

OFFICE OF SPECIAL MASTERS

No. 91-178V

(Filed: February 15, 2000)

AARON GANCZ and BAILA GANCZ,	*	
Guardians of SARAH GANCZ,	*	
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	*	
Petitioners,	*	TO BE PUBLISHED
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Clifford J. Shoemaker, Esq., Vienna, Virginia, for Petitioners.

Elizabeth F. Kroop, Esq., United States Department of Justice, Washington, D.C., for Respondent.

ONSET DECISION

I. PROCEDURAL BACKGROUND¹

This case concerns the eligibility of Sarah Gancz for compensation under the National Childhood Vaccine Injury Compensation Act (hereinafter Vaccine Act, or Program.)² Petitioners claim that Sarah's current neurological injuries are sequela to her third diphtheria-pertussis-tetanus

¹ References to the relevant documents filed in this case shall be truncated as follows: The February 26, 1999 hearing will be cited as, "Tr at ____."; Petitioners' Post-Hearing Memorandum as "Pet. Memo at ____."; Respondent's Post-Hearing Memorandum as R's Memo at ____."; Petitioners' Reply to R's Memo as P's Reply Memo at ____."; and finally, Petitioners Exhibits will be cited as "P's Ex. ____."

² The statutory provisions governing the Vaccine Act are found at 42 U.S.C.A. § 300aa-1 *et. seq.* (1991 & Supp. 1994). Hereinafter, for ease of citation, all references will be to the relevant subsection of 42 U.S.C.A. § 300aa.

(DPT) vaccination administered on 23 November 1987.³ On 29 January 1991, Petitioners brought their claim before this Court. On 25 April 1995, Respondent filed her report seeking further medical records. Upon receipt of certain records and a deposition of one of the treating physicians, Respondent advised the Court that she would be contesting entitlement and thus, an award of compensation under the Vaccine Act. On 26 February 1999, the Court conducted an evidentiary hearing in East Elmhurst, New York limited to one factual issue. On behalf of the Petitioners, the Court received the testimony of Aaron and Baila Gancz, Sarah's parents.

II. DISCUSSION

The sole issue for determination by the Court at this juncture is when did young Sarah have her first seizure? The Court does not discuss or make any findings regarding the medical issues raised by the instant facts. In her post-hearing brief, Respondent asserts that the Gancz's oral testimony conflicts with the contemporaneous medical records. (R's Memo at 2.) To wit, the records from the treating physician dated 25 December 1987 record onset of possible seizure activity "one to two months" prior to the visit. (R's Memo at 4.) In addition, another doctor (on 29 December 1987) recorded that the parents indicated that seizures occurred "one to two weeks prior to Sarah's November 23, 1997 DPT vaccination." (R's Memo at 4.) Two years after these visits, another doctor recorded that while being diapered, Sarah "turned blue and stared for several seconds" during a brief episode on 24 November 1987. (R's Memo at 5.) Referring to a second DPT vaccination given on 21 October 1987 (a month prior to the third and suspect DPT vaccination), a fourth doctor subsequently records that the parents claimed that the mother noticed that Sarah's "eyes were glassy, that she was pale, and that her nails were bluish." (R's Memo at 5.) In order to reconcile confusing dates, Respondent contends that the Gancz's testimony was tailored to reflect a memory of "general terms" regarding the discovery of Sarah's seizure onset. As can be seen from a perfunctory overview of the above dates, there appears to be an internal inconsistency in the medical records.

At the outset, the Court notes that no prior history of seizures or health related problems were recorded in the doctor's notation dated 24 November 1987. The pediatric record on 29 December 1987 (P's Ex. 13 at 54) documented that seizures began six to seven weeks prior to that visit. Petitioners's testimony reflects that they had not confirmed that general statement with a calendar. (Tr. at 25.) Moreover, other records reflect that prior to the medical exam on 24 December 1987, a seizure was observed "one to two months" prior to the visit. (R's Memo at 4.) Finally, it is not contested that Sarah's seizures were documented within a month of her third DPT vaccination.

Because the medical records were vague as to a precise time of when the seizures actually began, the testimony of Petitioners's witnesses was the key element underlying this decision. After careful assessment of the demeanor and comportment of Aaron and Baila Gancz, the Court concludes that each witness was highly credible. The Court found no evidence of dishonesty or significant inconsistencies between the testimony given and the available medical records.

³ Sara received her first and second DPT vaccinations on 19 November 1986 and 21 October 1987 respectively. P's Ex. 11.

In addition to the witness testimony, the Court finds Petitioners’ account more probative in light of their Jewish heritage. Both Mr. and Mrs. Gancz are members of the Lubavitch sect and faithfully adhere to the Hebrew calendar. (P’s Memo at 2.) Their recollection of events surrounded that calendar, and as the medical records disclose, their encounters with all the doctors do not reflect dates but rather approximation of times. Moreover, in this Jewish sect, the wife respects an ordered authority where the head of the household is the voice of the family. As a result, most of the medical records reflect that the histories were made by the father, Aaron Gancz, who testified that he gave the doctors general time frames. (Tr. at 25.) Comparatively speaking, the Court finds the following calendar comparison helpful:

Gregorian Calendar Month	Hebrew Calendar Month
23 November 1987 (Date of suspect shot)	2 Kislev 5748 (P’s Ex. 34.)
24 November 1987 (First alleged seizure)	3 Kislev 5748 (P’s Ex. 34.)

For the Petitioners, 2 Kislev 5748 is a day of significance in the Hebrew Calendar. It marked a “triumphant” court case, where a year earlier certain books of heritage were returned to a notable Judiaca library. On 3 Kislev, the Petitioners celebrated this occasion at the home of friends. It was during this celebration that Sarah was alleged to have suffered her first seizure. Since seizure symptoms were unknown to the Petitioners, they described what they saw to their doctors in terms of Sarah appearing “cold”, and making swallowing motions. (Tr. at 95.) Relevant to this case, one of Sarah’s doctors recorded in September 1989 that “[a]t approximately 15 months of age, *while being diapered*, Sarah turned blue and stared for several seconds.” (P’s Reply Memo at 3 (referring to Ex. 25)(emphasis added.)) This event was memorable to the Petitioners because it occurred on 3 Kislev 5748, the day of their celebration. Moreover, it fits within the “one to two month” onset time frame documented as occurring prior to a 24 December 1987 doctor’s exam. (P’s Ex. 6 at 12 and P’s Ex. 25.) The Court finds these explanations credible and internally consistent with the medical records. Were Petitioners found to be not credible in their testimony, this case may have been decided against them. However, this is not the case.

As to the possibility that this case involves a *Murphy*⁴ issue, the Court finds that the medical records are themselves inconsistent. Ergo, the *Murphy* rule does not apply to the case *sub judice*. In point of persuasion, Petitioners’ testimony serves to confirm and explain the medical records.⁵

⁴ *Murphy v. Secretary of HHS*, 1991 WL 74931 (Cl. Ct. Spec. Mstr. April 25, 1991) *aff’d* 23 Cl. Ct. 726 (1991), *aff’d per curiam*, 968 F.2d 1226 (Fed. Cir. 1992) (holding that oral testimony in conflict with contemporaneous records is entitled to little evidentiary weight.).

⁵ As the federal court in *Murphy* noted,

“[I]t must be recognized that the absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance. Since medical records typically record only a fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant.”

III. CONCLUSION

The Court concludes that Sara suffered an event as per parental testimony within three days of her November 1987 DPT vaccination, and that this event occurred on-Table. However, resolution of this issue in favor of Petitioners is not yet dispositive on the issue of entitlement for the Court merely finds that the event is itself presumably descriptive of an alleged seizure. The Court makes no finding as to whether the event described was a seizure; rather, it defers that ruling until after the medical experts have opined on that issue.

Within thirty (30) days of the filing of this decision, Petitioners will contact my law clerk, Christopher Kachouff, Esq., to schedule a status conference. At that conference, the Court will discuss future proceedings on entitlement.

IT IS SO ORDERED.

Richard B. Abell
Special Master

Murphy, 968 F.2d 1226, 1228.