

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 10-848V
Filed: July 1, 2011**

THOMAS DICK,	*	
	*	
Petitioner,	*	
v.	*	Failure to Prosecute; Failure
	*	to Follow Court Orders; Dismissal
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

DECISION¹

Vowell, Special Master:

On December 9, 2010, petitioner filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*² [the “Vaccine Act” or “Program”]. Petitioner then filed an amended petition on January 28, 2011. The Amended Petition alleges that petitioner received a trivalent influenza vaccine on October 10, 2007, and that the vaccination caused in fact his Guillan-Barré Syndrome [“GBS”]. Amended Petition, ¶¶ 2, 9.

On January 6, 2011, I ordered petitioner to file by no later than Monday, March 7, 2011, (1) all medical records not already filed that support his causation claim, (2) a statement of completion, and (3) an expert report. Petitioner failed to respond. On March 15, 2011, I ordered petitioner to comply with that order by no later than March 28, 2011. Petitioner failed to respond to that order as well. On April 4, 2011, I ordered petitioner to comply with those orders or otherwise show cause for why this case should not be dismissed for failure to prosecute. On May 3, 2011, petitioner made a defective

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

oral motion for an enlargement of time to respond to the show cause order, and then filed a paper motion on May 5, 2011 after the deadline had passed.

I then scheduled a status conference, conducted May 6, 2011, to discuss petitioner's repeated noncompliance. Petitioner's counsel assured me that he and his client would not continue to ignore court orders. Petitioner's counsel proposed deadlines of May 13, 2011, to file the medical records, and May 27, 2011, to file an expert report. I memorialized those deadlines in a May 9, 2011 order. Petitioner timely filed his medical records on May 13, 2011. Petitioner failed to file an expert report or otherwise respond to the order to do so. On June 6, 2011, I ordered petitioner to comply with the order to file an expert report or otherwise show cause why this case should not be dismissed for failure to prosecute. Petitioner, again, failed to respond. Additionally, after respondent identified outstanding medical records necessary to substantiate the petition, I issued a May 23, 2011 order for petitioner to file those records or indicate their unavailability. Petitioner failed to respond to that order as well.

I. Failure to Prosecute.

As I have reminded petitioner on numerous occasions, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, would result in dismissal of petitioner's claim. *Tsekouras v. Sec'y, HHS*, 26 Cl. Ct. 439 (1992), *aff'd per curiam*, 991 F.2d 810 (Fed. Cir. 1993); *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b). Petitioner was warned of this in writing via orders filed March 15, 2011, April 4, 2011, and June 6, 2011. Petitioner's counsel was also warned of this in a telephonic status conference conducted May 6, 2011. It was during that status conference that petitioner's counsel assured me that he would file his expert report by no later than May 27, 2011. But since that time petitioner has failed to produce the report, an explanation, or a request for more time.

II. Failure to Establish Vaccine Causation.

In order to receive compensation, a petitioner must prove either a "Table" injury³ or that a vaccine listed on the Table was the cause in fact of an injury. Because GBS is not listed on the Vaccine Injury Table with reference to the influenza vaccination he received, petitioner cannot demonstrate a "Table" injury. Therefore, he must demonstrate that the influenza vaccine caused his injury. See § 300aa-11(c)(1)(C)(ii). A petitioner may not receive a Program award based solely on the petitioner's claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. § 300aa-13(a)(1). No reliable evidence submitted links his vaccination as the cause in fact of his GBS. I therefore hold that petitioner has failed to establish his entitlement to compensation.

³ A "Table" injury is an injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3 (2010), corresponding to the vaccine received within the time frame specified. The influenza vaccine is listed on the Table; however petitioner's medical condition is not an injury specified for compensation for that vaccine.

Petitioner received a trivalent influenza vaccination on October 10, 2007. Petitioner's Vaccine Record, filed Jan. 28, 2011, at 1.⁴ He was 72 years old. See *id.* On December 9, 2007, petitioner reported to Raleigh General Hospital with generalized pain and numbness that had begun that evening. Raleigh General Hospital Records, filed Jan. 28, 2011, pp. 1, 10. He was initially assessed with back pain, discharged, and sent home. *Id.*, p. 32.

Petitioner returned to Raleigh General Hospital on December 10, 2007, with worsening symptoms. See Raleigh General Hospital Records, filed Jan. 28, 2011, p. 44. He was diagnosed with GBS, and his condition progressively deteriorated. *Id.* He was subsequently transferred to Charleston Area Medical Center for treatment. See Charleston Area Medical Center Records, filed Jan 28, 2011, p. 57.

Petitioner has filed voluminous medical records of his illness, but he has failed to point to any reference therein that supports his claim that the influenza vaccine caused his GBS. Petitioner has also failed to file the report of a reliable medical expert to establish "(1) a medical theory causally connecting the vaccination to the injury; (2) a logical sequence of cause and effect showing the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between the vaccination and the injury." *Althen v. Sec'y, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

At this point in time, petitioner's evidence is woefully insufficient to support a causation-in-fact claim. I have repeatedly ordered petitioner to supplement the record. During the May 6, 2011 status conference, I explained to petitioner's counsel the necessity of both supplementing the record, and timely responding to court orders, in order to prevail in this case. Nonetheless, petitioner has repeatedly failed to file evidence and respond to court orders.

⁴ Petitioner deficiently filed medical records on compact disc with the petition on December 9, 2010. He then refiled them on January 28, 2011. Then on May 13, 2011, petitioner filed additional medical records which appear to bear exhibits numbers that had previously been used in the January 28, 2011 filing. As such, I attempt herein to cite by exhibit description, page number, and filing date. Further, as the continuous bates-stamping is illegible on many pages, I have cited to the .pdf page number instead.

III. Conclusion.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate that the trivalent influenza vaccine caused his GBS. Petitioner has also failed to prosecute this case, as he has repeatedly failed to comply with a court order to file an expert report, and he has failed to explain why he cannot comply. **Thus, this case is dismissed for insufficient proof and failure to prosecute. The clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

Denise K. Vowell
Special Master