

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-626V

May 21, 2009

Not to be published

EVELYN LEE,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Respondent.

Evelyn Lee, pro se petitioner, Kansas City, MO.

Debra F. Begley, Washington, DC, for respondent.

Failure to file medical documents
or expert opinion to support
claim of injury

MILLMAN, Special Master

DECISION¹

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 constitute a clearly 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.

On August 29, 2008, petitioner filed a petition on her own behalf under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that a pneumonia vaccination administered to her on October 11, 2006 was not the vaccination she was supposed to have received. Attached to petitioner's petition was a standard statement of how to deal with a contusion as well as bunion surgery. Also attached to petitioner's petition was an informed consent form dated October 11, 2006 for an influenza vaccination. Petitioner alleged that the administering of the wrong vaccine was negligence and battery and had caused her mental stress.

On August 29, 2008, petitioner filed a motion to proceed in forma pauperis.

On September 24, 2008., the undersigned issued an Order granting petitioner's motion to proceed in forma pauperis, sending a list of vaccine attorneys whom she could contact to represent her in this petition.

On October 1, 2008, the undersigned held a telephonic status conference with petitioner and respondent's counsel. Petitioner stated she would be proceeding without an attorney. The undersigned advised petitioner that she had to gather all her medical records following her vaccination and file them with the court.

On October 28, 2008, petitioner filed a number of medical records: some from 2005 and 2006 showing urethral stenosis; and one from 2008 showing she had a cough due to asthmatic bronchitis, allergic rhinitis, and sinusitis, and that she had hypertension. None of these records referred to any post-vaccination injury.

On November 7, 2008, the undersigned held another telephonic status conference with petitioner and respondent's counsel. During the conference, the undersigned discussed with petitioner and respondent's counsel the medical records petitioner filed which showed a

contusion (petitioner explained during the status conference that this contusion was to her foot from dropping a vase), asthmatic bronchitis, allergic rhinitis, sinusitis, hypertension, and urethral stenosis. Petitioner had not asserted that any of these conditions was her vaccine injury. Because petitioner alleged that the pneumonia vaccine she received on October 11, 2006 caused her back pain, the undersigned ordered petitioner in an Order dated November 10, 2008 to file medical records that showed she had back pain after October 11, 2006. The undersigned emphasized that if petitioner did not prove a vaccine injury, she could not prevail in her case. The undersigned urged petitioner to try to find a vaccine injury attorney from the list previously provided to her.

On February 11, 2009, the undersigned held another telephonic status conference with petitioner and respondent's attorney. Petitioner stated she had not found an attorney yet. Although she contacted several attorneys, they refused to take her case. She was looking for a doctor for her back pain.

In an Order dated February 12, 2009, the undersigned emphasized that petitioner was required to file medical records indicating she had a medical injury and a report from a doctor that her injury was caused by her vaccination.

On April 22, 2009, the undersigned held another telephonic status conference with petitioner and respondent's attorney. Petitioner saw a doctor who diagnosed her with spondylitis. She told him about the pneumonia vaccine.

In an Order dated April 23, 2009, the undersigned reiterated the need for petitioner to obtain a medical expert report from a doctor supporting her allegation that her condition was caused by her vaccination.

On May 20, 2009, the undersigned held another telephonic status conference with petitioner and respondent's attorney. Petitioner stated she was going to sue the people who administered the wrong vaccine to her in the local Kansas City, MO, courts and would no longer pursue her case here.

The undersigned explained to petitioner that the undersigned will write a decision dismissing this case and 30 days after the date of the decision, the Clerk of the Court will issue a judgment. In order for petitioner to sue in her local courts, she must file in this court **within 90 days of the date of the judgment** an Election to File Civil Action or she will not be able to sue in her local courts. Petitioner should note that a sample copy of the Election to File Civil Action is attached to her petition with the page number 32 at the bottom of it.

DISCUSSION

To satisfy her burden of proving causation in fact, petitioner must prove by preponderant evidence "(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, 956 F.2d 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 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).

Here, petitioner has not proved that she had an injury from the vaccine either by filing medical records showing this or by filing an expert medical opinion that she has an injury the vaccine caused with a basis for the doctor's opinion. All petitioner has provided are her unsubstantiated claims and medical records with medical conditions unrelated to her vaccination.

The Vaccine Act, 42 U.S.C. § 300aa-13(a)(1), does not permit the special master to "make such a finding [in favor of petitioner] based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion."

Some of petitioner's assertions (negligence, battery) are not cognizable under the Vaccine Act. If petitioner wishes to pursue cases involving these claims, she needs to pursue them in the state courts of Missouri. The undersigned cannot rule on those claims. The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S. 310 (1986); Edgar v. Secretary of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Secretary of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Secretary of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Secretary of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of sovereign immunity was

beyond the authority of the court). A court may not expand on the waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991). When Congress enacted the Vaccine Act, it did not include as justiciable claims the torts of negligence and battery.

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

CONCLUSION

The petition is dismissed for failure to prove petitioner's allegations. In the absence of a motion for review filed pursuant to RCFC Appendix B, the Clerk of the Court is directed to enter judgment herein.²

IT IS SO ORDERED.

May 21, 2009
DATE

Laura D. Millman
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.