

OFFICE OF SPECIAL MASTERS

No. 90-2455V

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(Reissued for Publication June 11, 1999)⁽¹⁾

JACK M. LAWSON and JOYCE L. LAWSON, *
Parents and Next Friends of *
JENNIFER LAWSON, *

Petitioners, *
v. *

TO BE PUBLISHED

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

Ronald C. Homer, Boston, MA, for petitioners.

David L. Terzian, Washington, DC, for respondent.

DECISION

MILLMAN, Special Master

Statement of the Case

On October 1, 1990, petitioners Jack M. Lawson and Joyce L. Lawson, filed a petition for compensation under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1 et seq. for alleged vaccine injury to and subsequent death of their daughter Jennifer M. Lawson (hereinafter, "Jennifer"). Their petition claims that within several hours of Jennifer's receipt of her third DPT vaccination on May 24, 1977,⁽²⁾ she began to sleep for extended periods of time, became difficult to arouse, was disinterested in her surroundings, and showed a general lack of response to environmental stimuli, leading, two to three weeks later, to her slumping over. Petitioners allege that Jennifer suffered a vaccine Table injury. Pet. at ¶¶ 2, 5, 8, and 18.

In the hospital, Jennifer was diagnosed with a central nervous system (CNS) demyelinating disease which was progressive.⁽³⁾ Pet. at ¶ 11. Jennifer died on April 25, 1992 from a hemorrhage after her

parents noticed blood in her tracheostomy tube. Her mother had suctioned her tube earlier and her father had lifted her into her wheelchair. P. Ex. S (Mr. Lawson's affidavit), third page, dated September 7, 1995; P. Ex. U (Declaration of Dr. Laila Avetta, dated July 25, 1995).

FACTS

Jennifer was born on October 23, 1976. Med. recs. at Ex. A (Petitioners did not paginate their pages in this part of their submission). Jennifer's first hospitalization was on July 11, 1977 at the Children's Hospital of Pittsburgh where she stayed until July 15, 1977. *Id.* Mrs. Lawson gave a history that about four weeks prior to admission (which would be about June 11, 1977, or two and one-half weeks post-vaccination if the immunization occurred on May 24, 1977), Jennifer fell over while sitting in a chair, bruising her head. *Id.* During the ensuing weeks, she was unable to hold her head upright as before and lost her ability to roll over and grasp objects. *Id.*

A CT scan done on July 18, 1977 showed very mildly enlarged lateral ventricles, areas of diminished density bilaterally in the white matter of the frontal lobes and anterior parietal lobes. *Id.* The interpretation of the CT stated its finding may be seen with any of the dysmyelinating diseases of the white matter of the brain. *Id.* Jennifer did not have seizure activity. *Id.*

On September 3, 1980, at the Regional Comprehensive Rehabilitation Center for Children and Youth, Mrs. Lawson stated that Jennifer was not as active in utero as her other two pregnancies were. Med. recs. at Ex. E., p. 26. Jennifer started rolling over at about four months, sat up alone at six months, and scooted on a tile floor in a walker. *Id.* at p. 27. She fell from a bed but was not seriously injured. *Id.* About four weeks later, Jennifer developed a severe upper respiratory infection manifested by nasal congestion and poor appetite but no significant fever. *Id.* When she seemed to recover from this, she lost all motor skills, such as her ability to sit up and roll over, and she had no significant interest in her environment. *Id.*

Jennifer was profoundly mentally retarded and non-ambulatory. She needed and used a tracheostomy tube. Med. recs. at Ex. I. When she hemorrhaged on April 25, 1992, she was brought to Citizens General Hospital at 9:30 p.m., which diagnosed cardiac arrest secondary to massive hemorrhage. *Id.* The notes continue that Jennifer was intubated and large amounts of blood were suctioned from her tube. *Id.* Jennifer's death certificate states exsanguination due to rupture of a large blood vessel, due to a tracheostomy and radical stenosis (narrowing). Med. recs. at Ex. H.

DISCUSSION

The Vaccine Act requires petitioners to prove that Jennifer suffered "[a]ny acute complication or sequela (including death)" of a vaccine Table injury, i.e., encephalopathy in the instant action whether or not the onset of the Table injury occurred outside Table time. 42 U.S.C. §14(a)(I)(E). Assuming, arguendo, that petitioners could satisfy their burden of proving a vaccine injury, they cannot prove that Jennifer's hemorrhaging to death is a sequela of her CNS demyelination sixteen years earlier under Abbott v. Secretary, HHS, 27 Fed. Cl. 792 (Fed. Cl. 1993), aff'd in part, rev'd in part, remanded 19 F.3d 39 (Fed. Cir. 1994) (unpublished table decision).

Pursuant to the definition of "acute complication or sequela" in Abbott, supra, 27 Fed. Cl. at 794, Jennifer's death is unrelated to any biologic sequelae of her autoimmune demyelinating disorder. Jennifer ruptured a large blood vessel due to her tracheostomy tube and the narrowing of her esophagus consequent to her tracheostomy tube placement. As petitioners' Response to Order to Show Cause, filed May 28, 1999, at page 5, states, "The rupture was due to 'tracheal stenosis,' a narrowing of her windpipe,

a process which occurred over a period of at least 8 months." Petitioners assert this was not an external cause. Petitioners also state, *id.* at 6, "it is beyond question that Jennifer's tracheostomy tube, which had been in place for several months, simply eroded her trachea, resulting in a ruptured vessel."

In *Abbott*, *supra*, the vaccinee David had a seizure disorder due to DPT and subsequently entered a residential care facility. He was left unattended while bathing, had a seizure, and drowned in the bathtub. The Honorable Judge Wiese held that petitioners were not entitled to compensation because the water in the bathtub, which David imbibed and from which he died, was not a somatic condition or event "recognizable as the pathological sequence or result of an existing disease or disorder or ... an independent accompaniment of such a disease or disorder." *Id.* at 794. Because David's death was not due to pathological forces set in motion by his vaccine injury, but the result of suffocation brought on by an external force (filling of his lungs with water), i.e., an accident perhaps precipitated by, but not the medical consequence of, his disorder, petitioners could not prevail. *Id.*

The United States Court of Appeals, in an unpublished opinion, affirmed the biologic definition of sequelae in *Abbott*, reversing and remanding to discover whether David drowned on vomit (which would have been biologic) or water (non-biologic).

There is no reason to consider the erosive effect of a tracheal tube in the instant action to be any less external than the water in a bathtub (see *Abbott*). Although esophageal stenosis is biologic, its cause (a tracheal tube) is not, just as the failure to breathe in *Abbott* is biologic, but water is not. The undersigned is engaging not in the foreseeability analysis prevalent in tort law, but in interpreting a statutory waiver of sovereign immunity. Standard judicial interpretation of the waiver of sovereign immunity is that courts are to interpret the waiver narrowly. *Lane v. Pena*, 518 U.S. 187, 192 (1996), citing numerous cases.

In discussing the meaning of the term "sequela," the Federal Circuit in *Abbott* referred to its own affirmance of the definition of sequela as "a pathological condition resulting from a disease" in *Munn v. Secretary, HHS*, 970 F.2d 863, 867, 872 (Fed. Cir. 1992). *Abbott*, 19 F.3d 39 (Table), 1994 WL 32656, at *6.⁽⁴⁾ The petitioners in *Munn* did not dispute this definition of "sequela." *Munn*, 970 F.2d at 872 n.13.

In the context of claims for black lung disease (pneumoconiosis), the definition of "sequelae" has been similarly held to be of a biologic nature, one that is integral to the disease process, rather than unrelated to it, even if adding to the injury of the lung disease. In *Beatty v. Danri Corp. & Triangle Enterprises*, 49 F.3d 993 (3d Cir. 1995), claimant appealed the denial of black lung benefits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 901-45 (as amended). He had both pneumoconiosis as well as other nonrespiratory or nonpulmonary impairments. Twice he had failed to prove that he had a total disability due to pneumoconiosis. The Third Circuit affirmed the orders of the Benefits Review Board.

Claimant's lungs were exposed to coal dust, but he ceased working due to a stroke. Evidence showed that claimant's disability was due to conditions, such as his stroke, which were not due to a respiratory or pulmonary condition. The Third Circuit stated that a miner must show that pneumoconiosis is a substantial contributing cause to his total disability. In referring to the possibility that pneumoconiosis may lead to conditions that are sequelae of it, citing to 30 U.S.C. § 902(b), the Third Circuit defined "sequela" as "any lesion [loss of function] or affection [affliction] following or caused by an attack of disease." [citing *Dorland's Illustrated Medical Dictionary* 1509 (27th ed. 1988).] *Id.* at 997, n.3. The Director of the Office of Workers' Compensation Programs took issue with the counting of nonrespiratory and nonpulmonary impairments toward the definition of total disability. *Id.* The Third

Circuit deferred to the Director's interpretation. Id. at 997.

Weighing the effect of an unrelated factor with a compensable factor (vaccine injury) has recently been the focus of the Federal Circuit in Shyface v. Secretary, HHS, 165 F.3d 1344 (Fed. Cir. 1999). The Federal Circuit held in favor of petitioners because they proved that DPT vaccine was a substantial factor in the death of the vaccinee, Cheyenne Shyface, even though the special master held that the DPT-induced high fever and E. coli infection (unrelated to the vaccine) were factors in equipoise in causing his death. The Federal Circuit held that DPT was a substantial factor in causing the child's death because the E. coli infection was not of sufficient seriousness to be a predominant factor, although it too was a substantial factor.

In the instant action, Jennifer's putative vaccine injury, autoimmune CNS demyelination, occurred sixteen years before she experienced esophageal erosion due to the use of a tracheal tube whose consequence was a massive hemorrhage, causing cardiac arrest and death. Even though, but for her vaccine injury, she would not have needed a tracheal tube, the vaccine injury itself (demyelination) was not a substantial factor in her death. The substantial factor in her death was the tracheal tube which caused esophageal erosion, resulting in exsanguination (massive hemorrhage). The tracheal tube is unrelated biologically to the condition of her demyelinating CNS disorder which petitioners allege that DPT caused, even though its effect on Jennifer was biological. Not only is the tracheal tube a substantial factor in Jennifer's death, but also it is the predominant factor as well. The tube itself is external to her disease process of CNS demyelination, and under the analysis of Abbott as well as Shyface, cannot be considered to be an acute complication or sequela of her putative vaccine injury sixteen years earlier.

Under both the Abbott and Shyface analyses, petitioners have failed to satisfy their burden of proving a prima facie case.

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.

Dated: _____

Laura D. Millman

Special Master

1. This Decision was originally entered by the court on May 28, 1999 as an unpublished decision. This reissuance as a published decision follows in response to respondent's written request for publication which the court granted. It contains minor revisions not affecting the outcome of the decision. Petitioners' counsel represented orally that he did not object to respondent's request for publication. The reissuance of this decision *shall not affect the time for filing a motion for review pursuant to Vaccine Rule 23.*

2. Mrs. Lawson informed personnel at the Regional Comprehensive Rehabilitation Center for Children and Youth on September 3, 1980 that Jennifer received her first DPT on January 8, 1977, her second DPT on March 29, 1977, her third DPT on April 24, 1977 (not May 24, 1977 as in the petition), and her booster on June 30, 1978. Med. recs. at Ex. E, p. 27. There is a medical bill submitted listing a charge for Jennifer's DPT on May 24, 1977. P. Ex. P, filed May 30, 1995. There is also a vaccination record listing the dates of DPT vaccination in 1977 as January 8, March 29, and May 24 (with the "5" for "May" obviously overwritten). P. Ex. V, filed September 11, 1995. In Mrs. Lawson's baby book, she writes that Jennifer received her third DPT on May 24, 1977, and in her notation for June 24, 1977, states that for three to four weeks (which would put onset at the same day of the vaccination or a week later), Jennifer slept a lot and did not play as she used to or lift her head or sit up. P. Addendum to Ex. T, filed September 28, 1995.

3. Dr. Vera S. Byers, petitioners' expert, diagnosed Jennifer as suffering from an autoimmune demyelinating disorder which her first three DPT vaccinations caused or substantially contributed to and which her booster vaccination significantly aggravated. P. Ex. 1, filed November 12, 1998, p. 1. Dr. Byers views the onset of Jennifer's autoimmune demyelinating disorder to be 18 days after her third DPT. *Id.* at p. 2. Dr. Byers, in a letter dated May 11, 1999, states that if Jennifer's symptoms began the same day as the vaccination, causation is possible but not probable. P. Ex. 11.

4. The U.S. Court of Claims decision in Abbott also defines "complication" as a "morbid process or event occurring during a disease which is not an essential part of the disease, although it may result from it or from independent causes" (citing Stedman's Medical Dictionary 336 (25th ed. 1990)). Continuing, it cites another medical dictionary to define complication as "a disease or diseases concurrent with another disease" (citing Dorland's Ill. Medical Dictionary 368 (27th ed. 1988)). A tracheal tube is not a morbid process or a disease concurrent with another disease. The Federal Circuit did not address the definition of "complication" in Abbott.