

OFFICE OF SPECIAL MASTERS

No. 98-2808V

(Filed: June 30, 1998)

\*\*\*\*\*

**CECILIA and HOWARD I. BLUTSTEIN**

\*

**as legal Representatives of**

\*

**EMILIA BLUTSTEIN,**

\*

\*

Petitioners,

\*

**PUBLISHED**

v.

\*

\*

SECRETARY OF HEALTH AND

\*

HUMAN SERVICES,

\*

\*

Respondent.

\*

\*\*\*\*\*

Andrew R. Gordon, Alexandria, Virginia for Petitioners.

Eleanor A. Barry, U.S. Department of Justice, Washington, D.C., for Respondent.

**French**, Special Master.

**DECISION**

This matter arises under 42 U.S.C. §§ 300aa-1 to 16 (1996), the National Vaccine Injury Compensation Act. On October 1, 1990, Petitioners filed their claim alleging that as the result of a Diphtheria-Pertussis-Tetanus (DPT) vaccination, administered on an uncertain date during the month of July, 1964, their daughter, Emilia Blutstein (hereinafter Emilia), sustained a vaccine-related injury with permanent neurological deficits. In preparation for trial, Petitioners probed their recollections, and by reconstructing events, they now believe that the vaccine was administered on July 20, 1964 and that the first seizure occurred on the third or fourth day following.

Respondent defends by arguing that the medical records do not provide a reliable date of vaccination and that Petitioners are unable to establish a temporal relationship between vaccination and the onset of symptoms. Because the factual predicate for their claim is not documented as required by § 11 (c) (1), nor proved by external evidence, Respondent argues, this case cannot proceed

further.

Regretfully, the Court concurs with Respondent's view of the evidence in this case. For reasons that will be addressed hereafter, the Court finds that Petitioners have been unable to establish, by the requisite standard of proof, the alleged date of vaccination.

## PROCEDURAL BACKGROUND

This case is a pre-Act case filed hurriedly to meet the statutory deadline for filing. It was impossible, as in many such cases, to assemble a complete set of medical records by the filing date. Many extensions of time were sought and granted to give Petitioners an opportunity to cure inconsistencies and gaps in the evidence. Petitioners' burden was particularly difficult in this case because Emilia's pediatrician had died and his records destroyed. Vital documentary information about early pediatric care, including date of vaccination, therefore, was irretrievable.

In due order, on September 13, 1994, this case was assigned to a special master. Petitioners filed status reports every 60 days to document progress in their records search. On March 18, 1997, the special master determined that no further records were likely to be located and ordered a hearing. On April 25, 1997, the case was reassigned to the undersigned special master, and on July 1, 1997, a hearing was held in Washington, D.C. The hearing was confined to factual issues only. Petitioners, Cecilia Blutstein and Howard I. Blutstein, were the sole witnesses.

## STATUTORY REQUIREMENTS

Petitioners may establish their claim under the Vaccine Act in one of two ways. Petitioners may demonstrate that the first symptom or manifestation of onset of an injury listed in the Vaccine Injury Table (§ 14 of the Act) occurred within a prescribed time frame; in DPT cases, that time frame is 72 hours. If successful, Petitioners then enjoy a statutory presumption that the injury was caused by the vaccine. This method is referred to as a "Table case." Respondent may rebut Petitioners' claim by proving that the injury was caused by a factor unrelated to the vaccine.

If Petitioners are unable to establish a Table case, their claim may be established by proving that the injury "in fact" was caused by the vaccine. This method is referred to as "actual causation" or "causation-in-fact." Petitioners in this case are pursuing their claim as a Table case, but in the alternative, if the court should determine that onset occurred outside the 72-hour Table time frame, they believe that the vaccine in fact caused Emilia's seizure disorder.

## FACTS CLAIMED

Emilia Blutstein was born on March 2, 1964. Birth records confirm that she was the normal product of an uneventful pregnancy and birth. Early pediatric records were destroyed when her pediatrician, Dr. Harold Hobart died, and records maintained by the family were also destroyed by a fire in the family home. With the exception of two surviving documents, to be discussed hereafter, the oral testimony of Emilia's parents constitutes the only evidence as to her condition during the first five months of life.

According to her parents, Emilia was seen for well-baby examinations by Dr. Hobart, and during her first five months, no problems of note were apparent. Transcript of proceedings of July 1, 1997 (hereinafter Tr.) at 17. Mrs. Blutstein believes that Dr. Hobart administered a DPT vaccination and oral polio vaccine during an office visit on July 20, 1964. Tr. at 18.

Mrs. Blutstein recalls that when they left the doctor's office, Emilia was "fine," but later "she was kind of bluish," followed by unusual, inconsolable, and very loud crying that lasted for several hours. Tr. at 20. At some time during the next week, her mother saw Emilia's head lean involuntarily to the left, she was rigid, her eyes rolled up in her head, and she was unable to swallow. Tr. at 23. Mrs. Blutstein called Dr. Hobart who suggested that perhaps Emilia needed water as July was a very hot month. A second

incident, similar to the first, occurred on a weekend while attending a picnic at a lake. This episode lasted longer, so the next day, her parents brought Emilia to see Dr. Hobart. It was during that office visit, according to her parents, that Emilia suffered a seizure of 30 minutes duration. She was given phenobarbital, and admitted to Sibley Hospital where she remained for several days. The admission record for that day, July 27, 1964, states:

Acutely ill infant seen this [a.m.] in convulsion which was predominately on the left side afebrile[,] well since birth until onset of convulsions today. . . . This acute [sic] ill afebrile infant was admitted following a convulsion which occurred about 11:30 this am today lasting about ½ hours.

Petitioners' Exhibit (hereinafter P. Ex.) 7 at 745,749.

The admission history does not mention a prior DPT shot or a prior convulsion claimed to have occurred a few days earlier. One month later, Emilia was hospitalized for another major seizure "of undetermined etiology." P. Ex.7 at 743. Medical records thereafter confirm that Emilia clearly demonstrated the presence of an intractable convulsive disorder that never resolved. She has been hospitalized on several occasions for severe episodes of status epilepticus and is presently diagnosed as having severe psychomotor retardation. For several years, she has been a resident at the Institute for Behavioral Research, where she is apparently contented and happy.

#### DISCUSSION

The Court is authorized by § 13 (b) of the Act to find onset of an injury within the Table time frame even though the first occurrence of such symptom or manifestation was not recorded or was incorrectly recorded as having occurred outside such period. § 13(b)(2). Such a finding may be made only upon demonstration that the onset did in fact occur within the time period.

No documented evidence of a DPT shot exists that can be relied upon to support a temporal relationship between onset of symptoms and a DPT vaccination--that is, not before 1991. Beginning in 1991, after Petitioners filed their claim under the Vaccine Act, histories given to school authorities and other records state that Emilia's problems began three days or four days after receiving DPT shots although the reviewer to whom these facts were given adds the notation: "clinical records do not validate this information." See P. Ex. 15 at 4151 and P. Ex. 16 at 2005, 2006, 2034, 2037. These belated histories relating to onset of symptoms can be given limited weight because the historian, Mrs. Blutstein, is a party in interest. Prior to 1991 there is no record of a reaction to a DPT shot nor any records that there even was a DPT shot given.

After searching their recollections of events, Mr. and Mrs. Blutstein believe that the DPT was given on July 20, 1964; Petitioners rely on a hand-written billing statement for services rendered on July 20, 1964, and for a polio shot administered during an office visit on that date. Based on their belief that DPT shots were given the same time as the polio vaccine, Petitioners believe July 20, 1964 to be the date of DPT vaccination. In counting back from the major seizure of July 27, 1964, Mrs. Blutstein believes the two seizure-like events occurred either three or four days after vaccination and that the seizure disorder became full-blown with the onset of status epilepticus on the 27th day of July, 1964. Curiously, the billing statement creates, instead, a presumption against Petitioners' claim. No mention is made of a DPT shot on that date although Mrs. Blutstein insists that one was given.

The discovery of an Immunization Record, a document that surprisingly survived a fire, should have settled the question, but, unfortunately it does not in this case. The surviving document was not claimed to be an original, but was prepared by Mrs. Blutstein from memory some six years, possibly as many as

ten years after the fact, at a time when the family applied for Group Health benefits. Mrs. Blutstein acknowledges that the dates recorded for shots were estimations only and cannot be relied upon. For example, recorded dates for DPT shots on June 4, July 2, and August 6, 1965 are clearly inaccurate because the family was on foreign service detail in Madrid, Spain during the entire summer of 1965.

One documented record, recorded on October 18, 1970, seems to refer to the seizure described by Mrs. Blutstein as occurring on a hot day while the family was at a lake:

Then at age three months [Emilia] began to have her first sign of epilepsy. While on a picnic on a hot day, she had a tonic seizure with hard swallowing and head and eyes deviation to the [right]. This lasted about 10 minutes. Was begun on phenobarbital at that time. Her first grand mal seizure was on 7/27/64 at the age of six months.

P. Ex. 6 at 568. Emilia was three months old in June. This notation supports the existence of an early seizure event but fails to place it in temporal association with July 20, 1964, or any other DPT shot.

Many discrepancies appear in medical records as to onset of seizures. For example, onset is variously placed at: "three days" (P. Ex. 16 at 2236); "three months" (P. Ex.6 at 572, 598-599; P. Ex. 4 at 155; P. Ex. 7 at 638); "five months" (P. Ex. 7 at 564, 579-580, P. Ex. 4 at 83); "six months" (P. Ex. 20 at 25); and "eleven months" (P. Ex. 6 at 555).

Many explanations for these discrepancies exist. First, the Blutsteins had no reason to be precise in describing the onset of symptoms when giving medical histories. Their major concerns were undoubtedly the identification of the problem and getting it fixed. Second, little was known about DPT reactions in 1964, and it is not surprising that doctors did not consider a DPT reaction as a possible etiology for Emilia's disorder. One may speculate that perhaps a prior DPT shot is not mentioned because no doctor asked the right questions or the doctors dismissed the answers as irrelevant. Third, facts are not always recorded accurately as discussed earlier. Fourth, Petitioners may not have recognized the ominous nature of the early seizure-like incidents and failed to discuss them. Fifth, Mr. Blutstein was a foreign service officer with overseas assignments and trips to Spain and Mexico; continuity of family records was disrupted. Mrs. Blutstein admits some of those records were lost or misplaced during moves: "Whenever we traveled, we had to pack things and things got lost on the traveling with the State Department and I didn't have all my records, no." Tr. at 52.

Mrs. Blutstein admits also that she was "very bad with dates." Tr. at 16.

The Court must admit that Petitioners' belief in their claimed scenario of events may possibly be accurate. The Court, however, cannot yield to sympathy or speculation and is held to a legal standard of proof not demonstrated in this case for reasons largely beyond Petitioners' control. This Court does not suggest that Petitioners are manufacturing evidence or deliberately misstating facts. Both fact witnesses were entirely honest, forthright, and have labored diligently to reconstruct events occurring many years ago. But recollections are fallible and the reliability of memory is almost always suspect. As an example, when recalling estimated dates to be recorded on the "estimated" Immunization Record, many years closer to actual events, every entry provided for polio vaccinations was on a date differing from those for DPT vaccinations, although Mrs. Blutstein now recalls that polio vaccinations and DPT shots were invariably given on the same day.

Persuasive evidence is required to overcome the weight of medical records prepared for the purposes of diagnosis and treatment. When medical records are silent, internally inconsistent, or inconsistent with oral testimony, external evidence is required to meet the preponderance of evidence standard. In some

instances, eyewitness testimony qualifies. But eyewitnesses who have an interest in the outcome have an additional burden, and close scrutiny must be applied. This Court requires such testimony to be consistent, clear, cogent, and compelling. Unless recollections meet that standard, oral testimony alone does not present a firm legal basis for proving a material fact nor a basis for awarding compensation. The court cannot credit the reliability of recall in this case, given the inconsistencies between the oral testimony and the documented records, which records also rely on Petitioners' recollections.

### CONCLUSIONS

Petitioners have not established facts required by § 11 (c) that would permit this case to proceed. Without a reliable temporal basis, neither a Table-case nor causation-in-fact case can succeed. For the reasons stated heretofore, the Court concludes that this case must be dismissed. The Court finds, however, that Petitioners' claim had a reasonable basis and was filed in good faith. Petitioners, therefore, are entitled to reasonable attorneys' fees as provided for by law. Counsel for Petitioners may file an application for attorneys' fees pursuant to § 15 (e) and Vaccine Rule 13.

**IT IS SO ORDERED.**

E. LaVon French

Special Master