

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 9-310V
Filed: June 21, 2011**

MAEDOT TEKA, parent of Tibebe	*	
Abebe, a minor,	*	
	*	
Petitioner,	*	Failure to Prosecute;
	*	Failure to Follow Court
v.	*	Orders; Dismissal
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

DECISION¹

Vowell, Special Master:

On May 11, 2009, petitioner Maedot Teka filed a petition for compensation ["Pet."] under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*² [the "Vaccine Act" or "Program"], on behalf her son, Tibebe Abebe, ["Tibebe"]. The petition alleges that hepatitis A and meningococcal vaccines that Tibebe received on May 10, 2006, caused him to suffer "severe neurological regressive encephalopathy and mutism." Pet, ¶4. On December 10, 2010, the special master then assigned to this case ordered petitioner to file a supplemental expert report and a CV from Dr. Kenneth Bock by no later than February 8, 2011. The case was then transferred to me. Petitioner failed to respond to the December 10, 2010 order.

During a telephonic status conference held February 24, 2011, I granted petitioner an enlargement of time until April 25, 2011, to file the expert report and CV.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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

Petitioner failed to respond to that order as well. On May 2, 2011, I then ordered petitioner to comply with that order, or otherwise show cause why this case should not be dismissed for failure to prosecute, by no later than June 1, 2011. Petitioner failed to respond yet again.

On June 2, 2011, my chambers contacted counsel for both parties, and counsel for petitioner indicated he was not aware of the June 1, 2011 deadline until chambers contacted him. He did not explain why he was unaware of this deadline, but he did request an enlargement of time to respond to the May 2, 2011 order to show cause. Respondent did not object to this enlargement of time. On June 3, 2011, I granted the enlargement, and I ordered petitioner to show cause by no later than June 17, 2011, why I should not dismiss this case for failure to prosecute. Petitioner, yet again, failed to respond to my order. **Accordingly, this case is dismissed for failure of proof and for failure to prosecute.**

I. 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 actually caused or significantly aggravated an injury. Because the injuries petitioner alleges are not listed on the Vaccine Injury Table with reference to the vaccines Tibebe received, petitioner cannot demonstrate a “Table” injury. Therefore, she must demonstrate that the vaccines caused or significantly aggravated Tibebe’s injury. See § 300aa-11(c)(1)(C)(ii). No reliable evidence submitted links the vaccines as the cause in fact of any illness, disability, injury, or condition. Similarly, no reliable evidence submitted demonstrates that the vaccines significantly aggravated any illness, disability, injury, or condition. I therefore hold that petitioner has failed to establish her entitlement to compensation.

A. Medical Records.

Tibebe was born prematurely on February 12, 1996. Petitioner’s Exhibit [“Pet. Ex.”] 8, p. 87. Petitioner’s pregnancy was complicating by maternal HELLP syndrome⁴. Pet. Ex. 8, p. 3. Tibebe was without spontaneous respiratory effort and was cyanotic at birth. Pet. Ex. 8, p. 7. He weighed less than three pounds. See Pet. Ex. 8, p. 6. During his five week hospitalization, an ultrasound of his head showed an enlarged left ventricle, which later decreased in size. Nonetheless, doctors could not exclude intraventricular hemorrhage. See Pet. Ex. 8, pp. 101-02. Doctors considered him to be

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 hepatitis A and meningococcal vaccines are listed on the Table; however Tibebe’s medical condition is not an injury specified for compensation for those vaccines.

⁴ HELLP syndrome is hemolysis, elevated liver enzymes, and low platelet count, and occurs in association with preeclampsia. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1857 (31st ed. 2007).

at “risk for future neurodevelopmental problems and should be followed closely.” Pet. Ex. 4, p. 48.

Tibebu received routine childhood vaccinations for his first ten years of life (Pet. Ex. 2); the medical records, and petitioner’s affidavit, reflect no adverse reactions (see, e.g., Pet. Exs. 5, 6). Tibebu was diagnosed with autism at the age of four. Pet. Ex. 6, p. 46. He exhibited severe speech delay; a 2001 neurological exam noted “he is not yet talking.” See, e.g., Pet. Ex. 6, pp. 30-31. The neurologist noted that Tibebu was essentially nonverbal, and diagnosed Tibebu with Pervasive Developmental Delay. Pet. Ex. 6, pp. 30-31.

Tibebu received a hepatitis A vaccine and a meningococcal vaccine on May 10, 2006. Pet. Ex. 5, pp. 17-18. He was ten years old. The medical records contain no report of an adverse reaction to those vaccines. See Pet. Ex. 5. The next time Tibebu saw a doctor, October 4, 2006, petitioner reported that Tibebu was “doing ok but still not talking.” Pet. Ex. 5, p. 17.

On November 17, 2008, petitioner called Tibebu’s pediatrician, Dr. Van Gilder. The notes documenting the call indicate that petitioner was “convinced that the [meningococcal vaccination] triggered worsening of [Tibebu’s] autism.” Pet. Ex. 5, p. 8. This record clearly reflects that the doctor disagreed. He noted that he reviewed the data, then advised petitioner that the vaccine “does not worsen autism.” Pet. Ex. 5, p. 8. Petitioner then told Dr. Van Gilder, on November 25, 2008, that she was convinced that the vaccine caused Tibebu to “shut down and withdraw.” Pet. Ex. 5, p. 7. Doctor Van Gilder noted in the record that “[t]here is no evidence that [meningococcal] or any other vaccine triggers autism or exacerbates autism.” Pet. Ex. 5, p. 8.

B. Petitioner’s Affidavit.

In her affidavit, petitioner avers that Tibebu “seriously regressed with regard to his development.” She states that he had diarrhea the second day after the May 10, 2006 vaccinations; lost his ability to speak, cry, and laugh; stopped expressing emotion; experienced numbness; lost the ability to sense food in his mouth; lost the ability to learn; lost bowel control; and became dependent on her “for everything.” Petitioner’s Affidavit, filed Dec. 24, 2009.

C. Expert Reports of Dr. Kenneth Bock.

Petitioner has filed two reports from Dr. Kenneth Bock to support her causation theory. See Pet. Ex. 3, filed May 11, 2009; Pet. Ex. 10, filed Oct. 7, 2010. As I warned petitioner during the February 24, 2011 status conference, these reports are woefully insufficient to support a prima facie case. Their insufficiency necessitated the order to file a second supplemental report—the order with which petitioner has repeatedly failed to comply. See, e.g., Order filed Feb. 24, 2011. As no supplemental report has been

filed, I evaluate the two in the record, and I conclude that they fail to establish a prima facie case for causation or significant aggravation.

In his first report, Dr. Bock opines, with the weight of two sentences, that the May 10, 2006 vaccines caused Tibebu to suffer “severe neurological regressive encephalopathy and mutism.” Pet. Ex. 3. He provides no basis for this opinion, and he does not address the *Althen* factors for establishing causation. See *Althen v. Sec’y, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005) (explaining petitioner’s three-prong causation burden⁵). I do not accept this unsupported opinion as evidence of causation.

In his second report, Dr. Bock explains that his opinion is based on his own evaluation of Tibebu in January, 2008, histories provided by Tibebu’s parents, and DVDs of Tibebu before and after the May 10, 2006 vaccinations. Petitioner never filed these DVDs with the court, and as such I cannot evaluate them. Accordingly I do not rely on conclusions drawn therefrom.

Significantly, Dr. Bock does not indicate reliance on, or review of, Tibebu’s medical records. In this report, Dr. Bock describes the symptoms he observes in the videos, as well as the symptoms reported by Tibebu’s parents, occurring before and after the May 10, 2006 vaccinations. He proposes no medical theory for how hepatitis A vaccine or meningococcal vaccine can cause autism, encephalopathy, or mutism. He provides no explanation for how the vaccines caused Tibebu to suffer a worsening of his autism symptoms. And he posits no medically appropriate temporal relationship between receipt of these vaccines and a worsening of symptoms. Though this report is longer than his first, it is no more useful. Dr. Bock provides only parental history and his description of symptoms displayed on videos not before me as the basis for his opinion. As such, I do not accept this opinion either.

D. Petitioner has Failed to Establish Causation.

Though the petition characterizes petitioner’s theory as one of causation in fact, it is upon closer examination a theory of significant aggravation. 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). The opinions of treating physicians are “quite probative” because a treating physician is “likely to be in the best position to determine” cause and effect. *Andreu v. Sec’y, HHS*, 569 F.3d 1367, 1375 (Fed. Cir. 2009). The injuries that petitioner alleges, mutism and encephalopathy, were symptoms of Tibebu’s autism prior to the May 10, 2006 vaccinations, and that is well documented in the records described above. Petitioner’s affidavit claims Tibebu was worse after vaccination, but there is no reliable evidence in the record to support her assertions. There are, however, clear

⁵ *Althen* requires: (1) a reliable medical theory; (2) a logical sequence of cause and effect; and (3) a proximate temporal relationship between the cause and the injury. 418 F.3d at 1278.

records from a treating physician noting he did not associate Tibebu's presentation post-vaccination with a vaccine injury.

To receive compensation under the Program under a theory of significant aggravation of a causation-in-fact injury, petitioner must prove that the vaccines caused a "change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." § 300aa-33(4); see also §§ 300aa-13(a)(1)(A), 300aa-11(c)(1). I have previously determined that "a petitioner in an off-Table significant aggravation claim cannot merely demonstrate a significant worsening of a preexisting condition; he must also show that the vaccine was a legal cause of that significant worsening." *Hennessey v. Sec'y, HHS*, No. 1-190V, 2009 WL 1709053, at *40 (Fed. Cl. Spec. Mstr. May 29, 2009), *aff'd*, 91 Fed. Cl. 126 (2010); see also *Loving v. Sec'y, HHS*, 86 Fed. Cl. 135, 142 (2009) (formulating a similar test). "[P]etitioner must demonstrate by preponderant evidence that the vaccine was a "substantial factor" in, and a "but for" cause of, his current condition by adducing evidence supporting each of *Althen's* three factors." *Hennessey*, 2009 WL 1709053, at *40 (referencing *Althen v. Sec'y, HHS*, 418 F.3d 1274 (Fed. Cir. 2005), which sets forth a three-prong test for determining causation in fact in Vaccine Act cases).

In this case, the medical records do not support petitioner's claim. The expert reports she has filed fail to establish a prima facie case of significant aggravation. Petitioner did not file any evidence on whether vaccines can cause autism, regressive encephalopathy, or mutism. If petitioner has not proven that vaccines can cause these injuries, then she has not proven vaccines can significantly aggravate them.

II. Failure to Prosecute.

On December 10, 2010, petitioner was ordered to file a second supplemental expert report from Dr. Bock. In spite of several orders to comply with that order, she has failed to do so. As I reminded petitioner in my June 3, 2011 order, 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).

III. Conclusion.

Accordingly, it is clear from the record in this case that petitioner has failed to demonstrate that Tibebu's regressive encephalopathy and mutism were significantly aggravated by vaccinations. Petitioner has also failed to prosecute this case, as she has failed, for six months, to comply with a court order to file a second supplemental

expert report, and she has failed to explain why she cannot comply. **Thus, this case is dismissed for insufficient proof and failure to prosecute. The clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master