

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: September 20, 2007)

DO NOT PUBLISH

IRENE PREMPEH,	)
as natural mother and guardian ad litem of her son,	)
DUKE DARKWAH,	)
	)
Petitioner,	)
	)
v.	)
	)
SECRETARY OF	)
HEALTH AND HUMAN SERVICES,	)
	)
Respondent.	)

No. 07-0108V  
Decision on the Record;  
Dismissal

DECISION<sup>1</sup>

Petitioner, Irene Prempeh (Ms. Prempeh), as guardian ad litem of her son, Duke Darkwah (Duke), seeks compensation under the National Vaccine Injury Compensation Program (Program).<sup>2</sup> Ms. Prempeh maintains that Duke “sustained an encephalopathy,” or a significant “aggravation of pre-existing neurological problems,” following the administration of “DTAP, Polio, HIB, Hepatitis B, and Pneumococcol [sic]” vaccines on March 4, 2004, and on May 10, 2004. Petition (Pet.) ¶¶ 7-8. Ms. Prempeh asserts that Duke’s vaccinations “caused in fact” Duke’s injury. Pet. at 1.

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<sup>1</sup> 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.*

<sup>2</sup> The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

## FACTUAL/PROCEDURAL BACKGROUND

Duke was born on January 4, 2003, at University Hospital in Newark, New Jersey. *See* Petitioner's exhibit (Pet. ex.) 2 at 153-55. On March 4, 2004, Duke presented to his treating pediatrician, Tokunbo T. Dada, M.D. (Dr. Dada), for a routine evaluation and "shots [sic]." Pet. ex. 15 at 4. Although he exhibited "seborrheic dermatitis," Duke appeared well. *Id.* Duke received a diphtheria-tetanus-acellular pertussis (DTaP) vaccination, inactivated polio vaccine (IPV), a Haemophilus influenzae type-b (Hib) vaccination, a Hepatitis B vaccination and a pneumococcal conjugate (Prevnar) vaccination. *See id.* Duke's medical records that are contemporaneous with Duke's March 4, 2004 vaccinations do not reflect that Duke suffered any adverse reaction to his March 4, 2004 vaccinations.

On May 10, 2004, Duke presented to Dr. Dada for a routine evaluation and for "shots." Pet. ex. 15 at 5. Dr. Dada assessed "delayed develop[ment]." *Id.*<sup>3</sup> Indeed, Dr. Dada referred Duke for a "neuro[logical]" evaluation. *Id.*; *see also* Pet. ex. 9 at 65, 99, 106. Nevertheless, Dr. Dada, or a member of Dr. Dada's staff, administered DTaP vaccine, IPV, Hib vaccine, Hepatitis B vaccine and Prevnar vaccine to Duke. *See* Pet. ex. 15 at 3.

Between midnight and 7:00 a.m., on May 11, 2004, Duke experienced two seizures. *See* Pet. ex. 9 at 99, 105. He presented to the Newark Beth Israel Medical Center Emergency Department "for further management." Pet. ex. 9 at 105. As part of the investigation of Duke's seizures, Mark Rosovsky, M.D. (Dr. Rosovsky), performed a magnetic resonance imaging (MRI) of Duke's brain on May 12, 2004. Pet. ex. 9 at 145. The MRI revealed "findings" that were "consistent with incomplete classical lissencephaly."<sup>4</sup> *Id.*; *see also* Pet. ex. 9 at 65. During Duke's hospitalization, consultants in genetics and in neurology considered the relationship between Duke's lissencephaly, Duke's seizures and Duke's vaccinations. *See, e.g.,* Pet. ex. 9 at 65. The consultants described lissencephaly as a "congenital C[entral]N[ervous]S[ystem] abnormality," occurring "very early in pregnancy," which portends a "high likelihood of seizures and developmental delay." Pet. ex. 9 at 65. The consultants did "not believe" that Duke's lissencephaly, Duke's developmental delay and Duke's seizures "had anything to do with immunization." *Id.*

Ms. Prempeh filed a Program petition on February 15, 2007. The special master reviewed thoroughly the petition. He determined that the petition presented particularly complex medical issues. Therefore, he directed Ms. Prempeh to pursue promptly a medical expert to assist in the

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<sup>3</sup> Dr. Dada had noted possible developmental delay during two previous examinations. *See* Pet. ex. 15 at 4 (3/26/04: "some head lag"); 5 (4/29/04: "? developmental delay").

<sup>4</sup> Lissencephaly is "agyria." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1059 (30th ed. 2003). Agyria is "a malformation in which the convolutions of the cerebral cortex are not fully formed, so that the brain surface is smooth." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 41 (30th ed. 2003).

expeditious development of the case. *See, e.g., Prempeh v. Secretary of HHS*, No. 07-0108V, Order of the Special Master (Fed. Cl. Spec. Mstr. Mar. 16, 2007).

At the outset, Ms. Prempeh consulted informally a geneticist. *See, e.g., Motion for Judgment on the Record* (Motion), filed September 19, 2007, ¶ 5. Then, Ms. Prempeh retained Marcel Kinsbourne, M.D. (Dr. Kinsbourne). *See Status Report*, filed June 4, 2007; *see also Motion*, ¶ 2. A frequent witness for petitioners in Program cases, Dr. Kinsbourne professes expertise in pediatric neurology. On August 20, 2007, Ms. Prempeh informed the special master that Dr. Kinsbourne “is unable to support this case.” *Status Report*, filed August 20, 2007, at 1. Ms. Prempeh seeks now judgment on the record. *See generally Motion*.

### DISCUSSION

Congress prohibited special masters from awarding compensation “based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” § 300aa-13(a). Numerous cases construe § 300aa-13(a). The cases reason uniformly that “special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone.” *Raley v. Secretary of HHS*, No. 91-0732V, 1998 WL 681467, at \*9 (Fed. Cl. Spec. Mstr. Aug. 31, 1998); *see also Camery v. Secretary of HHS*, 42 Fed. Cl. 381, 389 (1998).

The special master has canvassed thoroughly the record as a whole. He determines that Duke’s medical records alone do not establish more likely than not that Duke suffered a vaccine-related injury. And, as Ms. Prempeh concedes, the special master determines that Ms. Prempeh has not adduced a reliable medical opinion demonstrating that Duke suffered a vaccine-related injury. *See, e.g., Status Report*, filed August 20, 2007, at 1; *Motion*, ¶ 5. Thus, in *granting* Ms. Prempeh’s Motion, the special master is constrained to conclude that Ms. Prempeh is not entitled to Program compensation.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Ms. Prempeh’s copy of this decision to Ms. Prempeh by overnight express delivery.

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John F. Edwards  
Special Master