

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

E-Filed: June 15, 2011

Case No. 06-777 V

EARL L. STEWART,	)	
	)	<b>PUBLISHED</b>
	)	
Petitioner,	)	Motion to Narrow Causation
	)	Issues at Hearing Unavailing;
v.	)	Collateral Estoppel Doctrine
	)	Cannot Be Applied
SECRETARY OF THE DEPARTMENT	)	Against the Government
OF HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

Ronald C. Homer, Boston, MA, for petitioner.

Julia W. McNerny, Washington, DC, for respondent.

## **RULING DENYING PETITIONER'S MOTION TO NARROW THE ISSUES RELATED TO CAUSATION AT HEARING<sup>1</sup>**

**Campbell-Smith**, Special Master

On November 16, 2006, petitioner, Earl L. Stewart, filed a petition seeking

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<sup>1</sup> Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

compensation under the National Vaccine Injury Compensation Program<sup>2</sup> (the Vaccine Program or the Act). Petitioner claims that he suffered Guillian-Barre Syndrome as a consequence of the trivalent influenza vaccination he received on November 20, 2003.

After the filing of the parties' expert reports and in anticipation of the entitlement hearing,<sup>3</sup> petitioner filed a Motion to Narrow the Issues to be Addressed at Hearing (Motion). See Pet'r's Mot. to Narrow, Apr. 27, 2010. Petitioner asserted that the doctrine of collateral estoppel has application in Vaccine Program proceedings. Mot. at 10. The doctrine of collateral estoppel contemplates that "a judgment on the merits in the first suit precludes relitigation in a second suit of issues actually litigated and determined in the first suit." Innovad Inc. v. Microsoft Corp., 260 F.3d 1326, 1334 (Fed. Cir. 2001).

Recognizing that a legal impediment existed to the requested relief, the undersigned expressed an intention to deny the motion by Order dated May 3, 2010, but deferred issuing a ruling until respondent filed her response to the pending motion. Respondent subsequently filed an opposition to petitioner's motion (Opposition). Resp. to Pet'r's Mot., May 12, 2010 at 20. The briefing is now complete, and the motion is ripe for ruling. For the reasons set forth in more detail below, petitioner's motion is **DENIED**.

## **I. The Parties' Respective Positions**

In his Motion, petitioner correctly pointed to the three prong test for establishing vaccine causation-in-fact set forth by the Federal Circuit in Althen v. Secretary of Health and Human Services, 418 F.3d 1274, 1278 (Fed. Cir. 2005). See Mot. at 7. Under Althen, petitioner must show: (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 of the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury. 418 F.3d at 1278. Petitioner asserted that the filed expert report of Dr. Derek Smith (Petitioner's Expert's Report) satisfied the evidentiary burden imposed by the first and third prongs of the Althen test. Mot. at 1-2. Accordingly, petitioner argued, the interests of fairness and judicial efficiency militated in favor of limiting the scope of the hearing to the second prong only. Id.

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<sup>2</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. 3758, codified as amended, 42 U.S.C. § 300aa-10 through § 300aa-34 (2006) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

<sup>3</sup> The hearing was conducted in May 2010.

Petitioner further explained his argument. Contending that the Althen questions of whether the flu vaccine can cause GBS and what time frame is appropriate after vaccination for the onset of injury have been decided in other vaccine cases, petitioner pointed out that other petitioners have received Program compensation for a GBS injury occurring within four weeks of receipt of the flu vaccine. Mot. at 11-12. Because respondent has litigated these issues previously and because petitioner's expert report established that petitioner suffered GBS within four weeks of his flu vaccine, petitioner urged the undersigned to limit the focus of the hearing to the second prong of Althen, considering only whether the flu vaccine caused petitioner's GBS in this case. Mot. at 14. Invoking the offensive use of collateral estoppel, petitioner asserted that requiring him to offer proof, beyond the submitted opinions from his treating neurologist and his expert neuroimmunologist, would amount to an impermissible relitigation of a previously settled issue. Mot. 9-10 (citing Parklane Hosiery Co. Inc. v. Shore, 439 U.S. 322, 326-27 (1976))<sup>4</sup> (explaining that offensive collateral estoppel serves to preclude a defendant from

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<sup>4</sup> Petitioner cited Reed ex. rel. Reed v. Secretary of Health and Human Services, 69 Fed. Cl. 437 (Fed. Cl. 2005) as support for the proposition that the collateral estoppel doctrine is applicable to Vaccine Program proceedings. Mot. at 10-11. In Reed, petitioner invoked the doctrine on a motion for review of a special master's decision to dismiss a vaccine petition as untimely. 69 Fed. Cl. at 439. Petitioner asserted that the dismissing special master was collaterally estopped by the preceding special master's refusal to dismiss the petition on an earlier motion by respondent challenging the timeliness of the filed petition. Id. at 440-41. The preceding special master had declined to dismiss the petition as time barred because at that time respondent filed the motion, insufficient medical records had been filed to permit a determination regarding timeliness. Id. at 441. In the order denying respondent's motion, the preceding special master indicated that the timeliness issue could be reconsidered when additional medical records were filed. See id. (quoting Order of January 13, 2005 denying respondent's motion).

The reviewing judge in the Reed case held that “[t]imely filing is a pre-condition to suit” and thus, properly can be considered at any time during the litigation. Id. at 440. Alternatively, the reviewing judge observed that even if the collateral estoppel doctrine could be applied to prevent reconsideration of the timeliness issue, petitioner's argument for its application was unavailing because respondent had not received a full and fair opportunity to litigate the timeliness issue. See id. at 441. That the losing party had a full and fair opportunity to litigate its position is one of the four enumerated requirements for applying the collateral estoppel doctrine. The other three requirements are:

- (1) the issue before the court must be identical to one before a previous court;
- (2) the issue must have been actually litigated in the prior proceeding; and
- (3) the resolution of the issue must have been necessary

relitigating issues which the defendant previously litigated and lost against another plaintiff).

Respondent opposed the Motion on several grounds. As an initial matter respondent observed that she “has never conceded the proposition that the flu vaccine can cause GBS,” the first prong of the Althen inquiry. Opp. at 20. Respondent added that petitioner’s showing of an undisputed date of onset, without more evidence of a causal association between the administered vaccine and the resulting injury, is insufficient to satisfy the third prong of Althen (the timing requirement). Opp. at 21. Thus, respondent challenged the “settledness” of the first and third prongs of Althen in flu/GBS vaccine cases. Additionally respondent stated that the Supreme Court limited the holding in Parklane in its subsequent decision in Mendoza and thus, rendered the doctrine of collateral estoppel inapplicable against the Secretary of the Department of Health and Human Services. See 464 U.S. at 162; Opp. at 21. Respondent argued that the Supreme Court in Mendoza unequivocally held that “nonmutual offensive collateral estoppel simply does not apply against the government.” Opp. at 20-21.

## **II. The Law Precludes the Relief Petitioner Seeks**

As respondent correctly observed in her briefing, the issue presented in petitioner’s briefing has been decided as a matter of law. Although the Supreme Court sanctioned the use of the doctrine of nonmutual offensive collateral estoppel in Parklane, the court subsequently limited the scope of its applicability. Mendoza, 464 U.S. at 160-63. The doctrine of non-mutual collateral estoppel applies “when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.” Parklane, 439 U.S. at 326 n.4. But, as later clarified in Mendoza, the doctrine may not be asserted against the government. Mendoza, 464 U.S. at 160-63. The Supreme Court explained:

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to the judgment in the previous case.

Id. at 441.

Petitioner’s reliance on Reed is misplaced. The holding of the case did not pertain to the applicability of collateral estoppel doctrine to vaccine cases but rather to the necessity for timely filing to pursue a vaccine claim. See id. at 441. Moreover, the United States Supreme Court has spoken decisively on the issue of whether the collateral estoppel doctrine can be applied against a government agency. See United States v. Mendoza, 464 U.S. 154 (1984). The doctrine is unavailable in cases involving the government as a party.

We have long recognized that “the government is not in a position identical to that of a private litigant,” INS v. Hibi, 414 U.S. 5, 8, 94 S.Ct. 19, 21, 38 L.Ed.2d 7 (1973) (per curium), both because of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates. It is not open to serious dispute that the government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity, [and] . . . [g]overnment litigation frequently involves legal questions of substantial public importance . . . .

Mendoza, 464 U.S. at 160. To avoid “thwart[ing] the development of important questions of law by freezing the first final decision” against the government, the Supreme Court limited use of the collateral estoppel doctrine to conflicts involving private parties only. See Mendoza, 464 U.S. at 160.<sup>5</sup>

By statute, petitioner’s vaccine claim necessarily is brought against the Department of Health and Human Services, a governmental agency, see 42 U.S.C. § 300aa-11, and the public health issues implicated in vaccine cases are matters of substantial public importance. See generally, Bruesewitz v. Wyeth LLC, 131 S.Ct. 1068, 1072-73 (2011) (recognizing vaccines as “one of the greatest achievements of the 20<sup>th</sup> century,” and underscoring the importance of the Vaccine Program in stabilizing the national vaccine market). For the reasons set forth by the Supreme Court in Bruesewitz, the Mendoza case is controlling and serves to bar the application of collateral estoppel in vaccine claims.

As a matter of law, petitioner’s motion cannot succeed. Petitioner’s Motion to Narrow the Issues Related to Causation at the Hearing is **DENIED**.

**IT IS SO ORDERED.**

s/Patricia E. Campbell-Smith  
Patricia E. Campbell-Smith  
Special Master

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<sup>5</sup> Although the holding of Mendoza was later questioned by the Supreme Court in United States v. Alaska, 521 U.S. 1, 13-14 (1997), the court ultimately left it undisturbed.