OFFICE OF THE SPECIAL MASTERS

(No. 90-0950V)

(Filed May 30, 1997)

* *		
LINDA L. WELCH, as Legal	*	
Representative of DAVID G.	*	
WELCH, an incompetent person	*	
	*	
Petitioner,	*	
	*	
vs.	*	
	*	PUBLISH
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *		

Andrew W. Dodd, Torrance, California, for petitioner.

Glenn A. MacLeod, United States Department of Justice, Washington, D.C., for respondent.

DECISION

WRIGHT, Special Master

On September 12, 1990, and September 20, 1990, the petitioner filed petitions[(1)] on behalf of David Welch ("David"), under the National Vaccine Injury Compensation Program (hereinafter "Vaccine Act" or the "Act").[(2)] Taken together, the petitions claimed that as a result of diphtheria-pertussis-tetanus ("DPT") vaccinations administered to David on February 25, 1970, April 2, 1970, November 13, 1970, and September 5, 1974, David sustained a shock collapse, or a hypotonic hyporesponsive collapse ("HHE"), a residual seizure disorder and/or an encephalopathy. Subsequently, petitioner elected to pursue a theory that the DPT inoculation David received on November 13, 1970, caused him to suffer an

acute encephalopathy, thereby significantly aggravating an underlying static encephalopathy.

I.

PROCEDURAL BACKGROUND

On July 8, 1993, respondent filed a report in this matter recommending compensation be denied since contemporaneous medical documentation did not support petitioner's claim. An evidentiary hearing was held in this matter on May 10, 1994, in San Francisco, California at which factual testimony of Linda Welch, David's mother and petitioner herein, was presented. A hearing on medical issues was held on September 13, 1996. At that hearing, petitioner presented the testimony of Dr. William Waring, a pediatrician who had briefly treated David.[(3)] Testifying for respondent was Dr. John T. McDonald, a board certified pediatric neurologist. Closing arguments were held telephonically on November 4, 1996.

II.

FACTUAL BACKGROUND

The following evidence is contained in the record in this matter:[(4)]

Medical record evidence

David was born on October 29, 1969. He was the 7 lb. 8 1/2 oz. product of a term pregnancy complicated by a maternal fall.[(5)] David's newborn exam was normal and he was discharged from the hospital at three days of age. P. Ex. 2 at 12.

David's first pediatric outpatient record is dated February 20, 1970. He was seen by Dr. Maurer on that date. A maternal history taken at that time indicated that David smiled and cooed at one month of age. He was also noted to roll from front to back at the time of the visit. P. Ex. 10 at 351. The family history was notable for a paternal uncle who had a thyroid condition and recurrent seizures. *Id.* at 352.

David was next seen by Dr. Maurer on February 25, 1970, at which time the doctor noted, "Mother thinks [he] is not strong enough - concerned about grip & back not being strong enough. Doesn't seem to hold onto things like he should." P. Ex. 5 at 307 Dr. Maurer noted "head support is not good." *Id.* David was described as happy and the neurological examination noted as normal for David's age. David was given his first DPT vaccination on that date. *Id.* No adverse reactions were documented.

David was taken to Dr. Maurer's office on March 11, 1970. The chief complaint was "smothered this am - bronchitis." P. Ex. 5 at 308. The medical history noted, "saw MD Friday for bronchitis - mother very jumpy nervous. Was given shot of PCN, neosynephrine, Benadryl and another med. Has done OK since - not dramatically better but this am got tangled up in blankets and was limp."[(6)] *Id.* No adverse reaction to any immunization was recorded at that time.

David received his second DPT immunization on April 2, 1970. P. Ex. 5 at 308; P. Ex. 3 at 22. No adverse reaction to this immunization was recorded.

On April 29, 1970, David was hospitalized at 5:20 a.m. for convulsions, having suffered a progressively severe naso-pharyngitis for several days. P. Ex. 4 at 27. The medical records indicate, "Just prior to the admission, the patient had a generalized convulsive seizure. The patient had no history of similar

episodes and has had no further complaints referable to headaches." *Id.* Hospital records indicate David was experiencing jerking-like movements of his extremities during admission and his temperature was noted to be 101.2 F. *Id.* at 29. At 9:30 a.m., he was again noted to be having jerking movements. *Id.* David was reported to be convulsing again at 7:35 p.m. that evening. At that time, his color was described as "dusky" and his temperature was 102 F. *Id.* at 28. A discharge summary, dated May 1, 1970, indicates David was sent home on antibiotics and phenobarbital. His diagnosis at the time was "naso-pharyngitis due to pneumococci" and "convulsive reaction due to fever." *Id.* at 41.

On May 26, 1970, David was seen again by Dr. Maurer who noted Mrs. Welch's concerns about David's developmental delay:

[M]other concerned about infant on several grounds. Not developing as fast as he should - not sitting up unassisted. Does not crawl or creep - rolls. Doesn't make a walker go. Mother says infant had a seizure in April - generalized - stimulated by light. . . . Seizures were long and lasted quite awhile. . . . Has been having seizures for about 10 days - during this period child has had at least 10 seizures. Throws head back, jerk whole body, eye rolling lasting 10 seconds. . . .

P. Ex. 5 at 309.

David was taken to the emergency room on June 26, 1970, for naso-pharyngitis. P. Ex. 4 at 43. The next day, he was admitted at Santa Rosa Hospital with a history of repeated seizures. P. Ex. 6 at 317. A maternal history recorded by Dr. O'Malley, the treating physician, indicates Mrs. Welch reported that over the preceding two months, the seizures were becoming more frequent but less vigorous. However, Dr. O'Malley recorded that Mrs. Welch described the day before as being "a regular nightmare wherein the child was seizuring for as long as two hours at a time. . . ." *Id.*

On July 19, 1970, David was again admitted to Santa Rosa Hospital with a history of seizures. P. Ex. 6 at 319. According to hospital records, on the day of admission, David was having recurrent seizures and his mother was unable to get them under control. *Id.* An EEG performed during this hospital stay was suggestive of centrencephalic epilepsy. P. Ex. 5 at 320. David was discharged on July 24, 1970, with a final diagnosis of "possible convulsive activity." P. Ex. 6 at 319.

David received his third DPT vaccination on November 13, 1970. P. Ex. 4 at 46. He was hospitalized at the Frank R. Howard Hospital on November 14, 1970, for convulsions. In a consultation report, Dr. Rusnak, noted the following:

According to the parents, the patient was perfectly well until approximately five months of age. At which time he was noted to have staring spells, blinking and jerking seizures. . . . Apparently, the patient had a number of these episodes, some lasting only a few seconds and others up to one-half hour. . . . He was seen both by Dr. Foster and by Dr. Sidney Maurer and apparently placed on a trial of Phenobarbital in [a] small dosage at that time, without good results. The parents became more and more distraught with the [infant's] condition and finally drove him to Santa Rosa where he was hospitalized by Dr. O'Malley for diagnostic pediatric seizure work up. The only possible precipitating causes of the seizures known at that time was an episode the infant had at approximately three months of age when the Mother found him wrapped in his blankets and not breathing and having cyanotic lips and face. She related that he had been twisted in the blankets and choked or suffocated, partially at that time. It was not known if there was a possibility of anoxic brain damage from this episode. . . . [A]t ten months of age and about one month later, he again began having a long protracted series of seizures, these of a different character where he would stare for several seconds at a time and then regain his normal play activities. As this series of seizures began on a Sunday, and the parents were unable to reach a doctor in Willits, they

drove him again to Santa Rosa where he was re-hospitalized by Dr. O'Malley. On his arrival at the hospital he had no further seizure episodes. Repeat electroencephalograms and other studies were done and all apparently were negative. After approximately one week in the hospital the parents claimed the child was discharged on no medications and has had no problems until the present hospital admission. On 13 November, the child received a routine DPT injection and his second Sabine [sic] trivalent polio vaccine in the office of Dr. Foster. That evening, the patient became irritable and started to have a series of seizures lasting a few seconds to half a minute each, on and off, throughout the night. The seizures became progressively worse toward morning and at approximately 10:30 A.M. the patient had a massive grand mal seizure where he became cyanotic and stopped breathing. . . . Over the past 48 hours the patient has been treated with large doses of IM Phenobarb and Dilantin and continued to have several grand mal seizures with perioral cyanosis.

P. Ex. 4 at 46. Dr. Rusnak noted a history of seizures in infancy in the maternal grandmother and questionable epilepsy in a half-brother of the father. *Id.* at 47.

On the first day of his hospitalization, David was noted to have three seizures. They lasted three minutes, two minutes and one and a half minutes, respectively. *Id.* at 52. With the first seizure, cyanosis was noted. Slight cyanosis was noted with the second seizure and the third was noted to be "mild," in which he became rigid with fixed eyes but no convulsion. *Id.* Progress notes written by Dr. Foster on November 15 indicate that notwithstanding the seizures David experienced since being admitted, he seemed "in no distress whatsoever." *Id.* at 48.

On November 15, 1970, the records reflect David had four seizures. The first lasted approximately five minutes but was not accompanied by any cyanosis. *Id.* at 57. The second seizure, during which cyanosis was noted, lasted one and a half minutes. The third seizure lasted approximately three minutes with no cyanosis noted. The fourth seizure lasted 5 minutes and was accompanied by cyanosis. *Id.* Dr. Foster's progress notes indicate that between convulsions, David appeared perfectly normal and was eating well.

On November 16, 1970, David had no seizures and was noted to be "playing," "talking," "squealing," "yelling" feeling "great," and "having a ball." *Id.* at 59. Again on November 17 and 18, David had uneventful days during which he was noted to be playing, and no seizures were noted. *Id.* at 60. His seizure activity continued to be controlled and on November 19, David was noted to be standing up in his crib, yelling at passers-by and playing. *Id.* at 63. David continued to do well and was discharged from the hospital on November 20, 1970, with a final diagnosis of idiopathic seizure epilepsy. P. Ex. 4 at 50.

David was hospitalized overnight in February 1971 for brief seizures associated with fever and heavy congestion. P. Ex. 4 at 72-73. In August 1971, during an illness of acute nasopharyngitis and fever, David was again hospitalized overnight with febrile convulsions. P. Ex. 4 at 85-97.

David was noted to be developmentally delayed and hyperactive as he grew. When he was six years old, developmental testing revealed an intellectual age of three and a half. P. Ex. 4 at 231.

Factual testimony

At the evidentiary hearing held in this matter on May 10, 1994, petitioner presented the testimony of

Mrs. Linda Welch, David's mother and petitioner herein. Mrs. Welch testified she expressed concerns to Dr. Maurer about David's strength during a February 20, 1970, visit simply because she was comparing him to her first child who was precocious in his developmental progress. Tr. at 16. Mrs. Welch testified that after David's February 25, 1970, DPT immunization, he became very fussy and cried off and on all that night and the next day. Tr. at 18. The next morning, February 27, 1970, David began crying again, stopped breathing and his eyes rolled back.(7) Tr. at 18-19. Mrs. Welch claims she took David right to the hospital after giving him mouth-to-mouth resuscitation.(8) Tr. at 19. According to Mrs. Welch, the doctor did not seem concerned and sent David home on Tylenol. Tr. at 20.

Mrs. Welch did not recall the incident recorded in the medical records in March 1970 during which she took David to the hospital because he partially suffocated in his blankets, stopped breathing and turned blue. Rather, she believes the incident occurred after his first vaccination. Tr. at 53, 63-65, 82-84.

On April 2, 1970, a friend of Mrs. Welch's, Joyce Cader, took David for his second DPT vaccination. Tr. at 27. That evening, David was again unconsolable, according to Mrs. Welch. Tr. at 30. She remembered that he cried for days and she could not make him comfortable. Tr. at 31. He also became difficult to feed and did not sleep well. Tr. at 32. In addition, he began to "thrash" with his arms and legs moving. *Id.* Mrs. Welch testified she called the doctor repeatedly and was simply told to keep giving David Tylenol and Dimetap. Tr. at 33.

Mrs. Welch testified that David returned somewhat to his normal self sometime between April 2, 1970, and April 29, 1970, when he was first hospitalized for seizures. Tr. at 34. However, Mrs. Welch's memory of David's hospitalizations for seizures prior to November 1970 was vague, at best. Tr. at 38-40. Nevertheless, she believes that David changed dramatically after his November 13, 1970, DPT immunization. Although Mrs. Welch does not recall what David's seizure pattern was like before the immunization in question, she described his post-vaccination seizures as "harder." With these seizures, David would also stop breathing, pass out and turn dark. Tr. at 45-46.

Mrs. Welch believes that after the November seizures, David was no longer a robust happy go-lucky baby. Tr. at 50. As time went on, it became apparent that David was not progressing developmentally. Tr. at 51. Currently, David is mentally retarded and exhibits aggressive behavior. As of October 1996, David had been off anti-seizure medication for approximately 18 months. However, according to his mother, he continues to have petit mal type seizures and brief focal seizures. Statement of Linda Welch, filed October 23, 1996.

Expert testimony

Dr. William Waring, a board certified pediatrician, testified on behalf of petitioner that David experienced an acute encephalopathic process following his November 13, 1970, DPT immunization consisting of irritability and seizure activity of increased severity despite large doses of anticonvulsant medication.(9) Tr. at 102-03. Notwithstanding David's clear underlying static encephalopathy manifested by his seizure disorder prior to his November 1970 DPT vaccination, Dr. Waring believes the seven generalized seizures following his immunization were more severe, based on their increased length and intensity. In addition, Dr. Waring testified David's post-immunization seizures were accompanied by cyanosis, cessation of breathing and increased irritability.(10) Tr. at 138. The "principal effect" of the post-immunization seizures was "an aggravation of the pre-existing seizure disorder," according to Dr. Waring. Tr. at 103, 107.

When pressed to describe how the post-immunization seizures were different from previous seizures, however, Dr. Waring was ultimately equivocal:

I understand that the evidence is, you know, it's not strong either way in my opinion, but as I said earlier, I believe that there were indications that there was something different at this time from the previous difficulties.

Tr. at 145.

David was next hospitalized for seizures on February 17, 1971. A description of the seizures at 4:45 a.m. that day indicates he had been having seizures of 20 to 30 seconds duration every two to three minutes with no loss of consciousness or eye movement.[(11)] He was described as flaccid but alert and responsive. P. Ex. 4 at 79. These seizures apparently ceased by 5:00 a.m. and David was discharged by 10:30 a.m. Citing the fact that the seizures occurred while David was on phenobarbital at the time, Dr. Waring believed the seizures were "severer [sic] than the ones in November." Tr. at 157. Dr. Waring did not elaborate further.

In August 1971, David was again hospitalized with acute nasopharyngitis and febrile convulsions. P. Ex. 4 at 87. David apparently had six grand mal seizures during this hospitalization lasting between 35 and 70 seconds. Tr. at 158-59. Dr. Waring conceded these seizures did not sound worse than his previous seizures.

As to the sequela of David's vaccine-related injury, while he believes David's seizure disorder was significantly aggravated by the November DPT vaccination, Dr. Waring testified:

I am reluctant to blame his mental retardation on the DPT immunization, although I can't exclude that as a possibility. As is often the case, from my experience dealing with developmentally disabled individuals, the exact etiology of their disability is often obscure. We just don't have an answer in a good many instances, and I would submit that David probably falls into that group.

Tr. at 106-07. Dr. Waring stressed that even though he thought David's post-inoculation seizures were more severe, he did not believe the severity of the seizures was indicative of a change in the severity of the underlying encephalopathy. Tr. at 154.

When asked if David was worse off today because of his November 1970, DPT vaccination, Dr. Waring replied that he did not know and again stressed he could not blame the inoculation for David's current mental retardation:

As I think I said in one of the previous statements that I've submitted, I have been very reluctant to blame his development [sic] disability, his mental retardation, on the DPT injection. We don't know the basis for his mental retardation, and I guess it's conceivable that there could be some relationship, but I'm not comfortable stating that.

The only relationship between what happened subsequently was that I felt, as I said, that there was an exacerbation of his seizure disorder resulting from that third DPT injection.

Tr. at 163.

When asked if he knew the status of David's current condition, Dr. Waring responded David was clearly developmentally delayed. Dr. Waring was unaware that David was currently experiencing any seizures, although he believed David was still on anti-convulsant medication. Tr. at 109. Dr. Waring explained that if David was on medication and not experiencing seizures, that "doesn't mean that he does not have a seizure disorder any longer" because the seizures are controlled by medication. Tr. at 109-10.

Finally, Dr. Waring testified that, according to a consultation during the November hospitalization, a history was given indicating that David was not at that time delayed in his developmental milestones. Tr. at 104-05.[(12)] Dr. Waring believes David's developmental delay only became apparent after the November hospitalization, although he could not pinpoint the date of any objective indications of delay, nor does he associate that delay with David's DPT immunization. Tr. at 106, 163.

On cross-examination, Dr. Waring conceded David experienced grand mal seizures before and during his April 29, 1970,[(13)] hospitalization, before David's May 16, 1970, visit to Dr. Maurer, and before David's July 19, 1970, hospital admission. He further conceded that the two hour episode of seizures described in the medical records in June 1970, probably constituted status epilepticus. Tr. at 117-19, 129-30, 134-35.

Dr. John McDonald, a board certified pediatric neurologist, testified to a reasonable degree of medical certainty on behalf of respondent that the November 13, 1970, DPT vaccination did not harm or compromise David. Tr. at 166. Dr. McDonald testified that children with epileptic seizures are rarely injured by the seizures themselves except in instances of status epilepticus.[(14)] Tr. at 167. Dr. McDonald noted that during David's November 1970, hospitali- zation, he had a total of only 21 minutes of seizure activity over a 38 hour period. Tr. at 168. Moreover, in between seizures, David was noted to be playful and interactive. *Id.*

Dr. McDonald also believes David did not suffer an acute encephalopathy following his November 13, 1970, immunization.[(15)] Tr. at 168-70. Dr. McDonald believes the irritability described in the medical records in November 1970 was likely due to drug intoxication with phenobarbital, a common occurrence. Tr. at 198. Further, if David had been encephalopathic, Dr. McDonald would have expected to see a change in level of consciousness, feeding problems, focal neurological signs, signs of increased intracranial pressure and other dramatic physical findings that would persist. Tr. at 169. Further, while David may have suffered brief periods of apnea (cessation of breathing) during the seizures, short periods of apnea are not unusual, according to Dr. McDonald. Tr. at 193, 197.

Dr. McDonald compared David's November 1970, seizures with previous seizure episodes. In April 1970, David suffered four generalized seizures over a 15 hour period. In June 1970, Mrs. Welch gave a history of seizures for as long as a two hour period. That, according to Dr. McDonald, would qualify as status epilepticus and would be much more troubling than the seizures described during David's post-vaccination hospitalization. Tr. at 172-73. Moreover, David's seizures are now under relatively good control. Tr. at 173-74.

As to the question of developmental delay, Dr. McDonald believes David's records clearly indicate subtle signs of developmental delay before his November 1970, DPT vaccination. Tr. at 175-79. Finally, medical records of David's February 1971, hospitalization do not indicate any change in the worse in his developmental status. Tr. at 185. Although an etiology for David's epilepsy was never pinpointed, Dr. McDonald believes it is due to a genetic condition pre-existing his birth. Tr. at 179.

III.

DISCUSSION

Causation in Vaccine Act cases can be established in one of two ways: either through the statutorily prescribed presumption of causation, or by proving causation in fact. Petitioner must prove one or the other in order to recover under the Act.[(16)] The Vaccine Injury Table lists certain injuries and conditions

which, if found to occur within a prescribed time period, create a rebuttable presumption that the vaccine caused the injury or condition.[(17)] The Table lists encephalopathy as a compensable injury which creates such a presumption if the onset occurs within 72 hours of the administration of the vaccine in question.[(18)] The presumption may be overcome by an affirmative showing that the injury was caused by a factor unrelated to the administration of the vaccine.[(19)]

A petitioner may also recover if there is a preponderance of the evidence that the vaccine recipient "sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table" within the statutorily prescribed time periods.[(20)]

At the beginning of the hearing on medical issues held on September 13, 1996, counsel for petitioner represented that while petitioner had initially posited a connection between David's "early symptomatology" and David's first two DPT immunizations, petitioner was not currently in a position to offer expert testimony based on reasonable medical probability as to the connection between the early immunizations and David's problems. Tr. at 96. Accordingly, petitioner stated her position that David's November 13, 1970, immunization significantly aggravated his pre-existing neurological disorder resulting in an acute encephalopathic process. Tr. at 97.

Petitioner appears to be pursuing two discrete injuries here. First, because David's condition prior to his November 13, 1970, DPT immunization constituted a static encephalopathy, petitioner argues that David suffered a separate Table injury, an acute encephalopathy, within 72 hours of his November 1970, immunization. This argument is simply specious. It is clear under the Supreme Court's decision in *Shalala v. Whitecotton*, 115 S. Ct. 1477 (1995), that if a person has a pre-existing injury listed on the Vaccine Injury Table, in this case, encephalopathy, that person cannot suffer a new compensable Table injury of the same type following a listed vaccination.

If a symptom or manifestation of a table injury has occurred before a claimant's vaccination, a symptom or manifestation after the vaccination cannot be the first, or signal the injury's onset. There cannot be two first symptoms or onsets of the same injury. Thus, a demonstration that the claimant experienced symptoms of an injury during the table period, while necessary, is insufficient to make out a prima facie case. The claimant must also show that no evidence of the injury appeared before the vaccination.

115 S. Ct. at 1480. The Act makes no distinction between a static and an acute encephalopathy. Accordingly, the only theory petitioner could successfully pursue here is a theory of significant aggravation.

Significant Aggravation

The term "significant aggravation" is defined in the Act as "any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health."[(21)] The legislative history has discussed the magnitude of deterioration required for petitioners to successfully prove significant aggravation:

The committee has included significant aggravation in the Table in order not to exclude serious cases of illness because of possible minor events in the person's past medical history. This provision does not include compensation for conditions which might legitimately be described as pre-existing (e.g., a child with monthly seizures who, after vaccination, has seizures every three and a half weeks) but *is meant to*

encompass serious deterioration (e.g., a child with monthly seizures who, after vaccination, has seizures on a daily basis.)

H. R. Rep. 98, 99th Cong., 2d Sess. Pt. 1 at 15-16, reprinted in U. S. Code Cong. & Admin. News 6344, 6356-57 (emphasis added).

On remand from the Supreme Court's *Whitecotton* decision, *supra*, the Federal Circuit enunciated a four-pronged test petitioners must meet in order to establish a Table significant aggravation. In the first three steps, the special master must: (1) assess the person's condition prior to the administration of the vaccine; (2) assess the person's current condition; and, (3) determine if the person's current condition is a significant aggravation of the prior condition within the meaning of the statute. If the special master concludes petitioner has met the first three conditions, the special master proceeds to the fourth step, in which a determination must be made whether the onset of the significant worsening began within the Table time period. *Whitecotton v. Secretary of HHS*, 81 F.3d 1099, 1107 (Fed. Cir. Apr. 16, 1996).

In assessing David's prior condition, the facts must be reviewed. David was taken to the hospital in March 1970 for an event during which he was reported to have been smothered in his blankets with limpness, unresponsiveness, difficulty breathing and cyanosis. David was then hospitalized for grand mal seizures three times prior to his November 13, 1970, DPT vaccination. During his first admission on April 29, 1970, he had four seizures over a 15 hour period. During the last of these seizures, at 7:35 p.m. on April 29, he was described as "dusky." He had two subsequent hospitalizations, on June 27, 1970, and July 19, 1970. Mrs. Welch reported that prior to the June 26th hospitalization, David had suffered seizures for as long as a two hour period. According to Dr. McDonald, this would have constituted status epilepticus.

As to his current condition, David currently takes no anti-convulsant medication and suffers only petit-mal and brief focal seizures.[(22)] In determining whether David suffered a significant aggravation of his underlying static encephalopathy, there must be a markedly greater disability, pain or illness accompanied by a substantial deterioration of health. Section 33(4). Petitioner's case fails on this issue.

Dr. Waring simply was not sufficiently apprised of David's current condition to effectively testify that David's current seizure disorder is significantly worse than his pre-vaccination seizure disorder. No testimony was elicited from Dr. Waring which accurately described David's current condition. His testimony failed to show how David's current condition represented a change for the worse from his pre-vaccination condition resulting in a markedly greater disability, pain or illness accompanied by a substantial deterioration of health. Moreover, Dr. Waring, a pediatrician, was simply unconvincing in describing how David's post-vaccination seizures were significantly worse than his pre-vaccination seizures.

Dr. McDonald, on the other hand, was a highly qualified and cogent witness. He testified, convincingly, that David's two hour period of seizures in June 1970, was more troubling in terms of potential damage to David's brain, than the seizures he suffered after his November 13, 1970, vaccination. He further testified that David's seizures after the vaccination in question were not substantially different that his pre-vaccination seizures, nor did they damage David's brain. This testimony is certainly bolstered by the fact that David was described as "perfectly normal" between his seizures during his November 1970, hospitalization. Petitioner failed to put on *any* convincing evidence that David's pre-existing condition was significantly worsened by the administration of the November 13, 1970, vaccination. Accordingly, I find that petitioner has not met her burden of proving by a preponderance of the evidence that within 72 hours of his November 1970, immunization, David suffered a significant aggravation of his underlying static encephalopathy. Petitioner has thus failed to establish prong number three of the *Whitecotton* test.

(23)

IV.

FINDINGS OF FACT

1. Petitioner has not previously collected an award or settlement of a civil action in connection with any alleged injury sustained by David due to the administration of the DPT vaccine in question. Section 11 (c)(1)(E); Petitioner's Affidavit, filed May 3, 1993.

2. David was administered a vaccine listed in the Vaccine Injury Table. Section 11(c)(1)(B)(i)(I); P. Ex. 4 at 46.

3. Said vaccine was administered in the United States, in Willits, California. Section 11(c)(1)(B)(i)(I); Petition, filed September 20, 1990, at 2.

4. There is not a preponderance of the evidence that David suffered the significant aggravation of an underlying static encephalopathy with onset within 72 hours of the administration of the DPT vaccination in question.

V.

CONCLUSION

Based on the foregoing, the undersigned finds, after considering the entire record in this case, that petitioner is not

entitled to compensation in this case under the Vaccine Act. In the absence of a motion for review filed pursuant to RCFC Appendix J, the clerk of the court is directed to enter judgement in accordance herewith.

IT IS SO ORDERED.

_____

Elizabeth E. Wright

Special Master

1. The two petitions were consolidated on March 21, 1991, by order of the Chief Special Master.

2. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C.A. §§ 300aa-1 through -34 (West 1991 & Supp. 1996)). References shall be to the relevant subsection of 42 U.S.C.A. § 300aa.

3. Dr. Waring was a partner of two pediatricians who treated David in 1970 and 1971. Tr. at 161.

4. The evidence in the record consists primarily of exhibits submitted as part of the petition filed in this case ("P. Ex. ____"), respondent's exhibits filed in this matter ("R. Ex. ____"), plus evidence taken at the evidentiary hearings in this matter ("Tr. at ____").

5. The fall occurred at seven months gestation and, according to medical records, broke three of Mrs. Welch's ribs. P. Ex. 13 at 502.

6. When David was hospitalized in November 1970, medical records describe the smothering event in relation to David's subsequent seizure history:

The only possible precipitating causes of the seizures known at that time was an episode the infant had at approximately three months of age when the Mother found him wrapped in his blankets and not breathing and having cyanotic lips and face. She related that he had been twisted in the blankets and choked or suffocated, partially at that time. It was not known if there was a possibility of anoxic brain damage from this episode.

P. Ex. 4 at 46. A history taken in March 1971 describes this same incident as follows:

[David] was well until 3 months of age when the mother awakened one night and found him tied up in his blankets with difficulty breathing and cyanosis and she thought he "looked almost gone." At the time he was staring and unresponsive, but there were no convulsive movements or twitching.

P. Ex. 7 at 321.

7. In her petition filed September 12, 1990, Mrs. Welch alleged that the screaming, difficulty breathing, turning blue and eyes rolling back began within *five* days of the February 25th immunization. She testified that after checking with her mother, she was able to pinpoint the actual dates. Tr. at 23.

8. There are no records documenting this hospital visit.

9. Dr. Waring believes David had seizures and a static encephalopathy prior to his November 1970 DPT vaccination. Tr. at 103, 108-09.

10. Although the medical records appear to suggest an association between David's described increased irritability and phenobarbital drug intoxication, Dr. Waring believed that irritability would not be a common reaction to phenobarbital, but rather would be "idiosyncratic." Tr. at 146.

11. Other medical records indicate that David had only had three brief seizures that date and that Mrs. Welch had apparently become "hysterical." P. Ex. 4 at 82-83.

12. In his history, dated November 16, 1970, Dr. Rusnak noted that David smiled at three weeks, sat alone at four months, crawled at nine months, walked at 12 months and was able to say single words at eight months. P. Ex. 4 at 47. However, Dr. Maurer, David's pediatrician, noted during a visit on May 26, 1970, that Mrs. Welch was concerned about David's developmental progress. He was still not then (at seven months of age) sitting unassisted. P. Ex. 5 at 309. Dr. Waring acknowledged that Dr. Maurer's history was probably more accurate and that failure to sit at seven months would be at the borderline of abnormal development and would provide reason to be alert to the possibility of subsequent developmental problems. Tr. at 122-23.

13. Dr. Waring testified that during his first seizure episode on April 29, 1970, David was described as

having a "dusky" color. P. Ex. 4 at 28. This description is "kind of a euphemistic way of saying cyanotic," Dr. Waring conceded. Tr. at 152.

14. Dr. McDonald described status epilepticus as a condition involving prolonged generalized or grand mal seizures lasting 30 minutes, or a series of generalized seizures coming and going for over an hour. Tr. at 167.

15. Dr. McDonald disagrees with the description in the medical records of David having a "massive grand mal seizure" because that would imply some prolonged period of status epilepticus, which was not present in David's case. Tr. at 193.

16. Petitioners must prove their case by a preponderance of the evidence, which requires that the trier of fact "believe that the existence of a fact is more probable than its nonexistence before [the special master] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence." *In re Winship*, 397 U.S. 358, 372-73 (1970) (Harlan, J., concurring) *quoting* F. James, Civil Procedure 250-51 (1965). Mere conjecture or speculation will not establish a probability. *Snowbank Enter. v. United States*, 6 Cl.Ct. 476, 486 (Cl. Ct. 1984).

17. Section 14(a).

18. Section 14(a)(I)(B).

19. [19] Section 13(a)(1)(B). Other prerequisites to compensation include: (1) that the injured person suffered the residual effects of a vaccine-related injury for more than six months after the administration of the vaccine. Section 11(c)(1)(D)(i); (2) that the petitioner incurred in excess of $1000 in unreimbursable vaccine-related expenses. Section 11(c)(1)(D)(i); (3) that the vaccine was administered in the United States. Section 11(c)(1)(B)(i)(I); (4) that the petitioner did not previously collect a judgment or settlement in a prior civil action. Section 11(c)(1)(E); and (5) that the action be brought by the injured person's legal representative. Section 11(b)(1)(A).

20. Section 11(c)(1)(C)(i).

21. Section 33(4).

22. David is also developmentally delayed, mentally retarded and exhibits aggressive behavior. However, petitioner's own expert explicitly declined to associate anything other than David's seizure disorder with the November 13, 1970, DPT immunization. Hence, his condition with respect to these other descriptions cannot be considered when determining whether David's current condition is worse than his pre-vaccination condition. Moreover, even if David's current mental retardation were to be taken into consideration, Dr. McDonald testified, persuasively, that, in hindsight, David was suffering from developmental delay prior to the immunization in question.

23. Because petitioner has failed to make out a prima facie case of a Table injury, the question of the etiology of David's underlying static encephalopathy need not be addressed.