

OFFICE OF THE SPECIAL MASTERS
No. 90-1115V
(Filed on: June 26, 1998)

MILO E. DECKER and KARLA K. DECKER, *
Parents and Next Friends of DESTRY DECKER, *

Petitioners, *

TO BE PUBLISHED

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

Robert Moxley, Cheyenne, WY, for petitioners.

Karen P. Hewitt, Washington, DC, for respondent.

DECISION

MILLMAN, Special Master.

On September 20, 1990, petitioners, on behalf of Destry Decker (hereinafter "Destry"), filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986⁽¹⁾ (hereinafter the "Vaccine Act" or the "Act").

In October 1996 and June 1997, respondent provided massive evidence in an Omnibus TS hearing which culminated in an Omnibus TS Decision. Barnes et al. v. Secretary, HHS, 1997 WL 620115 (Fed. Cl. Spec. Mstr. Sept. 15, 1997).

Subsequent to this Decision, the undersigned issued an Order, dated September 22, 1997, requesting more evidence on Destry's post-DPT symptoms.

The court held a hearing in Minneapolis, MN, on April 15, 1998, during which Milo and Karla Decker, Destry's parents, testified.⁽²⁾

TESTIMONY

Milo E. Decker testified first for petitioners. Damien and Destry, who are now twenty-three years old, were born on July 8, 1974.⁽³⁾ Tr. at 15. Destry stopped breathing at birth and both children were in the incubator for a few days after birth. Tr. at 57-58. Mr. Decker stated that both boys, as babies, spit up after eating. Tr. at 61. In December 1974 record, the twins had a head cold but no fever. Tr. at 64.

On either December 18, 1974 or December 19, 1974, Mr. Decker took the twins to Putnam Clinic for their DPT vaccinations.⁽⁴⁾ Tr. at 19.

Prior to this vaccination, Damien and Destry were generally happy but they would occasionally get colic. Tr. at 21. Mr. Decker described Damien as being full of life before his third DPT. Tr. at 35. He was strong and could support himself. Id. After the DPT, however, he became a "zombie." Id.

During the evening of the vaccination, Damien screamed the entire night. Tr. at 22-23. His cry was not typical and he sounded as if he were in pain. Tr. at 23. Destry also cried but his cry was not the same as Damien's. Id.

The day after vaccination, Mrs. Decker's father, Carl Jacobson, told the Deckers that something was wrong with the children.⁽⁵⁾ Tr. at 22. Later that day, the children had an episode during which their eyes closed, their muscles tightened and curled, and their arms contracted. Tr. 22, 26. This episode lasted for a few seconds and happened to both boys simultaneously. Tr. at 22-23.

Mr. Decker saw the boys have two more episodes that day which also occurred simultaneously. Tr. at 27-28. These episodes continued throughout the weekend. Tr. at 29-30. Mr. Decker observed approximately twelve episodes over the weekend. Tr. at 75. Damien's spasms became longer and more frequent than Destry's. Tr. at 30. Destry's spasms never got worse. Id. To the best of Mr. Decker's knowledge, neither of the children had fever during the episodes. Id. When the spasms were over, the boys cried. Tr. at 71.

The following Monday, the Deckers took the children to a doctor in Chippewa Falls who diagnosed their episodes as temper tantrums. Tr. at 28-29. Mr. Decker thought the doctor was "nuts" to make this diagnosis. Tr. at 29.

The Deckers then took the twins to Putnam Clinic; however, Mr. Decker could not recall this visit. Tr. at 31.

In January 1975, Damien was hospitalized due to an episode during which his eyes rolled back and he stopped breathing. Tr. at 32. Mr. Decker thought Damien was dead. Id. Dr. Lepodivan, a pediatrician, diagnosed Damien as having epilepsy. Tr. at 33-34. He gave him anticonvulsants (Phenobarbital and Dilantin) for his grand mal seizures which were occurring almost every day. Id. Dr. Lepodivan often changed Damien's medications because his seizures were uncontrollable. Tr. at 34. Mrs. Decker asked to see a specialist and was referred to the Mayo Clinic. Id.

At the Mayo Clinic in March 1975, Dr. Gomez diagnosed Damien as having TS. Tr. at 34. He was put on ACTH. Tr. at 36. After his first injection of ACTH, his seizures stopped. Id.

Unlike Damien, Destry was neither seen by Dr. Lepodivan nor referred to the Mayo Clinic because his seizures had stopped, having lasted for approximately one to two weeks after their onset. Tr. at 32, 71. After the initial episodes, Destry's spasms never returned. Tr. at 38. In July 1975, Destry saw the doctor at which time he had a negative physical examination. Tr. at 77. However, he did experience subsequent episodes of limpness on his right side in August 1975. Tr. at 38. These episodes occurred around the time he received his MMR vaccination but they disappeared in about one week. Id. The Deckers brought these episodes to the attention of Dr. Gomez, who tested Destry and found that he also had TS. Tr. at 38-39.

Damien has not been medicated with anticonvulsants for twenty-three years. Tr. at 40. Since his first and only treatment with ACTH, he has been seizure-free.⁽⁶⁾ Tr. at 37. Destry has never been on anti-convulsants. Tr. at 40. The Deckers first made a connection between DPT and the seizures at the Mayo Clinic when Dr. Gomez inquired if the twins had received DPT. Tr. at 40. Dr. Gomez told the Deckers that the children could not receive DPT again. Tr. at 41.

By the time the children were one and one-half years old, their development seemed slow. Tr. at 42. They did not talk or walk on time and were held back for one year before starting school. Id. Both children began in special education classes. Id. All of Damien's schooling consisted of special education classes; however, Destry was mainstreamed into simplified classes. Tr. at 45. Damien and Destry both graduated from high school. Tr. at 84, 87-88. Destry continued on to a two-year technical college which he did not complete. Tr. at 87-88. Damien has elective mutism which began before he entered school. Tr. at 43-43. He generally stops talking to people when he is separated from the person for a period of time. Id. For instance, he stopped talking to Mr. Decker in April 1979, when Mr. Decker was separated from the family due to business. Tr. at 43. In 1983, Mr. Decker had heart surgery, requiring Mrs. Decker to be away from Damien. Id. During that time, Damien stopped speaking to his mother. Id. Currently, Damien will speak only to Destry. Id. Damien is submissive to Destry. Tr. at 49. His main source of communication is writing but he will talk to Destry very quickly in a whisper. Tr. at 44, 87.

Both Damien and Destry live with their parents as they are incapable of independent living.⁽⁷⁾ Tr. at 46. Damien has no concept of money. Id. He has no defensive mechanisms. Id. Destry has attempted living on his own but became introverted. Id. He also cannot manage money. Id.

Destry has been in the work force but he cannot keep a job. Id. He has worked in construction, at a grocery store, and at a printer. Tr. at 90-91. Presently, he works half-days at a factory through a protective workshop. Tr. at 47. Damien, however, is a busy young man. Id. From 8:30 a.m. to 10:30 a.m., he works at WalMart washing windows. Id. From 10:30 a.m. to 11:00 a.m., he works at various jobs through a protective workshop. Id. Damien works approximately thirty to thirty-five hours a week. Tr. at 85.

Damien is obsessed with helium balloons and vacuum cleaners. Id. He has his own helium tank to fill his balloons and he vacuums the house constantly. Tr. at 85, 87. Damien is known and liked by many people. Tr. at 86. He watches the weather channel and goes to the movies. Id.

Destry smoked marijuana four to five times and chews tobacco. Tr. at 49. He has a driver's license and his own car. Id. He lived with a girlfriend for about one year whom he planned to marry; however, she broke off the engagement. Tr. at 91-92. Destry enjoys playing the drums. Tr. at 94. He used to skateboard but does so no longer. Tr. at 96. He listens to music and helps around the house. Tr. at 97.

Destry was treated for depression for over two years. Tr. at 53. Currently, he is on an antidepressant and his depression is much improved from months ago. Tr. at 54, 95. Mr. Decker has been intermittently

treated for depression for the last sixteen years. Tr. at 54. He was medicated with Prozac and is currently taking Zoloft. Id. Mr. Decker has not seen a psychiatrist for the last ten to twelve years. Id. Mrs. Decker is on Zoloft as well. Tr. at 55. She has been depressed for over a year due to marital problems. Id.

Currently, neither Destry nor Damien receives any special medical care. Tr. at 83. Damien is not on any medications or receiving any therapies. Tr. at 84. Destry sees a psychiatrist once a month. Tr. at 88.

Destry's IQ is borderline and Damien's IQ is less than borderline. Tr. at 95. Dr. Gomez attributed the level of the IQs to their seizures. Id.

Mrs. Karla Decker testified next for petitioners. She stated that Destry had some problem breathing at birth. Tr. at 101.

Mrs. Decker took the twins for their first two DPT vaccinations. Tr. at 101. Mrs. Decker's baby books reflect that Damien received his third DPT on December 18, 1974 and that Destry received his third DPT on December 19, 1974. Tr. at 103. Mrs. Decker explained this inconsistency was an error. Tr. at 103-04.

The baby book reflects that, after the third DPT, Destry was grouchy for two days, and his leg was sore. Tr. at 105. Damien cried excessively and his vaccine site was a little warm and hard after the vaccination. Tr. at 106-07. She described his cry as being high-pitched, deafening, and animal-like. Id. Damien screamed the night after his DPT. Tr. at 107.

The day after the vaccination, Mrs. Decker's father noticed the twins draw up as if they were hit in the stomach. Tr. at 108. Mrs. Decker observed the same movement later that day. Id. At first, it was subtle. Tr. at 109. The boys drew forward and their arms went up for a brief period. Id. Their eyes were open during the episode. Tr. at 111. She thought it was colic. Tr. at 109. They cried when the episode was over. Tr. at 110.

When the twins initially seized, they did not seize simultaneously. Tr. at 174. In two to three weeks, Damien had twenty-five to thirty seizures per day while Destry had four to five per day. Tr. at 175-76. Both Damien and Destry slept when the seizures were over. Tr. at 177. Mrs. Decker did not take the children's temperature during the three days after DPT; however, she testified that the children did not have fever. Tr. at 178.

Mrs. Decker saw this movement again hours later that day. Tr. at 111. The episodes did not occur in rapid succession. Id. While Damien's episodes were uncontrollable, increasing to fifty per day, Destry's stopped within two weeks. Tr. at 111, 116. They went to a pediatrician in Chippewa Falls who diagnosed temper tantrums. Tr. at 112.

Dr. Lepodivan diagnosed epilepsy in Damien. Tr. at 115. Damien was then taken to the Mayo Clinic where he saw Drs. Mellinger and Gomez. Tr. at 116. Dr. Gomez told her that DPT triggered the seizures. Tr. at 118. While at the Mayo Clinic filling out a form, Mrs. Decker changed the date of Damien's vaccination from December 1974 to November 1974. Tr. at 147.

On July 11, 1975, Destry received an MMR vaccination. Tr. at 119. The day after this vaccination, one side of his body went limp and he fell to the ground. Id. This episode was different from the initial seizures the boys previously had experienced. Id. Although Mrs. Decker's baby book records that Destry's seizures began in August 1975, Mrs. Decker is convinced that his seizures began one day after vaccination in July. Tr. at 154-56. She recalls that these seizures lasted for three days and stopped

spontaneously. Tr. at 161. Destry never took anticonvulsants. Tr. at 120.

Prior to December 1974, Damien and Destry were normal and alert. Id. They spat up after feeding. Tr. at 121. Damien was more advanced and stronger than Destry. Id. After the onset of seizures, Damien stopped being alert and did not interact. Id. As Damien's seizures progressed, his condition worsened. Id. After his grand mal seizure, he was like a vegetable and just sat and stared. Id. Mrs. Decker did not notice a change in Destry's behavior after the third DPT. Tr. at 122.

Damien and Destry were in preschool until age four and then attended special education classes. Tr. at 121. Destry was mainstreamed and had special help. Id.

Mrs. Decker believes that both Destry and Damien are incapable of independent living. Tr. at 123. While Destry can cook for himself and dress himself, he has no concept of money. Id. Damien is selectively mute. Id. Thus, he needs to be watched for emergencies. Tr. at 124. Damien also has no concept of money and is incapable of cooking for himself. Id. While Destry's IQ is barely normal, Damien's IQ is below normal. Id. Dr. Gomez told the Deckers that the more seizures one has, the more damage that is done to the IQ. Id.

In Mrs. Decker's opinion, Destry's development during his first year of life was normal. Tr. at 138. However, she believes that something was wrong with Damien because he was not as alert as Destry. Id. Damien's development was different from Destry's in that he did not interact with others and he did not walk on his own until he was fifteen months old. Tr. at 143.

DISCUSSION

Although the date of Destry's third DPT vaccination is completely absent from the record, the court finds that both Damien and Destry Decker had their third DPT at the same time, and that the onset of their seizures was within Table time. There is no reason to believe that the Deckers would bring only one child for the third vaccination when the children had received the two prior vaccinations simultaneously. Although Mrs. Decker's memory may not be exact, particularly in describing the onset of seizures after Destry's MMR, the medical records and her baby book support petitioners' allegations. That she changed the date of Damien's vaccination from December 1974 to November 1974 while at the Mayo Clinic is insufficient to persuade the undersigned that the twins received their vaccinations in November rather than December, as reflected by the parents' testimony and the medical records.

Petitioners have prevailed in satisfying their burden of showing that Destry suffered on-Table onset of seizures. However, petitioners still need to submit medical evidence to assist the court in determining if the twins suffered more than afebrile seizures after receiving their third DPT.

CONCLUSION

The parties shall file their respective medical expert reports no later than August 7, 1998.

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. Destry's twin, Damien, was also the subject of this hearing. Decker v. Secretary, HHS, No. 90-1116V (to be published).

3. Mr. Decker has a daughter from a prior marriage who is in good health. Tr. at 16

4. Mr. Decker does not remember the first two DPT vaccinations. Tr. at 18.

5. Mr. Jacobson lived with the Deckers during this time. Tr. at 22.

6. There were, however, a few other times in Damien's youth when he would stare. Tr. at 39. He was not prescribed seizure medication for these episodes because they happened so seldomly. Id.

7. Subsequent testimony informed the court that Destry had lived in an apartment with his former fiancée, but she terminated the relationship when he lost his job.