

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-536V

April 10, 2007

JENNIFER VILLASENOR, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Hepatitis B and MS;
failure to file any records

ORDER TO SHOW CAUSE

Petitioner filed a petition dated July 29, 1999, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that hepatitis B vaccine caused an unspecified adverse reaction. In almost 8 years, petitioner has never filed a single medical record either in the form of a CD or as a hard copy, much less an expert report. This case was included as part of the Omnibus proceeding concerning hepatitis B vaccine and demyelinating illnesses.

On March 8, 2007, in response to the undersigned's Order in the Omnibus cases, dated February 8, 2007, petitioner's counsel stated that he still does not have any records from petitioner. Petitioner's counsel asserts that this is a case of MS.

Petitioner is ORDERED TO SHOW CAUSE why this case should not be dismissed by **June 1, 2007** for failure to prosecute.

DISCUSSION

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[.]"

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. 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 MS, but also that the vaccine was a substantial factor in bringing about her MS. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

In petitioner's petition, petitioner's counsel states, at paragraph 4:

While the records are not available and/or ready for filing, counsel affirms that he is in the process of obtaining the medical records to be filed. The reasons for this delay include the fact that counsel is in the process of filing numerous claims for vaccine injury before the August 6, 1999 deadline and is concerned about getting all claims filed in a timely fashion.

It is a long time since the August 6, 1999 deadline for filing these numerous claims and, yet, petitioner's counsel could not have been forthright when he affirmed he was in the process of obtaining the medical records to be filed since almost eight years have elapsed without a single one being filed. There is absolutely no proof in this case to support petitioner's allegations.

The undersigned ORDERS petitioner to show cause by **June 1, 2007** why this case should not be dismissed.

IT IS SO ORDERED.

April 10, 2007
DATE

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