

In the United States Court of Federal Claims

No. 09-501V
April 2, 2010
Not to be Published

ASHLEE BOLL, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Dismissal on motion of petitioner;
failure to provide evidence in
support of allegations

William P. Ronan, III, Overland Park, KS, for petitioner.
Debra A. Filteau Begley, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition on July 31, 2009 under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that she had paralysis, fatigue, numbness, dizziness,

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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.

photophobia, headaches, and tingling after receiving three Gardasil vaccinations (human papilloma virus vaccine).

On September 17, 2009, during the first status conference in this case, petitioner's counsel opined that he thought petitioner had myasthenia gravis. Certain medical records and test results were missing.

On November 30, 2009, during the second status conference, petitioner's counsel did not want to dismiss the case but sought additional time to see what petitioner's condition actually was.

On February 17, 2010, petitioner filed copies of medical records from a professional association called The Woman's Place (P. Ex. 10) which discussed the lack of a diagnosis for petitioner's spells of failing to move but being aware of her surroundings. Ex. 10, p. 2.

On April 1, 2010, during the third status conference, petitioner's counsel, after consultation with his client, moved to dismiss. The undersigned grants petitioner's motion.

FACTS

Petitioner was born on February 22, 1991.

On August 3, 2006, petitioner received her first Gardasil vaccination. Med. recs. at Ex. 1. On August 4, 2006, petitioner made a phone call to her doctor, stating she had dizziness and light sensitivity. Her mother called to complain petitioner had nausea, headaches, and dizziness. Med. recs. at Ex. 1, p. 7.

On October 3, 2006, petitioner received her second Gardasil vaccination. Med. recs. at Ex. 1, p. 10. On October 16, 2006, petitioner had some headaches. Med. recs. at Ex. 1, p. 12.

On January 17, 2007, petitioner's mother phoned the doctor to say that she had picked up petitioner at school because she was dizzy and had headaches. Petitioner was very sensitive to hormonal therapies. Med. recs. at Ex. 1, p. 13.

The next day, on January 18, 2007, petitioner complained of headaches and migraines. Provera caused her dizziness and headaches. Her headaches had become worse since Christmas. Med. recs. at Ex. 1, p. 14. (Provera is the trademark name for medroxyprogesterone acetate. Dorland's Illustrated Medical Dictionary, 30th ed. (2003) at 1530. It is a female hormone. Id. at 1112-13.)

On January 23, 2007, petitioner went to the Hutchinson Clinic. She had ongoing and worsening headaches. Their onset was in September 2006. In late August, she started Yaz birth control pills to treat irregular menses. The headaches had become more frequent and now were occurring daily. She also had nausea. She had a family history of migraines (her father and paternal grandmother). Med. recs. at Ex. 2, p. 1.

On February 3, 2007, petitioner returned to the Hutchinson Clinic emergency department. She could not move. She was recently diagnosed with mononucleosis. Generally, she was doing better. She went sledding earlier that day with her sister. That evening, she had an episode of extreme weakness where she could hardly move. The onset was a few hours earlier. The symptoms were mild. Med. recs. at Ex. 3, p. 36.

On February 5, 2007, petitioner stated to her doctor that, since she went off OBCP (presumably obstetric chemopharmaceutical), her headaches had not gotten any better. She had been in the emergency department over the weekend due to the sudden onset of paralysis. She

had a problem recently with generalized weakness/instability and, on Saturday, she could not move. She could have myasthenia gravis. Med. recs. at Ex. 1, p. 17.

On February 7, 2007, petitioner saw Dr. Subhash Shah, a pediatric neurologist. Her EEG was normal. Med. recs. at Ex. 4, p. 1. On that same date, Dr. Shah wrote a letter to Dr. Reagan Glover stating that petitioner had mild generalized weakness in her extremities, with present and symmetrical deep tendon reflexes. His diagnosis was migraine headaches with the possibility of myasthenia gravis. Med. recs. at Ex. 4, pp. 2, 3.

On February 9, 2007, petitioner returned to Hutchinson Hospital emergency department. She had temporary paralysis whose onset was 30 minutes before she arrived. Med. recs. at Ex. 3, p. 26. She had decreased tone. She had equal weakness in all extremities. Her deep tendon reflexes were normal. She was diagnosed with generalized weakness without cause. Med. recs. at Ex. 3, pp. 28, 31.

On February 14, 2007, petitioner returned to Hutchinson Hospital emergency department. She was partially numb. The onset was 40 minutes earlier. This was her fourth episode of sudden onset of generalized weakness. The previous episodes lasted two to four hours with no residual symptoms when they resolved. Her symptoms began in both arms and progressed to other extremities. Med. recs. at Ex. 3, p. 21.

From February 14 to 15, 2007, petitioner was at Wesley Medical Center. Med. recs. at Ex. 8, p. 3. She complained of a two-week period of four episodes of sudden unexplained paralysis. She said the onset was around Christmas with migraine headaches. Additionally, she developed a cough and sore throat and was diagnosed with mononucleosis. Id. Dr. Susan L. Pence noted in the discharge summary that petitioner's weakness was noted differently by each

examiner. Dr. Subhash Shah examined her and found her to have normal tone and normal deep tendon reflexes. Med. recs. at Ex. 8, p. 4. She did have diminished effort when he attempted to measure her strength. Dr. Shah felt petitioner was not suffering from demyelinating disease. He felt, after a brain MRI showed nothing abnormal, that petitioner's periodic paralysis was secondary to conversion disorder since her potassium, CPK, and ESR were normal, ruling out hypokalemic paralysis, myasthenia gravis, and autoimmune disorders, respectively. Petitioner's mother, after all this was explained to her, okayed a psychiatric consultation, but then declined it and opted for a second neurologic opinion. Id.

On February 19, 2007, petitioner told her doctor that no one could figure out her abnormal spells. She went a long time without one but had one recently. Med. recs. at Ex. 1, p. 21. Also on February 19, 2007, petitioner received her third Gardasil vaccination. Med. recs. at Ex. 1, p. 20.

On February 27, 2007, petitioner saw Dr. James A. Isaac at Hutchinson Hospital who diagnosed her with episodic weakness of uncertain cause. Dr. Isaac doubted that petitioner had myasthenia gravis or periodic paralysis. Med. recs. at Ex. 3, p. 19. Petitioner entered Hutchinson Hospital emergency department complaining of episodes of paralysis. She had been diagnosed with mononucleosis after a lab test at the clinic one and one-half weeks ago. Med. recs. at Ex. 3, p. 13. She had no focal motor deficits and no focal sensory deficits, and she had normal deep tendon reflexes and normal speech. Med. recs. at Ex. 3, p. 14.

On February 28, 2007, petitioner saw Dr. Jerome V. Murphy, a neurologist. She gave a history of going completely limp and missing school for six weeks. She had headaches all the

time. There were no aggravations of this. Petitioner's mother thought it could be stress related. Dr. Murphy's diagnosis was periodic paralysis. Med. recs. at Ex. 5, pp. 19, 20.

On March 28, 2007, petitioner returned to Hutchinson Hospital emergency room with chest pain which had begun 30 minutes earlier. This resolved. Med. recs. at Ex. 3, p. 6.

On July 11, 2007, petitioner saw Dr. Rabi N. Tawil and Dr. Chad Heatwole at the University of Rochester Medical Center. Med. recs. at Ex. 7, p. 3. Dr. Heatwole writes that petitioner's symptoms began in December 2006 when she was diagnosed with mononucleosis. Over the next four to eight weeks, she noticed generalized leg weakness and increased somnolence resulting in excessive night time sleeping. She noticed her first event of severe weakness in February 2007. This weakness lasted several hours. Since then, she has had seven to eight additional episodes. She has never lost consciousness during these events. She has described an out of body experience and has referred to herself in the third person during attacks. She has never had any shaking, or bowel or bladder incontinence during these attacks. On occasion, stress can trigger the event. *Id.* The doctors' impression was episodic weakness and mononucleosis. She did not have a clinical history suggestive of periodic paralysis. Mononucleosis may explain some of the persistent fatigue, but not the transient weakness. The doctors thought that there are some underlying psychogenic stressors in petitioner's life that might account for her episodes of weakness. "Certainly, the diagnosis of a somatoform disorder cannot be completely ruled out at this time." Med. recs. at Ex. 7, p. 4.

On August 28, 2007, petitioner saw Dr. Brian H. Strange of the Grene Vision Group. She had had blurred visual acuity for three months, and trouble reading the computer and street signs. Dr. Strange diagnosed petitioner with floaters. Med. recs. at Ex. 6, pp. 1, 2.

On December 18, 2007, petitioner went to Hutchinson Hospital emergency department with a sore throat and low grade fever. She was diagnosed with a viral infection. Med. recs. at Ex. 3, pp. 1, 3.

On January 15, 2008, petitioner saw Dr. Strange, complaining of blurred vision for six weeks. Dr. Strange diagnosed petitioner with myopia. Med. recs. at Ex. 6, pp. 1, 4.

On July 3, 2008, petitioner saw Dr. Kathryn Sawchak, complaining of abnormal spells in which she could not move, but was aware of her surroundings. She had gone a long time without one. Dr. Sawchak diagnosed petitioner with polycystic ovary syndrome. Med. recs. at Ex. 10, pp. 2, 5.

On July 15, 2008, a note states that petitioner got her contact lenses changed in January. Med. recs. at Ex. 6, p. 5.

On October 20, 2009, petitioner saw Dr. Sawchak again. She had not had a spell in over a year. Med. recs. at Ex. 10, p. 21.

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 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, she would not have whatever she has, but also that the vaccine was a substantial factor in bringing about whatever she has. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Petitioner has failed to get a diagnosis for her abnormal spells where she suddenly becomes paralyzed but maintains awareness. No one has diagnosed her with a neurologic disease or any disease. She has had possible diagnoses of migraines, sensitivity to hormonal medication, mononucleosis, conversion disorder, and polycystic ovary syndrome. Petitioner has failed to find any medical expert to opine that any of these possible diagnoses are causally related to Gardasil vaccine, much less to give a basis for such an opinion.

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

petitioner's symptoms to Gardasil vaccine. There are no medical records definitively diagnosing petitioner with a specific syndrome or giving a cause for that specific syndrome.

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

Petitioner's Motion to Dismiss is GRANTED.

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.²

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

² 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.