

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

No. 9-407V
Filed: May 6, 2011

JULIANNE SCHERZINGER,	*	
	*	Petitioner's Motion for a Decision
	*	Dismissing her Petition;
Petitioner,	*	Insufficient Proof of Causation;
v.	*	HPV Vaccine; Juvenile Myoclonic
	*	Epilepsy
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

DECISION¹

On June 22, 2009, Julie Gloria Scherzinger ["Mrs. Scherzinger"] filed a petition ["Pet."] for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*² [the "Vaccine Act" or "Program"], on behalf of Julianne Scherzinger ["petitioner"], her daughter. The petition alleged that human papillomavirus ["HPV"] vaccines petitioner received on December 13, 2007, and February 22 and June 20, 2008, caused her to develop juvenile myoclonic epilepsy. Pet., ¶¶ 3, 4, 7. On February 22, 2010, the special master then presiding over this case³ granted a motion to amend the caption of the case as petitioner had reached the age of majority.

On June 28, 2010, petitioner and Mrs. Scherzinger gave testimony in a fact hearing held in Austin, Texas. I issued a Ruling on Facts Pertaining to Onset on August 18, 2010 ["Fact Ruling"]. The facts surrounding onset of petitioner's juvenile myoclonic

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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).

³ The case was reassigned to me on March 25, 2010.

epilepsy are set forth in detail in my Fact Ruling, and I incorporate them herein by reference.

The parties then filed expert reports, and we reconvened for a telephonic status conference on March 3, 2011. At that conference I presented the parties with my tentative evaluation of their respective materials and positions, and we discussed whether to proceed to an entitlement hearing.⁴ At that time I informed the petitioner that although she had filed an expert report, and could present testimony from that expert at an entitlement hearing, I was unlikely to find the expert's theory reliable, and also unlikely to find her evidence sufficient to demonstrate entitlement under the causation standard set forth in *Althen v. Sec'y, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).⁵ I also observed that respondent's experts were well-qualified to opine about seizure disorders, and that their opinions were well-supported by the medical literature available. At that time I informed petitioner she was free to supplement the record with a second report from her expert, or the report of a second expert, one more qualified to opine on seizure disorders and their causes. Petitioner requested time to evaluate her options, and I ordered her to file a status report.

Petitioner's resultant status report indicated that she intended to dismiss her case. See Petitioner's Status Report filed May 2, 2011. Also on May 2, 2011, petitioner filed a Motion for a Decision Dismissing her Petition. Petitioner asserts in the motion that "[a]n investigation of the facts and science supporting her case has demonstrated ... that she will be unable to prove that she is entitled to compensation." Petitioner's Motion at 1. Accordingly, petitioner requests that I dismiss her petition, and she acknowledges that dismissal will result in a judgment against her. *Id.*

Under the Act, petitioners may not be given a Program award based solely on the petitioners' claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. § 300aa-13(a)(1). To receive compensation under the Program, petitioner must prove either 1) that she suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of her vaccinations, or 2) that she suffered an injury that was actually caused by a vaccine. See §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). Actual causation must be demonstrated under the rubric set forth in *Althen*, 418 F.3d at 1278. Because the vaccine alleged to be causal in this case is not associated with a Table Injury, petitioner cannot demonstrate a Table case. Further, as petitioner acknowledges in her motion,

⁴ Vaccine Rule 5 requires the special master to convene a status conference 30 days after the filing of respondent's report to review the evidence, evaluate the parties' respective positions, and present tentative findings and conclusions. While the March 3, 2011, status conference was not conducted 30 days after the filing of respondent's report, it functioned in much the same way as it was the first opportunity to discuss the case with the parties after the filing of expert evidence.

⁵ As discussed during the conference, one of several problems with the expert report was its heavy reliance on VAERS data as proof of a causal connection. Special masters and judges of the Court of Federal Claims have repeatedly ruled that VAERS data, which may be filed by anyone, without verification, is inherently unreliable as causation evidence. See, e.g., *Donica v. Sec'y, HHS*, No. 08-625V, 2010 WL 3735707, at *11 (Fed. Cl. Spec. Mstr. Aug. 31, 2010) (citing *Analla v. Sec'y, HHS*, 70 Fed. Cl. 552, 558 (2006)).

the record does not contain a reliable medical expert's opinion or preponderant evidence sufficient to demonstrate that petitioner's alleged injury was vaccine-caused. As we discussed during the March 3, 2011 status conference, petitioner's case falls far short of the *Althen* requirements.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate either that she suffered a "Table Injury" or that her injuries were "actually caused" by a vaccination. **Thus, this case is dismissed for insufficient proof. The Clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

s/Denise K. Vowell

Denise K. Vowell
Special Master