In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-0414V

Filed: 22 September 2008

DAVID W. HOLTZMAN, and KATHALLENE N. HOLTZMAN, as parents and natural guardians of their son, ALEX J. HOLTZMAN, Petitioners, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	Motion to Dismiss; Statute of Limitations; Vaccine Rule 8(d); RCFC 8, 9, & 12; Sufficiency of Pleadings; Amendment; Significant Aggravation; Cause in Fact

PUBLISHED ORDER[1]

The Court convened a status conference in the above-captioned matter on 18 September 2008. Respondent has moved for dismissal on the basis of failure to comply with Section 16(a)(2) of the Vaccine Act.[2] In response, Petitioner filed a Memorandum in Opposition to the Motion, with supporting affidavits. Based upon fact witness recollection and medical records, Petitioner argues

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[1] This Order will be published and posted to the Court of Federal Claims website. Therefore, Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), they have 14 days from the date of this Order 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 Court reminds the parties of the standard followed by the Court on a motion to dismiss. *See, e.g., Miller v. Secretary of HHS*, Case No. 07-0530, 2008 WL 458727 (Fed. Cl. Spec. Mstr. Feb. 04, 2008) ("In ruling on a motion to dismiss based on the Petition and accompanying exhibits ... brought pursuant to Vaccine Rule 8(d) and RCFC 12, ... the deciding court must accept as true the allegations in the petition and must construe such facts in the light most favorable to the nonmoving party."), quoting *Nelson Const. Co. v. United States*, 79 Fed. Cl. 81 (2007) and citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) and *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

that a preexisting delay affected Alex, and that the alleged vaccine injury for which compensation is claimed is separate and distinct from the preexisting condition. Respondent moved the Court at the status conference to at least rule that Petitioners were bound to a significant aggravation theory only, and to preclude them from what Respondent's Counsel termed a "cause in fact" theory of recovery.

The Court corrected Respondent's misunderstanding on this point, noting that there are only two theories of proving entitlement that provide compensatory relief for a petitioner: presumed causation based upon correspondence with Table[3] criteria, or actual causation.[4] In proffering preponderant proof of injury, which is a required element of entitlement, a petitioner may prove that the vaccine caused, *sui generis*, a previously nonexistent injury, or, alternatively, he may prove that the vaccine worsened a preexisting injury, under a theory of "significant aggravation"[5] of the underlying injury.[6]

Accordingly, here Petitioners may alternatively plead, prove, and argue either (1) that the vaccine caused a new injury, medically separate and distinct from a condition that preexisted the vaccine, or (2) that the vaccine caused a significant aggravation of the preexisting condition that worsened it substantially; provided that the onset of the new injury or significant aggravation occurred within the applicable statute of limitations.

To juxtapose "cause in fact," which is actually one aspect of legal causation (paired with "proximate cause"[7]), against "significant aggravation," as an either/or pairing of theories for recovery, is to establish a false dichotomy. This is especially true where, as here, Petitioner does not allege or believe that the vaccine caused a further worsening of the same condition, but rather has pled primarily that the putative vaccine-related injury was a different condition altogether from the underlying, preexistent delay, and has only pled "significant aggravation" in the alternative, in the event the Court views the injuries as a piece when ruling on causation.

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[3] *See* 42 C.F.R. § 100.3.

[4] *See* § 13(a)(1) and § 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).

[5] "The term 'significant aggravation' means any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." § 33(4).

[6] *See Shalala v. Whitecotton*, 514 U.S. 268, 274-75 (1995) (addressing significant aggravation in the context of proof of injury in a case claiming the "Table" presumption, i.e. one not attempting to prove actual causation, of which "cause in fact" is a sub-element).

[7] *Pafford v. Secretary of HHS*, 451 F.3d 1352, 1355 (Fed. Cir. 2006), *rehearing and rehearing en banc denied*, (Oct. 24, 2006), *cert. den.*, 168 L. Ed. 2d 242, 75 U.S.L.W. 3644 (2007), citing *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Where, as is especially true for cases within the Omnibus Autism Proceeding,[8] categorization of injury is yet a shifting sand, it is premature to force a "typing" of injury just to continue the petition in the Program.[9] If whatever new symptoms of injury (whether signs of a new, freestanding injury or just a worse deterioration of a preexisting condition) first arose clearly outside of the statute of limitations period, Respondent's motion to dismiss might be granted. Such is not the case here.

Regardless of whether the Court treats the issue of timeliness as a matter to be affirmatively pled and proved by a petitioner,[10] as Respondent urges, or whether the statute of limitations bar is an affirmative defense properly raised and proved by Respondent,[11] the Court sees no reason to move beyond the standard of review appropriate for challenges to a petition and accompanying materials. The Court here remains loathe to bind future findings to its current level of understanding, given that no expert scientific evidence has been taken by the Court on this matter. This motion requests dismissal on the basis of the pleadings and accompanying exhibits. It is not a motion for summary judgment or a motion for judgment as a matter of law. In light of the procedural stance in which the case now stands, dismissal is not required by the evidence the Court now has before it.

Wherefore, the Court **ruled** that Petitioners may allege both direct injury and significant aggravation, pled in the alternative, within their Petition. The Court **granted** Petitioner's motion to amend the Petition, and **ordered** Petitioners to make such amendment with as specific reference to facts as circumstances allow, including a discussion of the preexisting condition(s) suffered. Lastly, the Court **denied** Respondent's Motion to Dismiss the Petition, as it did not meet the standard required by Vaccine Rule 8(d) and RCFC 12.

Petitioner **shall file** an **Amended Petition** on or before **20 October 2008**. A status conference will follow, to convene on **23 October at 10:30 AM (EDT)**. Any obstacles encountered in the meantime should be addressed with my law clerk, Isaiah Kalinowski, Esq., at 202-357-6351.

IT IS SO ORDERED.

Richard B. Abell
Special Master

[8] This Court has expressly disclaimed and postponed defining or categorizing the injury of Autism. *See* Autism General Order # 1.

[9] *See, e.g., Kelley v. Secretary of HHS*, 68 Fed. Cl. 84, 100 (Fed. Cl. 2005) (overruling the Chief Special Master's decision as contrary to law, holding that "[t]he Vaccine Act does not require petitioners coming under the non-Table injury provision to categorize their injury; they are merely required to show that the vaccine in question caused them injury–regardless of the ultimate diagnosis").

[10] "For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." RCFC 9(f).

[11] "In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations ... and any other matter constituting an avoidance or affirmative defense." RCFC 8(c).