

In the United States Court of Federal Claims

No. 08-921V
June 30, 2009
Not to be Published

WILLIAM THOMAS BOYKIN on *
behalf of his wife JEAN D. BOYKIN, *
Deceased, *

Petitioner, *

v. *

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

Respondent. *

Dismissal; flu vaccine alleged
to have caused subdural
hemorrhage; no expert report

Peter J. Sarda, Raleigh, NC, for petitioner.
Chrysovalantis P. Kefalas, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition initially pro se on December 24, 2008 under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that his wife's influenza vaccination caused her heart attacks, strokes, and a brain aneurysm.

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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

Petitioner's wife received flu vaccine on October 27, 2006, although attachment 2 says the date of vaccination was December 27, 2006. She died on April 15, 2008.

Attachment 3 is a VAERS (Vaccine Adverse Event Reporting System) report, dated November 11, 2008, stating that, within four hours of petitioner's wife's receipt of flu vaccine, she had severe pains and weakness. Refiled as page 5 of the medical records. Petitioner is the one who filled out the VAERS report.

Attachment 5 is a death certificate, dated June 16, 2009, attributing petitioner's wife's death to multi-system organ failure.

On April 23, 2009, petitioner's counsel told the undersigned during a telephonic status conference that he had no success in getting any of petitioner's wife's treating physicians to support petitioner's allegations. On the same date, the undersigned issued an Order granting petitioner's request for 60 days to retain an expert and file an expert report and accompanying C.V. by June 22, 2009. No such expert was identified within the time allocated.

On June 24, 2009, the undersigned issued an Order directing petitioner to advise the undersigned whether he was going forward with the case or not.

On June 25, 2009, petitioner filed a Status Report/Request for Ruling on the Record. In this filing, petitioner stated he did not wish to have the case dismissed but "asks the court to consider the aches and pains Mrs. Boykin suffered the afternoon she received the flu shot to be evidence of her reaction to the flu shot which resulted in the subdural hemorrhage diagnosed on November 28, 2006." Filing of June 25, 2009. Petitioner also admits he "is unable to find qualified experts willing to opine that the source of Mrs. Boykin's medical issues which arose on

November 11, 2006 were proximately caused by the flu shot administered on October 27, 2006.”

Id.

FACTS

Petitioner’s wife was born on August 8, 1930. She was almost 78 years old when she died.

On November 10, 2006, petitioner’s wife saw Dr. Lakshmi Narasimhan at Onslow Memorial Hospital. Petitioner’s wife had a history of hypertension, coronary artery disease, and peripheral vascular disease. Two weeks earlier, she received the flu vaccination and subsequently developed some malaise. The evening of the vaccination, she had some chest tightness with shortness of breath which went away after she put on an old transderm patch. Subsequently, she felt weak and fatigued all week and the next week. On November 9, 2006, she was sitting when she had two episodes of a few minutes of not being able to use her right hand. She lost all power in it and had to use her left hand to lift her right hand. She also had shortness of breath with paroxysmal nocturnal dyspnea. She was wheezing and came to the ER. She had no history of fever or rashes.

From November 11 to 16, 2006, she was at Onslow Memorial Hospital. On November 11, 2005, petitioner’s wife had a myocardial infarction and left bundle branch block with transient ischemic attack-type symptoms. Although an initial CT scan of her head was normal, a repeat CT scan of her head showed left parietal subarachnoid hemorrhage on the end of the sulci. She was diagnosed with spontaneous hemorrhage caused by her anticoagulant.

On November 11, 2006, Dr. Adnan Taj Eldin of Onslow Memorial Hospital wrote that petitioner’s wife was brought to the emergency room because of dyspnea and wheezing. She

had had flu vaccine two weeks previously and a prolonged viral syndrome since then with achiness, congestion, and cough. On the day of admission, she developed two episodes of right arm weakness and right facial and tongue weakness with slurred speech and a sudden increase in dyspnea, orthopnea, and wheezing. A chest x-ray showed bilateral patch infiltrates which could indicate infection or heart failure. Her temperature was 100.3° rectally. Petitioner's wife had had cardiac surgery in 2001 with five coronary artery bypass grafts, bilateral carotid endarterectomies in 2003, hypertension, hyperlipidemia, and previous transient ischemic attacks involving the left upper extremity before the carotid endarterectomies. An EKG showed a complete left bundle branch block. An echocardiogram reported hypokinesis in the anterior wall and apex and a reduced left ventricular ejection fraction to 45-50%. Petitioner's wife was transferred on November 11, 2006 to Pitt Memorial Hospital.

From November 11 to 16, 2006, petitioner's wife was at Pitt County Memorial Hospital. Med. recs. at 72. She was discharged with a diagnosis of myocardial infarction with left bundle branch block and transient ischemic stroke/hemorrhagic stroke. Id. Her history included hypertension, coronary artery disease, and peripheral vascular disease. Two weeks before admission, she received a flu vaccination and developed some malaise and chest tightness, "but it went away after she used transdermal nitroglycerin patch." Id. She felt weak and fatigued all week. On November 10, 2006, she was sitting in a chair watching television when she had two episodes of weakness in her right arm and hand which resolved, and another episode of weakness in her right hand, with twitching of the muscles of her right face. She complained of some chest tightness. CT scan of the head was negative. The first set of cardiac enzymes was negative but the second set was positive. Another CT scan of the head showed left parietal

subarachnoid hemorrhage in the sulci. She had a left bundle branch block shown on EKG. MRA and MRI of the brain showed a small hemorrhagic infarction of the brain of the left parietal lobe. Id.

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....”

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 flu vaccine, his wife would not have had the left branch blockage, subdural hemorrhage and death, but also that the vaccine was a substantial factor in bringing about her left branch blockage, subdural hemorrhage, and death. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Petitioner has failed to find any medical expert to support his allegations. Clearly, there is temporal association between petitioner's flu vaccination and her feeling of malaise. But the undersigned cannot under the case law enunciated in Knudsen, Althen., and Capizzano or within the terms of the Vaccine Act conclude that her cardiac symptoms of left branch blockage and brain hemorrhage are sequelae of her malaise after the flu vaccination. The Vaccine Act states that the undersigned may not rule in favor of petitioner based solely on his 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 wife's cardiac problems and death to her flu vaccination. Petitioner's wife had a lengthy history of cardiac problems.

Petitioner asks for a ruling on the record although he terms his status report on page 2 of his filing as "interim." Filing of June 25, 2009. This is puzzling terminology when petitioner has failed to put on a prima facie case by not filing a medical report from either an expert or a treating doctor. When a petitioner asks for a ruling on the record because he cannot find an expert, and there is insufficient evidence in the medical records to rule for petitioner, the case is over. Petitioner's counsel suggests the undersigned make factual findings as if there would then be another part of this case. Filing of June 25, 2009, pp. 1-2. In this Program, there is no issue of negligence. If petitioner fails to satisfy the three criteria that the Federal Circuit enunciated in

Althen, the case is over. Here, petitioner admits he cannot find medical support for his claims either in the medical records from treating physicians or from an expert medical doctor.

Consequently, petitioner has failed to make a prima facie case and this petition must be dismissed.

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.

June 30, 2009
DATE

s/ Laura D. Millman
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.