

In the United States Court of Federal Claims

Office of Special Masters

No. 07-11V

March 16, 2011

Not to be Published

ANNIE L. BELL,
Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,
Respondent.

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Order to Show Cause;
failure to prosecute

ORDER TO SHOW CAUSE¹

On January 8, 2007, petitioner filed a petition pro se under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that tetanus vaccine and MMR vaccine that she received on January 9, 2004 caused her swollen eyes, feet, legs, and ankles, starting the next day, with sore arms, fatigue, tachycardia, hypertension, low grade fever, an usual dark rash under her chin, and failure to concentrate.

Petitioner filed medical records that showed she complained of swollen and painful ankles two days before she received her vaccinations. On February 3, 2004, she

¹ Because this order contains a reasoned explanation, the special master intends to post this order 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 constitute a clearly unwarranted invasion of privacy. When such a designated substantive order is filed, petitioner has 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.

went to an outpatient clinic, complaining that since January 7, 2004, she had ankle swelling and pain. Med. recs. at Ex. 2, p. 1.

This contrasts with another medical record dated February 17, 2004, in which petitioner complained of swollen feet and ankles since February 10, 2004 without pain. However, her swelling decreased overnight. Med. recs. at Ex. 2, p. 1.

A record dated May 3, 2004 states she had a noticeable reaction to a tetanus shot with swollen feet and ankles and fatigue. Med. recs. at Ex. 2, p. 3.

In the first status conference in this case on March 19, 2007, the undersigned explained to petitioner that she needed to file a letter from a doctor saying that tetanus vaccine (or MMR or both) caused her complaints and giving a reason for his or her opinion.

Subsequent status conferences were held on April 16, 2007, May 14, 2007, June 11, 2007, May 22, 2008, July 25, 2008, September 26, 2008, October 30, 2009, April 14, 2010, June 16, 2010, and October 15, 2010, during which petitioner explained she was trying to see a doctor or trying to find an attorney to take her case. Petitioner did not show up for previously-scheduled status conferences on April 22, 2009 and February 23, 2011.

On February 24, 2011, the undersigned issued an Order telling petitioner to contact the undersigned's law clerk by March 3, 2011 to explain her absence at the February 23rd status conference. In the Order, the undersigned stated that if petitioner failed to contact the undersigned's law clerk by March 3rd, the undersigned will dismiss this case for lack of prosecution. It is now almost two weeks after that deadline, and petitioner still has not contacted the undersigned's law clerk.

Petitioner is ordered to show cause by March 31st why this case should not be dismissed.

DISCUSSION

To satisfy her burden of proving causation in fact, petitioner 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 HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Sec'y of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992):

A persuasive medical theory is demonstrated by “proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[,]” the logical sequence being supported by “reputable medical or scientific explanation[,]” *i.e.*, “evidence in the form of scientific studies or expert medical testimony[.]”

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. *Id.* at 1148.

Petitioner must show not only that but for the vaccine, she would not have had the alleged injury, but also that the vaccine was a substantial factor in bringing about her alleged injury. Shyface v. Sec’y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

Since petitioner filed her petition over four years ago, she has not provided evidence to make a prima facie case. First, it is unclear when her symptomatology began. Some records put onset before vaccination while others put it after. Secondly, she has not filed a report from a medical doctor that tetanus vaccine (or MMR vaccine) can cause swollen ankles and lack of concentration, that it or both did so in this case, and the reason for the doctor’s opinion on causation. Throughout these four years, the undersigned has repeatedly requested this evidentiary proof to no avail.

Litigation cannot persist for years with petitioner making the same statements repeatedly that she was going to see a doctor or looking for an attorney, but unable to get to a doctor or find an attorney to take her case. At some point, it becomes apparent that petitioner is failing to prosecute her case. This is that point.

Unless petitioner contacts the undersigned’s law clerk by March 31, 2011, the undersigned will dismiss this case for failure to prosecute.

IT IS SO ORDERED.

Mar. 16, 2011
DATE

Laura D. Millman
Laura D. Millman
Special Master