



Petitioner's counsel requested that the undersigned decide the case based on the records submitted.

## FACTS

Diane was born on April 2, 1950. Med. recs. at Ex. 1. The date of her first DPT vaccination is unknown. The date of her second DPT is putatively November 22, 1950 when she would have been seven and three-quarters months old.<sup>(2)</sup>

Ten years later, Diane was in Meadowbrook Hospital from May 9 to 12, 1960 with a grand mal convulsive disorder.<sup>(3)</sup> Med. recs. at Ex. A, p. 2. The history given reflects that Diane had no medical problems until seven months of age when she had a generalized viral infection. Med. recs. at Ex. A, p. 3. She was in a coma for two and one-half weeks and treated for four months. Id. She had episodes of high temperature. Id.

Another history taken during this hospitalization reflects that, at the age of seven months, Diane convulsed three times with temperature. Med. recs. at Ex. A, p. 6. She was brought to a hospital where spinal taps were done. Id. Mr. Aalders was told that Diane had a viral infection in every organ of her body. Id. She was in a coma for one and one-half weeks and hospitalized for two and one-half weeks. Id.

On May 10, 1960, Diane underwent an EEG which was abnormal, indicating a seizure disorder. Med. recs. at Ex. A, p. 19.

Diane returned to Meadowbrook Hospital from July 23 to 24, 1960. Med. recs. at Ex. A, pp. 22, 27. The history given during this visit was that she was well until seven months of age when she ran a very high fever, convulsed, and was in a coma for two and one-half weeks. Med. recs. at Ex. A, p. 23. The Aalders stated that she was diagnosed as having acute exanthem roseola. Id. Diane was hospitalized for two weeks during which time two spinal taps were performed. Id. She recovered slowly. Id. However, her development was retarded. Id. For approximately four years after her roseola infection, she ran high fevers (104 degrees). Id.

Diane went to North Shore Hospital Outpatient Department on January 27, 1961 because of convulsions and trance-like seizures. Med. recs. at Ex. B, p. 1. The history given reflects that Diane became ill at seven months of age with a temperature of over 105 degrees and convulsions. Med. recs. at Ex. B, p. 2. She was hospitalized and put in an oxygen tent. Id. The doctors could not diagnose her condition but thought it was possibly roseola. Id. Mr. Aalders gave a history that Diane received her third DPT about five days before the onset of this illness. Id. When she was discharged, she was physically and mentally retarded. Id. The doctor's impression was encephalitis at the age of seven months due to roseola. Med. recs. at Ex. B, p. 4. The doctor further noted that it was unlikely due to her DPT vaccination. Id.

On February 25, 1980, almost thirty years after the events in issue, Dr. Howard B. Reiser, a neurologist, wrote a letter regarding Diane's condition. Med. recs. at Ex. 9. Dr. Reiser stated that, at eight months, Diane had encephalopathy secondary to DPT vaccination. Med. recs. at Ex. 9, p.1. She was in a coma for two days and paralyzed briefly. Id. Her growth and development were somewhat slowed and she had mild brain damage. Id. On examination, Dr. Reiser found Diane to be mildly retarded. Id. His impression was that she had a post-DPT encephalopathy with a seizure disorder. Med. recs. at Ex. 9, p. 2. The seizures were almost certainly of a temporal lobe origin. Id.

Diane saw Dr. Martin Lesser of HCA University Hospital on April 14, 1987. Med. recs. at Ex. 10, p. 1. In a record dated May 1, 1987, Dr. Lesser noted that Diane had a history of encephalopathy secondary to a DPT reaction when she was eight months old. Id.

## AFFIDAVITS AND REPORTS

Mrs. Melanie Aalders, Diane's mother, submitted an affidavit dated September 28, 1990. In her affidavit, Mrs. Aalders stated that Diane was normal for eight months before receiving DPT vaccine. P. Ex. 3, p. 2. Prior to November 24, 1990, Diane had neither seizures nor brain damage. Id.

Both Mr. and Mrs. Aalders filed affidavits, dated September 28, 1990, stating that the information in the petition is correct. P. Exs. 6 & 8.

On May 1, 1997, Mr. and Mrs. Aalders filed an additional joint affidavit, stating that Diane received her second pertussis vaccination on November 22, 1950.<sup>(4)</sup> P. Aff. at p. 1. They further state that Diane had a DPT reaction less than forty-eight hours after this vaccination during which her arms and legs became stiff, she began to seize, her eyes rolled back, and she screamed. P. Aff. at p. 2. Prior to the seizure, she had a high fever. Id. The Aalders state that the seizures reoccurred and were later accompanied by whooping. Id. Thereafter, Diane became comatose. Id.

In this affidavit, the Aalders further note that the medical history given in the 1961 North Shore Hospital records is incorrect due to an error by either the scrivener or Mr. Aalders. Id. When Mr. Aalders gave the history in this record, he was under extreme emotional distress as both his wife and daughter were hospitalized.<sup>(5)</sup>

On November 12, 1997, petitioner submitted the medical expert report of Dr. Marcel Kinsbourne. Dr. Kinsbourne based his opinion solely on the history provided by Mr. and Mrs. Aalders. Rprt. of Dr. Kinsbourne at p. 1. Dr. Kinsbourne opined that it was highly improbable that Diane had encephalopathy due to roseola because neurological complications from roseola are exceptionally rare as is the failure to recover from such complications. Id. at pp. 1-2. He found the diagnosis of a virus infection to be speculative. Id. at p. 1. Dr. Kinsbourne opined that if the Court finds that Diane's encephalopathy occurred within three days of her DPT vaccination, then she suffered a pertussis vaccine encephalopathy. Id. at p. 2.

Respondent submitted the medical expert report of Dr. Arnold D. Gale. R. Ex. C. Dr. Gale stated that, according to the medical records, there was no on-Table onset of encephalopathy. Id. at p. 3. Petitioner herself could not obviously remember what happened to her at seven months of age and the only documentary history addressing onset puts it at five days after DPT. Id. at pp. 2-3. Dr. Gale further noted that acute exanthematous roseola is an extremely common febrile illness of infancy caused by a more common virus, human herpes virus type 6. Id. at p. 3. Unlike Dr. Kinsbourne's opinion, Dr. Gale states that neurologic complications from roseola are not rare. Id. Such complications may be serious or permanent, and can even cause death. Id.

Petitioner filed a supplemental report from Dr. Kinsbourne, dated May 25, 1998, in which he reiterated that there is no basis for diagnosing a roseola encephalopathy, particularly because roseola rarely causes brain damage as severe as Diane has. Supp. Rprt. of Dr. Kinsbourne at p. 1. In cases of roseola encephalopathy, recovery is complete. Id. Appended to Dr. Kinsbourne's report is an article describing twenty-one infants with central nervous system complications from roseola.<sup>(6)</sup> The authors conclude that since infants with roseola either recover with a variety of sequelae or have a fatal outcome, it is important for doctors to be aware of the potential hazard of the serious complications and unexpected death.<sup>(7)</sup>

## DISCUSSION

Well-established case law holds that information in contemporary medical records is more believable than that produced years later at trial. United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948); Burns v. Secretary, HHS, 3 F.3d 415 (Fed. Cir. 1993); Ware v. Secretary, HHS, 28 Fed. Cl. 716,

719 (1993); Estate of Arrowood v. Secretary, HHS, 28 Fed. Cl. 453 (1993); Murphy v. Secretary, HHS, 23 Cl. Ct. 726, 733 (1991), aff'd, 968 F.2d 1226 (Fed. Cir. 1992), cert. denied sub nom. Murphy v. Sullivan, 113 S. Ct. 263 (1992); Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1328 (1980). Contemporaneous medical records are considered trustworthy because they contain information necessary to make diagnoses and determine appropriate treatment. Cucuras v. Secretary, HHS, 993 F.2d 1525, 1528 (Fed. Cir. 1993):

Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health

professionals to facilitate diagnosis and treatment of medical conditions.

With proper treatment hanging in the balance, accuracy has an extra

premium. These records are also generally contemporaneous to the

medical events.

Id.

The instant case suffers from a lack of contemporaneous records, leaving the undersigned to rely on records which at the earliest were recorded ten years later. These records establish that Diane received DPT; however, they also establish that the onset of her seizures and encephalopathy occurred five days after vaccination while she had roseola and an extremely high temperature. The histories in these records indicate that onset of seizures and encephalopathy was off-Table. Since these are the earliest medical records available, the court places more weight on them than on histories provided twenty years after these histories were given.

It is not respondent's burden to prove what caused Diane's seizures and encephalopathy. Rather, it is petitioner's burden to prove that her onset of seizures and encephalopathy occurred within Table time. Petitioner has failed to meet this burden. First, she herself cannot provide personal information since she was only seven months of age at the time. Secondly, the histories that Mr. and Mrs. Aalders gave thirty to forty years after the event are less credible than those they gave earlier in time. The Aalders' attempt to explain away the earlier histories as the result of either a scrivener's error or Mr. Aalders' emotional state is not convincing. Their motive at the time of Diane's hospitalizations in 1960 and 1961 was to give as accurate a history as possible so as to procure appropriate treatment. Their motive nearly fifty years later is to help their daughter prevail in her suit.

Dr. Kinsbourne's two reports are unpersuasive. Dr. Kinsbourne seems to believe that disputing roseola as the cause of Diane's encephalopathy will help her case. However, roseola is irrelevant legally because petitioner has not succeeded in establishing on-Table onset. Dr. Gale, more believably, countered Dr. Kinsbourne's thesis with the opinion that roseola does indeed have neurologic complications which can be quite serious. This is borne out in the article that Dr. Kinsbourne submitted purportedly in support of his statement about the unlikelihood of roseola's having neurological complications, but which shows just the opposite. Even if Dr. Kinsbourne were medically correct to assert that roseola rarely results in encephalopathy and seizures, petitioner, legally, cannot prevail based on mere statistical fact, Knudsen v. Secretary, HHS, 35 F.3d 543, 550 (Fed. Cir. 1994), notwithstanding her failure to prove on-Table onset. Accordingly, petitioner has failed to satisfy her burden of showing on-Table onset of encephalopathy and RSD.

## CONCLUSION

This petition is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC Appendix J, the clerk of the court is directed to enter judgment in accordance herewith.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

Laura D. Millman

Special Master

1. The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. § 300aa-10 *et seq.* (West 1994). The National Vaccine Injury Compensation Program comprises Part 2 of the Vaccine Act. For convenience, further reference will be to the relevant subsection of 42 U.S.C. § 300aa.
2. A vaccine record has not been submitted in this case.
3. The medical records from this hospitalization are the earliest records that petitioner submitted.
4. The affidavit did not, however, explain how they knew the date without documentation in support thereof.

On the date of the filing of this affidavit, petitioner's counsel also moved for a hearing. The undersigned denied this motion on May 7, 1997. The decision whether or not to hold a hearing is within the discretion of the special master. 42 U.S.C. §300aa-12(d)(3)(B)(v). In light of the paucity of evidence in support of petitioner's allegations, the undersigned found that a hearing was neither reasonable nor necessary.

5. Petitioner did not submit evidence of Mrs. Aalders' hospitalization during this time.
6. Sadao Suga, *et al.*, "Clinical and Virological Analyses of 21 Infants with Exanthem Subitum (Roseola Infantum) and Central Nervous System Complications," 22 *Ann Neur* 597 (1993).
7. *Id.* at p. 602.