

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-813V

Filed: April 5, 2012

DAVID HELMAN, * Special Master Zane

*

Petitioner, *

v.

*

SECRETARY OF HEALTH * Ruling on the record; Tetanus,
AND HUMAN SERVICES, * diphtheria, acellular pertussis (Tdap)
* vaccine; optic neuritis (ON);
* transverse myelitis (TM)

*

Respondent. *

*

Ronald C. Homer, Conway, Homer & Chin-Caplan, Boston, MA, for Petitioner;
Justine E. Daigneault, United States Dep't of Justice, Washington, D.C., for Respondent.

UNPUBLISHED RULING¹

This matter is before the Court on Respondent's Motion for Ruling on the Record, which was filed in lieu of Respondent filing an expert report in response to the filing of Petitioner's expert's report. Respondent's Notice of Filing, October 20, 2011. Petitioner's expert opined to a reasonable degree of medical certainty that Petitioner's neurological demyelinating injuries, including neuromyelitis optica ("NMO") and transverse myelitis ("TM"), were caused by the Tetanus-diphtheria-acellular-pertussis ("Tdap") vaccine Petitioner received on November 4, 2008. As explained below, Respondent's Motion for Ruling on the Record is granted. The record establishes that Petitioner is entitled to compensation.

¹ Because this 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).

BACKGROUND

On November 24, 2010, Petitioner, Dr. David Helman, filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986, as amended (“the Vaccine Act”), 42 U.S.C. § 300aa-1, *et seq.*, alleging that he suffered from neurological demyelinating injuries, specifically NMO and TM, as a result of the Tetanus-diphtheria-acellular-pertussis (“Tdap”) vaccination he received on November 4, 2008. Petition at 1.

On April 6, 2011, Respondent filed a report pursuant to Vaccine Rule 4(c). In that report, Respondent took the position, *inter alia*, that Petitioner had not offered a “reputable medical or scientific theory causally connecting [Petitioner’s] November 4, 2008 Tdap vaccination to his ON [optic neuritis] and TM.” Respondent’s Rule 4 Report at 18. Respondent also noted that any statements of Petitioner’s treating physicians in the medical records that Petitioner cited in support of his claim “are simply notations of the temporal association between petitioner’s Tdap vaccine and the onset of his neurological symptoms and do not imply a causal relationship.” *Id.* Respondent further stated that the medical records in this case “identify an alternative cause for petitioner’s ON and TM.” *Id.* Respondent concluded that based on the record as it existed at that time, Petitioner’s claim was not appropriate for compensation under the terms of the Vaccine Act. *Id.*

Following the filing of Respondent’s report, on August 11, 2011, Petitioner filed an expert report from a neurologist, Norman Latov, M.D., Ph.D., along with copies of the medical literature cited in Dr. Latov’s report. Dr. Latov opined that to “a reasonable degree of medical certainty that [Petitioner] developed transverse myelitis and optic neuritis as a direct consequence of having received the Tdap vaccine on November 4, 2008.” Petitioner’s Exhibit 7 at 4.

Respondent was to file a responsive expert report 60 days thereafter. *Order*, dated July 11, 2011. But, rather than filing a responsive expert report, Respondent filed a “Notice of Filing Statement” on October 20, 2011. In that filing, Respondent stated that “while respondent believes that petitioner has failed to provide preponderant evidence supporting his allegation or to establish a logical cause and effect relationship between the vaccine and the alleged injury, **respondent will not present expert testimony to defend this claim** [emphasis added].” Respondent’s Notice of Statement, filed Oct. 20, 2011, at 1.

Shortly thereafter, on November 14, 2011, Respondent filed a Motion for Ruling on the Record. Respondent stated that she “decline[d] to expend further resources to contest entitlement in this matter, and requests that the Special Master issue a ruling on the record.” Respondent’s Motion for Ruling at 1.

Petitioner filed a response to Respondent’s Motion for Ruling on the Record on November 30, 2011, stating that Petitioner’s “medical records, affidavit, the opinions of [Petitioner’s] treating physicians, and the expert opinion of Dr. Latov demonstrate by preponderant evidence that Dr. Helman’s tetanus vaccine, more likely than not, caused his neurological demyelinating injuries.” Petitioner’s Response to Motion for Ruling at 2-3.

Having considered Respondent's motion, the undersigned hereby grants Respondent's motion for a ruling on the record and enters this ruling based upon the entire record. Vaccine Rule 8(d).

DISCUSSION

To be awarded compensation under the Act, a petitioner must prove either: 1) that he suffered a "table injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of the vaccinations in question, which creates a presumption that the injury was caused by the vaccination, or 2) that any of his medical problems were caused by the vaccine(s) at issue. *See* 42 U.S.C. §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). A petitioner may not be awarded compensation based on the petitioner's claims alone. 42 U.S.C. § 300aa-13(a)(1). Rather, the petition must be supported by either medical records or by the opinion of a competent physician. *Id.*

On the issue of a table injury, Petitioner may not take advantage of any presumption because the Table does not indicate an association between the vaccination at issue here, the Tdap vaccination, and his alleged injuries. 42 C.F.R. § 100.3(a). Further, Petitioner has not alleged that he suffered from a "table injury," and there is no evidence that any "table injury" occurred. As a result, Petitioner cannot be deemed entitled to compensation on that basis.

Because Petitioner cannot prevail based on a "table injury," Petitioner bears the burden of proving that the vaccination caused the injury for which he seeks compensation. *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). Petitioner must demonstrate that the vaccination was a substantial factor in causing the injuries. *Moberly v. Sec'y of Health & Human Servs.*, 592 F.3d 1315, 1321-22 (Fed. Cir. 2010). To do this, Petitioner "must 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." *Moberly*, 592 F.3d at 1322 (quoting *Althen*, 418 F.3d at 1278). As explained below, a review of the record as a whole demonstrates that Petitioner has satisfied this burden and demonstrated by preponderant evidence that the Tdap vaccination caused his neurological injuries.

First, in his report, Petitioner's expert, Dr. Latov, stated that "[v]accination could trigger autoimmune diseases via several mechanisms, including activation of autoreactive inflammatory cells or molecular mimicry." Petitioner's Exhibit 7 at 6. Dr. Latov also explained, with references to literature that vaccination is a recognized cause of transverse myelitis, optic neuritis, or ADEM, demyelinating medical conditions which Petitioner claims were caused by the vaccination. Petitioner's Exhibit 7 at 4-5.

Second, both Dr. Latov and Petitioner's treating physicians provided evidence of a logical sequence of cause and effect. The neurologist who initially examined Petitioner on or about November 25, 2008, approximately three weeks after receipt of the vaccination, believed that Petitioner had a demyelinating illness. Petitioner's Exhibit 1 at 40, 47, 58. The neuro-

ophthalmologist's examination indicated that Petitioner's symptoms were consistent with right retrobulbar optic neuritis. Petitioner's Exhibit 1 at 43-44, 186. The treating neurologist eventually gave a differential diagnosis that included monophasic demyelinating illness, multiple sclerosis and neuromyelitis optica ("NMO"). Petitioner's Exhibit 1 at 43. Additionally, Dr. Latov, noted that "[t]he clinical presentation and results of the MRI and laboratory studies were most consistent with the diagnosis of transverse myelitis and optic neuritis as a manifestation of acute disseminated encephalomyelitis ("ADEM")." Petitioner's Exhibit 7 at 4. Dr. Latov, further concluded that "[n]o cause for the transverse myelitis and optic neuritis, other than vaccination could be identified." *Id.*

Finally, Dr. Latov noted that "[t]he initial symptoms occurred at approximately 3 weeks following vaccination, within the time period that immune reactions to vaccinations are known to occur." Petitioner's Exhibit 7 at 5. Petitioner's treating physicians and expert provided evidence and an opinion that satisfies the *Althen* factors.

Respondent has opted not to contest this matter further through a responsive expert opinion or by challenging the evidence contained in the record. Petitioner has shown sufficient evidence to demonstrate the vaccination caused his injuries. The Court finds that Petitioner is entitled to compensation.

IT IS SO ORDERED.

/s/ Daria J. Zane
Daria J. Zane
Special Master