

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-104V

Filed: June 20, 2012

DANIELLE MAGERFLEISCH, by her
mother, ADRIAN MAGERFLEISCH,

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Special Master Zane

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Petitioner,

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v.

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Ruling on the record; Hemophilus influenza
type b/Hepatitis B (Comvax), Diphtheria-
tetanus-acellular pertussis (DTaP), Inactive
poliovirus vaccine (IPV), Pneumococcal
conjugate vaccine (PCV); encephalopathy;
developmental delays.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

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Respondent.

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Michael G. McLaren, Black McLaren Jones Ryland & Griffee, Memphis, TN for Petitioner;
Claudia B. Gangi, United States Dep't of Justice, Washington, D.C., for Respondent.

UNPUBLISHED DECISION DISMISSING CASE*

On February 18, 2010, Petitioner, Adrian Magerfleisch, filed a petition on behalf of her daughter, Danielle Magerfleisch (“Danielle”), for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §300a-10, *et seq.*, as amended (“the Act”), alleging that Danielle suffered from a “table” encephalopathy, “developmental delays[,] and other injuries that have persisted for over six months” as a result of her receipt of the Comvax (Hepatitis B, Hemophilus influenzae type b), DTaP (diphtheria-tetanus-acellular pertussis), IPV (inactive

*Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document’s disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

poliovirus vaccine), and PCV (pneumococcal conjugate) vaccinations administered to her on February 26, 2008. Petition, ¶ 1. Petitioner alleged alternatively that Danielle suffered from an aggravation of her pre-existing injuries as a result of these vaccines. *Id.*, ¶ 4. For the reasons set forth below, the undersigned finds that Petitioner is not entitled to compensation and dismisses her case.

Petitioner filed incomplete medical records with her petition on February 18, 2010. All outstanding medical records were filed by March 15, 2011. On June 13, 2011, Respondent filed a report pursuant to Vaccine Rule 4(c). Respondent stated, *inter alia*, that Petitioner had not established a medically appropriate time frame between the onset of Danielle's "table" encephalopathy and her receipt of the DTaP vaccine, which is the only vaccine Danielle received on February 26, 2008, for which there is a corresponding Table Injury of encephalopathy. Respondent's ("Resp's") Rule 4 report at 10. Emergency department records submitted indicated that the onset of Danielle's symptoms on February 29, 2008 at 10:10 P.M. was more than 72 hours after her February 26, 2008 DTaP vaccine. See Petitioner's Exhibit 11 at 303. Respondent further stated that Petitioner failed to establish that the February 26, 2008 vaccines were the cause-in-fact of Danielle's developmental delay and other injuries due to "preponderant evidence in the record that the onset of Danielle's seizure disorder pre-dated her receipt of any vaccines, and particularly those she received on February 26, 2008." *Resp's Rule 4* at 11-12. Lastly, Respondent noted that Petitioner "has offered no medical theory or scientific evidence in support of her argument that Danielle's mitochondrial disorder Complex 1 deficiency, intractable non-lesional multifocal epilepsy, global development delay, and hypotonia were . . . significantly aggravated by the vaccines she received on February 26, 2008." *Id.* at 16. Respondent therefore concluded that compensation was not appropriate in this case.

Additional medical records were filed on November 3, 2011. Due to Petitioner's intention that Danielle undergo SCN1A genetic testing as ordered by her treating neurologist, the parties jointly requested suspension of expert report deadlines until such testing was complete; this motion was granted on November 4, 2011. Following the results of the testing which showed that Danielle did not have the SCN1A gene mutation, Petitioner filed a Motion for a Decision Dismissing the Petition due to her inability "to secure evidence to prove entitlement to compensation in the Vaccine Program." Petitioner's Motion for Decision, ¶ 2. As Petitioner intends to preserve her rights to file a civil action in the future, she has requested that the undersigned issue a decision dismissing her case. *Id.*, ¶¶ 5, 7. Respondent did not file a response.

Having considered Petitioner's motion, the undersigned hereby grants Petitioner's motion to dismiss the petition and enters this ruling based upon the entire record. Vaccine Rule 8(d).

To be awarded compensation under the Act, a petitioner must prove either: 1) that she suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of the vaccinations in question, or 2) that any of her medical problems were actually caused or significantly aggravated by the vaccine(s) at issue. *See* 42 U.S.C. §§ 300aa-13(a)(1)(A) and 300aa-11(c)(1). A petitioner may not be awarded compensation based on

petitioner's claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. 42 U.S.C. §§ 300aa-13(a)(1).

An examination of the record demonstrates that it does not contain medical records or a medical opinion sufficient to demonstrate that Danielle was injured by the subject vaccines. First, while Petitioner does allege that Danielle suffered the "Table Injury" of encephalopathy from the DTaP vaccination, the records submitted all indicate that Danielle suffered the first symptom or manifestation of the onset of an encephalopathy after the requisite 72 hours of vaccination. *See* Petitioner's Exhibit 11 at 303; 42 C.F.R. § 100.3(b)(2). As such, Petitioner has not established that the first symptoms occurred within 72 hours, a requisite to the establishment of a "Table Injury."

Second, with regard to establishing causation as to an injury not included in the Table, the medical records do not indicate that any of Danielle's treating physicians opined that her alleged injuries were caused or significantly aggravated by her vaccinations. *See generally* Petitioner's Exhibits 1-31. Moreover, Petitioner has not submitted an opinion of a medical expert and, by her filing of the motion for decision, has indicated that she will not be submitting a report of an expert. Because Petitioner has not submitted supporting medical records or a medical expert report, she has not provided materials necessary to prove the vaccine(s) caused her injury.

Accordingly, based on the record as a whole, Petitioner has failed to prove by a preponderance of evidence that Danielle suffered a "Table Injury" or that her conditions were "actually caused" or "significantly aggravated" by a vaccination. For these reasons and in accordance with 42 U.S.C. § 12(d)(3)(A), **Petitioner's claim for compensation is denied, and this case is dismissed for insufficient proof.** In the absence of a motion for review, the Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

/s/ Daria J. Zane
Daria J. Zane
Special Master