosis was paranoid personality and hyperthyroidism. Med. recs. at Ex. 1, p. 40.

On January 11, 2008, petitioner went to Adventist with weakness and fatigue. The diagnosis was delusional paranoia, anxious personality. Med. recs. at Ex. 1, p. 119.

On February 15, 2008, petitioner went to Adventist. The diagnosis was fibromyalgia and anxiety. Med. recs. at Ex. 1, p. 51.

Other Submitted Material

Petitioner filed a report dated September 3, 2008 from Dr. F. James Bishofberger who, according to petitioner's former counsel during a telephonic status conference on March 4, 2009, is a chiropractor and not a medical doctor. Ex. 3, p. 1. Dr. Bishofberger does not give an opinion on causation. He states that petitioner has chronic low back pain, fibromyalgia, anxiety, and paranoia. Ex. 3, p. 2. He states petitioner had a flu vaccination on January 3, 2006 and was diagnosed with "hyprophalaxis." As far as the undersigned is aware, "hyprophalaxis" does not exist. There is a notation on page 2 of Exhibit 1 of "flu prophylaxis" and the undersigned assumes that Dr. Bishofberger misread and misunderstood this notation. All that "flu prophylaxis" means is that petitioner received a flu vaccination to ward off influenza.

Dr. Bishofberger lists petitioner's complaints including dyspnea and cough on August 29, 2006, bronchitis and fatigue on September 21, 2006, low back pain on October 12, 2006, and a diagnosis of fibromyalgia on February 15, 2008. He spoke with petitioner on September 2, 2008 and she blamed the flu vaccination on January 3, 2006 for all her muscle pain, weakness, and not feeling well. Dr. Bishofberger concludes that petitioner has chronic low back pain and

fibromyalgia, He does not say what has caused them He notes there are references in the records to anxiety and paranoia. Ex. 3, p. 2.

DISCUSSION

This is a causation in fact case. 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. *Id.* at 1148.

Petitioner must show not only that but for the vaccine, she would not have had fibromyalgia, but also that the vaccine was a substantial factor in bringing about her fibromyalgia. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Petitioner has provided no evidence that would satisfy any of the three Althen prongs. Dr. Bishofberger's report restates her medical history without giving any opinion as to causation in fact. He does not state there is a biologically plausible medical theory causally connecting influenza vaccine and fibromyalgia, giving a basis therefor. He does not state there is a logical

sequence of cause and effect between petitioner's influenza vaccination and her fibromyalgia in this case. And he does not say that two years is a medically appropriate time frame for causation between influenza vaccination and fibromyalgia.

Even if Dr. Bishofberger had given an opinion on causation, because he is not a medical doctor, the undersigned would not have accepted it. Domeny v. Secretary of HHS, No. 94-1086V, 1999 WL 199059 (Fed. Cl. Spec. Mstr. March 15, 1999), aff'd, (Fed. Cl. May 25, 1999) (unpublished), aff'd, 232 F.3d 912 (Fed. Cir. 2000) (per curiam) (unpublished) (proffer of dentist's testimony for diagnosis of a neuropathy rejected).

Petitioner did not find any other expert to opine that influenza vaccine caused her fibromyalgia.

In a telephonic status conference held on June 30, 2009, petitioner's former attorney stated that Dr. Christine Gowan, a rheumatologist, refused to assist in the case. The attorney stated he wanted to go on the record without an expert.

When her former attorney withdrew from representing her, petitioner did not contact the undersigned's law clerk in order to proceed with this case even though a list of attorneys who might help her was mailed to her. She has not responded to the undersigned's most recent Order that she call the undersigned's law clerk by October 23, 2009 if she intended to proceed pro se.

Petitioner has failed to make a prima facie case of causation in fact and this petition is dismissed as well for failure to prosecute.

CONCLUSION

This 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 his right to seek review.