

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

MERLE P. WIDVEY,

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No. 07-509V

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Special Master Christian J. Moran

Petitioner,

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Filed: June 11, 2009

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v.

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entitlement, flu vaccine,

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meningoencephalitis, ruling on the

SECRETARY OF HEALTH

*

record

AND HUMAN SERVICES,

*

*

Respondent.

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David P. Murphy, David P. Murphy & Assoc., P.C., Greenfield, IN., for petitioner; Rebecca J. Trinrud, United States Dep't of Justice, Washington, D.C., for respondent.

UNPUBLISHED DECISION DENYING COMPENSATION*

Mr. Widvey alleged that the flu vaccine caused him to suffer meningoencephalitis. He sought compensation pursuant to the National Vaccine Injury Compensation Act, 42 U.S.C. § 300aa-10 et seq. (2006). For the reasons explained below, Mr. Widvey is not entitled to compensation.

I. Facts

The parties do not dispute the relevant facts. Due to the procedural posture of this case, the presentation of facts is condensed.

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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).

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, a party has 14 days to identify and to move to delete such information before 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. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

Mr. Widvey was born in 1930. Before receiving the flu vaccination in 1997, Mr. Widvey had, among other medical problems, coronary artery disease and congestive heart failure. He also had experienced an “altered mental status.” Exhibit 3 at 6-7.

On January 2, 2007, Mr. Widvey received the flu vaccination. Pet’r Vol. 1 at 5-8. The next day, he had a motor vehicle accident. Exhibit 2. He was taken to an emergency and, then, admitted to a hospital where he stayed for two weeks. Pet’r Vol. 1 at 3; Pet’r Vol. 2 at 25. Records from his hospitalization describe Mr. Widvey as having problems with his mental abilities. Pet’r Vol. 2 at 25-26.

Mr. Widvey seeks compensation for a condition his expert describes as an “acute meningoencephalitis.” Exhibit 15 (supplemental report of Dr. Rushing, dated Dec. 30, 2008) at 1.

II. Procedural History

This case began on July 2, 2007, when Mr. Widvey’s wife, Alta Widvey, filed a petition on his behalf. Neither Ms. Widvey nor Mr. Widvey is an attorney. In September 2007, Mr. Murphy became counsel of record for the petitioners. In the next month, the caption was reformed to show that Ms. Widvey was not a petitioner.

Mr. Widvey filed exhibits, presenting facts relevant to his claim, on various dates between January 2008 and May 2008. Mr. Widvey filed a report from Dr. Lige B. Rushing, Jr., as exhibit 14. Dr. Rushing is board certified in internal medicine, rheumatology, and geriatrics. He opined that “there was a temporal relationship between the immunizations . . . and [Mr. Widvey’s] acute confused state.” Exhibit 14 at 3.

Respondent presented a report from Dr. Benjamin Greenberg, who is a neurologist. Dr. Greenberg stated that Mr. Widvey’s presentation was “completely consistent with a transient ischemic attack or stroke.” Dr. Greenberg concluded that the vaccinations did not cause Mr. Widvey’s problems. Exhibit A at 2-3.

Petitioner was ordered to file a supplemental report from Dr. Rushing to address Dr. Greenberg’s opinion. Order, filed Oct. 3, 2008. Mr. Widvey did file a supplemental report on December 5, 2008. However, the supplemental report did not address the concerns raised in the earlier orders. Thus, Mr. Widvey was ordered to file a second supplemental report by March 2, 2009. Order, filed Jan. 30, 2009.

On March 2, 2009, Mr. Widvey’s attorney filed a status report. This status report stated that Mr. Widvey had died on February 14, 2009. The status report also stated that “Counsel will be meeting with the surviving spouse in the very near future and will recommend that this claim

be dismissed.” Pet’r Status Rep’t, filed Mar. 2, 2009, at 1. Following a status conference, Mr. Widvey’s attorney filed a motion seeking a ruling on the record.

III. Analysis

Special Masters may adjudicate cases based upon the written record without conducting an evidentiary hearing. 42 U.S.C. § 300aa-12(d)(3)(B)(v); Vaccine Rule 8(b). Before deciding a case upon the written record, the special master must ensure that each party has a full and fair opportunity to present its case. Hovey v. Sec’y of Health & Human Servs., 38 Fed. Cl. 397, 400-01 (1997) (affirming special master’s decision denying petitioners’ request for an evidentiary hearing).

To receive compensation pursuant to the Vaccine Program, the petitioner must prove either: 1) that he suffered a “Table Injury”—that is, an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) that he suffered an injury that was actually caused by a vaccine. See 42 U.S.C. §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). For the flu vaccine, no injuries are specified for compensation. See 70 Fed. Reg. 19092, 19092 (April 12, 2005); see also 42 C.F.R. § 100.3(a)(XIV). By necessity, Mr. Widvey is entitled to compensation only if he establishes that the flu vaccine caused him to experience an adverse reaction.

To prove causation in fact, a petitioner must establish at least three elements. The petitioner’s

burden is to show by preponderant evidence that the vaccination brought about [the] injury by providing: (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. Sec’y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec’y of Health & Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991).

Pursuant to the Vaccine Act, a petitioner may not be given a Vaccine Program award based on the petitioner’s claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. 42 U.S.C. § 300aa-13(a)(1).

Here, Dr. Rushing’s reports support an award of compensation to Mr. Widvey, to a minimal degree. However, as they currently stand, Dr. Rushing’s reports do not constitute a preponderance of the evidence. Dr. Greenberg’s report raises several points that Dr. Rushing was in the process of addressing when Mr. Widvey died. If Dr. Rushing were given an

opportunity, he may have demonstrated that his opinion was persuasive. But, on the existing record, a preponderance of the evidence does not support a finding that the flu vaccine caused any adverse reaction to Mr. Widvey.

Based upon the March 2, 2009 status report and counsel's representations during the April 1, 2009 status conference, it appears that Mr. Widvey's surviving wife does not want to pursue this case. Petitioner filed a motion seeking a judgment on the record, even though the need for a second supplemental report from Dr. Rushing was outstanding.

Petitioner has failed to establish the elements required for compensation. Therefore, the claim must be denied. In the absence of a timely-filed motion for review of this decision (see Appendix B to the Rules of the Court), the Clerk's Office shall enter judgment in accord with this decision.¹

IT IS SO ORDERED.

Christian J. Moran
Special Master

¹ The March 2, 2009 status report indicated that petitioner will file a motion for attorneys' fees and costs. Before doing so, the case should be re-captioned to show that someone is acting on behalf of Mr. Widvey's estate.