

must be denied.

FACTS

The following facts are claimed. Mylyndia Duncan was born on February 23, 1970. Her mother, Shirley Harper, alleges that her daughter was a healthy normal child prior to March 30, 1973. Early medical records of the first three years of Mylyndia's life are unavailable, but nothing appears in any surviving record that contradicts petitioner's allegation in this regard.

Mylyndia was three years and one month of age when, on March 30, 1973, she received an inoculation of measles vaccine and a diphtheria-tetanus (DT) booster.⁽¹⁾ Again, no contemporaneous medical records exist that document subsequent events. Mylyndia's mother alleges that within hours of her March 30, 1973 vaccination, her daughter developed fever which rose above 103 degrees F., that she was taken to the emergency room at Lankenau Hospital in Philadelphia, that she was observed there to demonstrate seizure activity, and that she was admitted to the hospital where she remained for approximately two weeks. She claims further that her daughter has had various types of seizures since that time, and that no other cause of her condition has ever been identified. Affidavit of Shirley Harper, Id., at Document #11. Attempts to verify these events have been unsuccessful. Although medical records of the alleged visit to Lankenau Hospital no longer exist, the hospital claims it has retained on microfiche all records of admissions and discharges for the months in question, and that they have no record that Mylyndia was ever admitted to the hospital in 1973 as claimed. "Declaration Under Penalty of Perjury of Correspondent Representative of the Medical Records Department of Lankenau Hospital," Respondent's Exhibit B, filed July 3, 1995.

The earliest available medical records, other than her birth records, are dated February 4, 1975, just 19 days before her fifth birthday. In that record, entitled "Pediatric Neurological Consultation," Dr. Zeller, a pediatric neurologist, reports the onset of seizure-like episodes "one year earlier," -- placing onset at approximately age four, nearly one year after vaccination -- for which Dilantin and Valium were prescribed.⁽²⁾ Dr. Zeller's history notes "no serious illnesses . . . [and] no known allergies." "Submission of Documents," filed March 1, 1991, at Document #4, pages 1-2.

Approximately eight months later, in October of 1975, Dr. Zeller diagnosed minimum brain damage of the right frontal lobe, visual motor perceptual problems, motor incoordination, and learning disabilities. The cause or onset of her condition was not otherwise addressed. He recommended special education. Id. Document #4, at unnumbered page 4 dated October 21, 1975. These documents, written within two years of vaccination, do little to support petitioner's claim of an onset of symptoms in close proximity to the vaccination.

STATUTORY SCHEME

Petitioners in vaccine cases may establish a claim by one of two methods. If a petitioner can demonstrate the onset of an injury listed in the Vaccine Injury Table (§14 of the Act), and demonstrate that the onset occurred within the prescribed Table time frame, petitioner is then entitled to a presumption of causation. Thereafter, if respondent is unable to rebut the statutory presumption by establishing that the injury, more likely than not, is due to a factor unrelated to the vaccine, petitioner may prevail. This method of proof is referred to as a "Table case."

If petitioners are unable to establish a Table case, they may pursue a second method which requires persuasive medical or scientific evidence that the injury was, in fact, caused by the vaccine. This is commonly referred to as "causation in fact." Petitioner must establish one or the other in order to receive

compensation. In a case, as here, involving a claim of encephalopathy following a measles vaccination, the Act prescribes that the onset must occur within fifteen days. In both methods of proof, however, the existence of the encephalopathy must be established by medical records or credible expert testimony. Petitioner has the burden of establishing also, by a preponderance of evidence, the factual basis on which the expert testimony relies.

DISCUSSION

Because medical records are missing that might corroborate the testimony of the fact witness, and because medical records that do exist, in fact, contradict petitioner's claim, the evidence falls short of the preponderance standard necessary to establish onset of symptoms within the Table time frame. The fact that the hospital has no record of a March or April admission, of course, does not establish conclusively that events could not have occurred as Mrs. Harper insists. Memories can become faulty, however, due to the lapse of years, and the proof here is legally insufficient for a favorable finding on the basis of a Table case.

Failure to establish relevant facts is only one problem in this case. Petitioner has failed also to provide adequate expert opinion. For this reason, she is unable to establish causation in fact. In order to prevail, a petitioner must provide supporting opinion from a medical expert qualified to make such statement, and the opinion statement must be accompanied by an explanation of the basis on which the expert's conclusions are made. Petitioner relies upon the statements of three medical experts. Not one of the three, nor a combination of them all, meets the standard required to establish a prima facie case.

The first expert statement consists of a letter dated October 30, 1984 written by Dr. R.L. Edwards. Dr. Edwards' statement is presented in its entirety:

Re: Mylyndia B. Harper

To Whom It May Concern,

This patient has history of acute allergic reaction to immunizations during early childhood. Further immunizations would be risky and are contra-indicated.

Id. at Document #8.

No information is provided as to Dr. Edward's expertise, the intended purpose of his letter, or the basis for his conclusion.

The second is a letter dated July 23, 1991 from Dr. Jerry B. Stringfellow:

Ms. Harper's seizures started following marked hyperthermia secondary to a measles [sic] injection at a very early age. It has been determined previously and I concur that this young lady does indeed suffer from measles [sic] encephalopathy secondary to measles [sic] injection. And unfortunately, she has complex seizures as a result of that. At present, her seizures are better controlled on her present change of treatment regimen, however, she will have seizures for life and is handicapped as a result of this.

Petitioner's filing of August 27, 1991, Letter of Dr. Stringfellow dated July 23, 1991.

Dr. Stringfellow does not identify his expertise or the basis for his opinion. He first saw Mylyndia in 1991 when petitioner was age 21. First hand knowledge of onset of symptoms or their cause is not

claimed and his medical opinion appears to be based on either prior recorded histories, not now available, or oral information provided by Mylyndia herself. In either event, he first saw petitioner after petitioner's claim was filed. He does not explain his reasoning, and the court, therefore, cannot adequately evaluate its reliability.⁽³⁾

The third and final letter, identified as "Written Report From Dr. Mike E. Clevenger Dated January 26, 1996 Received By Petitioner's Attorney on February 1, 1996, and filed on March 12, 1996," states in relevant part:

I have seen Ms. Duncan on only one occasion, in my office, on September 22, 1995 Unfortunately, Mylyndia was somewhat sketchy regarding details surrounding this vaccination and her subsequent clinical course. . . . From her notes that I have received, including an affidavit from her mother, signed on February 28, 1991 . . . soon after [vaccination] she began to run a fever, and was taken to an emergency room . . . [where] she apparently had some seizures. . . . Two years later, the patient was diagnosed [by Dr. Zeller] as having minimal brain damage . . . I cannot be certain from the affidavit of Ms. Harper, that a definite cause and effect relationship was established by Dr. Zeller between the vaccination and her minimal brain damage. . . . [S]he apparently did suffer spells as a young child, with these spells beginning in early 1975. . . . Her neurologic examination in my office was essentially unremarkable. From her previous records, it can be seen that the [patient] has borderline motor and verbal IQ results. In conclusion, . . . it does appear that Mylyndia did experience an acute febrile reaction shortly after her measles vaccination in 1973. It also appears that she developed seizures requiring hospitalization shortly after this vaccination. I think that it is likely that she may have experienced seizures as a young child, although these spells consisted of many behavioral symptoms and an absolute seizure diagnosis cannot be made by me, this far removed from the occurrence of these events. . . . I would consider it possible that many of these problems she experienced as a child could be attributed to a measles [sic] vaccination encephalopathy.

Id.

On March 19, 1996, the court informed petitioner that petitioner's expert opinions are legally insufficient to sustain her allegations of a vaccine-related injury. First, Dr. Clevenger's conclusion is based on recollections by parties in interest of facts unsupported by corroborating evidence and which the court finds unreliable. The court directed petitioner's attention to the Order of November 1, 1991 in this case clarifying the criteria for an expert opinion including the need for the expert to address the factual and medical basis for the doctor's opinion. Those criteria state further that affidavits that merely draw a conclusion, as here, are not legally sufficient. Second, petitioner's expert statements do not explain the reasoning or relevant symptomatology on which their conclusions are predicated. The court notes further that Dr. Clevenger is unwilling to state his opinion to a reasonable degree of "medical probability" but as "a possibility" only, a standard that cannot support a finding of a preponderance of evidence.

The court provided additional time for petitioner to supplement her expert opinion evidence. Petitioner thereafter informed the court that no expert was willing to supply any additional support. Whereupon the court informed the parties that a decision on the merits would be issued based on the record as it stands.

Some vaccine-related claims fail because supporting documentation no longer exists. At times, in such cases, the eyewitness accounts are clear, consistent, and convincing to a degree that can overcome missing or scanty supporting documentation. That is not true in this case. The eyewitness account here is contradicted directly. That failure affects also the reliability of the expert opinion based as it is on eyewitness recollections. The court is persuaded that the record as it now stands is sufficient to permit the special master to reach a fair, reasoned, and informed decision and that an evidentiary hearing would

not affect the outcome of this case. The special master has such authority. See e.g. Murphy v. Secretary of HHS, No. 90-882V (Order April 19, 1991) aff'd, 23 Cl. Ct. 726, 730 (August 9, 1991) aff'd. per curiam, 968 F.2d 1226 (Fed. Cir. 1992); reh. cert den. 113 S. Ct. 463 (1992). The court has taken the liberty of presenting in detail all relevant portions of the evidence in the event that petitioner chooses to seek review.

One additional piece of evidence is relevant to the court's decision and will be addressed. Even if the court were to accept all of petitioner's factual claims, respondent presents rebuttal evidence that makes a vaccine-related injury highly questionable. Respondent's expert, Dr. Robert E. Weibel, explains in his report:

The lack of corroborative medical evidence notwithstanding, the onset of febrile seizures within one day of a live measles vaccination does not support a diagnosis of an adverse reaction to that vaccine. Fever associated with a live measles vaccine virus infection occurs after an incubation period of five (5) to twelve (12) days. This opinion is supported by current literature and by the consensus of my peers and colleagues in the field of vaccine research. . . . Based on the foregoing facts, it is my opinion, to a reasonable degree of medical certainty, that there is no medical evidence or literature that would establish a causal link between Mylyndia's current condition and the measles vaccine administered to her on March 30, 1973.

Respondent's Exhibit C, Affidavit of Dr. Robert E. Weibel, M.D., filed July 23, 1996. Attached to Dr. Weibel's statement are three vaccine case decisions on which respondent relies in support of its position that an adverse reaction within the time frame claimed in this case is highly unlikely to be related to measles vaccine: Saia v. Secretary of HHS, No. 90-2556V (Fed. Cl. Spec. Mstr. March 27, 1992) aff'd by unpublished opinion, July 24, 1992; Silva v. Secretary of HHS, No. 90-1098V (Ct. Fed. Cl. Spec. Mstr., May 22, 1992; and Hines v. Secretary of HHS, No. 89-90V (Cl. Ct. Spec. Mstr. June 22, 1990), aff'd, 21 Cl. Ct. 634 (1990), aff'd 940 F.2d 1518 (July 31, 1991). Dr. Weibel's opinion is consistent with evidence presented before this court in other cases with similar facts. Under the circumstances, Dr. Weibel's opinion is considerably more persuasive than those presented by petitioner's experts.

CONCLUSION

For the foregoing reasons, the court concludes that petitioner is not entitled to compensation. A preponderance of evidence supports a finding that petitioner's condition, more likely than not, is unrelated to the vaccine. Petitioner's claim, therefore, is denied.⁽⁴⁾ Absent a motion for review filed pursuant to RCFC Appendix J, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

E. LaVon French

Special Master

1. This information is recorded in an "Inoculation Certificate" dated August 18, 1975 and signed by John

H. A. Bomberger, M.D. The document was filed as "Document #2" on March 1, 1991 with several other documents.

2. Dr. Zeller states: "This is a 4 year old left handed female who began having episodes about one year prior to my seeing her." This medical history was recorded on Mylyndia's first visit to Dr. Zeller.

3. Available histories are imprecise. Some oral histories recorded after 1991 report that she has had seizures since age two.

4. The court finds that this case was filed in good faith and that a reasonable basis existed for the claim. Petitioner, therefore, is entitled to reasonable attorney's fees and costs which will be the subject of a separate decision. Petitioner is directed to submit an application for fees and costs pursuant to Vaccine Rule 13.