

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 11-736V

Filed: January 24, 2013

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DON OUK and VANNARIM OEUR, \*  
parents of KEVIN OUK, deceased, \*

Petitioners, \*

v. \*

SECRETARY OF HEALTH \*  
AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

NOT TO BE PUBLISHED

Special Master Zane

Ruling on the Record; Trivalent

Influenza (flu), DTaP,

Hib, IPV and Rotavirus Vaccines;

Insufficient Proof of Causation

*Amy Fashano*, Ronald C. Homer, Boston, MA, for Petitioners

*Lynn Ricciardella*, United States Dep't of Justice, Washington, DC, for Respondent

### **UNPUBLISHED DECISION DISMISSING CASE<sup>1</sup>**

On November 4, 2011, Don Ouk and Vannarim Oeur (“Petitioners”) filed a petition for compensation on behalf of their deceased son, Kevin Ouk, under the National Childhood Vaccine Injury Act of 1986 (“the Vaccine Act”), 42 U.S.C. § 300a-10, *et seq.*, as amended. Petitioners alleged that their son suffered from a neurological injury, which ultimately resulted in his death, as a result of receipt of influenza (“flu”), Diphtheria-Tetanus-acellular-Pertussis

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<sup>1</sup> 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 website of the United States Court of Federal Claims, in accordance with the E-Government Act of 2002 § 205, 44 U.S.C. § 3501 (2006). All decisions of the Special Master 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).

("DTaP"), *Haemophilus influenza* type B ("Hib"), Inactivated Polio vaccine ("IPV"), and Rotavirus vaccinations. Petition at ¶ 4. Petitioners alleged that their son received these vaccinations on November 24, 2008. Petition at ¶ 2. For the reasons set forth below, the undersigned finds that Petitioners are not entitled to compensation and dismisses their case.

## I. BACKGROUND

Petitioners originally filed their petition on November 4, 2011. Subsequently, outstanding medical records were filed on December 22, 2011. Petitioners moved for several enlargements of time to extend the deadlines to file additional medical records. All such motions were granted. Additional medical records were filed by Petitioners in March, April, May, June, and August of 2012. On October 26, 2012, Respondent filed a report pursuant to Vaccine Rule 4, stating, *inter alia*, that the injury suffered by Petitioners' son is not a table injury, and therefore, there is no presumption of the causation between the vaccines received and the injuries suffered by Petitioners' son. *See* Respondent's Rule 4 report at 17. Additionally, Respondent stated that Petitioners failed to prove by preponderant evidence that their son's injury was caused-in-fact by the vaccinations he received on November 24, 2008, because Petitioners failed to provide a reliable medical theory causally connecting his vaccinations with his medical condition, and failed to establish a logical sequence of cause and effect showing that the vaccines caused his injury. *See id* at 21. Therefore, Respondent concluded that compensation is not appropriate in this case. *Id.*

On November 21, 2012, Petitioners were ordered to file an expert report and any outstanding medical records by March 1, 2013. On January 17, 2013, Petitioners filed a Motion for Decision Dismissing the Petition ("Motion for Decision"). In their motion, Petitioners represented that they had conferred with Respondent and that Respondent did not object to the filing of the motion. Respondent did not file a response to Petitioners' motion. This matter is now before the undersigned for decision.

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

## II. DISCUSSION

To be awarded compensation under the Vaccine 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, or 2) that any of his medical problems were actually caused or significantly aggravated by the vaccination(s) at issue. *See* 42 U.S.C. §§ 300aa-11(c)(1) and 300aa-13(a)(1)(A).

Actual causation must be proved by preponderant evidence demonstrating that the subject vaccination caused the petitioner's injury by showing: "(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). The logical sequence of cause and effect must be supported by "reputable medical or scientific explanation." *Id.*, quoting *Grant v. Sec'y of Health & Human Servs.*, 956

F.2d 1144, 1148 (Fed. Cir. 1992). A petitioner may not be awarded compensation based on 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.*

An examination of the record demonstrates that it does not contain medical records or a medical opinion sufficient to demonstrate that Petitioners' son was injured by a result of receipt of influenza ("flu"), Diphtheria-Tetanus-acellular-Pertussis ("DTaP"), *Haemophilus influenzae* type B ("Hib"), Inactivated Polio vaccine ("IPV"), and Rotavirus vaccinations. First, the claimed neurologic injury is not a "Table Injury" associated with any of vaccinations received by Petitioners' son, and Petitioners did not claim their son suffered a "Table Injury." *See* 42 C.F.R. § 100.3(a) (2011),

Second, Petitioners have not proved that their son's injuries were caused in-fact by his receipt of the influenza ("flu"), Diphtheria-Tetanus-acellular-Pertussis ("DTaP"), *Haemophilus influenzae* type B ("Hib"), Inactivated Polio vaccine ("IPV"), and Rotavirus vaccinations. Specifically, the record indicates that Petitioner's son's treating physicians diagnosed him with Charcot-Marie-Tooth Syndrome 2A which is a known neurological disorder caused by a genetic mutation. Pet. Ex. 4 at 20. Moreover, none of the treating physicians opined that his injuries were caused or significantly aggravated by the vaccinations he received. *See* Exs. 1-17. Finally, Petitioners have not submitted an expert report and, by filing this Motion for Decision Dismissing the Petition, have indicated that they will not submit an expert report supporting their claim that the vaccinations caused their son's injuries.

Based on the review of the record as a whole, Petitioners have failed to prove by preponderant evidence that their son suffered a "Table Injury" or that his condition was "actually caused" by his vaccinations.

**Petitioners' claim for compensation is DENIED, and this case is DISMISSED for insufficient proof.** In the absence of a motion for review, the Clerk of the Court is directed to enter judgment accordingly.<sup>2</sup>

**IT IS SO ORDERED.**

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

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<sup>2</sup> This document constitutes a final "decision" in this case pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of the Court shall enter judgment in accordance with this decision. Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.