

# In the United States Court of Federal Claims

Office of Special Masters

No. 09-433V

August 17, 2010

Not to be Published

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LETASHA BETANCOURT, personal \*  
representative for the estate of \*  
ANDREW RAHMEL BREEDEN, Jr. \*  
a/k/a/ ANDREW BETANCOURT, \*

Petitioner, \*

v. \*

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

Respondent. \*

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Miriam E. Zakarin, New York, NY, for petitioner.

Traci R. Patton, Washington, DC, for respondent.

Dismissal; death case;  
failure to provide evidence in  
support of allegations

**MILLMAN, Special Master**

## DECISION<sup>1</sup>

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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 Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 clearly be an 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 delete such material from public access.

Petitioner<sup>2</sup> filed a petition on July 9, 2009 under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that vaccinations administered to her son Andrew on July 6, 2006 at the age of two months caused his death the next day on July 7, 2006.<sup>3</sup>

The Death Certificate states that the cause of death is uncertain. Ex. G.<sup>4</sup>

An autopsy performed on July 8, 2006, states that Andrew was found dead co-sleeping with his parents in an adult bed. Ex. A, p. 1. An upper respiratory culture and a blood culture showed E. coli and staphylococcus aureus. Ex. 1, pp. 8, 10.

Petitioner's counsel attempted to find expert medical support for petitioner's allegations, but was unable to find anyone who could give Andrew a cause of death, much less state that his vaccinations caused his death. Counsel consulted Dr. Steven Godfrey, a pathologist.

During a telephonic status conference held on July 14, 2010, petitioner's counsel stated that Dr. Godfrey could not determine a cause of death. Petitioner's counsel consulted an additional doctor who answered similarly.

On July 19, 2010, petitioner's counsel told the undersigned's law clerk that her client was willing to dismiss the case.

## **FACTS**

Andrew was born on May 9, 2006.

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<sup>2</sup> Petitioner initially filed just in her own name. By Order dated September 18, 2009, the caption was amended to reflect that Ms. Betancourt is the personal representative for the estate of her dead child Andrew.

<sup>3</sup> Petitioner filed a civil lawsuit on December 24, 2007 which was dismissed on May 4, 2009. During that time period, the Vaccine Act's two-year statute of limitations was tolled, making the filing of the petition on July 9, 2009 under the Vaccine Program timely. Sections 300aa-11(a)(2)(B) and -16(a)(3).

<sup>4</sup> Petitioner used letters instead of numbers for her exhibits.

On July 6, 2006, when he was two months old, Andrew received DTaP, HiB, hepatitis B, inactivated polio, and pneumococcal vaccines.

On July 7, 2006, Andrew died.

On July 8, 2006, Detective Mason of the Office of Chief Medical Examiner, wrote a report after personally interviewing Andrew's father who stated that he slept with his arm over Andrew. Andrew awoke about 4:00 a.m. when the father said he fed Andrew eight ounces of formula and then went back to sleep with Andrew next to him in bed. Andrew was in bed with both parents and covered with two blankets because they had the air conditioning on. R Ex. 1, p. 35.<sup>5</sup>

## DISCUSSION

To satisfy her burden of proving causation in fact, petitioner 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[.]"

In Capizzano v. Secretary of HHS, 440 F.3d 1317, 1325 (Fed. Cir. 2006), the Federal Circuit said "we conclude that requiring either epidemiologic studies, rechallenge, the presence

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<sup>5</sup> Because petitioner used letters to mark her exhibits, respondent used numbers.

of pathological markers or genetic disposition, or general acceptance in the scientific or medical communities to establish a logical sequence of cause and effect is contrary to what we said in Althen....”

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.

Petitioner must show not only that but for the vaccinations, Andrew would not have died, but also that the vaccinations were substantial factors in bringing about his death. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Petitioner has failed to find any medical expert to opine what was the cause of Andrew's death much less that vaccines caused it.

The Vaccine Act states that the undersigned may not rule in favor of petitioner based solely on her claims alone “unsubstantiated by medical records or by medical opinion.” 442 U.S.C. § 300aa-13(a)(1). Here there are no medical records or medical opinion ascribing Andrew's death to any cause.

Petitioner has failed to make a prima facie case. This petition must be DISMISSED.

The death of any child is a tragedy and the undersigned expresses her sympathy to petitioner.

## **CONCLUSION**

This petition is dismissed. 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.<sup>6</sup>

**IT IS SO ORDERED.**

August 17, 2010  
DATE

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

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<sup>6</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.