

OFFICE OF SPECIAL MASTERS

Not for Publication

No. 05-938V

December 8, 2005

VICTOR DENGLER and LIDIA HERNANDEZ, *
Natura parents and legal representatives of a *
minor child, MAYRA DENGLER, *

Petitioners, *

v. *

SECRETARY OF THE DEPARTMENT OF *
HEALTH AND HUMAN SERVICES, *

Respondent. *

Victor Dengler, Tucson, AZ, for petitioners pro se.
Linda S. Renzi, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

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

Petitioners filed a petition dated August 31, 2005, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that hepatitis B vaccination caused their daughter Mayra Dengler (hereinafter, “Mayra”) to have idiopathic thrombocytopenic purpura (hereinafter, “ITP”), Evan’s Syndrome, systemic lupus erythematosus, and hemolytic anemia..

On November 10, 2005, the undersigned held a telephonic status conference with Victor Dengler, acting pro se for petitioners, and respondent’s counsel. Mr. Dengler stated he had been looking for a medical expert to provide a report. The undersigned encouraged Mr. Dengler to seek legal counsel.

Subsequently, Mr. Dengler telephoned the undersigned’s law clerk to inform her that he was no longer interested in pursuing the petition and asked for dismissal.

FACTS

Mayra was born on December 31, 1988. She received her first hepatitis B vaccination on August 14, 2000. Med. recs. at Ex. 3, p. 1. She received her second hepatitis B vaccination on September 10, 2001. Med. recs. at Ex. 5, p. 1. She received her third hepatitis B vaccination on January 28, 2002. Med. recs. at Ex. 6, p. 1.

On the day Mayra received her third hepatitis B vaccination, her physician Dr. Sant Singh Khalsa noted that she had had two weeks of persistent cough and slight congestion. On physical examination, Mayra’s tonsils were mildly enlarged and inflamed, and she had inspiratory rales and a frequent wet cough. He diagnosed her with bronchitis. Med. recs. at Ex. 6, p. 1.

Seven months later, on September 6, 2002, Mayra saw Dr. Khalsa with left upper arm pain for the prior two days. She had a fever on Monday (September 2, 2002) and vomited once.

On September 5, 2002, her right ankle hurt a little bit for a while, but was not painful at the doctor visit. Med. recs. at Ex. 8, p. 1.

Two months after this visit, on November 5, 2002, Mayra saw Dr. Khalsa, complaining that, for the prior five to six days, she had mild congestion, headaches, fatigue, mild aches and pains in her arms and legs, and some bruising. On physical examination, she had four distinct bruises. Dr. Khalsa diagnosed petechiae, fatigue, and a viral syndrome. Med. recs. at Ex. 10, p. 1.

Also on November 5, 2002, Mayra went to the University Medical Center Emergency Department, where Dr. Douglas J. Smith and Dr. Arthur B. Sanders noted that she had fainted as blood was being drawn. She had a history of being fatigued over the prior two to three weeks. Their diagnosis was anemia, ITP, and syncope. Mayra was admitted to University Medical Center under the care of Dr. Rochelle Bagatell. She stayed at the hospital until November 19, 2002. Med. recs. at Ex. 12, p. 1.

On November 11, 2002, Mayra underwent an EEG, which Dr. John C. Gray interpreted. He took a history that she was admitted on November 5, 2002 with a one-week history of weakness and fatigue. She recently had an acute mental status change with a left facial droop and left eye deviation. The background of her EEG was diffusely slow with marked asymmetry in the background with the right side much more suppressed than the left. The right side had less amplitude. This suggested an underlying structural abnormality involving the right hemisphere. Med. recs. at Ex. 14, pp. 1, 2.

On November 13, 2002, Mayra had a second EEG, which Dr. Colin R. Bamford interpreted. She was on Prednisone, which resulted in mental status changes. Her EEG was

abnormal due to frontal intermittent delta activity on a slow and disorganized background. The pattern seen was suggestive of a diffuse encephalopathy. In her age group, toxic and metabolic factors would be more probable. Med. recs. at Ex. 15, p. 1.

Dr. James R. Smith, a pediatrician, wrote the discharge summary from University Medical Center on November 19, 2002. Med. recs. at Ex. 16, p. 1. Mayra had about two weeks of a petechial rash on her lower extremities, one week of weakness and fatigue, and three days of headaches (primarily at the top of her head) before she was admitted to University Medical Center on November 5, 2002. The diagnosis was pancytopenia, which means deficiency of all blood cells. She was positive for Epstein-Barr virus and mononucleosis (her monospot test was positive), both of which can cause pancytopenia. Med. recs. at Ex. 16, p. 3. It was unclear what the cause of her anemia and thrombocytopenia were at that point. Mayra had an autoantibody response to her red blood cells as well as to her platelets. Her antinuclear antibody (ANA) was positive. Her blood culture done on November 11, 2002 grew out staphylococcus aureus which was penicillin G resistant. Med. recs. at Ex. 16, pp. 4, 5.

On November 17, 2002, Dr. Bagatell, a pediatric hematologist/oncologist, noted that Mayra had a Coombs positive hemolytic process, meaning she had antibodies to red blood cells. Med. recs. at Ex. 17, p. 1. Over time, Mayra developed significant neurological abnormalities including left-sided weakness, facial palsy, aphasia, and questionable seizure activity. She might have lupus cerebritis or a thrombotic thrombocytopenic-like picture. She had an infusion of plasma and five days of plasmapheresis with dramatic improvement. *Id.*

Mayra returned to University Medical Center with anemia and systemic lupus erythematosus under the care of Dr. Robert Hom, a pediatrician. Med. recs. at Ex. 21, p. 1.

DISCUSSION

Petitioners do not allege a Table injury. Therefore, they must prove their allegations by causation in fact. To satisfy their burden of proving causation in fact, petitioners must offer "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury. A reputable medical or scientific explanation must support this logical sequence of cause and effect." Grant v. Secretary, HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992). Agarwsal v. Secretary, HHS, 33 Fed. Cl. 482, 487 (1995); see also Knudsen v. Secretary, HHS, 35 F.3d 543, 548 (Fed. Cir. 1994); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, supra, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Hasler v. US, 718 F.2d 202, 205 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984).

Petitioners must not only show that but for the vaccinations, Mayra would not have had a her conditions, but also that the vaccines were substantial factors in bringing about her conditions. Shyface v. Secretary, HHS, 165 F.3d 1344 (Fed. Cir. 1999).

Petitioners have not filed any expert medical report supporting their allegations that hepatitis B vaccine caused Mayra numerous conditions. Petitioners have not satisfied their burden of proof.

A failure to prosecute a case will lead to dismissal. Hayman v. US, No. 02-725, ___ Fed. Cl. ___ (May 9, 2005) (failure to provide a complete expert report results in dismissal, citing Sapharas v. Sec'y of DHHS, 35 Fed. Cl. 503 (1996); Tsekouras v. Sec'y of DHHS, 26 Cl. Ct. 4439 (1992); and, outside the Vaccine Program context, Claude E. Atkins Enters., Inc. v. US,

899 F.2d 1180 (Fed. Cir. 1990); Adkins v. US, 816 F.2d 1580, 1583 (Fed. Cir. 1987); and Kadin Corp. v. US, 782 F.2d 175, 177 (Fed. Cir. 1986)).

Petitioners have not made a prima facie case that hepatitis B vaccine caused in fact Mayra's numerous medical conditions.

CONCLUSION

Petitioners' petition is dismissed with prejudice. 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.²

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

² 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.