

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**OFFICE OF SPECIAL MASTERS**

\*\*\*\*\*

JOAN CAVES, \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

No. 07-443V  
Special Master Christian J. Moran

Filed: November 25, 2008

Influenza vaccine; transverse myelitis; judgment on the record; failure to establish causation; motion for a hearing.

*Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA., for petitioner; Althea Davis, United States Dep't of Justice, Washington, D.C. for respondent.*

**PUBLISHED ORDER\***

Joan Caves claims that the influenza (“flu”) vaccine, which she received in 2005, caused her to develop a neurological demyelinating injury, transverse myelitis. Petition, filed June 28, 2007. Ms. Caves seeks compensation pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 et seq. (2006).

Ms. Caves has filed a motion for a ruling on the existing record arguing that she is entitled to compensation. This motion is DENIED. The record does not support a decision awarding Ms. Caves compensation at this time. Ms. Caves’s motion for a hearing to take the testimony of respondent’s expert witness is also DENIED.

---

\* Because this published order contains a reasoned explanation for the special master’s action in this case, the special master intends to post it 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).

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, a party has 14 days to identify and to move to delete such information before 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. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

## **I. Factual Background**

Ms. Caves was born on October 7, 1953. Amend. Pet. ¶ 1; exhibit 10 at 5. Her medical history, prior to the vaccination at issue, does not appear to be relevant. Respondent has not argued that any illness in Ms. Caves's medical history is relevant to her claim for compensation. See Resp't Rep't at 2, 19.

Before her influenza vaccination, Ms. Caves worked as a registered nurse at Raulerson Hospital, a position she held for 30 years. Exhibit 11 (affidavit of Joan Caves dated June 27, 2007) ¶ 3. Her duties at the time of the vaccination included working in an operating room as a circulator and taking calls for after hours cases. Ms. Caves was also the nurse manager supervising 20 employees. Id.

Ms. Caves received an influenza vaccination on November 18, 2005. Exhibit 10 at 5. In an affidavit, Ms. Caves states that approximately three weeks later, on December 11, 2005, she noticed pain and weakness in her legs and back. Some of the pain was relieved when Ms. Caves got up and walked around. However, Ms. Caves continued to experience pain in her lower back and legs later that day while returning home from church. When she arrived home, Ms. Caves went to bed which gave her some additional pain relief. Exhibit 11 ¶ 5-6.

At approximately 3 o'clock that afternoon, Ms. Caves's condition quickly deteriorated. Ms. Caves states that her legs were numb and she was completely unable to walk. She was transported to the emergency room at Raulerson Hospital by the Okeechobee County Fire Rescue Department. Exhibit 4 at 1.

At Raulerson Hospital, Ms. Caves underwent a series of laboratory tests including a complete blood count and erythrocyte sedimentation rate. The Raulerson Hospital Emergency Room triage note reports:

[P]atient [states] that she was sitting having coffee and her legs starting cramping both legs, went to church about 1100 more cramping and weakness in her legs in the bed until 1500, was unable to walk or stand, right leg numb. Pain in butt and leg when the pain gets worse to numbness increases. Right leg numb up to hip area. Denies any injury. Had a flu shot 2 weeks ago. [Patient] awake and alert. [Patient] able to feel touch on left leg [slightly] different, right leg very num[b], unable to move right leg or foot. Numbness on right up to hip.

Exhibit 5 at 843-844. An x-ray of the spine and a CT (computerized tomography) scan of the brain were performed. The results were negative. Exhibit 5 at 860-62, 866, 868.

The next day, Ms. Caves was transferred to the Shands Medical Center at the University of Florida in Gainesville, Florida. While at Shands, Ms. Caves was evaluated by Dr. Ramon Rodriguez. In reviewing Ms. Caves's medical history, Dr. Rodriguez notes that:

Ms. Caves has never experienced such severe leg pain or any focal weakness or numbness in the past. She has had no associated symptoms prior to those described above. She does note having taken a flu shot two weeks before the onset of symptoms and a very mild sinus cold recently with no flu-like symptoms.

Exhibit 5 at 741.

In conducting the physical examination, Dr. Rodriguez also notes:

Sensory exam reveals decreased sensation in pin prick circumferentially up to the knee on the right lower extremity and half-way up to the pelvic shin on the left lower extremity. . . She has significant allodynia of both lower extremities, right greater than left. This is particularly notable in her right proximal thigh laterally.

Id. at 742.

In the assessment plan, Dr. Rodriguez notes, “Interestingly, she did obtain a flu shot two weeks ago. The differential diagnosis includes Guillain-[Barré] syndrome, transverse myelitis which could be idiopathic or autoimmune, or less likely a vascular event in the spinal cord. Guillain-[Barré] syndrome could certainly produce her weakness and loss of reflexes with paresthesias and sensory loss, particularly two weeks after an influenza immunization; however, the strikingly abrupt onset of her symptoms would be atypical for this disorder making transverse myelitis highly suspect.” Id.

A December 13, 2005 progress note indicates that Ms. Caves began steroid treatment, which brought some improvement. Exhibit 5 at 736. Ms. Caves was discharged from Shands Hospital on December 14, 2005, with a diagnosis of transverse myelitis. Id. She was transferred back to Raulerson Hospital for inpatient rehabilitation.

On December 15, 2005, Ms. Caves was evaluated by Dr. Abu Ali, a neurologist. Dr. Ali notes that Ms. Caves was still experiencing significant weakness in her legs although she could move her legs bilaterally and proximally. Dr. Ali also notes that Ms. Caves’s problems with bowel incontinence and bladder retention did not show improvement. Exhibit 5 at 32. In recounting Ms. Caves’s medical history, Dr. Ali notes “interestingly she had received a flu vaccination about two weeks prior to the onset of symptoms and a week prior to the onset of symptoms she had mild sinus congestion symptoms. She did not report any frank flu like symptoms.” Id. Dr. Ali’s impressions included “paraplegia relatively acute onset, which has improved to paretic stage, with significant weakness in both lower extremities . . . This is most likely in favor of transverse myelitis terminal cord.” Id.

That same day, Ms. Caves was also evaluated by Dr. Marvin Young, a urologist, for issues with her bladder. Exhibit 9 at 3-4; exhibit 5 at 37-8. Dr. Young notes in Ms. Caves’s medical history that she “had a flu like syndrome about a week or so prior to her present neurologic problems.” Id. Dr. Young’s impression of Ms. Caves was for “transverse myelitis

resulting in compromised bladder and bowel function.” Dr. Young recommended that Ms. Caves continue with intermittent catheterization as well as a bowel regime with Dulcolax. Id.

On December 16, 2005, Ms. Caves was evaluated by Dr. John Chang, a gastroenterologist. Dr. Chang notes in Ms. Caves’s medical history, “[t]he patient has been having some flu-like symptoms, had a flu shot earlier and developed decreased paralysis and acute exacerbation of the lower extremities, as well as transverse myelitis at the level of the L2.” Exhibit 5 at 35. Dr. Chang’s treatment plan included following “with gastrointestinal prophylaxis with proton pump inhibitor (PPI) and also consider motility agent for the bowel activity, and also add Colace at this time.” Id.

Ms. Caves continued her physical therapy at Raulerson Hospital until she was discharged on December 24, 2005. On the discharge form, Dr. Khan noted that Ms. Caves’s diagnosis was “transverse myelitis, status post flu shot.” However, Dr. Khan checked the box “Unable to determine” indicating that the cause of Ms. Caves’s transverse myelitis was unknown. Exhibit 5 at 20.

Ms. Caves was admitted to Health South Treasure Coast Rehabilitation Hospital on December 28, 2005, for further rehabilitation. Exhibit 7 at 1. At this time, Ms. Caves’s care included supervision with eating and grooming, assistance with dressing, toileting, bladder and bowel management and total assistance with ambulation. She required no assistance with comprehension, expression, social interaction, problem solving and memory. Exhibit 7 at 13.

Ms. Caves was discharged from Health South on February 2, 2006. At that time, Ms. Caves required no assistance with eating, required moderate supervision with grooming and bathing and moderate assistance with bowel management, transfers and wheelchair mobility. Ms. Caves still required total assistance with ambulation. The discharge summary, signed by Dr. Jimmy Lockhart (the admitting physician), noted that Ms. Caves did well throughout her hospitalization, but with “no real neurologic recovery.” It was also noted that there was “no real etiology found for her transverse myelitis.” Id. at 14.

On March 27, 2006, Ms. Caves presented to Dr. Khan for a follow-up examination and treatment. Exhibit 1 at 2. Dr. Khan noted that Ms. Caves had some improvement in “movement in her lower left extremities,” but that her “right side is still extremely weak.” Ms. Caves was, however, able to take some steps with her walker. Id.

On April 17, 2006, Ms. Caves presented to Dr. Young. Exhibit 9 at 1. Dr. Young notes that he was “happy to see that [Ms. Caves] is in fact regaining some function.” Dr. Young also notes that her “bowel movements have also regularized and she is able to move her bowels without the use of suppositories or digital manipulation.” Dr. Young’s impression at that time was that Ms. Caves “is doing quite well managing herself with timed voiding and is also moving her bowels daily. She clearly has a neurologic bladder. Fortunately, I think she has a low-pressure system with diminished pressure outlet.” Id.

On May 3, 2006, Ms. Caves presented to Dr. Ali for a follow-up evaluation. Exhibit 8 at 1-4. Dr. Ali concluded that Ms. Caves had transverse myelitis and paraplegia, which was slowly improving. Id.

On June 6, 2006, Ms. Caves followed-up again with Dr. Khan. Exhibit 1 at 1. Dr. Khan notes that “a underlying factor has not been determined” for Ms. Caves’s transverse myelitis. Dr. Khan recommended that Ms. Caves continue with her current treatment plan. Id.

Ms. Caves continued with physical therapy until she was discharged on April 10, 2007. Exhibit 21 a 1; Exhibit 22 at 17. In her June 27, 2007 affidavit, Ms. Caves describes her current condition as follows:

I am no longer able to work as an operating room nurse. Much of my daughter’s care has been transferred to my husband, as [he] has all of the management of the house. Much of my energy is consumed with my own daily needs. Activities of daily life that used to take minutes now take hours . . . The worst part of all of this has been that I have had to become so focused on myself. My life has been about caring for others, my family, my patients, and my mission work.

Exhibit 11 ¶ 10-11, 13.

## **II. Procedural History**

Ms. Caves filed her petition seeking compensation on June 28, 2007. She filed a collection of the medical records approximately two weeks later. Additional records were filed between November 2007 and February 2008. Ms. Caves filed an amended petition on January 7, 2008.

Respondent filed his report, pursuant to Vaccine Rule 4, on September 28, 2007. Respondent asserted that Ms. Caves was not entitled to compensation. In particular, respondent states that a review of Ms. Caves’s medical records demonstrates that her “treating physicians never concluded that [Ms. Caves’s] vaccine was the likely cause of her [transverse myelitis].” Resp’t Rep’t at 10. Respondent also notes that “petitioner has not submitted any expert opinion in support of her position. Instead, petitioner attempts to rely on statements made by her treating physicians.” Id. at 10.

On January 7, 2008, petitioner filed an amended petition and a motion for ruling on the existing record. In the motion, Ms. Caves argues that “her medical records and the medical opinions of her treating physicians demonstrate preponderant evidence that the flu vaccine, not something else, caused her symptoms.” Pet’r Mot. for Ruling on the Record, filed Jan. 7, 2008, at 14. In particular, Ms. Caves cited passages from Dr. Abul Ali, a neurologist; Dr. Marvin Young, a urologist; Dr. John Chang, a gastroenterologist; and Dr. Saeed Khan, Ms. Caves’s primary care physician. Id. at 15. During this time, respondent also requested additional medical records from Ms. Caves which were filed in January and February 2008.

A February 26, 2008 Order afforded the parties time to discuss the possibility of settlement. The court also ordered respondent to file a response to Ms. Caves's motion for ruling on the record in addition to filing an expert report should settlement discussions fail.

On April 23, 2008, respondent filed a response to petitioner's motion for ruling on the record as well as the curriculum vitae and expert report of Dr. Arthur P. Safran. Dr. Safran's report discounts any association between Ms. Caves's influenza vaccination and her onset of transverse myelitis stating that "[t]here is no reason to suspect the influenza inoculation given that its background does not appear to be above expected in the population." Exhibit A at 4.

A status conference was held on May 8, 2008. By order of the same date, the petitioner's motion for ruling on the record was held in abeyance while the parties continued to engage in settlement discussions.

Another status conference was held on June 11, 2008. During that status conference, petitioner conceded that she was unlikely to prevail on her Motion for Ruling on the Record and requested the opportunity for a hearing to cross-examine respondent's expert, Dr. Safran. Petitioner was ordered to file a motion requesting such a hearing. Ms. Caves has not filed an expert report in this case.

Ms. Caves filed her motion requesting a hearing to cross-examine Dr. Safran on July 16, 2008. Respondent filed a response on August 22, 2008 arguing that Ms. Caves has "misunderst[ood] what she must prove to demonstrate actual causation" by attempting to prove her case through Dr. Safran. Respondent argues that the evidence presented by Ms. Caves fails to establish a prima facie case and therefore her case must fail and her motion to cross-examine Dr. Safran should be denied.

After reviewing the records and pleadings in this matter, Ms. Caves's motion for ruling on the record and motion for a hearing to cross-examine Dr. Safran are ready for adjudication.

### **III. Analysis**

#### **A. Standards for Determining Whether a Petitioner May Be Awarded Compensation Based upon the Written Record**

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 Health & Human Servs., 38 Fed. Cl. 397, 400-01 (1997) (affirming special master's decision denying petitioners' request for an evidentiary hearing).

Ms. Caves has requested a ruling based upon the existing record. Ms. Caves assumes that the existing record establishes her entitlement to compensation. This assumption is in error. Thus, Ms. Caves's motion for a ruling on the record is denied.

To prove causation in fact, a petitioner must establish at least three elements. The petitioner's

burden is to show by preponderant evidence that the vaccination brought about [the] injury by providing: (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 Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec'y of Health and Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991).

At a minimum, Ms. Caves has not produced persuasive evidence demonstrating the second Althen prong – a logical sequence of cause and effect showing that the vaccination was the reason for the injury. Although Ms. Caves contends that statements from her treating doctors constitute a preponderance of evidence on this point, they do not. In addition, Ms. Caves has not established the first Althen prong – a medical theory causally connecting the vaccination and the injury.

In determining whether Ms. Caves is entitled to compensation, the “record as a whole” must be considered. 42 U.S.C. § 300aa–13(a). The entire record necessarily includes statements of treating physicians. Capizzano v. Sec'y of Health & Human Servs., 440 F.3d 1317, 1326 (Fed. Cir. 2006). The weight to be given to treating physicians' reports can be affected by factors such as “contrary medical evidence, failure of the professional to consider relevant factors, [and] lack of particularity in relating diagnosis to nature and extent of disability.” Vanieken-Ryals v. Office of Personnel Management, 508 F.3d 1034, 1048 (Fed. Cir. 2007). The records do not support a judgment in favor of Ms. Caves because she has failed to establish at least one of the three prongs required by Althen. Ms. Caves's failure of proof is most apparent with regard to the second prong in Althen – “a logical sequence of cause and effect showing the vaccination was the reason for the injury.” Thus, this prong is discussed first.

#### **B. Evidence Concerning the Second Prong in *Althen***

From the entire record, Ms. Caves identifies five treating doctors: Dr. Rodriguez, Dr. Abul Ali, a neurologist; Dr. Marvin Young, a urologist; Dr. John Chang, a gastroenterologist; and Dr. Saeed Khan, Ms. Caves's primary care physician. Pet'r Mot. at 14-16. However, none

of these statements, considered either individually or collectively, contain a persuasive statement that the influenza vaccine “was the reason for the injury” suffered by Ms. Caves.

**1. Dr. Ali**

Ms. Caves cites one passage from a record created by Dr. Ali, whom Ms. Caves saw on December 15, 2005. Pet’r Mot. at 4-5. Dr. Ali notes that “interestingly [Ms. Caves] had received a flu vaccination about two weeks prior to her onset of symptoms and a week prior to the onset of symptoms she had mild sinus congestion symptoms. She did not report any frank flu like symptoms.” Exhibit 5 at 32.

At best, Dr. Ali’s notes provide a chronology of what happened. Ms. Caves received the influenza vaccine on November 18, 2005, and then experienced the onset of transverse myelitis on December 11, 2005, approximately three weeks later. The context of the notes suggests that Dr. Ali was simply making a note of Ms. Caves’s history as she was providing it to him.

Dr. Ali’s statement does not contain any indication that Dr. Ali believed that Ms. Caves’s illness was caused by the influenza vaccine. The mere description of one event as occurring after another event is not the same as a statement of causality, nor does the word “interestingly” automatically demonstrate causation. See Grant v. Sec’y of Health & Human Servs., 956 F.2d 1144, 1148 (Fed. Cir. 1992) (a vaccination is not the cause for all events that follow it). Thus, Dr. Ali’s statement is not persuasive evidence to support Ms. Caves’s claim for compensation.

**2. Dr. Young**

Ms. Caves cites to a record created by Dr. Young, whom Ms. Caves saw on December 15, 2005, in consultation for her neurologic bladder, and again on April 17, 2006, for a follow-up examination. Exhibit 5 at 37-38. During the December 2005 consultation, Dr. Young noted that Ms. Caves “had a flu like syndrome about a week or so prior to her present neurologic problems.” Exhibit 9 at 3. Having a flu-like syndrome does not necessarily mean that Ms. Caves had the flu or was experiencing any type of reaction to the flu vaccine.

Again, Dr. Young’s statement does not contain any indication that Dr. Young believed that Ms. Caves’s illness was caused by the influenza vaccine. A note that Ms. Caves may have experienced a “flu like syndrome” a week earlier does not create an inference that the vaccine actually caused her injuries. See Grant, 956 F.2d at 1148. Thus, Dr. Young’s statement is not persuasive evidence to support Ms. Caves’s claim for compensation.

**3. Dr. Chang**

For the same reason, the passage that Ms. Caves cites from Dr. Chang’s records is also not persuasive evidence. Dr. Chang’s notes stated that Ms. Caves had “been having some flu-



like symptoms, had a flu shot earlier and developed decreased paralysis and acute exacerbation of the lower extremities, as well as transverse myelitis at the level of L2.” Exhibit 5 at 35.

Again, having a flu-like syndrome does not necessarily mean that Ms. Caves had the flu or was experiencing any type of reaction to the flu vaccine. Dr. Chang’s statement is simply a recitation of the events. There is no medical theory presented nor is there any indication that the influenza vaccine can cause or did cause Ms. Caves’s transverse myelitis.

#### **4. Dr. Khan**

The fourth doctor cited by Ms. Caves is Dr. Khan. Ms. Caves identifies one statement made by him. Pet’r Mot. at 15.

Dr. Khan’s final diagnosis for Ms. Caves was “transverse myelitis, status post flu shot.” Exhibit 5 at 20. Dr. Khan’s has not expressed an opinion that the influenza vaccine caused Ms. Caves’s transverse myelitis. Dr. Khan is merely recounting Ms. Caves’s medical history.

#### **5. Other Medical Records**

In the fact section of her motion, Ms. Caves cites to other medical records that mention the influenza vaccine. Pet’r Mot. at 2-8.

One was the statement of Dr. Ramon Rodriguez who examined Ms. Caves on December 13, 2005, at Shands Hospital. Dr. Rodriguez noted that Ms. Caves had “taken a flu shot two weeks before the onset of symptoms and a very mild sinus cold recently with no flu-like symptoms . . . Interestingly, she did obtain a flu shot two weeks ago. . .” Exhibit 5 at 741-2.

Again, these statements made by Dr. Rodriguez do not establish a medical theory connecting the influenza vaccination to Ms. Caves’s transverse myelitis. Similar to Dr. Ali’s statement, the word “interestingly” does not, in any way, establish causation. The mere description of one event as occurring after another event is not the same as a statement of causality, nor does the word “interestingly” automatically demonstrate causation. Grant, 956 at 1148. Thus, Dr. Rodriguez’s statement is not persuasive evidence to support Ms. Caves’s claim for compensation.

In addition, a triage note from the Raulerson Hospital Emergency Department noted “Right leg numb. Denies any injury. Had a flu shot 2 weeks ago.” These statements appear to be part of an intake evaluation with no causation being established.

#### **6. Evaluation of All Evidence**

A review of the record in this case indicates that none of Ms. Caves’s treating doctors determined an etiology of Ms. Caves’s illness, although all seem to agree that Ms. Caves suffers from transverse myelitis.

From the collection of material, Ms. Caves selects portions of treatment records from five doctors to establish, by a preponderance of evidence, “a logical sequence of cause and effect showing that the vaccination was the reason for the injury.” Althen, 418 F.3d at 1278. In doing so, Ms. Caves excludes certain other statements from these same doctors that, by implication, indicate that the doctors did not attribute the cause of Ms. Caves’s problems to the influenza vaccine. However, these records and statements must be considered as well. 42 U.S.C. § 300aa–13(a).

Two treating doctors expressly state that the cause for Ms. Caves’s transverse myelitis has not been determined. Dr. Khan specifically notes that he was “unable to determine” the cause of Ms. Caves’s transverse myelitis. Exhibit 5 at 20. When Ms. Caves was discharged, the discharge summary signed by Dr. Lockhart states that there was “no real etiology found for [Ms. Caves’s] transverse myelitis.” Exhibit 7 at 14.

In addition, Dr. Rodriguez, Dr. Ali, Dr. Young and Dr. Chang do not express an opinion about causation at all. See exhibit 1 at 2; exhibit 5 at 3-4, 32, 35-38, 741-2; exhibit 7 at 13-14; exhibit 8 at 1-4; exhibit 9 at 1-4; exhibit 21 at 1; exhibit 22 at 17. Considering that Ms. Caves bears the burden of establishing “a logical sequence of cause and effect showing that the vaccination was the reason for the injury,” Althen, 418 F.3d at 1278; a lack of an affirmative statement from any of these doctors cannot be the basis for a finding that Ms. Caves has met her burden of proof.

The passages identified by Ms. Caves in her motion for ruling on the record, when assessed either individually or collectively, do not carry such persuasive force that Ms. Caves has fulfilled her burden of establishing “a logical sequence of cause and effect showing that the vaccination was the reason for the injury.” Consequently, Ms. Caves has not established that she is entitled to judgment in her favor based upon the existing record.

### **C. Evidence Concerning the First Prong in *Althen***

Although the determination that Ms. Caves has not met her burden of proof regarding the second prong from Althen means that her motion for a ruling on the record must be denied, the evidence presented on the first prong from Althen is discussed as well. This discussion helps to explain why Ms. Caves’s motion for an evidentiary hearing is denied.

Another element for Ms. Caves’s case is to present a preponderance of evidence showing “a medical theory casually connecting the vaccination and the injury.” Althen, 418 F.3d at 1278. A theory is not required to be established to a level of medical certainty and does not need to describe the precise biological mechanism. Nevertheless, the theory must have some minimal level of reliability. Knudsen v. Sec’y of Health & Human Servs., 35 F.3d 543, 548 (Fed. Cir. 1994); Bunting v. Sec’y of Health & Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991). The theory connecting the vaccine to the injury “must be supported by a sound and reliable medical or scientific explanation.” Knudsen, 35 F.3d at 548. As mentioned, Ms. Caves

has not presented the opinion of an independently retained expert. Thus, to be entitled to a ruling on the record in her favor, she must rely upon the opinions of treating doctors contained in the medical records.

The doctor's reports do not contain a "medical theory." A review of the exhibits indicates that four physicians (Dr. Ali, Dr. Young, Dr. Khan and Dr. Chang) noted that Ms. Caves received the influenza vaccine two weeks before the onset of her transverse myelitis. Exhibit 5 at 20, 32, 35, 37-8; Exhibit 9 at 3-5.

However, none of these doctors' statements express a "medical theory." The statements are mere restatements of Ms. Caves's medical history that lack a theory explaining how the influenza vaccine caused Ms. Caves's condition. Thus, Ms. Caves fails to establish the first Althen prong.

#### **D. Ms. Caves's Motion to Elicit Sworn Testimony of Dr. Safran**

On July 16, 2008, Ms. Caves filed a motion for a hearing to take the testimony of respondent's expert, Dr. Arthur Safran. Ms. Caves has not retained her own independent expert to review her case. Instead, she relies on the current medical record and has requested a hearing solely for the purpose of cross-examining Dr. Safran. In support of her motion, Ms. Caves states that Dr. Safran "has offered opinions in sharp contrast to those of her treating physicians" and that "since the inception of the [Vaccine Program], the respondent has never been denied the opportunity to explore the bases of the opinion of petitioners' expert witnesses under oath." Pet'r Mot. for Hearing, filed July 16, 2008 at 16. In response, respondent states that a hearing is not necessary or required because petitioner has failed to establish a *prima facie* case of causation.

The decision to hold a hearing is within the discretion of the special master. 42 U.S.C. § 300aa-12(d)(3)(B)(v). Vaccine Rule 8(d) states that: "[t]he Special Master may decide a case on the basis of written filings without an evidentiary hearing." "Both the statutory and case law instruct that the special master is not required to conduct an evidentiary hearing." Murphy v. Sec'y of Health and Human Servs. 23 Cl. Ct. 726, aff'd, 968 F.2d 1226 (Fed. Cir. 1992). In addition, if "convening a hearing would frustrate Congress's objective of making the proceedings expeditious, flexible, and less adversarial, the special master has a duty to deny the [request for a] hearing." Cox v. Sec'y of Health and Human Servs., 30 Fed. Cl. 136, 148 (1993).

Ms. Caves has failed to establish that she is entitled to compensation in this case based upon the current record. When petitioners fail to establish that they are entitled to compensation, respondent is not required to present a case. Ms. Caves's case is comparable to Aea v. Sec'y of Health & Human Servs., No. 93-502V, 1992 WL 121389, \*17 (Cl. Ct. Spec. Mstr. May 8, 1992). In Aea, at the close of petitioners' case in chief, the special master determined that petitioners had failed to establish, by a preponderance of the evidence, their right to entitlement. The special master, then, denied petitioners the opportunity to cross-

examine respondent's expert. Both a judge at the Claims Court, 26 Cl. Ct. 878 (1992), and the Federal Circuit, 6 F.3d 787 (Fed. Cir. 1993) (table), affirmed the special master's decision.

The premise of Ms. Caves's motion requesting a hearing is that Dr. Safran will fill one gap in her case – the medical theory required in Althen. Given that Dr. Safran has written a report saying that he believes the flu vaccine did not cause Ms. Caves's transverse myelitis, exhibit A at 4; Ms. Caves's premise seems to rest upon an unlikely hope. But even if the basis were more than a wish, Ms. Caves's request would not be justified. Even if Dr. Safran supplied a medical theory, Ms. Caves would not prevail because she has not established the second prong from Althen. See Capizzano v. Sec'y of Health & Human Servs., 440 F.3d 1317, 1327 (Fed. Cir. 2006) (“The second prong of the Althen III test is not without meaning. There may well be a circumstance where it is found that a vaccine *can* cause the injury at issue and where the injury was temporally proximate to the vaccination, but it is illogical to conclude that the injury was actually caused by the vaccine.”) Therefore, conducting a hearing solely to cross-examine Dr. Safran would not advance the case meaningfully.

Because the existing record does not reveal any disputes about facts, holding a hearing is not necessary. Ms. Caves's case, therefore, differs from Campbell v. Sec'y of Health & Human Servs., 69 Fed. Cl. 775 (2006). In Campbell, a judge of the United States Court of Federal Claims determined that a special master erred in denying a hearing when “testimony reasonably might shed light on the apparent tension between medical records and later recorded recollections.” Id. at 779-80. Here, there is no tension in the factual record because Ms. Caves has not challenged the accuracy of the contemporaneously created medical records. There also is no tension between experts because Ms. Caves has not retained an expert. Campbell does not support the holding of a hearing in this case.

#### **IV. Conclusion**

For these reasons, petitioner's motion for a ruling on the record is DENIED. Petitioner's motion for a hearing to take the testimony of Dr. Safran is also DENIED. A status conference will be held shortly. During this status conference, Ms. Caves should be prepared to indicate whether she intends to retain an expert to offer an opinion that the flu vaccine caused Ms. Caves's transverse myelitis.

IT IS SO ORDERED.

S/ Christian J. Moran

---

Christian J. Moran  
Special Master