

# In the United States Court of Federal Claims

No. 99-526V  
February 21, 2008  
Not to be Published

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LAURA CANNIZZARIO, \*

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Petitioner, \*

v. \*

Dismissal of hepatitis B  
vaccine petition; failure to  
prove over six months' injury

SECRETARY OF THE DEPARTMENT \*

OF HEALTH AND HUMAN SERVICES, \*

\*

Respondent. \*

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Clifford J. Shoemaker, Vienna, VA, for petitioner.

Althea W. Davis, Washington, DC, for respondent.

**MILLMAN, SPECIAL MASTER**

## DECISION<sup>1</sup>

Petitioner filed a petition on July 28, 1999 under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that she suffered an adverse reaction after receiving hepatitis B vaccine. The medical records are consistent in relating that the onset of petitioner's symptoms of demyelinating disease was four days after vaccination. The undersigned held that

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<sup>1</sup> 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.

hepatitis B vaccine could cause demyelinating disease in the Omnibus proceeding dealing with hepatitis B vaccine and demyelinating diseases.

In the instant case, the medical records note the doctors' impression that hepatitis B caused petitioner's myelitis. However, it is unclear to the undersigned how long petitioner's myelitis lasted. Her myelitis was followed by a large herniated disk in her back for which she required surgery.

On April 9, 2007, the undersigned issued an Order to Show Cause for petitioner to show by May 18, 2007 that petitioner's myelitis lasted more than six months as required by the Vaccine Act, 42 U.S.C. § 300aa-11(c)(1)(D)(i). Petitioner filed a response on May 18, 2007 that the medical records should be sufficient for petitioner's proof that her injury lasted more than six months, but, if they were not sufficient, petitioner could obtain a medical expert report.

On May 21, 2007, the undersigned issued an Order stating that it continued to be unclear whether petitioner's symptoms were a sequela of her alleged vaccine injury or of her herniated disk and subsequent back surgery. The undersigned ordered petitioner to file a medical expert report addressing whether petitioner's symptoms are a sequela of the alleged vaccine injury and/or the back surgery by July 2, 2007.

Since that time, petitioner has requested seven extensions of time to comply with the undersigned's Order of May 21, 2007. The undersigned granted the first six motions, but denied the seventh motion for an extension of time to file a medical expert report, setting a telephonic status conference for January 18, 2008.

At the status conference on January 18, 2008, petitioner's counsel informed the undersigned that Dr. Carlo Tornatore, the neurologist that petitioner's counsel normally has used

to provide an expert report for counsel's clients on the hepatitis B vaccine-demyelinating diseases issue, declined to give a report in this case. Petitioner's counsel requested the undersigned issue another Order to Show Cause why this case should not be dismissed.

On January 18, 2008, the undersigned issued an Order repeating the history of this case and ordering petitioner to prove by February 19, 2008 that her myelitis lasted more than six months. If petitioner failed to do so, the undersigned would have no choice but to dismiss this case.

On February 20, 2008, the undersigned's law clerk telephoned petitioner's counsel for a response to the undersigned's January 18, 2008 Order. Counsel told the undersigned's law clerk that after multiple attempts to reach petitioner, petitioner's counsel had failed to be able to contact her and would not be filing anything further in this case. The undersigned understands this message to mean that petitioner cannot make a prima facie case because she cannot prove that the symptoms which she alleges lasted more than six months after onset of her demyelinating condition are attributable to that condition rather than to her herniated disk and subsequent surgery.

### **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. 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 1317, 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, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Hasler v. US, 718 F.2d 202, 205 (6<sup>th</sup> Cir. 1983), cert. denied, 469 U.S. 817 (1984).

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

In addition, the Vaccine Act requires that petitioner show that she suffered the vaccine injury or its sequela for more than six months. 42 U.S.C. § 300aa-11(c)(1)(D)(i). Petitioner has failed to do so after repeated requests to do so. Dr. Carlo Tornatore, a neurologist experienced in testifying on behalf of petitioners in the Vaccine Program particularly on the hepatitis B vaccine-demyelinating diseases issue (and testified in the Omnibus proceeding dealing with that issue) has refused to provide a medical expert report in support of petitioner’s case.

Consequently, petitioner has failed to make a prima facie case and this petition must be dismissed.

**CONCLUSION**

This petition must be dismissed. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.<sup>2</sup>

**IT IS SO ORDERED.**

February 21, 2008  
DATE

s/ Laura D. Millman  
Laura D. Millman  
Special Master

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<sup>2</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.