

OFFICE OF SPECIAL MASTERS

No. 04-1448V

March 28, 2006

MICHAEL McGRATH, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

John F. McHugh, New York, NY, for petitioner.

Glenn A. MacLeod, Washington, DC for respondent.

Entitlement; brachial neuritis
alleged post-tetanus; failure
to provide expert report

MILLMAN, Special Master

DECISION¹

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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.

Petitioner filed a petition on September 13, 2004 on his own behalf under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that a tetanus vaccination he received on May 10, 2003 caused him an on-Table brachial neuritis.

Petitioner did not submit a neurological expert report substantiating his allegation.

On March 27, 2006, during a telephonic status conference, petitioner's counsel asked the undersigned to rule based on the records filed in this case.

FACTS

Petitioner was born on December 6, 1960. On October 18, 2001, he went to the Valley Hospital, complaining of a multiple-year history of pain in his low back which had been aching, throbbing, and stabbing over the prior couple of years. Med. recs. at p. 17. Petitioner did heavy construction work.

Petitioner received a tetanus vaccination on May 10, 2003. Med. recs. at p. 6. Although a physiatrist, Dr. Donna M. DePhillips, stated on April 23, 2004 that she diagnosed petitioner with left brachial neuritis after his tetanus vaccination, she does not note anything about petitioner's reflexes. Med. recs. at p. 1. Petitioner took an MRI of his cervical spine on June 27, 2003 which Dr. Robert S. Port interpreted as showing minimal degenerative disc disease. Med. recs. at p. 218.

Petitioner took an MRI of his left shoulder on July 17, 2003, which Dr. Corey J. Weiner interpreted as showing no signs of internal derangement. Med. recs. at p. 224.

On September 9, 2003, petitioner saw Dr. Carl W. Heise, a neurologist. Filing of August 15, 2005. Petitioner complained of pain two weeks after his tetanus vaccination which occurred whenever he moved. He had not previously seen a neurologist. On neurological examination,

petitioner showed no pathologic reflexes. He had no focal atrophy and looked quite fit. He had maximum strength in all four limbs. He had no neurologic findings on examination although painful left shoulder range of movement. *Id.* at 2. Dr. Heise stated, “Although it is possible that he developed an upper level brachial neuritis, his symptoms are not particularly suggestive of this entity. He also has no neurologic findings.” *Id.* at 3. Dr. Heise notes in writing that brachial neuritis is usually exquisitely painful but then the pain resolves in about two weeks, and does not occur with movement but is constant and spontaneous. Dr. Heise concludes, “I think he is a chronic pain personality and is not honest or forthcoming.” *Id.*

Other Submissions

Respondent filed the expert report of Dr. Vinay Chaudhry, a neurologist, dated September 22, 2005. R. Ex. A. Dr. Chaudhry states that petitioner did not have brachial neuritis. The pain in brachial neuritis is of abrupt onset, located in the shoulder region, lasting several hours to two weeks. Petitioner has complained of pain lasting over one year. Brachial neuritis involves prominent weakness and muscle wasting which develops when the pain diminishes about two weeks after the resolution of the pain. Petitioner’s weakness is not described until three months after the onset of pain and vaccination. His EMG was normal in November 2004 even though petitioner stated he had significant pain at the time. He had weakness until August 2004, which is inconsistent with brachial neuritis. Dr. Chaudhry states petitioner’s pain could be related to his underlying arthritic condition or to adhesive capsulitis.

Respondent submitted a supplemental report from Dr. Chaudhry, dated October 17, 2005. R. Ex. B. Dr. Chaudhry read Dr. Heise’s record of September 9, 2003 which is close in time to Dr. DePhillip’s note of August 15, 2003 in which she finds signs of weakness. Yet Dr. Heise

found no weakness except for painful maneuvers of petitioner's arm. Dr. Heise found no focal atrophy and 5/5 strength in all four limbs. Petitioner's sensory examination was normal as were his deep tendon reflexes which were symmetrical except for a diminished right ankle jerk. Petitioner did not have spontaneous pain. His pain lasted more than two weeks, and he had a normal neurological examination. Dr. Chaudhry concludes that petitioner did not have brachial neuritis.

DISCUSSION

Petitioner is alleging a Table injury, brachial neuritis, after a tetanus vaccination. His only support comes from a physiatrist, Dr. DePhillip, who never mentions his reflexes but found petitioner to be weak. The appropriate specialty for determining if someone has a neurological condition is a neurologist, and Dr. Heise, petitioner's treating neurologist, who saw petitioner one month after petitioner saw Dr. DePhillip, found petitioner to be of normal strength and to have no neurological abnormality. Petitioner's complaint of pain with movement and pain that lasted over a year does not fit within the definition of brachial neuritis. Dr. Heise's report is more persuasive than Dr. DePhillips' report because he did measure petitioner's reflexes, tested him thoroughly neurologically, and did not rely on petitioner's assertions in forming his opinion that, neurologically, petitioner was normal. Moreover, Dr. Heise is a neurologist, whereas Dr. DePhillip is a physiatrist.

A failure to provide an expert neurologic report supporting his allegation means that petitioner has not made out a prima facie case of a Table brachial neuritis. Moreover, respondent's expert Dr. Chaudhry explains in detail, consonant with Dr. Heise's report, why petitioner does not have brachial neuritis.

Petitioner's failure to provide a supportive expert report must result in dismissal.

Sapharas v. Secretary of HHS, 35 Fed. Cl. 503 (1996); Tsekouras v. Secretary of HHS, 26 Cl. Ct. 4439 (1992).

CONCLUSION

Petitioner's 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.