

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 07-0131V

Filed: 25 April 2008

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JEROME ANHALT,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

* * * * *

UNPUBLISHED DECISION¹

Sherry Kay Drew, Esq., McDowell & Drew, Ltd., Glenview, Illinois, for Petitioner;
Lisa Ann Watts, Esq., U. S. Department of Justice, Washington, D.C., for Respondent.

**RULING ON ENTITLEMENT
BASED UPON THE WRITTEN RECORD**

ABELL, Special Master:

On 26 February 2007, the Petitioner filed a *pro se* petition for compensation under the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act" or "Act"),² alleging that he ("Jerome") suffered from a chronic form of Bell's Palsy, which required recourse to emergency care and plastic surgery, and that such was related to the administration of a trivalent flu vaccine to Jerome on 2 November 2005. Original Petition at 1-3. Subsequently, Petitioner retained counsel

¹ This opinion constitutes my final "decision" in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Therefore, unless a motion for review of this decision is filed within 30 days after the time given herein to Petitioner to make such filing has elapsed, the Clerk of this Court shall enter judgment in accord with this decision. Moreover, Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of decision within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

² The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 et seq. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

and thereafter filed an amended petition on 17 July 2007, alleging the same essential facts and claiming additionally that Petitioner continues to suffer ill effects of the alleged condition to this day. Amended Petition (Pet.) at 1-2. As an alleged vaccine-related injury, Petitioner demanded compensation for unreimbursable expenses for past or future treatment and expenses reasonably appurtenant thereto, pain and suffering, and attorney's fees and costs. This Court is invested with the task of determining whether Petitioner is entitled to compensation. Due to the lack of substantiating proof of the types statutorily-required and amounting to a preponderance of the evidence, the Court denies compensation.

I. PROCEDURAL HISTORY

Petitioner was represented by able counsel, and filed contemporaneously with the Amended Petition all of the relevant medical records relating to Petitioner's alleged condition which had not previously been filed. See Petitioner's Exhibits ("Pet. Ex.") 17-21. Respondent filed its Report, pursuant to Rule 4(c), on 8 November 2007, denying compensation. After sincere attempts to engage a medical expert to opine in support of the Petition, Petitioner moved on 9 October 2007 for a ruling on the written record, and the Court hereby grants that motion.

II. FACTUAL RECORD

Petitioner Jerome Anhalt experienced a history of episodic nerve pain involving the fifth cranial nerve. Pet. Ex. 18-20. Two days after Petitioner received the influenza vaccine on 2 November 2005, he went to the Hammond Clinic, complaining of nerve pain and swelling on the right side of his face, which he stated began mere hours after vaccination. Pet. Ex. 2 at 1; Pet. Ex. 15 at 2. He was treated for Bell's Palsy with an anti-viral drug empirically addressed to that condition. Pet. Ex. 2 at 1. In follow-up doctor visits, Petitioner reported left-sided facial nerve paralysis lasting four days. Pet. Ex. 9 at 1-3. MRI results were consistent with Bell's Palsy of the seventh cranial nerve, and related the condition to "chronic microvascular ischemia." Pet. Ex. 10. Symptoms continued through November 2005, but Petitioner reported feeling "a little better" at a 1 December 2005 visit. Pet. Ex. 9 at 5-10. When the condition did not resolve on its own, Petitioner received plastic surgical attention for several sites on his face. Pet. Ex. 11 at 7.

III. DISCUSSION

This Court is given jurisdiction to award compensation for claims where the medical records or medical opinion have demonstrated by preponderant evidence that either a listed Table Injury occurred within the prescribed period or that an injury was actually caused by the vaccination in question. § 13(a)(1). For certain categories of vaccines, the Vaccine Injury Table lists specific injuries and conditions, which, if found to occur within the period prescribed therein, create a rebuttable presumption that the vaccine(s) received caused the injury or condition. §14(a). The vaccine which Petitioner alleges to have caused his condition was the trivalent flu vaccine, listed under category XIV on the Vaccine Table, a category with no coordinate injury assigned. 42 C.F.R. § 100.3(a). Essentially, this relegates all claims for such a vaccine to an "actual causation" theory of relief.

Under the statute, the Court cannot grant a petitioner Program compensation based solely on the petitioner's asseverations. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. 42 U.S.C. § 300aa-13(a)(1). Here, because the medical records do not seem to support the petitioner's claim, a medical opinion must be offered in support. Petitioner, however, did not offer such an opinion. Accordingly, the information on the record extant does not show entitlement to an award under the Program.

A petition may prevail if it can be demonstrated to a preponderant standard of evidence that the vaccination in question, more likely than not, actually caused the injury or condition complained of. See § 11(c)(1)(C)(ii)(I) & (II); *Grant v. Secretary of HHS*, 956 F.2d 1144 (Fed. Cir. 1992); *Strother v. Secretary of HHS*, 21 Cl. Ct. 365, 369-70 (1990), *aff'd*, 950 F.2d 731 (Fed. Cir. 1991). The Federal Circuit has indicated that, to prevail, every petitioner must:

show a medical theory causally connecting the vaccination and the injury. Causation in fact requires proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury. A reputable medical or scientific explanation must support this logical sequence of cause and effect.

Grant, 956 F.2d at 1148 (citations omitted); *see also Strother*, 21 Cl. Ct. at 370.

Furthermore, the Federal Circuit recently articulated an alternative three-part causation-in-fact analysis as follows:

[A petitioner's] burden is to show by preponderant evidence that the vaccination brought about [the] injury by providing: (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).

Under this analysis, while Petitioner is not required to propose or prove definitively that a specific biological mechanism can and did cause the injury leading to Petitioner's condition, he must still proffer a plausible medical theory that causally connects the vaccine with the injury alleged. See *Knudsen v. Secretary of HHS*, 35 F.3d 543, 549 (1994).

Of importance in this case, it is part of Petitioner's burden in proving actual causation to "prove by preponderant evidence both that [the] vaccinations were a substantial factor in causing the illness, disability, injury or condition and that the harm would not have occurred in the absence of the vaccination." *Pafford v. Secretary of HHS*, 451 F.3d 1352, 1355 (2006) (emphasis added), citing *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1352 (Fed. Cir. 1999). This threshold is the litmus test of the cause-in-fact (a.k.a. but-for causation) rule: that the injured party would not have sustained the damages complained of, *but for* the effect of the vaccine. See generally *Shyface*, *supra*.

Here, Petitioner has not offered a theory of causation as such, but this is certainly not due to lack of opportunity to present a medical expert opinion. There has not been demonstrated to the

Court a “a logical sequence of cause and effect showing that the vaccination was the reason for the injury,” *Q.E.D. See Althen, supra*.

Returning to the legal standard pertaining to actual causation, as stated by the Federal Circuit in *Grant* and then reiterated in *Althen*, a petitioner must “show a medical theory causally connecting the vaccination and the injury. Causation in fact requires proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury.” *Grant*, 956 F.2d at 1148; *Althen* at 1278. Here the Petitioner has not demonstrated “a medical theory causally connecting the vaccination and the injury,” nor has he set forth “a logical sequence of cause and effect showing that the vaccination was the reason for the injury.” *Althen* at 1278. In short, Petitioner has not met the burden of proof set forth in the Act.³ Petitioner has presented none of the evidence required by the Act in the form of corroborative medical records, and failed to account for the contrary explanations set forth in the medical records that contradicted their contentions.

IV. CONCLUSION

Therefore, in light of the foregoing, no alternative remains for this Court but to **DISMISS** this petition with prejudice. In the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 within 30 days of this date, the clerk shall forthwith enter judgment in accordance herewith. **IT IS SO ORDERED.**

Richard B. Abell
Special Master

³ See *Raley v. Secretary of HHS*, No. 91-0732, 1998 WL 681467 (Fed. Cl. Spec. Mstr. Aug. 31, 1998) (stating “[t]he requirement that [a] petitioner[‘s] claims must be supported either by medical records or medical expert opinion simply addresses the fact that the special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone”); *Bernard v. Secretary of HHS*, No. 91-1301, 1992 WL 101097 (Fed. Cl. Spec. Mstr. Apr. 24, 1992) (“The medical significance of the facts testified to by the lay witnesses must be interpreted by a medical doctor, who, in turn, expresses the opinion either that a compensable Table injury has occurred or that the vaccine in question actually caused the injury complained of. If such an opinion appears in the medical records, then it is unnecessary to call a retained expert witness in order to establish a prima facie case; if, on the other hand, the medical records do not provide such substantiation, then a petitioner must retain a medical doctor who, upon review of the entire record, concludes that it is more likely than not that a compensable injury has occurred.”).