

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTER
Filed: November 16, 2010
No. 06-551V

NATALIE LESZCZYNSKI, by her)	
mother and Natural Guardian KAROLINA)	
LESZCZYNSKI,)	UNPUBLISHED
)	
Petitioner,)	Respondent's Motion for
)	Ruling on the Record;
)	Diphtheria-Tetanus-Acellular
v.)	Pertussis (DTaP) Vaccine;
)	Seizure Disorder;
SECRETARY OF THE DEPARTMENT)	Developmental Delay
OF HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	
<u>Seth Bader</u> , New York, NY, for petitioner.		

Linda Renzi, Washington, DC, for respondent.

RULING ON ENTITLEMENT¹

Campbell-Smith, Special Master

On July 31, 2006, Karolina Leszczynski, (“petitioner”), filed a petition seeking compensation under the National Vaccine Injury Compensation Program (“the Vaccine Program”)² on behalf of her minor daughter Natalie. In the petition, petitioner alleged

¹ Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless the decisions contain trade secrets or commercial or financial information that is privileged or confidential, or the decisions contain medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. Within 14 days of the filing of a decision or substantive order with the Court, a party may identify and move for the redaction of privileged or confidential information before the document’s public disclosure.

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755,

that Natalie suffered an encephalopathy and acute complications and sequela therefrom, in the form of a residual seizure disorder, which was “caused-in-fact” by her August 22, 2003 diphtheria-tetanus[-acellular] pertussis (“DTaP”)³ vaccination. Petition at 1.⁴

On September 21, 2006, petitioner was ordered to file a medical expert report. On October 4, 2006, petitioner filed the expert report of Dr. Marcel Kinsbourne. Dr. Kinsbourne opined that Natalie suffers from a refractory complex partial seizure disorder caused by the administration of DTaP vaccines on August 22, 2003. Dr. Kinsbourne’s opinion was based in part on the allegation that the onset of Natalie’s seizures occurred approximately twenty-six hours following vaccination. He further opined that Natalie’s developmental delays were a sequela of her vaccine-related injury. See Petitioner’s Exhibit (P’s Ex.) 14.

On December 14, 2006, respondent’s counsel filed a Rule 4(c) report, and the medical expert opinion of Dr. Max Wiznitzer. Respondent’s report recommended against compensation, Dr. Wiznitzer opined that Natalie did not have a complex partial seizure disorder, but suffered from infantile spasms unrelated to the administration of the DTaP vaccination. He further opined that even if Natalie suffered from a complex partial seizure disorder, there was no evidence linking it to the receipt of her DTaP vaccine. See Respondent’s Exhibit (R’s Ex.) A.

On April 27, 2007, petitioner filed the supplemental report of Dr. Kinsbourne. P’s Ex. 22. Dr. Kinsbourne’s supplemental opinion addressed the expert opinion of Dr. Wiznitzer. Dr. Kinsbourne’s opinion on causation remained unchanged. On May 23, 2007, respondent submitted the supplemental expert opinion of Dr. Wiznitzer, who maintained his position that Natalie’s seizures and developmental delays were unrelated to her August 22, 2003 DTaP vaccine. R’s Ex. I.

After the parties’ experts opinions had been filed, the undersigned conducted an onset hearing on November 29, 2007. Two months later, on January 29, 2008, the parties

codified as amended, 42 U.S.C. § 300aa-10-§ 300aa-34 (2006) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

³ The petition states that Natalie received a diphtheria-tetanus-pertussis (“DTP”) vaccine on August 22, 2003. Petition at 1. However, the medical records establish that Natalie actually received a DTaP vaccine on this date. See Petitioner’s Exhibit 4 at 2.

⁴ Although petitioner initially alleged that Natalie suffered a Table encephalopathy, this case proceeded on the allegation that Natalie’s residual seizure disorder and developmental delays were caused-in-fact by receipt of the August 22, 2003 DTaP vaccination.

filed a Stipulated Findings of Fact, wherein the parties stipulated that the onset of Natalie's symptoms occurred on August 23, 2003, one day after she received the DTaP vaccine.

On September 16, 2010, respondent filed Respondent's Amended Rule 4 Report and Motion for a Ruling of the Record (R's Amended Report) indicating that in their client's view, petitioner has failed "to provide preponderant evidence supporting her allegation" or "to establish a logical cause and effect relationship between the vaccine and the alleged injury." *Id.* at 7-8. However, respondent's client also determined that "no further resources should be spent defending this case." R's Amended Report at 8.⁵ Respondent's motion is now ripe for a ruling.

Among the persuasive factors supporting petitioner's vaccine claim are the timing of the onset of petitioner's seizures, the persistence of the petitioner's symptoms in the days following the onset of symptoms, and the corroboration of petitioner's recollection of the events through the subpoenaed telephone logs of calls to the pediatrician. *See* Tr. 16-20, 20-25, 28-29, 30-33, 42-43. These factors together with respondent's election not to expend further resources to challenge petitioner's claim inform the undersigned's decision that petitioner is entitled to compensation under the Vaccine Program.

Counsel in this case have previously indicated that they would be ready within one week of the issuance of a decision in this case to file either a proffer on damages or a status report indicating when the proffer would be filed. *See* September 13, 2010 Order. Accordingly, the parties are directed to file a proffer on damages or a status report indicating when one will be filed **on or before Friday, December 3, 2010.**

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Special Master

⁵ Respondent stated in the Amended Rule 4 Report that the "facts of this case are particularly unique" and noted that respondent would "strongly object to any future attempt to interpret respondent's decision not to defend this matter as an acquiescence to any aspect of vaccine causation regarding any particular injury or fact pattern in any other case." R's Amended Report at 8 (footnote).