

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-448V

Filed: February 26, 2010

RICHARD COY MERKEL, and)	
JESSICA DENTON, as parents and)	
next kin of TEAGAN COY MERKEL,)	NOT TO BE PUBLISHED
a deceased minor)	Entitlement: DTaP;
)	no petitioners' expert opinion;
Petitioners,)	ruling on the record
)	
v.)	
)	
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

Mark L. Edwards, McAlester, OK, for Petitioners.

Lisa Ann Watts, United States Department of Justice, Washington, DC, for Respondent.

LORD, Special Master.

DECISION¹

I. INTRODUCTION AND SUMMARY

Petitioners Richard Coy Merkel and Jessica Denton filed a petition on July 10, 2009 under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq. ("Vaccine Act"),

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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

on behalf of their deceased son Teagan Coy Merkel. Petitioners allege that on August 6, 2008, Teagan received diphtheria-tetanus-acellular pertussis (“DTaP”), inactivated poliovirus vaccine (“IPV”), and Hepatitis B (“HepB”) immunizations, and that those vaccines caused Teagan’s death on August 7, 2008. Petitioners allege an actual causation claim and not a table injury claim.

On January 13, 2010, Respondent filed her Rule 4(c) Report. Respondent argues that without expert opinion, Petitioners cannot succeed on their theory of causation. Respondent acknowledges the close temporal relationship between Teagan’s vaccinations and death, but states that temporal relationship, without more, is insufficient to prove causation.

The undersigned and the parties held telephonic status conferences on October 26, 2009, December 15, 2009, and February 23, 2010. At the most recent status conference, Petitioners’ counsel stated that he was unable to find expert medical support for his clients’ vaccine injuries. Accordingly, Petitioners’ counsel requested a decision on the record.

II. FACTUAL BACKGROUND

The facts in this case are undisputed. Teagan was born at term on May 29, 2008. (Pet. Ex. 2 at 2.) The day after his birth, physicians discovered that he had a heart murmur. (Id. at 4; Respt.’s Report at 2.) An echocardiogram revealed that Teagan had a possible hypoplastic left heart and an enlarged right ventricle. (Pet. Ex. 2 at 4-5.) Teagan was transferred by Mediflight to the neonatal intensive care unit at the OU Medical Center, Children’s Hospital (“OU Children’s”) for evaluation by pediatric cardiology. (Respt.’s Report at 2.) At OU Children’s, Teagan continued to have cardiac problems. Id. On June 2, 2008 doctors performed a Sano/Norwood reconstruction on Teagan’s heart. (Pet. Ex. 3 at 1.) Teagan was discharged on July 15, 2008, in stable condition. (Respt.’s Report at 3.)

On the morning of August 6, 2008, Teagan received DTaP, IPV, and HepB vaccinations from his pediatrician. (Pet. Ex 4.) At 10:09 p.m. on August 6, 2008, Teagan’s parents called emergency medical services because Teagan was having trouble breathing. (Respt.’s Report at 4.) Teagan was admitted in critical condition to the emergency room at the Medical Center of Southeastern Oklahoma, and he was then transferred via helicopter to OU Children’s for specialized cardiac care. (Pet. Ex. 6 at 2, 20-21.) During Teagan’s transfer, he was inadvertently extubated and had to be reintubated. (Respt.’s Report at 5.) At OU Children’s, his condition continued to deteriorate, and fluids, pressor agents, bicarbonate, and intravenous antibiotics were administered. Id. at 5. Teagan was pronounced dead at 6:45 a.m. on August 7, 2008. (Pet. Ex. 7.) The death certificate lists lactic acidosis due to or as a consequence of cardiogenic/hypovolemic shock, sepsis, and hypoplastic left heart as the immediate cause of death. Id.

III. DISCUSSION

Special masters may adjudicate cases based upon the written record without conducting an evidentiary hearing. 42 U.S.C. § 300aa-12(d)(3)(B)(v); Vaccine Rule 8(b). Before deciding a case upon the written record, the special master must ensure that each party has a full and fair opportunity to present its case. Hovey v. Sec’y of Dep’t of Health & Human Servs., 38 Fed. Cl. 397, 400-01 (1997) (affirming special master’s decision denying petitioners’ request for an evidentiary hearing).

Pursuant to the Vaccine Act, petitioners may be compensated for injuries caused by certain vaccines. See generally §§ 300aa-10 to 34. To receive compensation, a petitioner must prove that either: 1) he suffered a “Table Injury”– that is, an injury falling within the Vaccine Injury Table – corresponding to one of his vaccinations, or 2) he suffered an “off-Table” injury that was actually caused by or “caused-in-fact” by a vaccine. See §§ 300aa-13(a)(1)(A), 300aa-11(c)(1); Shalala v. Whitecotton, 514 U.S. 268, 270 (1995). In this case, Petitioners have alleged that the vaccinee suffered an off-Table injury.

To satisfy their burden of proving causation in fact, Petitioners 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. Sec’y of Dep’t of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Petitioners must show not only that but for Teagan’s vaccinations he would not have been injured, but also that the vaccinations were a substantial factor in bringing about his injury and subsequent death. Shyface v. Sec’y of Dep’t of Health & Human Servs., 165 F.3d 1344, 1352 (Fed. Cir. 1999). If a petitioner alleges a vaccine related death, he must also prove that the death was caused by the vaccine injury. See Hellebrand v. Sec’y of Dep’t of Health & Human Servs., 999 F.2d 1565, 1569 (Fed. Cir. 1993) (holding that in a Table case petitioner must prove death was a sequela of a vaccine injury). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec’y of Dep’t of Health & Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991). Mere temporal association, however, is not sufficient to prove causation in fact. Grant v. Sec’y of Dep’t of Health & Human Servs., 956 F.2d 1144, 1148 (Fed. Cir. 1992).

A petitioner may not be given a Vaccine Program award based on the petitioner’s claims alone. § 300aa-13(a)(1). Rather, the petition must be supported by either medical records or by the opinion of a competent physician. See id.; Grant, 956 F.2d at 1148-49.

In this case, Petitioners were not able to provide sufficient evidence to satisfy the three Althen prongs. Although Teagan’s death occurred within 24 hours of his vaccinations, Petitioners have not proven, with medical opinion evidence or medical records, any medical theory or cause connecting Teagan’s injury to a vaccine. Accordingly, it is clear from the record that Petitioners have failed to make a prima facie case that the DTaP, IPV, and HepB

vaccinations caused Teagan’s injury and subsequent death. Therefore, the Special Master must deny this petition.

IV. CONCLUSION

Based on careful review of the record as a whole, Petitioners are unable to establish that the vaccinee suffered a “Table Injury” or that his injuries were “actually caused” by a vaccination. Therefore, Petitioners’ petition is dismissed with prejudice for insufficient proof. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Dee Lord
Special Master