

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

No. 99-584V

Filed: July 26, 2007

Not for Publication

DESMOND LAMAR, by his mother and	*	
natural guardian, TYEKA LAMAR,	*	
	*	
Petitioner,	*	Judgment on the record;
	*	Hepatitis B Vaccine;
v.	*	Seizure Disorder
	*	
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Clifford Shoemaker, Esq., Shoemaker and Associates, Vienna, VA, for petitioner.
Vincent Matanoski, Esq., U.S. Department of Justice, Washington, DC, for respondent.

DECISION¹

Denise K. Vowell, Special Master:

On August 4, 1999, Tyeka Lamar filed a petition for compensation on behalf of her minor son, Desmond Lamar [“Desmond”], under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*² [the “Vaccine Act” or “Program”] alleging that hepatitis B vaccines and “other vaccinations” he received caused him to develop unspecified “adverse reactions.” Petition, ¶ 3. The petition did not identify the other vaccines nor specify when the vaccines were received. None of the statutorily

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’s website, in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). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² Hereinafter, for ease of citation, all “§” references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2000 ed.).

required supporting documentation accompanied the petition.³ Accordingly, the special master to whom the case was then assigned ordered petitioner to file the required documentation or a written status report informing the court of progress in obtaining that information by December 6, 1999. Order, dated September 1, 1999. No status report or any other documentation was filed in response to this order.

Petitioner's counsel filed a motion to designate a master file in numerous cases alleging injury from the hepatitis B vaccine on December 9, 1999, including Donovan's case. That motion was denied on February 14, 2000. Thereafter, petitioner filed a status report on February 15, 2000. On April 27, 2000, his case was stayed for 180 days. Nonetheless, petitioner filed status reports on May 16, August 21, and December 12, 2000 and on March 13, 2001 indicating that records were still being collected for filing.

On July 31, 2001, petitioner sought authority to subpoena medical records; that the motion was granted on August 14, 2001. Although no medical records had yet been filed, petitioner was ordered to file the report of a medical expert by August 29, 2001, or request a stay. On July 19, 2002, petitioner requested a stay of the proceedings.

The stay of proceedings was the last substantive action on this case until shortly after the reassignment of this case to me on February 8, 2006. On February 24, 2006, I set a joint recorded status conference for this and numerous other hepatitis B vaccine cases to be held on March 27, 2006. At that status conference, petitioner's counsel indicated his inability to locate his client. Petitioner's counsel was ordered to file a status report by May 26, 2006, detailing his progress in contacting his client.

Petitioner's counsel missed the May 26, 2006 deadline, and on May 27, 2006, he requested an additional 30 days to locate his client. I held another joint recorded status conference on June 9, 2006, during which I informed counsel that motions for extensions of time must be timely filed, detail specifically what efforts counsel have made to comply with an order, and estimate when compliance may be expected. Order, dated June 26, 2006. Based on petitioner's counsel's representations at that status conference, I ordered him to file a status report by July 26, 2006, detailing his progress in locating his client, and indicated that I would entertain a motion to rule on the record as it stands, in the event counsel could not locate his client. *Id.*

On June 1, 2006, petitioner's counsel filed Petitioner's Exhibits ["Pet. Ex."] 1-4, the first medical records ever filed in this case. Petitioner's Exhibit 1 established that Desmond was born prematurely on October 16, 1994, and received hepatitis B vaccinations on December 13, 1994, January 13, 1995, and November 18, 1996. He received diphtheria, pertussis, tetanus ["DTP"], polio ["OPV"], and Haemophilus

³ Section 300aa-11(c) of the Vaccine Act requires the petition to be accompanied by certain documentary evidence, including records pertaining to the vaccination and subsequent treatment. See also, Vaccine Rule 2(e), RCFC, Appendix B.

influenzae type b ["Hib"] vaccinations on January 3, 1995, and June 24, 1996. He received a third DPT vaccination on November 15, 1996, and OPV and Hib vaccinations on November 18, 1996. He received DTaP⁴ and Hib vaccinations on May 28, 1997. Pet. Ex. 1, pp. 1-2. Petitioner's Exhibit 2 indicated that Desmond began having seizures in April 1995. *Id.*, p. 2. He was hospitalized for apnea the week before his seizures were formally diagnosed. *Id.* He was diagnosed with a progressive encephalopathy at three and one half years of age; the physician's notes indicated that his brother had a similar diagnosis. Pet. Ex. 3, p. 2.

In a July 26, 2006 status report, petitioner's counsel indicated that he had located his client and requested 60 days to obtain and file Desmond's medical records. I ordered the medical records and petitioner's affidavit filed by September 25, 2006, and an expert report by November 22, 2006. On September 25, 2006, petitioner requested a 60 day extension of time to file the affidavit and the medical records, indicating her inability to complete all the paperwork. I granted the motion in part, giving petitioner an additional 30 days to file the medical records and affidavit, but also noting that in spite of numerous status reports dating from 2000 indicating that records were being collected, only minimal records had been filed. I indicated that petitioner risked having her case dismissed for failure to substantiate her claim if she failed to comply with the order to produce the medical records and her affidavit. Order, dated September 29, 2006.

Petitioner failed to comply with the order to produce records and an affidavit by October 27, 2006, instead filing a status report detailing Desmond's condition and the difficulties encountered by his mother on a daily basis. I held a status conference on November 21, 2006, and, based on representations by petitioner's counsel that he could file the medical records and petitioner's affidavit by January 22, 2007, granted petitioner an extension to file them by that date. I also ordered petitioner to disclose the name of the medical expert reviewing Desmond's case by February 19, 2007. Order, dated November 22, 2006.

Numerous medical records were filed by January 22, 2007, and I granted yet another extension to file the remaining records by February 22, 2007. Petitioner filed a late status report naming her expert on February 20, 2007, and another request for an extension of time to obtain medical records and file petitioner's affidavit on February 22, 2007. In an order issued on March 8, 2007, nearly a year after activity on this case had resumed, I summarized the many delays granted in this case and granted one final extension of time to file petitioner's affidavit and the outstanding medical records. I warned petitioner that further delays risked the dismissal of this case for failure to comply with court orders. After a status conference on March 19, 2007, I ordered the affidavit or narrative to be filed by the previously imposed deadline of March 30, 2007, and the expert report filed by May 30, 2007. Order, dated March 20, 2007. The affidavit was filed on time.

⁴ Referring to a newer version of the DPT vaccination, one containing an acellular pertussis toxoid.

Petitioner requested and received an extension of time until June 29, 2007, to file the expert report. On that date, petitioner indicated that she would be filing a motion for judgment on the record. As no expert report was filed, the motion for judgment on the record was filed on July 20, 2007, indicating that petitioner could not find an expert to support causation. In a July 24, 2007 response to the motion for judgment on the record, respondent interposed not objection.

Having considered the entire record, I conclude that petitioner has failed to demonstrate Desmond's entitlement to compensation.

DISCUSSION

In order to prevail under the Program, petitioner must prove either a "Table"⁵ Injury or that a vaccine listed on the Table was the cause in fact of an injury. Petitioner did not suffer a "Table" Injury. While Pet. Ex. 1 establishes that Desmond received several vaccines covered by the Vaccine Act, no evidence submitted links his vaccinations to any illness, disability, injury, or condition. See § 300aa-11(c)(1)(C)(I).

The Vaccine Act provides that a special master may not make a finding awarding compensation based on the claims of a petitioner alone, unsubstantiated by medical records or medical opinion. See § 300aa-13(a)(1). Petitioner has failed to proffer medical records or an expert opinion causally linking Desmond's medical condition to any vaccine.

To satisfy his burden of proving causation in fact, petitioner must demonstrate by preponderant evidence that Desmond's vaccinations caused his 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, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005). See also, *Hines v. Sec'y, HHS*, 940 F.2d 1518, 1525 (Fed. Cir. 1991). Petitioner must show "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*, 956 F.2d 1144, 1148 (Fed. Cir. 1992). Circumstantial evidence and medical opinions may be sufficient to satisfy the second *Althen* factor. *Capizzano v. Sec'y, HHS*, 440 F.3d 1317, 1325 (Fed. Cir. 2006). Without more, "evidence showing an absence of other causes does not meet petitioner's 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. See *Hasler v. U.S.*, 718 F.2d 202, 205 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984).

The medical records in this case establish that Desmond was diagnosed with a seizure disorder by April 15, 1995. Pet. Ex. 7, p. 356. At that point, Desmond had received two hepatitis B vaccinations, one DPT, one OPV, and one Hib vaccination.

⁵ A "Table" Injury is an injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, corresponding to the vaccine received within the time frame specified.

The vaccination most proximate to the diagnosis occurred on January 13, 1995. On November 12, 1998, when Desmond was three and a half years of age, he was diagnosed with a “probable X-lined recessive neurodegenerative disease.” Pet. Ex. 10, p. 18. Genetic counseling was recommended for the family. *Id.*

No medical opinion relates Desmond’s condition to any vaccinations, although his mother’s affidavit ascribes an onset of seizures on the day of his second hepatitis B vaccination. Pet. Ex. 13, ¶ 7. There are no exhibits reflecting any medical visits for seizures between the January 13, 1995 vaccination and a hospitalization for apnea, cough, and congestion April 8-13, 1995, when his mother expressed concern over possible seizures. Pet. Ex. 7, p. 528. Desmond’s seizure disorder was not diagnosed until a second hospitalization two days later. Pet. Ex. 7, p. 356. None of Desmond’s doctors appear to have adopted the family’s view of causation; the records repeatedly reference a genetic basis for Desmond’s condition. See, e.g., Pet. Ex. 10, p. 18; Pet. Ex. 7, p. 29.

Despite ample opportunities to do so, petitioner has failed to find a medical expert to opine favorably on causation. While close calls regarding causation must be resolved in favor of the petitioner, *Althen*, 418 F.3d at 1280, in this case petitioner has completely failed to establish that vaccination caused Desmond’s condition.

CONCLUSION

A special master can only authorize compensation when a medical condition either constitutes a “Table” injury or when some evidence, such as a reliable medical opinion, causally connects the vaccine with the injury. No such proof exists in the record before me. Therefore, the petition for compensation is DENIED. 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 with this decision.⁶

IT IS SO ORDERED.

s/ Denise K. Vowell

Denise K. Vowell

Special Master

⁶ 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.