

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-443V

March 24, 2010

Not to be Published

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ROBERT LASKOFF, \*

Petitioner, \*

v. \*

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

Respondent. \*

\*\*\*\*\*

Randall E. Smith, Portland, ME, for petitioner.

Michael P. Milmo, Washington, DC, for respondent.

Entitlement: influenza vaccine;  
15 days later, Guillain-Barré  
Syndrome (GBS); respondent  
requests ruling on the record

**MILLMAN, Special Master**

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 Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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

On July 7, 2009, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that influenza vaccine administered on October 9, 2007 caused him to develop Guillain-Barré Syndrome (GBS) whose onset was 15 days later.

Petitioner filed affidavits from two treating neurologists in support of his allegations. Dr. Hsien Young, in an affidavit dated May 18, 2009, states that she first treated petitioner on October 28, 2007. A stool culture revealed no salmonella, shigella, or campylobacter infections. Petitioner did not have a recent history of Epstein-Barr Virus, cytomegalovirus, HIV, mycoplasma, or clostridium. In Dr. Young's opinion, petitioner's flu vaccination caused his GBS. P. Ex. 12, pp. 1, 2. Dr. John K Sullivan, in an affidavit dated April 21, 2009, states that he first treated petitioner on November 27, 2007. His opinion is the same as Dr. Young's. P. Ex. 13, p. 1. Both doctors discuss GBS as an autoimmune disease which is triggered by an immune-mediated attack on components of the peripheral nerve from either infections or vaccines. The generally accepted time period between trigger and GBS is five days to three weeks. Among the triggers for GBS is influenza vaccine. Ex. 12, p. 1; Ex. 13, p. 1.

On October 5, 2009, respondent filed her Rule 4(c) Report, stating that respondent did not believe that a preponderance of the evidence supported entitlement. However, respondent was aware that GBS was frequently reported after influenza vaccine administration and some studies supported an association between the vaccine and GBS. Report, p. 2. Since there was no antecedent illness or other known cause besides the vaccine in this case, and petitioner actually had GBS which occurred within a feasible time frame, respondent stated she would not expend further resources to contest entitlement in this case. Id. Respondent asked petitioner to provide information for determining damages.

In a telephonic status conference held on March 24, 2010, the undersigned asked respondent's counsel if respondent would be willing for the undersigned to issue a ruling on entitlement in this matter in order to speed up the process of concluding damages if the parties agree on a settlement figure. Respondent's counsel said he would contact the undersigned's law clerk to advise her of what respondent's view was. Later on March 24, 2010, respondent's counsel did phone the undersigned's law clerk and told her that respondent would like a ruling on entitlement.

### **DISCUSSION**

To satisfy his 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. . . ." Such an approach is inconsistent with the use of circumstantial evidence. *Id.* The

Federal Circuit stated in Althen, 418 F.3d at 1280, that “the purpose of the Vaccine Act’s preponderance standard is to allow the finding of causation in a field bereft of complete and direct proof of how vaccines affect the human body.”

Close calls are to be resolved in favor of petitioners. Capizzano, 1440 F.3d at 1327; Althen, 418 F.3d at 1280. *See generally*, Knudsen v. Secretary of HHS, 35 F.3d 543, 551 (Fed. Cir. 1994).

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

The Federal Circuit in Capizzano emphasized the importance of the special masters’ heeding the opinions of petitioner’s four treating doctors in that case. 440 F.3d at 1326.

In the instant action, petitioner has filed opinions from two treating neurologists, Drs. Young and Sullivan, giving a plausible theory of medical causation (GBS is an autoimmune disease triggered by various infections and vaccines), a logical sequence of cause and effect (petitioner’s flu vaccine caused his GBS), and a medically appropriate time interval between vaccination and onset of GBS (two weeks fits within the appropriate time interval).

Respondent has chosen not to expend any further resources in contesting entitlement and requested a ruling on the record..

Petitioner has satisfied the three Althen criteria of proving causation in fact. Without the administration of influenza vaccine, he would not have had GBS.

**CONCLUSION**

Petitioner is entitled to reasonable compensation. The undersigned anticipates that the parties, which have been working well together toward resolution of damages, will complete this phase of the litigation successfully and quickly.

**IT IS SO ORDERED.**

March 24, 2010  
DATE

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