OFFICE OF SPECIAL MASTERS

No. 91-457V

(Filed: May 22, 1998)

* *		
PATRICIA PITTMAN, as Legal Represnetaitive of the Estate of MONTEZ PITTMAN, Deceased,	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

Boyd McDowell, III, Chicago, IL, for petitioner.

Glenn A. MacLeod, Washington, DC, for respondent.

DECISION AND ORDER

MILLMAN, Special Master

On January 31, 1991, Patricia Pittman, on behalf of her son, Montez Pittman (hereinafter "Montez"), filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986[(1)] (hereinafter the "Vaccine Act" or the "Act"). Petitioner has satisfied the requirements for a prima facie case pursuant to 42 U.S.C. § 300aa-11(c) by showing that: (1) she has not previously collected an award or settlement of a civil action for damages arising from the vaccine injury, and (2) DPT vaccine was administered to Montez in the United States.

Petitioner alleges that Montez suffered an on-Table encephalopathy as a result of his DPT which subsequently led to his death the day after vaccination.[(2)] 42 U.S.C. §§300aa-11(c)(1)(C)(I); 14(a)(I)(B). Respondent defends by arguing that Montez did not have an encephalopathy, noting that there are no medical records to substantiate petitioner's claim of encephalopathic symptoms.

The court held a hearing in this case on December 11, 1997. Testifying for petitioner were Patricia Pittman, her sister Yvette Pittman, and Dr. Marcel Kinsbourne. Testifying for respondent were

Dr. Marie Valdes-Dapena and Dr. Joel Herskowitz.

FACTS

Montez was born on May 19, 1977. Med. recs. at Ex. 3, p. 2. He received his first DPT vaccination on October 5, 1977 when he was five months old. Med. recs. at Ex. 6, p. 6. He died on October 6, 1977. Med. recs. at Ex. 6, pp. 3, 5.

A pathological report reflects that Montez saw a doctor on October 5, 1977. Med. recs. at Ex. 6, p. 2. The only notation from this visit was that Montez had a stuffy nose and seborrhea. Id. On autopsy, the pathologist noted that Montez's brain was "somewhat edematous." Id. However, on microscopic examination, nothing of significance was found. Med. recs. at Ex. 6, p. 4. In addition, the pathological report reflected that Montez's lungs were markedly congested and his brain weight was 160 grams.[(3)] Med. recs. at Ex. 6, pp. 2, 4. The coroner listed SIDS as the cause of death. Med. recs. at Ex. 6, pp. 2, 6.

The Medical Examiner Case Report, dated October 6, 1977, states that Montez had a stuffy nose and seborrhea on October 5, 1977. Med. recs. at Ex. 6, p. 6. According to this record, his last visit to the clinic was on July 27, 1977 at which time he was noted as being in good condition. Med. recs. at Ex. 6, p. 7. The record further reflects that he was hospitalized for one week in early August for gastroenteritis. Id.

TESTIMONY

Patricia Pittman testified first for petitioner. She has five children. Tr. at 4. Montez was her third child. Tr. at 4-5. Ms. Pittman stated that Montez was a very happy, alert, and active baby. Tr. at 11. He ate, gained weight, and slept well. Tr. at 11-12. In the early afternoon of October 5, 1977, he received his first DPT vaccination. Tr. at 14-15, 17. Prior to the vaccination, Montez was able to turn over, smile, hold his head up, sit with support, and climb across her chest. Tr. at 18-19.

When they got home, approximately one and one-half to two hours after the vaccination, Ms. Pittman undressed Montez and fixed him a bottle. Tr. at 19. He took one or two sips but kept turning his head back and forth as if he did not want to eat. Id. He felt warm. Id. Ms. Pittman tried to put Montez to sleep; however, he would sleep for only fifteen- to twenty- minute periods. Tr. at 20-21. Normally, he napped for over two hours. Id.

Ms. Pittman further testified that Montez's vaccine site was swollen. Tr. at 21. He was constantly moving, turning his head from side to side, and he would not take his bottle. Id. Ms. Pittman stated that he was crying, describing him as being irritable and cranky. Id. He had never previously acted this way. Tr. at 22. This behavior lasted until after midnight. Id. Ms. Pittman again tried to feed Montez but he repeatedly turned his head away. Id. She twice changed his diaper, which was wet each time. Tr. at 23-24. Ms. Pittman gave Montez Tylenol twice that day. Tr. at 27.

Ms. Pittman stated that Montez was cranky throughout the evening. Tr. at 28. He cried continually, stopping for only one period of ten to fifteen minutes, and he would not fall asleep. Tr. at 28, 30. He was not playful. Tr. at 28. His eyes were open and he occasionally looked at Ms. Pittman. Tr. at 29. Ms. Pittman noticed that he had tears on his cheeks and he looked as if he were in pain. Tr. at 29-30. When her sister, Yvette, picked him up, he became limp Tr. at 31-32. At approximately 1:00 or 2:00 a.m., Ms. Pittman put Montez to bed.[(4)] Tr. at 24.

Ms. Pittman does not remember calling the clinic that evening. Tr. at 32. She went to bed with

Montez at 1:00 or 2:00 a.m. and woke up at 9:00 a.m. Id. When she woke up, Montez was dead. Id. Ms. Pittman hollered and ran out of the house to the phone across the street. Tr. at 32-33. The emergency medical technicians (EMTs) and doctor came while she was across the street. Id. She neither went to the hospital with Montez nor talked to the police or the coroner. Tr. at 33-34.

Yvette Pittman, Patricia Pittman's sister, testified next for petitioner. Yvette testified that Montez was a very happy and active baby. Tr. at 66. He tried to walk up her stomach if she picked him up. Id.

Yvette saw Montez in the early afternoon of October 5, 1977. Tr. at 67. Montez was "slumpy[(5)]," irritated, crying, and unhappy. Tr. at 68. He cried intermittently, stopping for five minutes and then continuing. Tr. at 68-69. She testified that he sat there, looking as if he were in pain. Tr. at 69. He would not crawl up her chest. Id. She could not comfort him. Tr. at 69-70. He periodically went to sleep for fifteen or twenty minutes one or two times. Tr. at 70. He had a low grade fever but was not burning up. Tr. at 71.

Yvette testified that Patricia telephoned the doctor during that evening; however, she did not know the outcome of this call. Tr. at 71. Although Yvette spoke to the EMTs and police when they came to the home, she does not remember what she said. Tr. at 73. She did not go to the hospital. Id. She did not try to resuscitate Montez because he had white foam on his mouth and blood from his nose and at the corners of his mouth. Tr. at 77-78. Her last vision of Montez alive was that he was unhappy, crying, and irritable. Tr. at 72.

Dr. Marcel Kinsbourne testified next for petitioner. He is a pediatric neurologist. Tr. at 84. Dr. Kinsbourne opined that Montez had an on-Table encephalopathy which led to his death. Tr. at 88. He bases this opinion on Montez's clinical symptomatology and pathological findings. Id. Dr. Kinsbourne found the limpness and weakness that Montez suffered after vaccination to be sufficient to diagnose encephalopathy. Tr. at 89. Dr. Kinsbourne further noted that Montez's autopsy report describes his brain as "somewhat edematous" which is an early sign of encephalopathy. Id. In Dr. Kinsbourne's opinion, Montez died as a sequela of his encephalopathy. Tr. at 111.

Dr. Kinsbourne could not explain the mechanism by which the encephalopathy caused Montez's death because such mechanism is generally unknown. Tr. at 117. In attempting to explain this, Dr. Kinsbourne stated that, at some point, the acute reaction of the brain to the pertussis toxin and endotoxin stops the vital functions, i.e., there would be an effect on the brainstem which affects respiration and heart beat. Tr. at 117. Dr. Kinsbourne further explained that edema is a stage of evolution of an acute encephalopathy. Tr. at 115. Acute encephalopathy can either lead to death or be transient and not lead to death. Tr. at 118. Although Montez's edema was not sufficient to push the brain into the brainstem, he still suffered a severe encephalopathy because it killed him.[(6)] Tr. at 100.

As to Montez's clinical symptoms, Dr. Kinsbourne testified that Montez's irritability and crying could be due to his swollen vaccine site. Tr. at 102. While crying and irritability do not indicate encephalopathy, Dr. Kinsbourne stated that weakness and limpness are indicative of such. Id. Dr. Kinsbourne agrees that Montez did not have a lower level of consciousness. Tr. at 103-04. Thus, if Montez had not died, Dr. Kinsbourne would not opine that Montez suffered an encephalopathy. Tr. at 105. However, Montez's death, combined with the autopsy findings, i.e., his "somewhat edematous" brain, confirms his diagnosis. Tr. at 108.

Dr. Kinsbourne further noted that although Montez's brain was somewhat edematous on gross examination, there was no microscopic proof of brain edema. Tr. at 116. He explained this absence by stating that the particular slide may not have shown edema. Tr. at 116-17. Tr. at 118. Dr. Kinsbourne, however, has neither performed an infant autopsy nor handled an infant brain. Tr. at 114.

Dr. Marie Valdes-Dapena testified for respondent. She has been a pediatric pathologist for fifty years, performing thousands of infant autopsies. Tr. at 126-27. She has handled an infant brain in every autopsy. Tr. at 129-30. She is board-certified in anatomic pathology and in pediatric pathology. Tr. at 128-29. For the past two years, she has been one of two pathologists working on the Chicago Study which is concerned with causes of infant mortality in Chicago. Tr. at 127-29.

Dr. Dapena testified that she cannot discern the meaning of Montez's pathological findings because she has never seen a "somewhat edematous" brain in any of the infant autopsies she has performed. Tr. at 131. Dr. Dapena explained that an infant brain is the most difficult organ to examine because it has the consistency of vanilla pudding, breaking when touched. Id. She invented a method to remove the infant brain from the skull so as not to cause it damage. Id. Under this method, the infant body is actually removed from the brain. Id. Thus, the brain, itself, is never touched. Tr. at 131. Thereafter, the brain is put in formaldehyde which causes it to become firm.[(7)] Tr. at 131-32.

Dr. Dapena has never diagnosed edema on either gross or microscopic examination. Tr. at 137-38. She has also never diagnosed a baby as having an edematous brain because it is impossible to determine if a brain is swollen due to the infant brain's consistency. Tr. at 134. She noted that an infant will have a bulging fontanelle if his brain is swollen. Tr. at 133. However, she has never seen a bulging fontanelle in a dead baby. Tr. at 137. Dr. Dapena further explained that edema is basically water in the interstices of the tissue. Id. It cannot be diagnosed microscopically because water does not stain, and therefore does not show up when you look at sections. Id. If water were present in the brain, Dr. Dapena would not know. Id. Dr. Dapena also testified that she has neither diagnosed encephalopathy in an infant brain nor could she identify it. Tr. at 139-40.

On cross-examination, Dr. Dapena was asked about one of her articles (R. Ex. J) which notes that cerebral edema occurs in a small proportion of SIDS victims.[(8)] Tr. at 161-62. She admitted that cerebral edema can occur in the infant brain. Tr. at 162. However, she could not set boundaries for when a cerebral edema would be lethal in an infant. Id.

Dr. Joel Herskowitz testified next for respondent. He is a pediatric neurologist who sees 2,500 to 3,000 children a year. Tr. at 213. Dr. Herskowitz opined that Montez did not have encephalopathy. Tr. at 214. Rather, Montez had a typical response to DPT which included: a low-grade fever, a sensitive leg which was tender to touch and movement, and increased fussiness. Tr. at 215-16. Dr. Herskowitz attributed Montez's fussiness to the sensitivity in his leg. Tr. at 216.

Dr. Herskowitz opined that Montez's clinical symptoms do not describe an encephalopathic child. Tr. at 217. He noted that Montez did not shriek. Tr. at 216. Rather, he whined and cried. Id. This type of crying does not meet the level of inconsolable crying which is indicative of encephalopathy. Id. Although Ms Pittman tried to feed Montez, he rebuked her efforts by turning his head from side to side. Id. Dr. Herskowitz concluded that this head movement was a precursor to saying "no" which is a form of responsiveness to external stimuli. Tr. at 216-17. Dr. Herskowitz further noted that although Montez did not ingest much food, he did take some liquid because Ms. Pittman changed his diaper twice and he had tears on his face (connoting sufficient fluid in his

body). Tr. at 217-18. He was neither lethargic nor comatose. Tr. at 217. In fact, he was extremely irritable. Id. His eyes were open and he was not staring blankly. Tr. at 218.

Dr. Herskowitz further testified that Montez's anterior fontanelle was a little sunken and pulsating. Tr. at 219. These, however, are normal characteristics for this structure. Tr. at 219. The fontanelle would not have been pulsating had there been increased intracranial pressure. Id. Dr. Herskowitz attributed Montez's weakness and limpness to his fever. Tr. at 221. He noted that one common cause of hypotonia is a systemic condition. Id. Montez had an inflamed leg, a condition which carries general implications. Id. Dr. Herskowitz testified that Montez's clinical signs are insufficient to diagnose encephalopathy. Tr. at 225. In order to make such diagnosis, Dr. Herskowitz would have to see a loss of consciousness, unresponsiveness, bulging fontanelle, and lack of food intake. Id. However, none of these symptoms was present in Montez. Id.

Dr. Herskowitz did not attribute any significance to the notation that Montez's brain was "somewhat edematous." Tr. at 228. In Dr. Herskowitz's opinion, to describe the brain in this manner is essentially the pathologist's way of describing a soft brain. Tr. at 229. There was nothing abnormal on microscopic examination. Id. Dr. Herskowitz does not know why Montez died. Id.

Dr. Herskowitz defined limpness as a loss of muscle tone. Tr. at 234-35. Limpness could be a diffuse neurological sign, attributable to an acquired abnormality of the brain. Tr. at 234-36. However, to diagnose encephalopathy, one would need a profound alteration of mental state and not general symptoms like weakness and limpness. Tr. at 237-38.

Although edema is a non-specific reaction, Dr. Herskowitz stated that there are different degrees of such. Tr. at 239. In order to kill someone, edema must squeeze the brainstem or be the result of an overwhelming metabolic insult where there was a lack of oxygen. Tr. at 239-40. For a fatal consequence to occur, one would expect to see moderate or severe edema. Tr. at 240.

DISCUSSION

The Vaccine Act affords petitioner two theories of recovery, thereby allowing causation to be proven by showing that either: (1) a Table-injury occurred or (2) the vaccine was the cause-in-fact of the injury. The former theory is governed by Section 14(a) of the Act which contains a Vaccine Injury Table. If the injuries described in this Table occur within the statutorily defined time period, petitioner has proven the existence of a "Table-injury," creating a rebuttable presumption of causation.[(9)] To rebut this presumption, respondent must provide affirmative evidence demonstrating that a known factor unrelated was the cause-in-fact of the vaccinee's condition.[(10)]

In the instant matter, petitioner claims that Montez suffered an on-Table encephalopathy as a result of his DPT vaccination which, in turn, led to his death. In support of her claim, petitioner provided the medical expert opinion of Dr. Marcel Kinsbourne. Dr. Kinsbourne opined that Montez suffered an on-Table encephalopathy which resulted in his death. The basis of Dr. Kinsbourne's opinion is two-fold, relying on both Montez's clinical presentation and pathological findings.

To determine whether or not a petitioner experienced an encephalopathy, the undersigned turns to a section of the Act entitled "Qualifications and aids to interpretation." 42 U.S.C. § 300aa-14 (b). Under this section, encephalopathy is defined as:

The term "encephalopathy" means any significant acquired abnormality of, or injury to, or impairment of function of the brain. Among the frequent manifestations of encephalopathy are focal and diffuse neurologic signs, increased intracranial pressure, or changes lasting at least 6 hours in level of consciousness, with or without convulsions. The neurological signs and symptoms of encephalopathy may be temporary with complete recovery,[(11)] or may result in various degrees of permanent impairment. Signs and symptoms such as high pitched and unusual screaming, persistent unconsolable [sic] crying, and bulging fontanel are compatible with an encephalopathy, but in and of themselves are not conclusive evidence of encephalopathy. Encephalopathy usually can be documented by slow wave activity on an electroencephalogram.

Applying the above to the instant case establishes that Montez's clinical presentation does not meet the Act's criteria for determining that a petitioner suffered an encephalopathy. The testimony of Ms. Pittman and her sister, Yvette, reflect that Montez experienced limpness and weakness after vaccination. However, Montez also had a low grade fever to which Dr. Herskowitz attributed these symptoms. Dr. Kinsbourne relied solely on these symptoms in forming his opinion of encephalopathy.

Montez did not experience any of the other symptoms the Act associates with encephalopathy. He did not have high pitched or unusual screaming. He cried but he took naps and eventually fell asleep. Although he was irritable and whined, these symptoms can be attributed to his sore, swollen vaccine site. Yvette Pittman testified that Montez would not climb on her chest after the vaccination. Yet, this lack of movement is not unusual considering the pain in his leg. What, however, is least persuasive in finding that Montez had an encephalopathy is that his state of consciousness did not change. He drank his bottle to some extent, making it possible for him to both cry tears and urinate. He responded to his mother, looking at her as she attempted to feed him and turning his head from side to side, a refusal directed at her attempts. Finally, his fontanelle was flat. Clearly, Montez's clinical presentation is not demonstrative of an encephalopathy as the Act describes it.

Aside from these clinical symptoms, Dr. Kinsbourne also based his opinion of encephalopathy on pathological findings which reflect Montez had a "somewhat edematous" brain on gross examination. At trial, much was been made of this finding; however, the microscopic slides

showed that there was nothing wrong with Montez's brain. In addition, the pathologist himself did not conclude that Montez died from brain edema. Rather, he did not identify any cause for Montez's death. As Dr. Herskowitz testified, brain edema must be either moderate or severe to cause death. However, Montez's brain was "somewhat edematous," clearly insufficient to kill him.

Dr. Kinsbourne buttressed his opinion that encephalopathy caused Montez's death by stating that the death and his "somewhat edematous" brain confirmed the clinical symptoms of limpness and weakness. However, death, by itself, cannot prove a Table injury.[(12)] Moreover, since the edema was not severe enough to be fatal or to confirm pathologically a diagnosis of encephalopathy, the court is left with the clinical signs of limpness and weakness. According to Dr. Kinsbourne, these symptoms by themselves are insufficient to warrant a conclusion of encephalopathy. He testified that if Montez had not died, Dr. Kinsbourne would not be diagnosing encephalopathy. Obviously, if Montez had lived, the two factors (a "somewhat edematous" brain and death) on which Dr. Kinsbourne's diagnosis relies, would be missing.

The court agrees with Dr. Kinsbourne, finding that limpness and weakness alone are not enough to diagnose encephalopathy. Since death itself cannot prove a Table injury, and the somewhat edematous brain has no clinical significance in the absence of a bulging fontanelle or a squeezed brainstem, the court cannot find that petitioner has satisfied her burden of proving an on-Table encephalopathy.

The death of Montez was a deeply tragic event. However, the court in its sympathy cannot ignore the scant proof in this case of a Table encephalopathy. Petitioner has failed to make a prima facie case of on-Table encephalopathy. The other issues, i.e., death as a sequela and the credibility of the factual witnesses absent medical record confirmation, are moot.

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.

DATE: _____ _____

Laura D. Millman

Special Master

1. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C.A. §300aa-1 et seq. (West 1991), as amended by Title II of the Health Information, Health Promotion, and Vaccine Injury Compensation Amendments of November 26, 1991 (105 Stat. 1102). For convenience, further references will be to the relevant subsection of 42 U.S.C.A. § 300aa.

2. Petitioner initially alleged that Montez also suffered on-Table hypotensive-hyporesponsive shock collapse; however, she later dropped this allegation.

3. As discussed infra, the brain weight recorded in this report is a patent error because it is impossible for a child of Montez's age to have a brain weight of this amount.

4. Normally, however, he went to bed at 8:00 or 9:00 p.m., and would sleep until 4:00 a.m. Tr. at 25.

5. When Yvette described Montez as "slumpy," she testified that she meant that his muscles were relaxed and gave out. Tr. at 69.

6. With regard to the autopsy findings, Dr. Kinsbourne noted that the weight of Montez's brain is incorrect because there is no way it could possibly have been 160 grams. Tr. at 101.

7. Dr. Dapena doubts that the pathologist in this case used her technique. Tr. at 133. Although she would generally have taken seven to nine sections, she stated that the two sections taken in the instant case were adequate as they were well stained and looked normal. Tr. at 154-55.

8. Valdes-Dapena, Marie, "The Sudden Infant Death Syndrome: Pathologic Findings," 19 Clinics in Perinatology, 701, 710 (Dec. 1992).

9. The court need not discuss the causation-in-fact standard as petitioner in this case is proceeding strictly under a Table-injury theory.

10. 42 U.S.C § 13(a)(1)(B).

11. One would presume that an encephalopathy which is temporary and results in complete recovery, as described in aforementioned section, would not be compensable pursuant to the Act in contradistinction to an encephalopathy which results in permanent impairment.

12. See Hodges v. Secretary, HHS, 9 F.3d 958 (Fed. Cir. 1993); Hellebrand v. Secretary, HHS, 999 F.2d 1565 (Fed. Cir. 1993); cf. Jay v. Secretary, HHS, 998 F.2d 979 (Fed. Cir. 1993).