

OFFICE OF SPECIAL MASTERS

No. 90-3524V

(Filed: May 30, 2000)

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VELDON L. KOUBA and VIRGINIA L. \*  
KOUBA, as Legal Representatives \*  
of ALLEN W. KOUBA, \*

Petitioners, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

TO BE PUBLISHED

John A. Bass, El Reno, OK, for petitioners.  
Karen P. Hewitt, Washington, DC, for respondent.

DECISION

MILLMAN, Special Master

Statement of the Case

On November 30, 1998, the undersigned issued an unpublished decision stating that were the tuberous sclerosis (TS) cases not on appeal (at that time, to the Federal Circuit, but ultimately to the U.S. Supreme Court), the undersigned would dismiss this case. On May 30, 2000, the Supreme Court denied certiorari in Hanlon v. Secretary, HHS, No. 99-1223. Since the Federal Circuit

has previously affirmed the undersigned's holdings in the TS cases, this case is dismissed. What follows is the material that the undersigned has previously described in the unpublished decision of November 30, 1998.

### History

On December 23, 1992, this court ruled on behalf of petitioners. The above-captioned matter was part of the TS cases pending during the undersigned's Omnibus TS hearing dated October 8-11, 1996 and June 3-4, 1997. Subsequent to my decision in the Omnibus case, dated September 15, 1997,<sup>1</sup> the court determined what course to follow in this individual case.

This case concerns Allen W. Kouba ("Allen"), born on October 10, 1966 with TS. He received a DPT vaccination on January 10, 1967 and began seizing within two days. Med. Recs. at 3, 17, 21. He had numerous afebrile seizures within the next year. Med. Recs. at 6.

Allen's parents filed their petition on October 1, 1990, alleging that Allen had convulsions within Table time of his first DPT vaccination on January 10, 1967. An analysis of Allen's MRI shows that he has twenty cortical tubers. R. Ex. Q.

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<sup>1</sup> Barnes et al. v. Secretary, HHS, 1997 WL 620115 (Fed. Cl. Spec. Mstr. Sept. 15, 1997). The holding of the Barnes decision is discussed infra.

The court held a hearing on October 20, 1998. Testifying for petitioners were Veldon L. Kouba and Virginia L. Kouba. Respondent did not put on any witnesses.

#### FACTS

Allen was born on October 10, 1966. He received his first DPT vaccination on January 16, 1967 when he was three months old. Med. recs. at 36. (The petition states the vaccination date was January 10, 1967, but this was an error.)

The history given to their pediatrician Dr. Jack Shirley on January 20, 1968 was that Mr. and Mrs. Kouba noticed Allen having choking spells at noon two days previous to admission, or on January 18, 1967, two days post-vaccination. He had had his DPT vaccination on Monday, January 16, 1967. He ran a little fever on Monday and Tuesday. On Wednesday, he started having a type of akinetic seizure. He had a little fever and a cold. He continued to have akinetic type seizures, but immediately afterward, he was ready to go and play. Physical examination revealed a normal, healthy three-month-old. However the doctor admitted him to the clinic for evaluation. Med. recs. at 3. From January 20 to 23, 1967, Allen was in Presbyterian Hospital,

Oklahoma City Clinic, for focal motor seizures whose cause was undetermined.

Dr. J. E. Mays, Allen's attending physician, wrote that Allen had run a temperature of 101 and 101.5 degrees on Monday night and Tuesday after his vaccination. He was given aspirin for this. On Wednesday, he became limp all over, his eyes rolled back, and his mouth watered. This spell lasted from thirty to sixty seconds. When it was over, he was fine and happy and had no problems. He continued to eat, without vomiting or other problems. Allen had one of these brief seizures in Dr. Mays' presence. He became limp, his eyes rolled back, and his mouth and tongue moved rhythmically. This lasted a very short time and he immediately awoke and was fine. Med. recs., submission of October 26, 1992 at 1.

On March 25, 1968, Dr. Thomas at the neurology clinic noted that Allen had seizures first noticed two days after his first DPT vaccination. Med. recs. at 17, 21. On December 9, 1968, Dr. Dotter at the Oklahoma City Clinic noted that Allen developed a convulsive disorder following his initial DPT vaccination. Med. recs. at 6.

#### TESTIMONY

Mr. Veldon L. Kouba testified first for petitioners. He has two sons, Jeffrey, born two years earlier than Allen, and Allen.

Allen was fine for his first three months. He was very happy. On the day of the DPT vaccination, Mr. Kouba came home for lunch and picked Allen up. He thought Allen was dying. He started choking and his eyes rolled back. This scared Mr. Kouba.

Mr. Kouba did not connect this episode to the DPT because he did not know what had happened. The episode lasted fifteen to twenty seconds. Allen very seldom made a sound after that. This changed his whole character. His eyes took on a dull appearance and he never returned to the baby he had been before the vaccination.

Mr. Kouba testified that Allen might have had a fever. He never cooed again. Mr. Kouba found testifying hard thirty-one years after the events. Allen was not a happy baby after that and got very solemn. He had a dozen episodes that week. They put him on anti-convulsants. None of his subsequent seizures was associated with high fever. He walked normally. He was several years old before he started to talk.

Mrs. Virginia L. Kouba testified next for petitioners. For Allen's first three months, he was normal, happy, and contented. He received his first DPT vaccination on Monday, January 16, 1967 at 9:00 or 9:30 a.m. For the rest of the morning, he was okay.

Mr. Kouba came home for lunch, got Allen, and played with him. Mr. Kouba told her there was something wrong with Allen.

His eyes were rolling back into his head and he drooled a little. He had a temperature that afternoon. Allen seemed much duller, not as bright-eyed; he seemed quieter. She does not recall if he cried. He seemed different. He no longer made sounds. His eyes were duller and distant.

Mrs. Kouba does not know if she called the doctor that afternoon, but she took him to the clinic and they called Dr. Mays in Oklahoma City. She saw him on Friday, January 20, 1967, but it seemed sooner in her mind. Allen's condition after the DPT was significantly different than before the DPT. He walked normally, but did not talk until he was over four years of age. He was toilet trained after four years of age.

Allen ate and slept all right. He did not cry extraordinarily.

#### DISCUSSION

Mr. and Mrs. Kouba are certainly sincere parents, but their memories conflict with the contemporaneous histories they gave when Allen first started seizing. To both Dr. Shirley and Dr. Mays, the history was that Allen was fine, active, and alert after his seizures. The Koubas testified he was a different boy.

Well-established case law holds that information in contemporary medical records is more believable than that

produced years later at trial. United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948); Burns v. Secretary, HHS, 3 F.3d 415 (Fed. Cir. 1993); Ware v. Secretary, HHS, 28 Fed. Cl. 716, 719 (1993); Estate of Arrowood v. Secretary, HHS, 28 Fed. Cl. 453 (1993); Murphy v. Secretary, HHS, 23 Cl. Ct. 726, 733 (1991), aff'd, 968 F.2d 1226 (Fed. Cir.), cert. denied sub nom. Murphy v. Sullivan, 113 S. Ct. 263 (1992); Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1328 (1980).

Contemporaneous medical records are considered trustworthy because they contain information necessary to make diagnoses and determine appropriate treatment:

Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events.

Cucuras v. Secretary, HHS, 993 F.2d 1525, 1528 (Fed. Cir. 1993).

The undersigned does not find petitioners' testimony credible that Allen's demeanor and behavior suddenly changed when he began his infantile spasms. If indeed Allen had changed so remarkably after vaccination compared to his demeanor and behavior before vaccination, it is extraordinary and frankly not believable that his parents would not have told each and every

doctor of this upsetting change. Doubtless, Allen changed over time and the court must assume that the Koubas have telescoped what happened gradually in Allen's demeanor and behavior into a very short, post-vaccination period.

The undersigned holds, as it did earlier, that Allen's seizures began in Table time, although not on the day of vaccination, but, as the medical records state, two days later. This afford petitioners the presumption that the DPT vaccination caused these seizures.

As the court held in its Omnibus TS Decision, if a vaccinee with TS has a seizure as his or her sole symptom following DPT vaccination, without any indicia of a vaccine reaction, e. g. , fever, screaming, inconsolable crying, altered affect, insomnia, anorexia, or excessive irritability, the court will hold that: (1) TS is the factor unrelated to the vaccination that caused his seizures, and (2) petitioners do not prevail on a theory that DPT significantly aggravated the vaccinee's TS. See Barnes et al., supra, at \*32-33.

The scenario discussed in the holding of the Omnibus TS Decision is illustrated in the instant case. After DPT, Allen had a low fever. Two days after the vaccination, he had seizures. Dr. Kinsbourne, petitioners' expert, states in his report, that Allen's fever and a cold preceded his seizures by



two days and could not have caused them. Submission of Feb. 26, 1998. Allen, according to the medical records of Dr. Shirley and Dr. Mays, and consistent with Dr. Mays' examination of Allen after one of his typical, brief seizures, was not impaired after his seizures. He did not experience an altered level of consciousness, a diminution of his skills, anorexia, insomnia, inconsolable screaming, high-pitched crying, or any other symptom except his seizures.

Respondent has prevailed in proving that TS is the known factor unrelated that caused Allen's initial seizures and his current condition.

#### CONCLUSION

This petition is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC Appendix J, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

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Date

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Laura D. Millman  
Special Master