OFFICE OF SPECIAL MASTERS

May 13, 2005

CHRISTOPHER DENNY,	*	
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Petitioner,	*	
	*	
v.	*	No. 04-1432V
	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

ORDER TO SHOW CAUSE[1]

Petitioner filed a petition dated September 10, 2004, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that a hepatitis B vaccination he received on September 13, 2001 caused him to have a seizure 21 days later, followed by encephalitis 30 days after vaccination.

[1] Because this order contains a reasoned explanation for the special master's action in this case, 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 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.

FACTS

Christopher Denny (hereinafter, "Christopher") was born on December 29, 1985. He received a hepatitis B vaccination on September 13, 2001. Ex. 1.

From October 4-9, 2001, Christopher was in Firelands Community Hospital, where Dr. M.D. Schmiedl wrote that Christopher was unresponsive and had a headache. His prior history was that he had been fine, in his normal state of health, with no prodromal[2] symptoms. Christopher had had a cold and a stuffy head for the prior two days. He took cough medicine earlier on October 4, 2001, and went to school where he developed a severe frontal headache. He was a bit warm that afternoon. At night, he was breathing rapidly and shallowly. He was unresponsive with blood at the corner of his mouth. He started to come around after two to three minutes, but was combative, flailing, and disoriented. He did not recognize his parents or his surroundings. By the time Christopher came to the hospital, he was oriented. Med. recs. at Ex. 5d, p. 29.

Christopher did not have the following symptoms: neck pain, stiffness, nausea, vomiting, visual or hearing disturbance, numbness, weakness, tingling, abdominal pain, breathing difficulty, cough, congestion, shortness of breath, itching, hives, rash, or incontinence. *Id.* He had had meningitis at 16 months of age without subsequent problems. Med. recs. at Ex. 5d, p. 30.

Christopher's vital signs were normal except for a temperature of 99.6°. His motor and sensory examination were normal. His reflexes were 1-2+. His toes were downgoing. *Id.* He

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[2] Prodromal means "[a]n early symptom indicating the onset of an attack or a disease." http://dictionary.reference.com/search?q=prodromal

had a normal white blood cell count of 7,000. Med. recs. at Ex. 5d, p. 31. A CT scan of his brain was normal. Ex. 5d, p. 105. Christopher had a maternal aunt who had a febrile seizure at the age of 13. Med. recs. at Ex. 5d, p. 33.

On October 5, 2001, Dr. M.S. Chandran, a neurologist, noted that Christopher had a history of concussion two years previously. Med. recs. at Ex. 5d, p. 36. Dr. Chandran stated Christopher had a new onset of seizure disorder, most likely complex partial seizures with secondary generalization. Med. recs. at Ex. 5d, p. 37. Christopher's head MRI on October 5, 2001 was normal as was his EEG of the same date. Med. recs. at Ex. 5d, pp. 102. 106.

The discharge summary, dated October 9, 2001, states that, over the first one to two days, Christopher was extremely uncomfortable with headaches. He had persistent nausea and vomiting. On the third day of hospitalization, he had a staring spell during which he had difficulty speaking. His spinal tap showed an elevated white blood cell count. It was felt that Christopher most likely had viral meningitis. He was given intravenously Solu-Dilantin and dramatically improved. This confirmed that Christopher had viral meningitis. Med. recs. at Ex. 5d, p. 112.

On October 13, 2001, Christopher returned to the ER of Firelands Community Hospital with a possible reaction to his medications. He vomited repeatedly and complained of headache and dry skin. His temperature was 97.5°. Med. recs. at Ex. 5d, p. 116.

On October 13, 2001, Dr. M.J. Cunningham wrote that Christopher had recurrent headache and had vomited three times. He had erythema (redness) of his eyes. On the day before, he was relatively well. But today, he had malaise and cephalgia (headache), but no

nuchal (neck) rigidity. He did not appear in acute distress. Med. recs. at Ex. 5d, p. 118. He had recent dry mouth and a glassy-eyed appearance. Med. recs. at Ex. 5d, p. 121.

On October 14, 2001, Dr. Timothy Herron, a neurologist, recorded that Christopher had a recurrence of headaches, nausea, and vomiting on October 13, 2001. On October 14, 2001, he had difficulty forming words and some numbness in his right hand. Med. recs. at Ex. 5d, p. 124. Christopher told Dr. Herron that his hearing was distorted. Med. recs. at Ex. 5d, p. 125. Dr. Herron's impression was that there was no precise explanation for Christopher's current syndrome. Some of his headache might be due to his spinal tap. His speech difficulties were intermittent and did not clearly represent aphasia.[3] Med. recs. at Ex. 5d, p. 126.

On October 15, 2001, Christopher was seen at the University Hospitals of Cleveland. A history was given that he had pneumococcal meningitis at 11 months of age and recent viral meningitis. He was admitted to Firelands on October 4, 2001. A spinal tap showed a picture of viral meningitis. Med. recs. at Ex. 7c, p. 445. The diagnosis was that Christopher's altered mental status was mostly encephalitis-related. Med. recs. at Ex. 7h, p. 447. On October 15, 2001, Christopher had an MRI of his head which confirmed encephalitis. Med. recs. at Ex. 7h, p. 467.

On October 24, 2001, Christopher had another MRI of his head which showed he had improving viral encephalitis. Med. recs. at Ex. 7h, p. 474. Christopher stayed at the University Hospitals of Cleveland from October 14 to November 19, 2001. The records state that his previous symptoms were suggestive of viral meningitis treated with steroids. Christopher's

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[3] Aphasia is "[p]artial or total loss of the ability to articulate ideas or comprehend spoken or written language, resulting from damage to the brain caused by injury or disease." http://dictionary.reference.com/search?q=aphasia

symptoms recurred while being tapered off his steroids. His initial spinal tap showed 171 white blood cells with 98 monocytes. He had low grade fevers. Med. recs. at Ex. 7j, p. 592.

Other submitted material

Christopher filed an affidavit, dated September 9, 2004, which is attached to his petition, stating that, a few days after he received hepatitis B vaccine on September 13, 2001, he was tired, lost his appetite, and had difficulty hearing. On October 4, 2001, he had a severe headache, slept, and had a seizure. Christopher's mother filed a similar affidavit, dated September 9, 2004. Ex. 3.

DISCUSSION

Petitioner does not allege a Table injury. Therefore, he must prove his allegations by causation in fact. To satisfy his burden of proving causation in fact, petitioner 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).

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

Petitioner has not filed any expert medical report supporting his allegations that hepatitis B vaccine caused his seizure three weeks later and his encephalitis four weeks later. Moreover, the medical records state, without refutation, that a virus caused Christopher's encephalitis. Petitioner has not satisfied his burden of proof. Moreover, petitioner's counsel advised the undersigned and respondent's counsel on May 12, 2005 that petitioner has not responded to petitioner's counsel's numerous attempts to contact him by phone and letter. There is an issue here of whether petitioner has lost interest in pursuing his case or just wants to dismiss his counsel. In either event, a failure to prosecute his 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)).

Petitioner is ORDERED TO SHOW CAUSE why this case should not be dismissed by May 31, 2005 for failure to present a prima facie case.

IT IS SO ORDERED.

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DATE Laura D. Millman
Special Master