

OFFICE OF SPECIAL MASTERS

No. 91-393V

(Filed: May 30, 2000)

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JAMES MOODY and JANET MOODY, \*  
Parents of LINDSAY BRIANNE MOODY, \*

Petitioners, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

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TO BE PUBLISHED

Robert T. Moxley, Cheyenne, WY, for petitioners.  
Karen P. Hewitt, Washington, DC, for respondent.

DECISION

MILLMAN, Special Master

Statement of the Case

On December 23, 1998, the undersigned issued an Order stating that were the tuberous sclerosis (TS) cases not on appeal (at that time, to the Federal Circuit, but ultimately to the United States 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 Order of December 23, 1998.

### History

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 the court's decision in the Omnibus TS case, dated September 15, 1997,<sup>1</sup> the court determined what course to follow in this individual case.

This case concerns Lindsay Brianne Moody ("Lindsay"), born on November 6, 1981 with TS. Lindsay's parents filed their petition on January 30, 1991, alleging that Lindsay had convulsions within Table time of her third DPT vaccination on May 4, 1982, and thus a significant aggravation of her TS which had previously not been clinically manifest. An analysis of Lindsay's MRI shows that she has seven 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 November 20, 1998. Testifying for petitioners were Janet Moody and James Moody. Respondent did not put on any witnesses. Respondent contested on-Table onset of seizures.

#### FACTS

Lindsay was born on November 6, 1981. Med. recs. at P. Ex. BB. She received her first DPT vaccination on January 12, 1982 when she was two months old. Id. She received her second DPT on March 9, 1982 when she was four months old. Id. She received her third DPT on May 4, 1982 when she was six months old. Id. All three DPT vaccinations were administered by the Chatham County Health Department which, in a printout dated May 17, 1994, listed that Lindsay had no reaction next to each of these three DPT vaccinations. Id.

On May 6, 1982, two days after the third DPT vaccination, Lindsay saw her pediatrician, Dr. Gustave M Kreh, for her six month check-up. Med. recs. at Ex. 5, p. 3. Dr. Kreh noted her weight, age, head circumference, and temperature, which was 100.6 degrees rectally. Id. Lindsay still had torticollis to some degree, but was much better. Id. She was to see Dr. Wessinger in one month. Id. She was taking Enfamil with iron well. Id. She had received her vaccinations at the health department. Id.

Lindsay saw Dr. Kreh's associate, Dr. Joseph V. Morrison, on May 8, 1982, just two days later, with a fever. Med. recs. at Ex. 5, p. 4. Her temperature was 99 degrees rectally. Id. Dr. Morrison diagnosed pharyngitis and did a throat culture. Id. He prescribed Amoxicillin. Id.

Lindsay saw Dr. Morrison three weeks later, on May 29, 1982, with a temperature of 99.8 degrees. Id. Dr. Morrison wrote that Lindsay seemed really jittery at times. Id. Her eyes watered and got big usually after awakening two to three times a day. Id. On physical examination, she was normal. Id. She was neurologically active and alert. Id. She moved all her extremities well. Id. Dr. Morrison doubted any significant problem but felt that with Mrs. Moody very worried, she should probably see a neurologist for further evaluation. Id.

On June 4, 1982, Lindsay saw Dr. J. Michael Hemphill, a pediatric neurologist. Med. recs. at Ex. 4, p. 8. He took a history that approximately four weeks prior to her visit, Lindsay began acting as though she were startled. Id. This behavior had increased in frequency and intensity since that time. Id. The episodes tended to occur just after she had awakened. Id. She would get quiet, her eyes would water, and she would throw her arms out and jump. Id. This occurred initially one to two times daily; when she saw Dr. Hemphill, it was occurring four to five

times daily. Id. The episodes lasted for two to three minutes with jerks every thirty to forty-five seconds. Id. Dr. Hemphill said the history was typical for infantile spasms. Med. recs. at Ex. 4, p. 11. Her EEG showed hypsarrhythmia. Med. recs. at Ex. 4, p. 9. Mrs. Lindsay told Dr. Hemphill that Lindsay had had no illnesses in the past. Med. recs. at Ex. 4, p. 8.

About a year after the onset of Lindsay's seizures, Mrs. Moody wrote a retrospective history in which, inter alia, she states that after Lindsay's last DPT, she began jerking her head and arms. P. Ex. AA. Her head would drop and her arms would fly up. Id. Mrs. Moody wrote that she immediately called Dr. Kreh and described Lindsay's symptoms. Id. At the time, Lindsay had a cold and was taking Triaminic. Id. Dr. Kreh told Mrs. Moody that Lindsay was probably reacting to the medication and to stop administering it and see what happened. Id. Mrs. Moody did, but Lindsay still continued to jerk. Id. She would jerk a few times every couple of days. Id. Mrs. Moody wrote that she was not too concerned at first because Lindsay seemed fine. Id. A week later, she called Dr. Kreh back and he said not to worry and it was probably nothing. Id. She stated she decided to wait another week, but when she brought Lindsay in, Dr. Kreh was not there; she saw Dr. Morrison instead. Id. He recommended a neurologist. Id.

## TESTIMONY

Mrs. Janet Moody testified first for petitioners. Tr. at 14. She owns two dry cleaners and one laundromat. Tr. at 15. Lindsay is her and her husband's only child. Tr. at 16. Lindsay was a happy baby. Tr. at 17. She slept through the night at one month of age. Tr. at 18. She had some trouble on formula and switched to Prosobee. Id. Dr. Kreh was her regular pediatrician. Id.

On Tuesday, May 4, 1982, Lindsay received her third DPT from the Health Department in the afternoon between 4:00 and 6:00 p.m. Tr. at 23. Her husband took care of Lindsay during the day because he was not working then. Tr. at 24. She returned to work in the last week of May or the first week of June 1982. Id.

After her third DPT vaccination, Lindsay had a fever. Her leg was very swollen, the vaccine site was red and hard, and she cried a lot. Tr. at 26. She was fussy and not her normal self. Mrs. Moody does not remember how long Lindsay cried or if she slept. Tr. at 27. On Thursday, May 6, 1982, Lindsay still had fever and a swollen leg. Id. She saw Dr. Kreh for her six month well-baby check-up. Tr. at 29. Lindsay had been born with a stiff neck which Dr. Wessinger diagnosed as torticollis. Tr. at 26.

Mrs. Moody does not remember Lindsay's condition on Friday, May 7, 1982, but she saw Lindsay have a startle response. Tr. at 30. Her arms went up, and her head to one side, lasting twenty to thirty seconds. Id. Mrs. Moody was home between 1:00 to 2:00 p.m. Tr. at 31. She saw this with her husband. Id.

On Saturday, May 8, 1982, she saw Dr. Morrison. Tr. at 35. Afterward, she was on the phone with the doctor's office two to three times a week. Id. Lindsay did not have seizures every day. Id. She asked Dr. Hemphill, the neurologist who saw Lindsay on June 4, 1982 and who diagnosed infantile spasms, if DPT caused them and he said no. Tr. at 38-39. Dr. Hemphill asked her what took her so long to get there. Tr. at 39. It had been four weeks since the DPT. Tr. at 39-40.

Lindsay's seizures worsened. Tr. at 41. She had eight to nine per week. Id. Lindsay was put on ACTH and her seizures went away only to return when she was one year old. Tr. at 42-43. Lindsay had normal development between the ages of six and twelve months. Tr. at 43. She walked at eleven months and talked at eight months, although she is now non-verbal. Id. She lost her speech ability when her seizures returned. Tr. at 44. She also stopped playing. Id. Her seizures never were controlled again. Id. Lindsay today functions like a two-year-old. Tr. at 47.

Lindsay did not have any reaction to her first two DPT vaccinations. Tr. at 49. Mrs. Moody never told doctors that Lindsay had a reaction to her third DPT vaccination. Tr. at 51.

Mr. James Moody testified next for petitioners. Tr. at 75. He has been a surveyor with the U.S. Corps of Engineers for seventeen years, since May 1982. Tr. at 75-76. When Lindsay was a baby, he was laid off from work. Tr. at 76. He remembers Lindsay received her third DPT vaccination on Tuesday, May 4, 1982, and was fussy and got a rash two days later. Tr. at 77. He does not recall a fever. Tr. at 78. He cannot recall when Lindsay's arms went up and she startled. Tr. at 81. He thinks he saw her first seizure. Tr. at 82. He believes that her arms went up two to three days after the vaccination. Id.

#### DISCUSSION

Mr. and Mrs. Moody are certainly sincere parents, but they understandably remembered little of what occurred sixteen years prior within a few days of Lindsay's third DPT vaccination. Respondent's strongest argument is that since nothing about Lindsay's startling on May 7, 1982 (three days after vaccination)<sup>2</sup> was included in the doctor's notes for the visit of

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<sup>2</sup> The undersigned assumes that Lindsay's startles did not occur by May 6, 1982 because of the scheduled well-baby visit on the date during which Dr. Kreh performed an examination and took a history which is devoid of any mention of startles. The

May 8, 1982 (when Lindsay had pharyngitis), the onset of Lindsay's infantile spasms must have occurred off-Table after the third DPT vaccination.

However, this defense ignores important factors weighing on behalf of the parents' allegations. Firstly, Lindsay's startle reactions were subtle and infrequent. Mrs. Moody testified that she called her pediatrician Dr. Kreh who thought they were insignificant. Secondly, Dr. Morrison's notes for the May 8, 1982 meeting were brief. True, he mentions the pharyngitis, but he hardly refers to anything else.

Thirdly, Dr. Morrison's opinion about Lindsay's jitteriness is apparent during the May 29, 1982 visit. He was not alarmed by Mrs. Moody's description. He recommended a neurologist to her only because she was upset. It seems to the undersigned that Dr. Morrison was not knowledgeable about seizure disorders or, particularly, about infantile spasms. If indeed Mrs. Moody had described an occasional startle to him on the May 8, 1982 visit, it would not surprise the court to see no notation for what undoubtedly was a trivial event to him.

Fourthly, in her visit to Dr. Hemphill on June 4, 1982, Mrs. Moody had a trained neurologist listening to her. She gave a

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parents do not insist that Lindsay's startles occurred before this visit.

medical history of startles and jerks going back approximately one month. That indeed could put the onset within three days of Lindsay's third DPT. Of course, it could also put the onset at four days after the DPT.

But, fifthly, the court finds Mrs. Moody earnest and sincere in her honest attempt to recollect the facts. The court finds her testimony credible and her history to Dr. Hemphill one month later supportive of on-Table onset. The history to Dr. Morrison on May 29, 1982 does not contradict an on-Table onset. It is silent as to onset date, perhaps a further indication of Dr. Morrison's lack of precision and incisiveness.

Mr. Moody was earnest as well but his memory was too faulty to be of assistance to the undersigned.

The court holds that Lindsay's seizures began in Table time. This affords petitioners the presumption that the DPT vaccination caused these seizures.

What other symptoms did Lindsay have on-Table? Her mother says that she was fussy, and cried, and had a swollen, hard, and red vaccine site. Her father confirms that she was fussy and cried. But it is apparent from the description to Dr. Hemphill and Mrs. Moody's own journal which she wrote a year later that Lindsay had no other symptoms that could be considered neurologic. The temperature that was recorded at the doctor on

May 6, 1982 and May 8, 1982 was barely above normal. Mrs. Moody informed Dr. Hemphill on June 4, 1982 that Lindsay had had no illnesses. This confirms that Lindsay did not have any medically significant symptoms beyond the infantile spasms.

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 or her 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, Lindsay had a low fever. Three days after the vaccination, she had infantile spasms. However, she did not experience an altered level of consciousness, a diminution of her skills, anorexia, insomnia, inconsolable screaming, high-pitched crying, or any other symptom such as a high fever that might suggest a cause from the vaccine except her seizures.

The undersigned holds that respondent has prevailed in satisfying its burden of proving that TS caused in fact Lindsay's

seizures and current condition and that the third DPT vaccination did not significantly aggravate Lindsay's TS.

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: \_\_\_\_\_

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Laura D. Millman  
Special Master