

OFFICE OF SPECIAL MASTERS

(Filed: April 29, 2005)

KATHY ARENA,)	
as legal representative of her daughter,)	
KAYLA J. ARENA,)	
)	
Petitioner,)	
)	
v.)	No. 03-1800V
)	DO NOT PUBLISH
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

DECISION¹

Petitioner, Kathy Arena (Ms. Arena), as legal representative of her daughter, Kayla J. Arena (Kayla), seeks compensation under the National Vaccine Injury Compensation Program (Program).² Ms. Arena alleges essentially that Kayla suffers guttate psoriasis that is related to immunizations that she received on August 2, 2000. *See, e.g.*, Fifth Status Report, filed April 5, 2004; *see also* Petition (Pet.), filed July 29, 2003. Ms. Arena pursues necessarily an actual causation theory. According to the United States Court of Appeals for the Federal Circuit, Ms. Arena's burden under the actual causation standard is "heavy." *Whitecotton v. Secretary of HHS*, 81 F.3d 1099, 1102 (Fed. Cir. 1996). The mere temporal relationship between a vaccination and an injury, and the absence of other obvious etiologies for the injury, are patently insufficient to prove actual causation. *See Grant v. Secretary of HHS*, 956 F.2d 1144, 1148 (Fed. Cir. 1992); *Wagner v. Secretary of HHS*, No. 90-

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

1109V, 1992 WL 144668 (Cl. Ct. Spec. Mstr. June 8, 1992). To prevail under an actual causation theory, Ms. Arena must demonstrate by the preponderance of the evidence that (1) “but for” the administration of the August 2, 2000 immunizations, Kayla would not have been injured, and (2) Kayla’s August 2, 2000 immunizations were a “substantial factor in bringing about” Kayla’s injury. *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1352 (Fed. Cir. 1999).³ The actual causation standard requires Ms. Arena to present “a medical theory,” supported by “[a] reliable medical or scientific explanation,” establishing “a logical sequence of cause and effect showing that the vaccination was the reason for the injury.” *Grant*, 956 F.2d at 1148; *see also Knudsen v. Secretary of HHS*, 35 F.3d 543, 548 (Fed. Cir. 1994)(citing *Jay v. Secretary of HHS*, 998 F.2d 979, 984 (Fed. Cir. 1993)). “The analysis undergirding” the medical or scientific explanation must “fall within the range of accepted standards governing” medical or scientific research. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). Ms. Arena’s medical or scientific explanation need not be “medically or scientifically certain.” *Knudsen*, 35 F.3d at 549. But, Ms. Arena’s medical or scientific explanation must be “logical” and “probable,” given “the circumstances of the particular case.” *Knudsen*, 35 F.3d at 548-49.

Ms. Arena retained Howard Maibach, M.D. (Dr. Maibach), as her medical expert. *See, e.g.*, Eighth Status Report, filed July 6, 2004. Ms. Arena represented that Dr. Maibach is a dermatologist associated with the University of California, San Francisco, School of Medicine. *See* Sixth Status Report, filed May 14, 2004. Over the course of many months, Ms. Arena and Dr. Maibach conducted extensive medical investigation of the claim. Indeed, the special master authorized even limited discovery. *See Arena v. Secretary of HHS*, No. 03-1800V, Order of the Special Master (Fed. Cl. Spec. Mstr. Feb. 8, 2005). On April 28, 2005, Ms. Arena proffered a report from Dr. Maibach. *See* Petitioner’s exhibit (Pet. ex.) 38. Dr. Maibach states that despite his and Ms. Arena’s very best efforts to identify appropriate “data and discussion in the literature” validating a likely causal relationship between immunizations and guttate psoriasis, he is “presently unable to offer an opinion in this matter, based on reasonable medical probability.” Pet. ex. 38 at 2.

Congress prohibited special masters from awarding compensation “based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” § 300aa-13(a). Numerous cases construe § 300aa-13(a). The cases reason uniformly that “special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone.” *Raley v. Secretary of HHS*, No. 91-0732V, 1998 WL 681467, *9 (Fed. Cl. Spec. Mstr. Aug. 31, 1998); *see also Camery v. Secretary of HHS*, 42 Fed. Cl. 381, 389 (1998). The special master has canvassed thoroughly the record. He determines that Kayla’s medical records alone do not

³ The preponderance of the evidence standard requires the special master to believe that the existence of a fact is more likely than not. *See, e.g., Thornton v. Secretary of HHS*, 35 Fed. Cl. 432, 440 (1996); *see also In re Winship*, 397 U.S. 358, 372-73 (1970) (Harlan, J., concurring), *quoting* F. James, CIVIL PROCEDURE 250-51 (1965). Mere conjecture or speculation will not meet the preponderance of the evidence standard. *Snowbank Enter. v. United States*, 6 Cl. Ct. 476, 486 (1984); *Centmehaiey v. Secretary of HHS*, 32 Fed. Cl. 612 (1995), *aff’d*, 73 F.3d 381 (Fed. Cir. 1995).

reveal an independent basis for the special master to conclude more likely than not that Kayla's August 2, 2000 immunizations caused actually Kayla's condition. Dr. Maibach concedes that based upon currently available medical evidence, he cannot support adequately Ms. Arena's claim. Therefore, the special master decides that Ms. Arena has not established a *prima facie* Program claim.

Kayla appears to be a beautiful young woman who has suffered terribly from her dermatological condition. The special master is deeply sympathetic to Ms. Arena's and Kayla's obviously tragic circumstances. However, the special master is constrained to rule on the record before him that Ms. Arena is not entitled to Program compensation.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Ms. Arena's copy of this decision to Ms. Arena by overnight express delivery.

John F. Edwards
Special Master