

**OFFICE OF SPECIAL MASTERS**

Filed: January 31, 2008; Re-Issued for Publication on February 12, 2008

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<b>DAVID BAILEY,</b>	)	
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	)	PUBLISHED
	)	
<b>Petitioner,</b>	)	No. 06-464V
	)	
<b>v.</b>	)	Motion for Decision Without
	)	Evidentiary Hearing
<b>SECRETARY OF THE DEPARTMENT</b>	)	
<b>OF HEALTH AND HUMAN SERVICES,</b>	)	
	)	
<b>Respondent.</b>	)	

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Kirk A. Patrick III, Baton Rouge, LA, for petitioner.

Richard Topping, with whom were Jeffrey S. Bucholtz, Acting Assistant Attorney General, Timothy P. Garren, Director, Mark W. Rogers, Deputy Director, and Gabrielle M. Fielding, Assistant Director, United States Department of Justice, Torts Branch, Civil Division, Washington, DC, for respondent.

**RULING DENYING PETITIONER’S MOTION FOR DECISION WITHOUT EVIDENTIARY HEARING**<sup>1</sup>

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<sup>1</sup> Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless an issued decision contains trade secrets or commercial or financial information that is privileged or confidential, or the decision contains medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. When a special master files a decision or substantive order with the Clerk of the Court, each party has 14 days within which to identify and move for the redaction of privileged or confidential information before the document’s public disclosure.

On June 16, 2006,<sup>2</sup> petitioner, David Bailey, filed a petition seeking compensation under the National Vaccine Injury Compensation Program (the Vaccine Program).<sup>3</sup> Petitioner alleges that on November 8, 1997, he “received a trivalent influenza vaccination . . . [and] thereafter suffered post vaccination encephalopathy and reactive depression.” Petition ¶ 1.

On July 23, 2007, petitioner’s counsel filed a Motion for Decision Without Evidentiary Hearing (P’s Mot.). The record in this case consists of: (1) an affidavit from David Bailey, see Petitioner’s Exhibit (P’s Ex.) 1; (2) a Vaccine Adverse Event Reporting System (“VAERS”)<sup>4</sup> report, see P’s Ex. 2; (3) an affidavit from Richard L. Strub, M.D., see P’s Ex. 3; and (4) medical records from Robert Stepp, M.D.

On August 14, 2007, respondent’s counsel filed a Response to Petitioner’s Motion for Decision Without Evidentiary Hearing (R’s Response). Respondent argued that “petitioner has failed to provide preponderant evidence in support of the petition for compensation.” R’s Response at 11. Respondent recommended that a decision be entered denying compensation. See id. Alternatively, should the petition not be dismissed, respondent’s counsel requested permission to submit a medical expert’s opinion in support of his client’s position. See id.

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<sup>2</sup> Petitioner’s counsel re-filed the petition and supporting documentation on September 7, 2006 in compliance with the undersigned’s Order dated August 8, 2006, requesting page numbers on the submitted documents.

<sup>3</sup> The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10-§ 300aa-34 (West 1991 & Supp. 2002) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

<sup>4</sup> VAERS is

a national vaccine safety surveillance program co-sponsored by the Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA). VAERS collects and analyzes information from reports of adverse events following immunization. . . . By monitoring such events, VAERS helps to identify any important new safety concerns and thereby assists in ensuring that the benefits of vaccines continue to be far greater than the risks.

Frequently Asked Questions About VAERS, at <http://vaers.hhs.gov/vaers.htm> (last visited November 15, 2006). Any person can file a report with VAERS. Id.

Petitioner's motion for decision without evidentiary hearing is now ripe for a ruling.

## **I. Facts**

David Bailey was born on February 29, 1952. P's Ex. 4 at 20. Petitioner asserts in his motion that he had no significant medical history prior to the receipt of his flu vaccination. Mot. for Decision ¶ 11. His filed medical records disclose, however, that on August 22, 1995, petitioner gave a medical history of headaches, allergic rhinitis, poor sleep, and herpes labialis. P's Ex. 4 at 111-113.<sup>5</sup>

On November 8, 1997, more than two years after petitioner reported a history of headaches and sinusitis, petitioner received an influenza immunization from his employer, American Airlines. See P's Ex. 4. 111-113; Petition ¶ 5. Petitioner is an airline pilot. P's Ex. 2 at 1.<sup>6</sup>

On January 6, 1998, two months after his flu vaccination, petitioner sought treatment from the Oschner Medical Clinic. P's Ex. 4 at 61. Petitioner complained of a history of malaise, headaches, lightheadedness, tender skin, chest discomfort, pain and weakness in the arms and legs, tinnitus, difficulty concentrating, and fatigue. P's Ex. 4 at 114-116. Petitioner's medical records reflect that he described these symptoms as having their onset in late November 1997. Id. Noted in petitioner's medical records was a 22-year history of poor sleep that was described as being "not particularly worse" during the six weeks since the flu vaccine. Id. The assessment of petitioner's condition was fatigue and neurologic symptoms of unknown etiology following the flu vaccine. Id.

Two days later, on January 8, 1998, petitioner returned to the Ochsner Clinic for an examination; he complained of difficulty concentrating, mild lightheadedness, and mild headache. See P's Ex. 4 at 117. The noted impression of petitioner's condition was fatigue following the flu. Id.

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<sup>5</sup> All references are to the re-filed, paginated petition and supporting exhibits that were filed on September 7, 2006.

<sup>6</sup> Among petitioner's filed records is a VAERS report bearing a date stamp of March 5, 1999, from American Airlines Medical Clinic. The vaccination date contained in the VAERS report of November 8, 1997, corresponds to the date that Mr. Bailey alleges that he received the trivalent flu vaccination, and reflects the manufacturer and lot number for the vaccination. The report does not include any identifying information for Mr. Bailey.

Because petitioner's symptoms reportedly had persisted, he received a neurological examination on January 15, 1998. P's Ex. 4 at 59. During this neurological examination, Mr. Bailey provided a history of flu-like symptoms that lasted four or five days after he received the vaccination. Id. Mr. Bailey reported that after experiencing the flu-like symptoms, he developed a cold and then spent a period of eight weeks "wiped out [with] sinus." Id. As a result of this examination, petitioner was treated with Ativan, an anti-anxiety drug. Id.

On January 21, 1998, petitioner saw Richard Strub, M.D., a neurologist. P's Ex. 4 at 58. Dr. Strub's examination notes indicate that petitioner had normal cerebrospinal fluid (CSF),<sup>7</sup> a normal electroencephalogram (EEG)<sup>8</sup>, and five months of therapy with Zoloft, an anti-depressant, without benefit. See id.

On April 14, 1998, John D. Hastings, M.D., a neurologist in Tulsa, Oklahoma, prepared a report of his examination of petitioner. P's Ex. 4 at 77-79. His report recapitulated Mr. Bailey's medical history after the flu vaccination. Id. at 77. Petitioner's symptoms after the vaccination were listed as "myalgia, sweating, low-grade fever, body aches, a feeling of malaise, some mild-to-moderate headache[s], and some difficulty concentrating." Id. Following five days of self-imposed bed rest, Mr. Bailey returned to work, but still "did not feel very well;" he felt dizzy and lightheaded. See id.

Dr. Hastings noted that for nearly one and a half years, Mr. Bailey had been treated by a dermatologist for eczema. Id. at 78. Dr. Hastings reported that Mr. Bailey was neurologically intact, and that his history did "not suggest any significant systemic illness." Id. at 79. Dr. Hastings "suppose[d] that there [was] a possibility of a post-

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<sup>7</sup> "Disease processes. . . can alter the permeability of the blood-brain barrier, allowing protein to leak into the CSF. Examples of diseases that may be associated with more permeable blood-brain barrier include infectious or inflammatory processes such as meningitis, encephalitis, or myelitis." Mosby's Manual of Diagnostic and Laboratory Tests, at 681 (3rd ed. 2006). An examination of a patient's cerebrospinal fluid may assist in the diagnosis of various disease processes, including "primary or metastatic brain or spinal cord neoplasm, cerebral hemorrhage, meningitis, encephalitis, degenerative brain disease, autoimmune diseases involving the central nervous system (CNS), neurosyphilis, and demyelinating disorders (e.g., multiple sclerosis, acute demyelinating polyneuropathy)." Id. at 677.

<sup>8</sup> An electroencephalogram is an "electrodiagnostic test . . . performed to identify and evaluate patients with seizures." Mosby's Manual of Diagnostic and Laboratory Tests, at 566 (3rd ed. 2006). The test is also used to evaluate patients for the following conditions: seizure disorders, brain tumor, brain abscess, intracranial hemorrhage, cerebral infarct and encephalitis, among others. See id. at 570.

vaccinal systemic reaction, as well as the possibility of post-vaccinal encephalomyelitis causing his nonspecific symptoms.” Id. (emphasis added). To rule out a post-vaccinal illness, he suggested additional testing. Id. He noted that if further testing ruled out a vaccine reaction, no further neurologic workup would be necessary. Id.

Dr. Hastings indicated that he was “going to send Mr. Bailey to the hospital . . . for a spinal fluid examination . . . for general studies and [to look for] any evidence of demyelinating disease.” Id. He further indicated that he would perform an EEG and would review the MRI scan that Mr. Bailey brought from New Orleans, which had been interpreted as normal. Id. It was Dr. Hastings’ overall impression that “we are dealing with an underlying depression which is manifesting itself in somatic symptoms.” Id.

Dr. Hastings saw petitioner again nearly three weeks later, on May 5, 1998. Dr. Hastings had reviewed Mr. Bailey’s CSF results and determined that although there was “one small abnormal protein band,” there was no evidence of an underlying neurological disease. P’s Ex. 4 at 76. Dr. Hastings noted Mr. Bailey’s complaints that he was still symptomatic and that he did not feel that he should be flying. Id. Dr. Hastings suggested that in the absence of evidence of an underlying neurologic disease, the “stress factors in Mr. Bailey’s life should be explored.” Id. A subsequent electromyograph (EMG) test,<sup>9</sup> conducted on July 19, 1998, showed no abnormality. P’s Ex. 4 at 75.

On August 7, 1998, Marsha Phillips, a clinical psychologist, evaluated Mr. Bailey. Her evaluation revealed a psychological underpinning to Mr. Bailey’s symptoms. P’s Ex. 4 at 69-74. Ms. Phillips found that Mr. Bailey’s “history and personality structure” made him especially vulnerable to somatoform disorders.<sup>10</sup> Id. at 73. Ms. Phillips’s report indicates that Mr. Bailey “stated that his symptoms began following a flu shot and that he hasn’t been the same since.” Id. She recommended that “the possibility of an idiosyncratic reaction to the shot be carefully explored.” Id. (emphasis added). Mr. Bailey subsequently received therapy for his psychological condition. P’s Ex. 4 at 69-74.

On February 17, 1999, six months after petitioner’s psychological evaluation, petitioner returned to the Ochsner Clinic presenting with sinus problems. P’s Ex. 4 at

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<sup>9</sup> Electromyography is “an electrodiagnostic technique for recording the extracellular activity (action potentials and evoked potentials) of skeletal muscles at rest, during voluntary contractions, and during electrical stimulation.” Dorland’s Illustrated Medical Dictionary, supra note 1, at 598.

<sup>10</sup> Somatoform means “denoting physical symptoms that can not be attributed to organic disease and appear to be of psychic origin.” Dorland’s at 1722.

119. His diagnosis was allergy or sinusitis. Id. Additionally, the medical records from this visit reflect that Dr. Strub diagnosed petitioner as having a post-influenza neuropathy. Id.

More than one year later, on July 19, 2000, F. William Black, Ph.D., Professor of Psychiatry and Neurology at Tulane University in New Orleans, Louisiana, examined petitioner. P's Ex. 4 at 25-37. The patient history detailed in Dr. Black's comprehensive report dated Mr. Bailey's symptoms back to his receipt of the flu shot on November 8, 1997. "[Mr. Bailey] described flu-like symptoms that grew progressively worse over a five-day period and . . . confined him to bed for the duration of that time." P's Ex 4 at 26. Mr. Bailey reported that he "continued to feel ill for the month of December, 1997." Id. Mr. Bailey "last flew a plane on January 1, 1998, after which he reported that he felt "horrible." Id. Mr. Bailey sought "a medical evaluation from his primary care doctor the following week, who concluded that his problems were of a neurological nature and sent him for a neurological work-up." Id. Dr. Black stated in his report that Dr. Michael Wilenski of Kenner, Louisiana, had performed a neurological work-up and concluded that Mr. Bailey was suffering from a viral infection.<sup>11</sup> Id. Dr. Black concluded in his report that petitioner had "no overt cognitive defects," and that following appropriate flight certifications, petitioner would be fit to return to flying. Id. at 37.

In addition to Dr. Black's report regarding petitioner's fitness to return to flying, two other physicians wrote letters on petitioner's behalf detailing his medical course after his flu vaccination and urging that Mr. Bailey receive certification to fly again. On August 16, 2000, one month after petitioner's neuropsychiatric evaluation by Dr. Black, Dr. Strub, petitioner's treating neurologist, wrote a letter to Robert J. Stepp, M.D., a member of the Aviation Medicine Advisory Service, stating that petitioner had been asymptomatic for the past 18 months, was "neuropsychologically-sound," and could return to his full employment duties in commercial aviation. P's Ex. 4 at 103.

Nearly one week later, on August 25, 2000, A. Kenison Roy, M.D., a psychiatrist, described his treatment of petitioner in a letter also addressed to Dr. Stepp, of the Aviation Medical Advisory Service. P's Ex. 4 at 21-22. Dr. Roy stated that Mr. Bailey had presented to his office for treatment on July 16, 1998. Dr. Roy explained that "from the psychiatric point of view, [Mr. Bailey] met the criteria for the diagnosis of depression." Id. Mr. Bailey also presented with physical symptoms that appeared to be related to a neurologic disorder of a relatively sudden onset. P's Ex. 4 at 21. Mr. Bailey's physical symptoms had caused him to seek medical attention and to discontinue

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<sup>11</sup> Dr. Wilenski's records and conclusions, if included among the filed medical records, were not identified clearly enough to permit meaningful review by the undersigned.

his flying duties. Id. Dr. Roy opined in his letter that “the neurologic disorder of sudden onset may well have caused brain dysfunction resulting in psychiatric illness.” Id.

Dr. Roy stated in his letter to Dr. Stepp that he had treated Mr. Bailey for depression with psychiatric medication through September 21, 1999. See P’s Ex 4 at 22. During that same period of time that he treated Mr. Bailey psychiatrically, Mr. Bailey “continued to see Dr. Strub at [the] Ochsner [Clinic] for his neurologic care . . . and [Mr. Bailey] reported that Dr. Strub became convinced that his neurologic symptoms were self[-]limited and [had] result[ed] [from] an immunization that he received shortly before he stopped flying.” P’s Ex. 4 at 21-22. Dr. Roy wrote that by September 23, 1998 “[he also] became convinced that [Mr. Bailey’s symptoms were] not a ‘conversion reaction.’”<sup>12</sup> Id. at 22. What convinced Dr. Roy was “evidence . . . that [petitioner’s] psychiatric symptoms had improved to normalcy but [that] his medical symptoms persisted.” Id. Petitioner stopped taking his psychiatric medications on September 21, 1999. Id. at 22. Dr. Roy opined in his letter that petitioner had “no psychopathology that would prevent him from flying an aircraft of any type with safety and competence.” Id. Dr. Roy recommended that Mr. Bailey return to flying.

On August 29, 2000, Dr. Robert Stepp wrote a letter to the Aeromedical Certification Branch of the Federal Aviation Administration (FAA) recommending that Mr. Bailey be found eligible for first class medical certification. P’s Ex. 4 at 19. Dr. Stepp is one of six physicians with the Aviation Medical Advisory Service (AMAS). See Expert Medical Advice as Near as the Phone, Air Line Pilot 30 (2002), available at <http://www.alpa.org/alpa/DesktopModules/ViewDocument.aspx?DocumentID=935>.

AMAS physicians are available to assist a party seeking a determination by the FAA of medical eligibility to perform flight operations. See Aviation Medicine Advisory Service Notice of Privacy Practices, available at [http://www.aviationmedicine.com/resources/files/PDF/HIPAA\\_Forms/hipaaAMASpolicies11-05.pdf](http://www.aviationmedicine.com/resources/files/PDF/HIPAA_Forms/hipaaAMASpolicies11-05.pdf) (last visited January 29, 2008) at 4. Part of the assistance that AMAS physicians provide to a party wanting medical certification from the FAA is submitting to “the FAA . . . certification authorities copies of . . . medical records and [patient-specific] data that [the party] or [his treating] physicians . . . provided to the [AMAS] [together] with an aeromedical summary [prepared by the AMAS physician] requesting a medical qualification/certification determination.” Id. AMAS physicians, however, “do[] not perform [independent] evaluations, make diagnoses, order tests, render treatment or provide monitoring or follow-up care” on behalf of the party being assisted. Id. at 3. Nor

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<sup>12</sup> A conversion reaction is a psychological problem that is converted and expressed as a physical disorder. See Dorland’s at 415.

does “the AMAS office . . . generate individual medical records other than correspondence that [AMAS] physicians send to . . . [the party seeking medical certification to perform flight operations] or correspondence sent at [that party’s] specific direction to outside organizations, such as the FAA, union representatives and attorneys, employers and insurance evaluators.” Id.

Working with petitioner to regain his aviation medical certificate, Dr. Stepp wrote to the FAA, in his capacity as an AMAS physician, that Mr. Bailey had been in his usual state of vigorous good health until November 8, 1997, when he received a flu vaccination. P’s Ex. 4 at 19. Dr. Stepp attached to his letter to the FAA various medical records for petitioner from several of petitioner’s treating physicians. Dr. Stepp summarized Mr. Bailey’s medical history, stating that “[i]n retrospect it now appears virtually certain that Mr. Bailey’s symptomatology was the result of a post vaccination encephalopathy and subsequent reactive depression, both of which have been completely resolved for several months.” P’s Ex. 4 at 19. Consistent with the limitations of his role as an AMAS physician, Dr. Stepp made assertions in his medical summary to the FAA that were not based on any particular expertise he might have in neurology or psychiatry, but were premised solely on the comments in petitioner’s medical records reflecting the patient history that petitioner himself provided to his treaters or alternatively, on the comments of Mr. Bailey’s treating doctors.

In addition to the filing of the foregoing described records, petitioner filed, in support of his vaccination claim here, an affidavit from Dr. Strub, his treating neurologist. P’s Ex. 3 at 9-10. The purpose of the summary affidavit was to provide a medical opinion that Mr. Bailey’s injury was vaccine-related. Dr. Strub conclusorily opined in his affidavit that “[a]s reflected in the medical records, it [was his] professional opinion that Mr. David Bailey’s symptoms were entirely caused by the November 8, 1997 trivalent flu vaccination.” P’s Ex. 3 ¶ 5. Dr. Strub gave no further explanation of the basis of his conclusion.

In Petitioner’s [Status] Report (P’s Report) filed on December 22, 2006, petitioner’s counsel stated that he had tried to contact Dr. Strub “to obtain a more thorough affidavit concerning his opinions [of causation].” P’s Report at 2. Petitioner’s counsel asserted that “[a]s Dr. Strub is [p]etitioner’s treating physician[,] . . . great weight should be afforded his opinion.” Id. Petitioner requested additional time within which to attempt to contact Dr. Strub to obtain a more complete affidavit for consideration. Id.

Subsequently, Dr. Strub issued another letter, at petitioner’s counsel’s request, on



March 26, 2007. See P’s Ex. B filed on May 29, 2007.<sup>13</sup> In this letter, Dr. Strub explained that petitioner “had been extensively evaluated by two neurologists [who found] no major neurologic problems . . . [evidenced] on the MRI scan, electroencephalogram, or spinal fluid examination [sic].” Id. Dr. Strub stated that “the onset of petitioner’s complaints “within days of his flu shot” and the “history of slow improvement over time,” supported a diagnosis of “post vaccinal encephalitis with neuritis.” Id. Dr. Strub did not elaborate further on these statements.

## **II. Discussion**

Before the court is petitioner’s motion for decision without an evidentiary hearing. Mr. Bailey alleges that he suffered an encephalopathy and reactive depression as a result of the flu vaccination he received on November 8, 1999.

### **A. Legal Standard**

The Vaccine Act permits a petitioner to prove entitlement to compensation by showing that either: (1) the vaccinee suffered an injury listed on the Vaccine Injury Table within the prescribed time period, commonly referred to as a “Table” case, see § 300aa-14(a); or (2) the vaccinee suffered an injury that is not listed on the Vaccine Injury Table or did not occur within the prescribed time period, but was caused in fact by the received vaccination, commonly referred to as an “off-Table” case, see § 300aa-11(c)(1)(C)(ii)(I). By either method, petitioner bears the burden of proving his claim by a preponderance of the evidence. § 300aa-13(a)(1).

The Vaccine Injury Table lists certain injuries and conditions which, if found to occur within a prescribed time period, create a rebuttable presumption that the vaccine caused the injury or condition. 42 U.S.C. §300aa-14(a). Here, Mr. Bailey does not allege a Table injury, nor would the record support such a contention. Id. Thus, petitioner must prove that the vaccine caused his injury, a so-called “off-Table” case.

### **B. No Off-Table Injury Occurred**

To establish entitlement to Program compensation absent a presumption of causation, petitioner must prove, by a preponderance of the evidence, that the vaccination he received caused the injury he has suffered. Petitioner satisfies this burden of proof “by

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<sup>13</sup> Petitioner’s counsel did not comply with the court’s rules regarding the designation of filings. The undersigned defers to counsel’s conventions in referring to filed exhibits to minimize confusion.

providing: (1) a medical theory causally connecting his vaccination and [his] injury; (2) a logical sequence of cause and effect showing that petitioner's vaccination was the reason for [his] injury; and (3) a showing of a proximate temporal relationship between [petitioner's] vaccination and [his] injury.” Althen v. Sec’y of Dept. of Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). The logical sequence of cause and effect proffered by petitioner must be supported by a reputable scientific or medical explanation. Grant v. Sec’y Dept. of Health and Human Servs., 956 F.2d 1144, 1148 (Fed. Cir. 1992); Knudsen v. Sec’y of Dept. of Health and Human Servs., 35 F.3d 543, 548 (Fed. Cir. 1994) (stating that a causation theory before a special master must be supported by a “sound and reliable” medical or scientific explanation). See also RCFC App. B, Vaccine Rule 8(c) (instructing the special master to ensure that the considered evidence is “relevant and reliable”).

A diagnosis and an opinion from a treating physician may be considered in the evaluation of a case. Capizzano v. Secretary of Health and Human Services, 440 F.3d 1317, 1326 (Fed. Cir. 2006). A summary opinion proffered by an expert, or the treating physician, however, does not assist the trier of fact. Hines v. Sec’y of HHS, 21 Cl. Ct. 634, 646 (1990) (holding that a special master is entitled to give little weight to the conclusory affidavit of a doctor, which contained no additional supporting facts); Fadelalla v. Sec’y of HHS, No. 97-573V, 1999 WL 270423, \* 6 (Fed. Cl. Spec. Mstr. April 15, 1999) aff’d 45 Fed. Cl. 196 (1999) (“Although the court is grateful for any treating physician’s testimony, its gratitude cannot extend to acceptance of cursory, conclusory opinions grounded on the doctor’s instinct.”)

In this case, petitioner has offered the conclusory medical opinion of Dr. Strub, his treating neurologist, causally connecting the vaccine to any alleged injury. Dr. Strub’s bare statement that petitioner’s condition is due “entirely” to the vaccine is premised on “[petitioner’s] complaints [which] began within days of his flu shot” and petitioner’s “history of slow improvement over time.” But, Dr. Strub does not address in his supplemental letter petitioner’s headaches that pre-dated the flu vaccination by more than two years. Neither does he address how petitioner’s consistently negative diagnostic test results, in particular the negative results of the CSF study, informed his diagnosis of an infectious encephalitis. Nor does he acknowledge and address the finding during Mr. Bailey’s psychological exam that petitioner is susceptible to somatoform disorders. Moreover, Dr. Strub fails to articulate a medical theory of causation connecting petitioner’s flu vaccination to the encephalitis that Dr. Strub diagnosed. Rather, Dr. Strub conclusorily asserts that based on a temporal association between petitioner’s vaccination and petitioner’s symptoms, Mr. Bailey’s injury is vaccine-related. A temporal association, without more, however, is not sufficient to establish entitlement to Program compensation.

There is no evidence in the record before the court of a medical theory of causation that Mr. Bailey's received vaccination on November 8, 1997, caused a post-vaccinal encephalitis with neuritis. And, petitioner has declined to introduce any further medical support for his claim, seeking instead the issuance of a decision without the conduct of an evidentiary hearing or an opportunity for respondent to introduce an expert opinion.

Petitioner argues that "every physician who examined Mr. Bailey confirmed his diagnosis." Mot. for Decision at 6. The records, however, contain physicians' recitations of petitioner's medical history as he related it to them, which included petitioner's report of Dr. Strub's diagnostic opinion. The referenced recitations in the filed records do not reflect the independent diagnostic conclusions drawn by the physicians and are therefore, of little evidentiary value. See Ryman v. Sec'y of HHS, 65 Fed. Cl. 35, 41 (2005)(citing Cucuras v. Sec'y of HHS, 993 F.2d 1525, 1526-27 (Fed. Cir. 1993) ("[Vaccine]. . . case law expresses a preference for contemporary medical history, not subjective recounting."))

It is true that petitioner's treating physicians uniformly agree that there is no evidence of a neurological basis for petitioner's complaints. See e.g., P's Ex. 4 at 76 (Dr. Hastings' conclusion that there was no evidence of an underlying neurological disease). Moreover, in Ms. Phillips' report after her psychological examination of Mr. Bailey, she notes that the possibility of an idiosyncratic vaccine reaction should be explored. Dr. Hastings, one of petitioner's treating neurologists, also cautiously considers the possibility of a vaccine reaction. These references however, simply advert to the possibility of a vaccine reaction; these references do not assist petitioner in satisfying his burden of proof that the vaccination more likely than not caused his injury. Acknowledgment of the mere possibility of a vaccine reaction does not qualify as preponderant evidence that petitioner's injury was vaccine-related.

Dr. Stepp, as an aviation medical consultant assisting petitioner in his efforts to regain his aviation medical certificate, wrote: "Mr. Bailey has requested the assistance of our office in reporting his diagnosis of and treatment for vaccination encephalopathy and reactive depression." Mot. for Decision at 14, (emphasis added). Dr. Stepp did not examine petitioner. Nor did he offer his personal assessment of petitioner's condition. Based on the purpose and nature of Dr. Stepp's correspondence to the FAA, the statements contained in his letter do not merit the weight that would be ascribed to the opinion of a treating physician. Neither are his statements entitled to the weight that might be afforded an expert offering an opinion of causation because there is no indication that the expressed opinion in his letter represents his medical opinion. The expressed opinion is simply a recitation of Dr. Strub's medical conclusion.

Additionally, the re-issuance of petitioner's aviation medical certificate by the

FAA, on which petitioner relies as evidence of an acknowledgment of his alleged vaccine-related injury, does not establish that petitioner in fact suffered a vaccine-related injury. See FAA Medical Certificate, Mot. for Decision at 16. The certificate does not address the nature of the condition that had prevented petitioner from flying. See id. Rather, the re-issued FAA medical certificate establishes only that petitioner is again eligible to perform flight operations.

Many of petitioner's filed records point to and reference Dr. Strub's diagnosis of petitioner. Dr. Strub, as petitioner's treating neurologist has filed two conclusory statements attributing petitioner's condition to the receipt of his flu vaccination. Dr. Strub does not articulate his theory of causation, other than pointing to a temporal association between petitioner's vaccination and his injury. Without more, the undersigned cannot evaluate properly whether it is more likely than not that petitioner's alleged encephalopathy and reactive depression resulted from the trivalent flu vaccination that was administered to him on November 8, 1997. Although petitioner need not provide evidence of the exact biological mechanism of harm, a mere temporal association between the administration of the trivalent flu vaccination and petitioner's injury is insufficient to establish that his injury is vaccine related. See Knudsen, 35 F. 3d 543, 549 (1994); Grant, 956 F.2d 1144 (Fed. Cir. 1992)(timing alone is not enough).

### **III. Conclusion**

For the foregoing reasons, the undersigned is unable to evaluate on the record presented whether Mr. Bailey's receipt of the flu vaccination caused him to suffer a post-vaccinal encephalopathy and reactive depression. Because the undersigned cannot evaluate adequately the merits of petitioner's claim, the undersigned cannot find that petitioner is entitled to Program compensation.

The undersigned affords petitioner a period of thirty days to file a status report indicating whether he elects to move forward with the conduct of an evidentiary hearing to present the testimony of Dr. Strub or another witness qualified to offer a medical opinion of causation on petitioner's behalf. If petitioner elects to move forward with an expert hearing, respondent will be afforded an opportunity to retain and present an expert witness as well. If petitioner declines to move forward with the conduct of an expert hearing, petitioner's claim for compensation will be denied.

**On or before Wednesday, February 27, 2008**, petitioner's counsel shall file a status report indicating how he would like to proceed. **On or before Wednesday, March 12, 2008**, the parties shall contact my law clerk Camille Collett by e-mail at [REDACTED], or by telephone at (202) 357-6361, and propose three mutually agreeable

dates, occurring **after March 12, 2008**, for the next status conference in the above-captioned matter to address petitioner's counsel's status report.

**IT IS SO ORDERED.**

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Patricia E. Campbell-Smith  
Special Master