

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 90-3944V
Filed: March 28, 1997

* * * * *
*
LARRY and DEBORAH LEVY, as *
Legal Guardians and Next Friends of *
STERLING LEVY, a minor, *
*
 Petitioners, *
*
v. *
*
SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES *
*
 Respondent. *
* * * * *

UNPUBLISHED

H. Baker Kurrus, Little Rock, Arkansas, for petitioners.

Claudia Barnes, Department of Justice, Washington, D.C., for respondent.

DECISION ON ENTITLEMENT

Petitioners filed a Petition for compensation alleging that their son, Sterling, suffered disabilities as a result of DPT vaccine administered on June 26, 1987. More specifically, petitioners allege that within 72 hours after receiving his vaccine, Sterling “suffered the first symptoms and manifestations of onset of residual seizure disorder and encephalopathy.” Petition at 2. Respondent contested petitioners’ claims arguing primarily that the medical records do not support petitioners’ allegations. Respondent’s Report filed August 14, 1995.

To resolve the factual and medical issues presented in this case, the court conducted an evidentiary hearing on September 24, 1996, in Little Rock, Arkansas. Thereafter, the parties filed post-hearing arguments; petitioners filed on November 21, 1996, and respondent filed on November

In resolving the factual questions in this case, it is clear to the court that Sterling “reacted” to the vaccination. However, reactions are quite common. See Longitudinal Study of Adverse Reactions Following Diphtheria-Tetanus-Pertussis Vaccine in Infancy, Long, Pediatrics, Vol. 85 No. 3, march, 1990; nature and Rates of Adverse Reactions Associated with DTP and DT Immunizations in Infants and Children, Cody and Baraff, Pediatrics Vol. 68 No. 5, November 198 1; see also Tr. at 175-76, 202. The problem presented in this case, and presented in numerous cases filed under this Program, is the severity of the symptoms, were they symptoms of a “normal” reaction or did the symptoms manifest a Table injury. Confronted with a similar situation, Judge Andewelt stated in pertinent part that:

But petitioner simply places too much weight on the individual symptoms that Shanelle exhibited, such as lethargy, during the post-vaccine period. Proof that Shanelle experienced certain symptoms that are commonly experienced by patients who suffer from an HHC does not necessarily mean that Shanelle experienced an HHC. Particular medical symptoms frequently can indicate a variety of medical conditions.

Raspberry v. Secretary of DHHS, 33 Fed. Cl. 420, 422-23 (1995). It follows that to determine a correct diagnosis from a set of symptoms requires clear, specific descriptions of those symptoms. Therein lies the problem in this case. Not only are descriptions absent from the contemporaneous medical records, gaps that Dr. Bomhofen **freely** admitted troubled him, but petitioners’ effort to fill those gaps vague, contradictory and ultimately unpersuasive.

First and foremost is the fact that the medical records do not support petitioners’ contentions. Beginning with Dr. Stone’s examination on July 11, while **the** head bobbing is noted, there is no mention of an extremely fussy , crying child. There is also no indication of the parents complaining of a distressed or abnormally behaving child. In fact, the notations indicate that Sterling was seen as normal at that visit. Pet, Ex. 5 at 1. The doctor’s notations of normalcy stand in stark contrast to the father’s description of Sterling on this date as “limp like a noodle,” Tr. At 20, or a “jelly type child.” Tr. at 47-48.

The next history of note was taken by Dr. Hoffman, a developmental Pediatrician, on September 30, 1987. The history was provided by the mother. Pet. Vol I, Ex. 8 at 2; Tr. at 116.

but clear on this point. She first stated that her conversation with Ms. Levy took place after the doctor's visit, thus making it impossible to gauge the temporal relationship with the vaccination. Tr. at 126. On cross-examination, she stated that Ms. Levy indicated that she would "check with her physician," meaning that the doctor's visit had not yet taken place. Tr. at 133. This inconsistency was brought to her attention immediately, to which she replied "I'm not real clear on that." Id.; see also Tr. at 136-37. Contrary to petitioners' arguments, Ms. Lawrence's unreliable observations about the timing of the head bobbing provide no substantiation for petitioners' allegations since it is unclear when the observations took place.

In the final analysis, the court found little reason to give the parents' testimony any weight. Their testimony conflicted with the medical records (Sterling was "limp like a noodle", Tr. At 20, whereas Dr. Stone found him to be normal, Tr. At 20-21; Pet. Ex. 5 at 1), conflicted with their own affidavits, conflicted with the testimony and affidavits of the day care personnel, was uncertain (on numerous occasions testimony was changed on cross-examination or re-direct) and was unreliable.

There were numerous uncertainties and contradictions in the parents' testimony that rendered it unreliable. For example, on the critical factual issue of the severity of Sterling's "fussiness," Ms. Levy testified that "[i]t was continuous. The fussiness just got worse and worse." Tr. At 70. However, in response to the court's questions concerning how such a fussy child could be placed in a day care, Ms. Levy stated first that the "fussiness subsided somewhat" over the two week period prior to the first doctor's visit and second that if he had been crying constantly the day care would have contacted her. Tr. At 110. No such contact was made. Another example is where Ms. Levy stated that Sterling could be consoled during the 72 hour period or otherwise they would have taken Sterling to the doctor. Tr. At 106. A mere three pages later, in response to the court, Ms. Levy stated that she "couldn't get him to calm down," Tr. At 109.

While some may find the court to be overly picky in its review of the testimony, it must be borne in mind that causation requires a finding of onset within a narrow window of time. In addition, a number of years have passed since the events in question took place.. Added to this mix are the facts that the allegations were not reported or recorded by medical professionals, that Sterling was well enough to be placed in the day care and to be taken on a trip to Memphis, and that the day care providers did not recall or report this sick child. Thus, as case law has logically pointed out, a