

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

No. 09-278V
Filed: June 24, 2011
Unpublished

BETHANNY WALZ and KENNETH WALZ, *
Legal Representatives of SABRINA WALZ, *
a Minor, *

Petitioners, *

v. *

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

Respondent. *

Ruling on the Record;
Diphtheria-tetanus-acellular
pertussis, DTaP; Hemophilus
influenza type b, Hib; Pneumococcal
conjugate; Regressive enceph-
alopathy; Neurological disorder

Carol L. Gallagher, Gallagher & Gallagher Law Firm, LLC, Somers Point, N.J., for Petitioner.
Lara A. Englund, U.S. Department of Justice, Washington, D.C., for Respondent.

DECISION¹

GOLKIEWICZ, Special Master.

On May 1, 2009, a *pro se* Petition in this matter was filed alleging that petitioners’ daughter suffered a regressive encephalopathy that resulted in speech loss, cognitive impairments, and other injuries caused by the Diphtheria-Tetanus-acellular-Pertussis (“DTaP”), hemophilus influenzae type b (“Hib”), and pneumococcal conjugate (“Prevnar”) vaccinations petitioners’ daughter received on May 3, 2006. Petition at 1. On March 30, 2010, petitioners’ retained counsel and filed an Amended Petition stating that petitioners’ daughter continues to suffer from a neurological disorder, which was a cause in fact of her injury after the administration of the vaccinations on May 3, 2006. Amended Petition at ¶13.

¹ 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 trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and 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.

Petitioners' daughter was immunized on May 3, 2006. On May 16, 2006, she was taken to her pediatrician for irritability, crankiness, and fever for which the treating physician attributed to allergies. P Ex 4 at 25. On June 12, 2006, petitioners' daughter was again taken to her pediatrician because she was cranky and pulling on her ear. The pediatrician's assessment was an unspecified earache. P Ex 4 at 23. One week later they returned to the pediatrician for fever and crankiness. P Ex 1 at 2-3. On October 26, 2006, petitioners' daughter was seen by her pediatrician who noted she was "[c]onsolable, smiling and playful." P Ex. 4 at 19. On December 15, 2006 petitioners' daughter was seen by Kenneth A. Bock, M.D. for a comprehensive consultation. P Ex 8 at 2-3. Dr. Bock diagnosed petitioners' daughter with regressive encephalopathy. P Ex 7 at 39-40. On February 1, 2007, petitioners' daughter was seen by a neurologist who noted that her symptoms placed her on the autistic spectrum and that there was not a high association of encephalopathy with these immunizations. P Ex 5 at 7. Throughout 2008 and 2009 petitioners' daughter suffered developmental delays and continued to receive care from Dr. Bock. Id.

On June 1, 2010, respondent filed her Rule 4(c) Report contesting compensation. R Report at 2. Respondent asserted that petitioners' daughter's injuries did not fit the criteria of a Table injury of encephalopathy. Although petitioners' daughter has been diagnosed with regressive encephalopathy, signs and symptoms of acute encephalopathy did not occur within three days of her immunization as required by the Table. R Report at 7. Further, respondent argued petitioners were unable to prove on a theory of causation in fact. Respondent argued petitioners had not offered a reliable medical or scientific theory causally connecting petitioners' daughter's vaccination with her injuries or condition. R Report at 7, 11.

On October 21, 2010, a fact hearing was held in Callicoon, New York. Testimony was heard from Bethany and Kenneth Waltz, and the paternal grandmother, Jeannet Walz. Motion for Judgment on the Existing Record at ¶5. On October 25, 2010, the undersigned issued a Findings of Fact and Order that noted the absence of reported symptoms to the pediatricians and the conflicting medical records and histories given to the treating doctors. Findings of Fact and Order at 1. Petitioners were ordered to file a medical expert report that relied "on the factual information contained in the medical records" to support petitioners' argument that the vaccines caused petitioners' daughter's injuries. Id.

After several Motions for Extension of Time to file the expert report, on June 2, 2011, petitioners' expert conveyed the difficulties of the case to petitioners and their attorney; an expert report was never filed. Motion for Judgment on the Existing Record at ¶12. On June 16, 2011, petitioners filed a Motion for Judgment on the Existing Record. Respondent communicated with the undersigned's office on June 20, 2011, that she does not object to petitioners' Motion for Judgment on the Existing Record.

As the undersigned detailed in the Fact Ruling, the medical records were to be relied upon in this matter and it was incumbent upon petitioner to produce a supportive medical opinion. The Act at 42 U.S.C. § 300aa-13(a) provides that the special master "may not make a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." Thus, this Petition remains unsupported by either medical records or medical

opinion. In accordance with section 13(a), the undersigned has no option but to **deny** petitioners' claim for want of proof.

The Clerk shall enter judgment accordingly.²

IT IS SO ORDERED.

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

² 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.