

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-2751V

November 6, 2008

To be Published

WYLDN H. PEARSON, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Terry J. Torline, Wichita, KS, for petitioner.

Alexis V. Babcock, Washington, DC, for respondent.

Entitlement; hep B vaccine + upper respiratory infection; TM three weeks later; both substantial factors; respondent requests ruling on the record

MILLMAN, Special Master

RULING ON ENTITLEMENT¹

¹ Because this ruling contains a reasoned explanation for the special master's action in this case, the special master intends to post this ruling 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 or 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.

Petitioner filed a petition dated November 26, 2003, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that hepatitis B vaccine administered to him on August 29, 2000 and November 4, 2000 caused him to suffer transverse myelitis (TM) whose onset was 26 days after the second hepatitis B vaccination.

On December 13, 2007, the undersigned issued an Order to Show Cause to respondent, asking respondent to explain by February 15, 2008 why this case should not be in damages.

On February 13, 2008, respondent moved for a 45-day extension of time to respond to the undersigned's Order to Show Cause, which the undersigned granted on February 15, 2008.

On April 1, 2008, respondent made an oral motion for a three-week extension of time to respond to the undersigned's Order to Show Cause, which the undersigned granted on that date.

On April 21, 2008, respondent file a Rule 4(c) Report and Request for Ruling on the Record, stating the facts of the case and that "DVIC will not expend further resources to defend the case. Accordingly, respondent requests a ruling on the existing record." Rule 4(c) Report, etc., p. 2.

On October 30, 2008, petitioner filed an expert report from Dr. Dorothy L. Williams, a neurologist who has been treating petitioner since December 2000. Her opinion is in agreement with that of Dr. Kristen Ries, an infectious disease specialist whom petitioner saw on March 27, 2001, that both hepatitis B vaccine and petitioner's upper respiratory infection were factors causing his transverse myelitis, and that the post-vaccination phenomena involved an autoimmune process. Dr. Ries specifically states that petitioner's transverse myelitis was "most probably related to the hepatitis vaccination. However the upper respiratory infection could be a factor as well." *Id.*

On November 6, 2008, the undersigned and the parties had a telephonic status conference to discuss Dr. Williams' expert report. Respondent's counsel reiterated respondent's motion for a ruling on the record, stating that in this case, respondent did not want to expend resources to obtain an expert report and defend this case.

FACTS

Petitioner was born on September 13, 1954.

On August 29, 2000, petitioner received his first hepatitis B immunization. Med. recs. at Ex. 2, p. 29.

On November 4, 2000, petitioner received his second hepatitis B immunization. Med. recs. at Ex. 2, p. 28. He had symptoms of cough and congestion starting the day before. *Id.* He had an absolutely unremarkable medical examination without fever, tachycardia, shortness of breath, or rales. *Id.* The doctor diagnosed him with early upper respiratory infection. *Id.*

On December 1, 2000, petitioner returned to his doctor, complaining of tingling in his feet going up his legs, and some finger tingling. Symptoms started on November 30, 2000. *Id.*

On December 2, 2000, petitioner went to Salt Lake Regional Medical Center where he was diagnosed with TM and a headache post-lumbar puncture. Med. recs. at Ex. 3, p. 3.

On December 3, 2000, Dr. Dorothy L. Williams diagnosed petitioner with post-infectious/post-vaccinal TM. Med. recs. at Ex. 5, p. 4.

On December 8, 2000, petitioner was discharged. Dr. Stephen Coleman diagnosed him with TM secondary to vaccination or upper respiratory infection. Med. recs. at Ex. 3, p. 5.

On March 29, 2001, Dr. Kristen M. Ries attributed the cause of petitioner's TM to hepatitis vaccination, although the upper respiratory infection could be a factor as well. Med. recs. at Ex. 6, p. 1.

A Utah DDS Case Summary dated October 10, 2001 summarizes all pertinent medical evidence including March 29, 2001 (Dr. Ries' record): TM related to hepatitis B vaccine. Med. recs. at Ex. 5, p. 60. Dr. R. Buchter signed as a consultant on October 19, 2001 that petitioner's TM was a possible reaction to vaccination. Med. recs. at Ex. 5, p. 61.

DISCUSSION

This is a causation in fact case. To satisfy his burden of proving causation in fact, petitioner must offer "(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. Secretary of HHS, 418 F. 3d 1274, 1278 (Fed. Cir. 2005). In Althen, the Federal Circuit quoted its opinion in Grant v. Secretary 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[.]"

In Capizzano v. Secretary of HHS, 440 F.3d 1274, 1325 (Fed. Cir. 2006), the Federal Circuit said "we conclude that requiring either epidemiologic studies, rechallenge, the presence of pathological markers or genetic disposition, or general acceptance in the scientific or medical communities to establish a logical sequence of cause and effect is contrary to what we said in Althen...."

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

The Federal Circuit in Capizzano emphasized that the special masters are to evaluate seriously the opinions of petitioner's treating doctors. 440 F.3d at 1326. In that case, there were four treating doctors who ascribed petitioner's rheumatoid arthritis to her hepatitis B vaccination.

Petitioner must show not only that but for the vaccine, he would not have had TM, but also that the vaccine was a substantial factor in bringing about his TM. Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

In this case, two factors, the hepatitis B vaccination and an upper respiratory infection, can both be substantial factors in causing petitioner's TM. Shyface is a case quite similar to this case, concerning two-month-old Cheyenne Shyface, who was vaccinated with whole-cell DPT at the time he was harboring the beginning of E. coli infection, each of which could and did cause fever that rose to 110°, causing his death four days later. 165 F.3d at 1345. Respondent defended in that case that the E. coli infection was the cause of the baby's fever and death. Testimony from Cheyenne's doctor was that both the vaccine and the infection were equally responsible for his fever and death. The Federal Circuit held that each of the two factors (the vaccine and the infection) was a substantial factor in causing Cheyenne's very high fever and death and, but for the presence of each of these two factors, the baby would not have had the high fever and would not have died. The Federal Circuit ruled in favor of petitioners even though petitioners did not prove that DPT vaccine was the only or predominant cause of his death. *Id.* at 1353.

In the instant action, Dr. Williams, Dr. Coleman, and Dr. Ries, all involved in evaluating petitioner's condition before litigation began, attributed petitioner's TM to both hepatitis B vaccination and upper respiratory infection. The Federal Circuit in Capizzano emphasized taking the opinions of treating doctors seriously. Therefore, the undersigned must give weight to their opinion that hepatitis B vaccine and an upper respiratory infection were both substantial factors in causing petitioner's TM.

The undersigned ruled in Stevens v. Secretary of HHS, No. 99-594V, 2006 WL 659525 (Fed. Cl. Spec. Mstr. Feb. 24, 2006), that hepatitis B vaccine can and did cause TM in that case. The medically appropriate time frame for onset according to respondent's expert Dr. Roland Martin was three to thirty days. 2006 WL 659525, at *15. In the instant action, onset was 26 days after vaccination, fitting within the appropriate time frame for vaccine causation.

Although respondent does not concede liability in this case, respondent has stated orally and in respondent's motion for a ruling on the record that respondent will not expend any further money to defend this case. Respondent has not provided any expert report to counter Dr. Williams' expert report.

The purpose of the Omnibus proceeding on hepatitis B vaccination and demyelinating illnesses, which included four paradigm cases one of which was Stevens, was to accelerate determinations of entitlement once the special master decided the issue of whether hepatitis B vaccine could cause TM and other demyelinating illnesses. The answer the undersigned reached is that hepatitis B vaccine can cause demyelinating diseases, including TM. The answer is also affirmative when there are two substantial factors, as in this case, which are both capable of causing TM, as petitioners' doctors note and Dr. Williams described in her report. There is no

reason for petitioner to expend further money in this case in proving entitlement. The undersigned rules that both hepatitis B vaccine and petitioner's upper respiratory infection were substantial factors in causing an autoimmune process that resulted in petitioner's transverse myelitis.

Petitioner has proven a prima facie case of causation in fact. This case is now in damages.

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master