

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**

No. 09-439V  
Filed: November 8, 2011  
Unpublished

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BRANDON and ELIZABETH GRAHAM,  
legal representatives of a minor child,  
SAVANNA GRAHAM,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

Respondent.

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\* Denial; Diphtheria-tetanus-acellular  
\* pertussis, DTaP; Seizures, infantile  
\* spasms; developmental delay  
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*Thomas P. Austin, Watson Law Firm, Greenwood, SC, for Petitioners.*  
*Alexis B. Babcock, U.S. Department of Justice, Washington, D.C., for Respondent.*

**DECISION**<sup>1</sup>

GOLKIEWICZ, Special Master.

On July 6, 2009, a Petition in this matter was filed alleging that petitioners’ daughter suffered an encephalopathy, seizure disorder and developmental delay due to her receipt of a DTaP vaccine administered on July 26, 2006.<sup>2</sup> Petition (“Pet.”) at 1-2. Along with the Petition, petitioners filed an affidavit from a treating pediatric neurologist, Dr. Morales, who noted the temporal association between the seizures and vaccinations suggests a possible link. The doctor notes that the pertussis component of the vaccine is associated with infantile spasms. Further,

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<sup>1</sup> The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing. Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.**

<sup>2</sup> It is noted that petitioners’ daughter received a DTaP vaccination on May 22, 2006, with no adverse events noted. P Ex 5 at 92.

the doctor states that petitioners' daughter's condition continued for several months, thus her condition is chronic and could qualify as an encephalopathy under the Vaccine Injury Table.<sup>3</sup> Morales Affidavit, attached to Petition, filed July 6, 2009 ("Morales Aff."). Medical records were subsequently filed on July 2, 2009, and October 26, 2009. See P Exs 1-8, filed Jul. 20, 2009; P Ex 9, filed Oct. 26, 2009.

On December 18, 2009, respondent filed her Rule 4(c) Report. Respondent's Report, filed Dec. 18, 2009 ("R Report"). Respondent notes that Dr. Morales' opinion does not meet petitioners' burden in that it does not provide a medical theory linking the DTaP to the alleged injuries, nor does the doctor cite any medical literature to support his opinion. R Report at p. 8. Further, Dr. Morales does not provide a logical sequence of cause and effect between the vaccination and the injury. R Report at 8 (citing see Althen v. Sec'y of the Dept. of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005)). Respondent also notes that Dr. Morales discussed the close temporal proximity of the vaccination to the seizures but failed to demonstrate this was an appropriate temporal association for causation. R Report at p. 8; see, e.g., Hasler v. Sec'y of the Dept. of Health & Human Servs., 718 F.2d 202, 205 (Fed. Cir. 1983)("[I]nnoculation is not the cause of every event that occurs within the ten day period.").

Thereafter, a status conference was held, following which petitioners were ordered to file requested medical records and a supplemental opinion from Dr. Morales. Scheduling Order, filed Feb. 1, 2010. Due to busy schedules and intervening events, a response from Dr. Morales was not filed until October 28, 2010. P Ex A, Letter from Dr. Morales, filed Oct. 28, 2010. Dr. Morales' letter states he "will not be able to say with confidence that the immunizations were more likely than not to have caused Savanna's seizures/autism." Id. On November 8, 2010, petitioners informed the court that they were seeking a referral for their daughter to a clinical geneticist, in hopes of securing a supportive opinion on causation. P Brief, filed Nov. 8, 2010; P Brief, filed Dec. 10, 2010. The report of the clinical geneticist was filed on December 27, 2010. P Brief, filed Dec. 27, 2010.<sup>4</sup> Much of this report discusses past and potential diagnostic considerations for petitioners' daughter. Regarding the vaccinations, "[i]t remains unclear as to whether [vaccination] was a primary or secondary cause of her clinical symptoms. There are increasing reports of vaccine-induced encephalopathy occurring secondary to underlying genetic conditions or predispositions." P Brief at p. 4. Although the vaccination's temporal association is noted, this report also fails to present a medical theory, logical sequence of cause and effect and the appropriate temporal association between the vaccination and injury. On October 25, 2011, a status conference was held wherein petitioners' stated they could not prove their case and wished to discontinue pursuit of the Petition.

Upon review of the record, petitioners fail to provide preponderant evidence that the vaccination their daughter received on July 26, 2006, caused her injuries. As required under Althen, the opinions provided by petitioners fail to evidence a medical theory, logical sequence of cause an effect, and an appropriate temporal association between the vaccine and the alleged

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<sup>3</sup> Petitioners do not claim their daughter suffered an acute encephalopathy following the DTaP vaccination, as it is defined in the Qualifications and Aids to Interpretation. Pet. at p. 1; see 42 C.F.R. § 100.3(b)(2).

<sup>4</sup> This exhibit is not labeled and is simply cited as the October 27, 2010 Brief, as captioned by petitioners, and page references are to the entire filing.

injury. “The special master or court may not make such a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” 42 U.S.C. § 300aa-13(a). Based upon the current record, it is clear that the evidence preponderates against petitioners’ claim. Thus, in accordance with section 13(a), the undersigned has no option but to **deny** petitioners’ claim for want of proof.

The Clerk of the Court is directed to enter judgment accordingly.

**IT IS SO ORDERED.**<sup>5</sup>

s/ Gary J. Golkiewicz  
Gary J. Golkiewicz  
Special Master

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<sup>5</sup> This document constitutes a final “decision” in this case pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision. Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.