

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-699V

April 23, 2010

Not to be Published

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SHANNON and EDWARD O'BRIEN, \*  
as parents and natural guardians of minor, \*  
KAYLA O'BRIEN, \*

Petitioners, \*  
\*

v. \*  
\*

SECRETARY OF THE DEPARTMENT OF \*  
HEALTH AND HUMAN SERVICES, \*

Respondent. \*

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Sheila A. Bjorklund, Minneapolis, MN, for petitioners.  
Voris E. Johnson, Washington, DC, for respondent.

Dismissal; petitioners move  
for ruling on the record; no  
expert report to support  
allegations

**MILLMAN, Special Master**

## DECISION

On October 15, 2009, petitioners filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986<sup>1</sup> (hereinafter the "Vaccine Act" or the "Act"), alleging

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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). Vaccine Rule 18(b) states that 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 constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to delete such information prior to 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

that their daughter Kayla O'Brien (hereinafter "Kayla") suffered developmental delay, speech delay, diarrhea, and encephalopathy after receiving MMR vaccine, Hib vaccine, Prevnar, PPD, and flu vaccine on November 13, 2006.

On April 9, 2010, during a telephonic status conference, petitioners' counsel stated that she was not going to file an expert report because, after a thorough review of the medical records, she realized she could not link the allegations to the vaccinations. Petitioners moved for a Ruling on the Record.

### **DISCUSSION**

To satisfy their burden of proving causation in fact, petitioners must prove by preponderant evidence "(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. Secretary of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Secretary of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[.]" the logical sequence being supported by "reputable medical or scientific explanation[.]" *i.e.*, "evidence in the form of scientific studies or expert medical testimony[.]"

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. *Id.* at 1148.

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delete such material from public access.

Petitioners must show not only that but for the vaccines, Kayla would not have had the alleged injuries, but also that the vaccines were a substantial factor in bringing about her alleged injuries. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

The Vaccine Act prohibits special masters from ruling in favor of petitioners based solely on their allegations without evidentiary support from the medical records or expert medical opinion. 42 U.S.C. § 300aa-13(a)(1): “The special master or court may not make such a finding [of entitlement] based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.”

Petitioners ask for a Ruling on the Record because they have not obtained expert medical support for their allegations and none of the medical records they have filed attributed Kayla’s speech and developmental delays to her vaccinations.

Petitioners have failed to make a prima facie case and their petition is dismissed.

### **CONCLUSION**

This case is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.

**IT IS SO ORDERED.**

April 23, 2010  
DATE

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s/Laura D. Millman  
Laura D. Millman  
Special Master