

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-223V

Filed: August 2, 2010

Not to be Published

DAWN L. BERGE and KENNETH O. BERGE *
as legal representative of a minor child, *
ZACHARY T. BERGE *

Petitioners, *

v. *

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

Respondent. *

Motion for Ruling on the Record;
Diphtheria-tetanus-acellular
Pertussis, DTaP; Measles-mumps-
rubella, MMR; Hepatitis A;
Influenza split virus vaccine;
Vaccine Table encephalopathy
Lack of preponderant evidence

DECISION¹

This action commenced with the filing of the original Petition on March 28, 2008. The Amended Petition in this matter was filed on March 24, 2010. Amended Petition, filed March 24, 2010 (hereinafter “Pet.”). As set forth in the Amended Petition, Zachary received a hepatitis A vaccine, DTaP/DTP vaccine, influenza split virus vaccine and a MMR vaccine on December 5, 2006. Pet. at ¶ 1. Petitioners allege that Zachary sustained a Vaccine Injury Table encephalopathy within seventy-two hours following his immunizations, resulting in a serious developmental decline. Pet. at ¶ 6. Petitioners state he suffered “fever like symptoms, diarrhea, encephalopathy prolonged lethargy, extended periods of sleeping, chemistry imbalance, metabolic problems, and significant loss of attention to speech stimuli” following the December 5, 2006, vaccinations. Pet. at ¶ 5.

On October 9, 2008, respondent filed the Rule 4(c) Report, stating the opinion that compensation was not appropriate in this matter. R Rule 4(c) Report, filed October 9, 2008. Thereafter, petitioners filed the expert report of Dr. Stephanie Cave. P Expert Report, filed April 20, 2009. Dr. Cave stated that Zachary was developing normally prior to immunization and opined that Zachary suffered a Table encephalopathy following his DTaP and other vaccines,

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.

which caused Zachary to suffer “symptoms and behavior of severe autism.” Id. at 2. Because Dr. Cave relied upon a “history given” by the parents, id. at 1, as opposed to the medical records, a fact hearing was convened on May 7, 2010, to take the testimony of Mr. and Mrs. Berge.

Immediately following this hearing, the undersigned issued a Fact Ruling and Order, finding the medical records must be relied upon for the factual information in this case. Fact Ruling and Order, filed May 11, 2010. The undersigned rejected the testimony of the fact witnesses, emphasizing “that the parents are obviously caring and loving parents and in no way dissembled in their testimony. However, the information contained in the contemporaneous medical records was attributed to the mother or resulted from examinations from treating doctors. As the Federal Circuit has instructed the special masters, those contemporaneous accounts are normally more reliable indicators of the factual events.” Fact Ruling and Order, 1-2 (citing Cucuras v. Sec’y of the Dept. of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993)). The undersigned noted numerous instances where the facts presented in the medical records were at odds with the parents’ testimony, particularly regarding the developmental concerns prior to the vaccinations. These discrepancies between the parent’s testimony and the medical records were detailed. Id. at 2-3. The undersigned continued, stating, “prior to the vaccine, Zachary had a robust history of speech and language issues” and “the fact witnesses gave the undersigned no persuasive reason to discount the information contained in the contemporaneous medical records.” Id. at 2.

In light of “Dr. Cave’s expert report being premised upon information supplied by the parents, [without discussing] the medical records at all, that opinion is rejected as without a factual predicate.” Id. at 3. Petitioners were ordered to file a status report by June 10, 2010, informing the court as to how petitioners intended to proceed. On July 23, 2010, petitioners filed a Motion for Entry of a Ruling on the Record.² On July 30, 2010, respondent communicated to the undersigned’s office that no objection would be raised to this Motion.

A review of the record shows petitioners have failed to provide preponderant evidence that Zachary suffered an encephalopathy within the time set forth on the Vaccine Injury Table as a result of his December 5, 2006 vaccinations. 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.³

IT IS SO ORDERED.

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

² This Motion was filed as “Petitioners’ Request for Entry of Order on the Record.” On August 2, 2010, the undersigned’s office clarified with petitioners’ counsel that petitioners were requesting a decision on the record.

³ 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.