

OFFICE OF SPECIAL MASTERS
December 30, 1997

PATRICIA ELAINE CLINKSCALES, *
as natural guardian and legal *
representative of her minor *
daughter, PATRICE ALLESHIA *
YVETTE CLINKSCALES, *

Petitioner, *
*

vs. * 90-3488V
* PUBLISHED

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

Respondent. *
*

James L. Ford, Atlanta, GA, for petitioner.

Aristia Karas, Washington, DC, for respondent.

DECISION

MILLMAN, Special Master

On behalf of her daughter Patrice Alleshia Yvette Clinkscases (hereinafter, "Patrice"), petitioner filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986⁽¹⁾ (hereinafter, the "Vaccine Act" or the "Act") on October 1, 1990. Petitioner has satisfied the prerequisites provided in § 300aa-11 (c) of the Act by showing that Patrice has not previously collected an award or settlement of a civil action for damages arising from the vaccine injury, and that she has incurred \$1,000.00 in unreimbursable medical expenses. She has not, however, satisfied the prerequisite of proving that DPT vaccine was administered to Patrice.

Petitioner alleges that Patrice suffered a residual seizure disorder (RSD) and encephalopathy within the Table time limits of administration of DPT under the Act. 42 U.S.C. § 300aa-14(a)(I)(B)and(D). Respondent defends with the assertion that Patrice did not suffer on-Table seizures or encephalopathy. In addition, respondent argues that there is no proof that Patrice received DPT on the date that petitioner alleges.

Petitioner's medical expert, Dr. Michael B. Fry, a neurologist who has treated Patrice since January 3, 1985, opined that Patrice had infantile spasms on-Table as a result of her DPT. Med. recs. at Ex. A

(unpaginated). He based this opinion on a history given by Mrs. Clinkscales which reflected that Patrice's symptoms began within several hours after receiving a DPT vaccination in late November 1984. Id. In his view as well, infantile spasms are a type of encephalopathy. Id. However, the medical records in this case fail to document administration of a DPT vaccination in late November 1984.

A hearing was not held in this case due to the dearth of medical documentation supporting the basis for petitioner's claim, i.e., that Patrice had indeed received DPT in late November 1984. The court is not obligated to hold a hearing. Vaccine Rule 3(b); Murphy v. Department of HHS, 23 Cl. Ct. 726, 730 (1991), aff'd, 968 F.2d 1226 (Fed. Cir.), cert. denied, 113 S. Ct. 463 (1992).

In a status conference held on December 9, 1997, the court advised a voluntary dismissal. Petitioner, however, does not want to file a voluntary dismissal because she intends to proceed civilly.

FACTS

Patrice was born on October 2, 1984. Petition at p. 1. Patrice went to the South Carolina Department of Health and Environmental Control (hereinafter "the clinic") on October 11, 1984. Med. recs. at Ex. 3 (iv), p. 79. During this visit, the clinic personnel discussed both the need and schedule for immunizations. Med. recs. at Ex. 3(iv), p. 132; med. recs. at Ex. I (unpaginated).

Patrice returned to the clinic five days later, on October 16, 1984. Id. She was in for a weight recheck because of prior inadequate diet. Id. Patrice screamed when moving her bowels. Id. The clinic personnel counseled Patrice's mother on feeding. Med. recs. at Ex. 3(iv), p. 132; med. recs. at Ex. I (unpaginated). Patrice had gained four ounces in five days. Id.

On November 2, 1984, Patrice saw Dr. Colquitt Sims, Jr., a pediatrician at Children's Clinic of Anderson. Med. recs. at Ex. 3(i), p. 14. The complaint was that she cried when moving her bowels. Id. He prescribed medication. Id.

Patrice's next visit to the clinic was on December 4, 1984. Med. recs. at Ex. 3(iv), p. 133; med. recs. at Ex. I (unpaginated). The history which was given reflects that a doctor saw Patrice in November due to problems with her bowels. Id. This was treated with medicine. Id. Mrs. Clinkscales stated that Patrice had been jerking a lot, her eyes rolling back, and her mouth moving "funny." Id. She had exhibited this behavior on a daily basis since the prior week (approximately November 29, 1984). Med. recs. at Ex. 3 (iv), p. 133; med. recs. at Ex. I (unpaginated). Patrice took formula well. Id. The medical record from this visit reflects a notation by clinic personnel that seizure activity should be ruled out. Id.

Patrice had an irregular heartbeat. Id. Mrs. Clinkscales was advised to talk to Dr. Sims regarding immunization and whether Patrice should receive DPT. Med. recs. at Ex. 3(iv), p. 133; med. recs. at Ex. I (unpaginated). Dr. Sims was to recheck Patrice's heart. Id. Nutritional counseling was to be provided at the clinic. Id. Patrice was to continue on her formula until six months and then begin eating cereal, fruits, and vegetables. Id.

Patrice saw Dr. Sims on December 13, 1984 with a complaint of jerking in her sleep as if she were gagging. Med. recs. at Ex. 3(i), p. 14. He opined possible seizures and told Mrs. Clinkscales not to give Patrice medicine for one week. Id. He advised a hospital work-up. Id.

On December 14, 1984, Patrice was admitted to Anderson Memorial Hospital. Med. recs. at Ex. 3(i), p. 30. Dr. Fry took a history that Mrs. Clinkscales was diagnosed as having seizures during gestation and was treated for a brief period of time with anticonvulsants. Id. Her seizures apparently abated. Id. The history for Patrice was that in the last several weeks she had been experiencing frequent, odd behavior,

such as, drooling, head turning, and stiffening. Id. This behavior occurred many times during the day, and was sometimes preceded by crying. Med. recs. at Ex. 3(i), p. 30.

There is a letter dated February 5, 1985 from Dr. Lawrence B. Mauldin, a pediatric neurologist, to Dr. Fry. Med. recs. at Ex. 8 (unpaginated). In this letter, Dr. Mauldin diagnoses Patrice as having a serious infantile seizure disorder. Id. The history he relates indicates that Mrs. Clinkscales experienced maternal black-out spells in the first trimester which were treated with phenobarbital for two months. Id.

Patrice was healthy as a newborn. Id. At approximately two months of age, she had sudden, brief stiffening and jerking spells. Med. recs. at Ex. 8 (unpaginated). These were not associated with fever, infection, or immunization. Id. She had a very abnormal EEG. Id. Prior to the onset of these seizures, Patrice was fixing, following, smiling, and gaining head control. Id. Since these seizures, however, she had a deterioration of function. Med. recs. at Ex. 8 (unpaginated). She had a dull expression on her face and did not fix or follow well. Id. She had poor head control, was hypotonic, and did not have sitting balance. Id.

In an August 29, 1986 visit, Dr. Sims noted that he had to check with Dr. Frye about Patrice's immunizations. Med. recs. at Ex. 3(i), p. 22.

In clinic records dated September 30, 1986, it is noted that Dr. Sims stated that he would start Patrice's immunizations on October 15, 1986 when she had an appointment for a physical examination. Med. recs. at Ex. 3(iv), p. 130.

Dr. Sims' records reflect that Patrice received DT vaccinations, without the pertussis component, on May 2, 1989, June 2, 1989, and May 3, 1990. Med. recs. at Ex. 3(i), pp. 25-27.

Becky Campbell, Director of the Anderson County Health Department, was deposed on November 30, 1994. Tr. at 1 (P. Ex. 1). Ms. Campbell stated that the clinic does not have a record of immunizing Patrice. Id. at 12. With reference to the December 4, 1984 visit⁽²⁾, Ms. Campbell testified that normally, if there is a question about whether to give DPT, the clinic nurses do not give it. Id. at 11, 12. The central office does not have a record of Patrice receiving a vaccination from 1983 to 1986. Id. at 18.

The deposition of Kaye M. Bratcher was also taken. Tr. at 1 (P. Ex. 1).⁽³⁾ She stated that the health department did not give any type of vaccination to Patrice. Tr. at 14.

Mrs. Clinkscales filed an affidavit stating that she went to Dr. Sims on December 14, 1984.⁽⁴⁾ P. Ex. 4, p. 135. She states under oath that Patrice received DPT from the clinic in the afternoon of a day in the last week of November 1984, and then started jerking, appeared withdrawn, and had "spells" or "nervous spasms." Id. at 136. Her father's affidavit is to the same effect. P. Ex. 5, p. 140.

DISCUSSION

Petitioner claims that Patrice suffered an on-Table RSD and encephalopathy as a result of DPT vaccine administered at the clinic during the last week of November 1984. However, according to the medical records, Mrs. Clinkscales did not visit the clinic in November 1984. After October, her next visit was on December 4, 1984. At that visit, the question of immunizing Patrice arose and Mrs. Clinkscales, who had just recounted activity akin to seizures to the clinic staff, said she wanted to talk to the pediatrician, Dr. Sims, before administering vaccine to Patrice. It is unlikely that Mrs. Clinkscales would be talking about having Patrice immunized if Patrice had just received DPT the week before. Moreover, it is unlikely that the clinic records would reflect two visits in October as well as visits in December, yet omit the very visit in November that Mrs. Clinkscales claims was the time of the vaccination.

A doctor visit on November 2, 1984 is also recorded; however, this visit was to Dr. Sims, not to the clinic, in early not late November, and occurred because Patrice was screaming when she had a bowel movement. There was no DPT administered and Patrice had not yet begun seizing.

It does not appear that Patrice has ever received pertussis vaccine. The medical records reflect that Patrice received diphtheria-tetanus (DT) vaccine in 1989 and 1990, which was five and six years after the onset of her seizure disorder. Med. recs. at Ex. 3(i), pp. 25-27.

Lastly, Dr. Frye's affidavit is of no avail to petitioner since his opinion rests solely upon the version of the facts that Mrs. Clinkscales gave him, to wit, that Patrice's seizures began in proximity to her receipt of DPT vaccine in late November 1984.

After careful scrutiny of the medical records, the court concludes that Patrice's seizure disorder is wholly unrelated to any receipt of DPT vaccine. As such, the court holds that petitioner has not sustained her burden of proving that Patrice suffered an on-Table RSD or encephalopathy following a DPT vaccination.

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-1 *et seq.* (West 1991). 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. At this visit, Mrs. Clinkscales said she would talk with Dr. Sims about immunization and whether or not Patrice should receive DPT.
3. Ms. Bratcher is a Disease Intervention Specialist with the Anderson County Health Department.
4. In this affidavit, she omitted, however, the visit to the clinic which occurred ten days earlier on December 4, 1984.