OFFICE OF THE SPECIAL MASTERS

January 7, 1998

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KATHLEEN CHIARAVALLE,	*	
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Petitioner,	*	
	*	
vs.	*	No. 90-3307V
	*	PUBLISHED
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *	*	

Kathleen Chiaravalle, Ormond Beach, FL, pro se petitioner.

Eleanor A. Barry, Washington, DC, for respondent.

DECISION AND ORDER

MILLMAN, Special Master

On October 1, 1990, petitioner Kathleen Chiaravalle, on behalf of her minor daughter, Kristie Chiaravalle (hereinafter, "Kristie"), 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 prima facie prerequisites outlined in § 300aa-11(c) of the Act by showing that: (1) Kristie has not previously collected an award or settlement of a civil action for damages arising from the vaccine injury, (2) she has incurred $1,000.00 unreimbursable medical expenses and, (3) the DPT vaccination was administered to Kristie in the United States.

Petitioner alleges that Kristie suffered encephalopathy after her first DPT vaccination on August 3, 1981 within the Table time limits prescribed by the Act. 42 U.S.C. § 300aa-14(a)(I)(B). Respondent defends with the assertion that Kristie did not have any Table injury following her DPT.

The court held a hearing on February 12, 1997 during which Kathleen Chiaravalle testified in order to determine whether her allegations of on-Table symptoms of encephalopathy were credible. The court also held a hearing on November 20 and 21, 1997 to hear the testimony of petitioner's medical expert,

Dr. Alyn L. Benezette, D.O., and respondent's medical expert, Dr. M. Harold Fogelson.

FACTS

Kristie was born on June 1, 1981. Petition at p. 1; Tr. at 4. She received her first DPT vaccination on August 3, 1981 when she was two months old. Med. recs. at p. 4. She received her second DPT vaccination on October 29, 1981 when she was five months old. Id. She received her third DPT vaccination on January 25, 1982 when she was almost eight months old. Id. She received her fourth DPT vaccination on December 15, 1982 when she was seventeen and one-half months old. Id.

The earliest medical record filed by petitioner, dated January 11, 1982, is from the Community Health Plan of Suffolk, Inc. Med. recs. at p. 87. The record reflects that Kristie was seven months old at the time and beginning to bear weight. Id. She had poor muscle tone and was not sitting alone. Id. Mrs. Chiaravalle noticed that Kristie was not as active as her other children. Id.

The next medical record filed by petitioner, dated January 25, 1982, is also from the Community Health Plan. Med. recs. at p. 88. This record reflects that Kristie was still not sitting alone and she had some head lag. Id. In the prone position, she had opisthotonic positioning.[(2)] Id. She received her third DPT vaccination at this time. Id.

On June 24, 1982, when Kristie was a year old, she received her first neurological evaluation at the Community Health Plan. Med. recs. at p. 94. The history reflects that Kristie had not been seriously ill since birth and that Mrs. Chiaravalle realized from the beginning that Kristie was developing at a slower rate as compared to her two other children. Id.

On December 13, 1982, Kristie was taken to the United Cerebral Palsy Associations of New York State. Id. at p. 83. The history given by Mrs. Chiaravalle reflects that, at four weeks, Kristie was already very active, and turning over from the prone to the supine position. Id. At the age of six weeks, Kristie was put to sleep on a queen-sized bed with pillows around her. Med. recs. at p. 83. She was subsequently found lying on the floor on her back. Id. After this incident, Kristie was alert and the doctor reassured Mrs. Chiaravalle. Id. However, Mrs. Chiaravalle reported that Kristie had not attempted to move since this incident. Id. She would lie down in her crib as placed, and was content. Med. recs. at p. 83.

When Kristie was six months old, Mrs. Chiaravalle noticed that she was having opisthotonic attacks. Id. If she were held erect, she pulled her legs in flexion, refusing to support her weight. Id. Her father was a late walker, beginning to walk at two years of age. Id. at p. 84. Kristie gained only one pound from January to June 1982. Med. recs. at p. 83. Her immunizations were up to date. Id.

On April 6, 1984, Kristie was taken to the Health Insurance Plan of Greater New York. Id. Her developmental milestones were considerably delayed. Id. Mrs. Chiaravalle gave a history that, at six months, Kristie lay still and would not roll or sit. Med. recs. at p. 119. She could not put weight on her feet at one year of age. Id. The impression was static encephalopathy. Id. at p. 120.

On May 2, 1986, Kristie was taken to the psychological services branch of United Cerebral Palsy, where a history was written which reflects that Kristie began having opisthotonic attacks at six months of age. Id. at p. 41.

A social work history, which was undated but occurred some time in 1986, states that Kristie was hard to leave as an infant because she moved around a lot. Med. recs. at p. 37. She even fell off a bed once. Id However, her movement ceased after she had her first DPT vaccination at eight weeks. Id.

On October 23, 1987, a notation states that Mrs. Chiaravalle was told that Kristie had cerebral palsy when she was an infant. Id. at p. 126.

On July 27, 1988, a pediatric neurologist wrote that Mrs. Chiaravalle noticed that Kristie was inactive and did not move around during her first six months. Med. recs. at p. 127. By the end of six months, Kristie was not rolling over or sitting. Id. She was also diagnosed as having cerebral palsy. Id.

On October 25, 1988, a school psychologist's report states that Kristie was unusually active during her first eight weeks. Id at p. 9. After her DPT vaccination, she became atypically inactive for the next several months. Med. recs. at p. 9.

A Comack Public School psychological report dated November 15, 1990, states that Kristie reportedly became lethargic after her DPT. Med. recs. at Ex. 7 (unpaginated). During the first eight weeks of life, however, she was very active. Id.

TESTIMONY

Mrs. Kathleen Chiaravalle testified that Kristie was the third of her three girls. Tr. at 5-6 (dated February 12, 1997). At two weeks, she could turn over and was a very active baby. Id. at 6. At six weeks, she was still active. Id. at 7-8. In mid-July 1981, a dog frightened Kristie and Mrs. Chiaravalle moved her to a different room, where she was put on a bed with four pillows surrounding her. Id. at 6-7. Kristie landed on a pillow on the floor. Tr. at 7. Mrs. Chiaravalle took Kristie to the doctor, who said that the child was fine. Id. Mrs. Chiaravalle further stated that the medical record which reflects that she told the doctor that Kristie stopped moving after this incident is inaccurate. Id. at 8.

Kristie received her first DPT on August 3, 1981. Id. at 9. The doctor told her that the child may experience pain, irritability, and swelling. Tr. at 9-10. On the day of the vaccination, Mrs. Chiaravalle went home and gave Kristie Tylenol. Id. at 10. The vaccine site was a big, red welt and had swollen to the size of her hand.[(3)] Id. at 10. Kristie cried and screamed the entire night. Id. Her temperature was 101 degrees. Tr. at 11.

The morning after the DPT vaccination, Kristie quieted down at approximately 6 or 7 a.m. Id. Mrs. Chiaravalle fed her a bottle during the night. Id. at 11-12. She probably changed her diaper. Id. at 12. She did not bathe her that day. Tr. at 12. Kristie resumed her normal habits on August 4, 1981. Id. at 13-14.

On approximately August 10th-14th, Mrs. Chiaravalle noticed that Kristie was different. Id. at 14. She specifically noticed that Kristie was not as active as before. Id. at 8-9. Previously, she would turn over, but now she just lay there. Tr. at 8-9. She was content. Id. When Kristie cried, she would get very stiff. Id. at 14-15. She would throw her head and feet back in a rigid U. Id. Mrs. Chiaravalle did not know precisely when this started, but it was some time between August 1981 and January 1982. Tr. at 21.

In January 1982, Mrs. Chiaravalle changed doctors. Id. at 16. The doctor witnessed the above behavior, i.e., stiffness, and rigid U, and inquired about such. Id. at 16. The doctor also noted that Kristie was delayed. Id. at 17. In the fall of 1982, Kristie was diagnosed with mild cerebral palsy. Tr. at 18. A neurologist told her that it could be the DPT. Id. at 19.

Kristie received her second DPT on October 29, 1981. Id. at 19. She had a temperature and was cranky; however, she was not screaming as after the first DPT. Tr. at 20. The vaccine site was not swollen. Id. Mrs. Chiaravalle did not file the pediatric records from Kristie's first seven months because they were destroyed in a fire. Id. at 22.

Kristie has never had seizures. Id. at 24. Mrs. Chiaravalle stated that she did not call a doctor after Kristie received the first DPT. Id. at 26. On the day after the first vaccination was administered, Kristie's leg gradually became less swollen. Id. In August, Kristie would not hold her bottle at all. Id. at 27. Mrs. Chiaravalle denied the accuracy of the medical record which stated that Kristie had been slow from birth. Tr. at 31. She was very active even in the womb. Id. She stated that her daughter smiled and cooed and was a good baby. Id. at 32.

Mrs. Chiaravalle testified that the medical record which states that Kristie stopped moving at six months of age is incorrect. Id. at 33. She further noted that Kristie's lack of movement began earlier than six months of age. Tr. at 33. She could never understand the cause of her daughter's problems. Id. at 34.

On November 20, 1997, Dr. Alyn L. Benezette testified for petitioner. Dr. Benezette is an osteopath as well as board-certified in adult neurology. Tr. at 4 (dated November 20, 1997). Babies constitute approximately one percent of his practice. Id. at 6.

Dr. Benezette opined that Kristie had acute disseminated encephalomyelitis (ADEM) within Table time of her first DPT vaccination. Id. at 10-13, 24. He based his opinion on the history that Kristie's father gave him when he brought her in for an examination on April 8, 1996.[(4)] Id. at 8. He further bases his opinion on the testimony that Mrs. Chiaravalle gave on February 12, 1997. Tr. at 24.

Dr. Benezette submitted two reports in this case. In his first report, which was based on the April 8, 1996 history and examination, Dr. Benezette opined that Kristie had a static encephalopathy. Id. at 10-11. In his second report, dated May 23, 1997, he opined that Kristie had ADEM. Id. at 11. Dr. Benezette reconciled these reports by agreeing that Kristie's static encephalopathy was a result of her having ADEM. Id. His basis for this diagnosis was the fact that Kristie experienced fever and developmental delays. Tr. at 10. She was not sitting up, and had increased tone in her body. Id. Dr. Benezette was unsure of the period of time when these complications occurred. Id. at 10-11. He further remarked that if Kristie were sensitive to the DPT vaccine, it is curious that she would have no further problems after receiving DPT numbers 2, 3, and 4. Id. at 13. Kristie has not received an MRI; however, such test could confirm his diagnosis of ADEM by showing demyelination. Tr. at 14.

Dr. Benezette diagnosed encephalopathy based on Kristie's fever and lethargy. Id. at 15. He stated that fever alone could not justify a diagnosis of encephalopathy. Id. at 20. It was brought to Dr. Benezette's attention that Mrs. Chiaravalle's testimony does not describe lethargy within three days of the first DPT vaccination. Id. at 20-21.

Dr. Benezette testified that he could not diagnose encephalopathy based solely on fever, screaming, and irritability. Tr. at 21. Even if Kristie experienced a fever of 101 degrees, a swollen injection site, screaming, and irritability during the night of her vaccination, Dr. Benezette stated that he could not diagnose encephalopathy. Id. In order to make such a diagnosis, he would need evidence of less activity and impairment of function. Id.

Although Dr. Benezette reiterated his opinion that Kristie had ADEM occurring on-Table from the first DPT, he stated that she did not suffer an on-Table encephalopathy. Id. at 24. He based his opinion on the fact that she experienced change in tone, rigidity, and stoppage of movement. Tr. at 24-25. He agreed that it is customary for a doctor to diagnose ADEM with an MRI. Id. at 25. He would diagnose ADEM based strictly on clinical symptoms, such as fever and irritability. Id. at 25-26, 31. He did not think that a consequence of encephalopathy would be a decrease in head circumference. Id. at 32. He could not explain why Kristie had a focal, not global, affect in the left side of her brain to account for her right hemiparesis. Tr. at 36-37.

Dr. M. Harold Fogelson testified for respondent. Id. at 43 (dated November 21, 1997). He is a board-certified pediatric neurologist who is also board-certified in pediatrics. Id. at 44. His opinion is that Kristie did not have an on-Table encephalopathy or ADEM after her first DPT vaccination. Id. at 44-47. The basis for his opinion is that Kristie's symptoms, which included crying, pain, and fever, are signs of a local reaction. Id. at 45. If she had encephalopathy, she would have experienced a loss of awareness, loss of abilities, seizures, alteration in consciousness or true personality change within 72 hours of the vaccination. Id. at 45-46.

A couple of weeks after the first DPT vaccination, Kristie may have developed opisthotonic posturing. Tr. at 46. She had a non-progressive course, which was aided by therapy. Id. She possibly has left hemiparetic cerebral palsy (CP). Id. However, there is no laboratory testing to substantiate any neurological condition that she may currently have. Id.

Dr. Fogelson stated that Kristie did not have ADEM, which is a specific and very rare disease that should be diagnostically confirmed with lab studies such as MRI, CT scan, or spinal tap. Tr. at 47-48. She did not have a monophasic course. Id. at 47. She did not have nuchal (neck) rigidity or choreathetosis (jerky movements). Id. at 47, 50. If Kristie had ADEM within 72 hours of her DPT, she would have immediately experienced loss of awareness, and inability to recognize her mother. Id. at 48. Seizure activity would have also been seen. Tr. at 48. ADEM is immune-mediated, and related to the T-cells. Id. One would expect that if Kristie had ADEM, the second, third, and fourth DPT vaccinations would have worsened it. Id.

In addition, if Kristie had encephalopathy, her head circumference would have decreased. Id. at 49. Kristie's head circumference did not decrease. Tr. at 49. Her head circumference is actually disproportionately large. Id. As such, one may consider it unlikely that DPT caused brain damage. Id.

Kristie's right brain may be significantly involved in a neurological disorder. Id. at 51. This suggests a focal lesion, rather than a diffuse or global affect. Tr. at 51.

At this point, Mrs. Chiaravalle stated that Kristie had choreathetosis and that, at eight weeks, she did not do afterwards what she had done before. Id. at 51-53.

Dr. Fogelson stated that he did not know the etiology of Kristie's neurological disorder, which is the situation in 45 to 50 percent of his patients' cases. Id. at 54-56. In the 1980's, the percentage of unknown etiology in neurological cases was 55 to 60 percent. Id. at 56. He reiterated that a post-DPT encephalopathy would manifest itself in a quiet child who is obtunded and sleepy, with nuchal rigidity, a high-pitched cry, hemiparesis, difficulty following, myoclonus, and failure to recognize the caretaker. Tr. at 57.

DISCUSSION

When oral testimony conflicts with contemporaneous documentary evidence, such testimony will not be accorded weight equal to or greater than the records. United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948); Montgomery Coca-Cola Bottling Co. v. United States, 222 Ct. Cl. 356, 375, 615 F.2d 1318, 1328 (1980).

In this case, the records conflict not only with themselves but with Mrs. Chiaravalle's testimony. Faced with the choice of believing records which are either earlier or later in time to the events at issue, the court must select the earlier records. The relevant information was obviously fresher in Mrs. Chiaravalle's mind at the time she gave the earlier histories. Moreover, the motive to be accurate is more likely to be present in the earlier histories. When histories are taken in the early stages of a child's

illness, accuracy is essential for obtaining proper diagnosis and treatment is pressing. In later histories, however, there is less emphasis on accuracy because the child's condition has already been diagnosed and treatment is either in progress or unavailable.

The history that Mrs. Chiaravalle gave during Kristie's first neurological evaluation on June 24, 1982 is particularly damaging to her claim that Kristie suffered symptoms of encephalopathy on the day of her first DPT vaccination. Med. recs. at p. 94. Mrs. Chiaravalle testified that Kristie purportedly had a post-vaccinal encephalopathy manifested by her lack of movement. Tr. at 8-9, 14. She testified that Kristie simply lay around and did nothing after the vaccination. Tr. at 8-9. However, in the June 1982 history, Mrs. Chiaravalle told the doctor that Kristie had not been seriously ill since she was born. Med. recs. at p. 94.

In addition, Mrs. Chiaravalle stated to the United Cerebral Palsy Associations of New York State on December 13, 1982 that, at the age of six weeks, Kristie had ceased movement after she fell off a bed. Id. at p. 83. This was two weeks prior to her vaccination. She further stated that Kristie would just lie content in her crib. Id. This statement is remarkably similar to her testimony today; however, Mrs. Chiaravalle now puts her daughter's behaviorial change after the first DPT, rather than after the fall which occurred two weeks prior to vaccination. Mrs. Chiaravalle also told the Cerebral Palsy group that Kristie's immunizations were up to date. Id. Surely, if Kristie had had a profound change after her first vaccination, that notation would have reflected such change.

Further discrepancies in the histories given by Mrs. Chiaravalle are also reflected in the medical records. In April 1984, Mrs. Chiaravalle stated that the onset of Kristie's lack of movement commenced at six months of age. Med. recs. at p. 119. In a 1982 history, she stated that onset occurred at six weeks of age. Id. at p. 83. However, the first mention of the fact that Kristie's lethargy began after the DPT vaccination is found in a 1986 medical record. Id. at p. 37. As such, the medical records evidence that Mrs. Chiaravalle gave a history of the onset of Kristie's lethargy at three different times: at six weeks after she fell from a bed (1982), at six months (1984), and finally at two months immediately following the DPT vaccination (1986).

Factual omissions from the medical records further weigh against Mrs. Chiaravalle's claim. For instance, the vaccination record, which is the only contemporaneous pediatric record that Mrs. Chiaravalle filed, indicates no reduction in dosage for the second, third, and fourth DPT vaccinations.[(5)] Clearly, if Mrs. Chiaravalle had informed her pediatrician that Kristie had changed from a functioning child to a non-functioning child after the first DPT, the doctor would at least have reduced the dosage of the second DPT vaccination which was administered two months later on October 29, 1981. In addition, the medical records do not reflect that Kristie experienced an extreme reaction to her vaccination. Kristie was Mrs. Chiaravalle's third child; thus, she witnessed her older children receive their DPT vaccinations. In light of this, she would have been likely to recognize a different reaction in Kristie, had it occurred, from the usual post-vaccinal reaction. Although we do not have the contemporaneous pediatric records, the recognition of an extreme reaction, if it had occurred, would surely have been reflected in the earliest records filed by Mrs. Chiaravalle.[(6)] There is, however, no mention of such in these records.

What more likely happened in this case is that Kristie experienced a local reaction to her first DPT, with a red, swollen vaccination site, which consequently subsided the following day. In her testimony on February 12, 1997, Mrs. Chiaravalle stated that Kristie resumed her normal habits on August 4, 1981, which was one day after the first DPT vaccination. Tr. at 13-14. She also testified that she noticed on about August 10th to 14th, seven to eleven days after vaccination, that Kristie was not as active as before. Id. at 8-9. She did not know precisely when Kristie's stiffening began, but it was sometime between August 1981 and January 1982. Id. at 21.

What Mrs. Chiaravalle most likely witnessed was Kristie changing over time and this change is probably as unconnected to the fall off a bed at six weeks as it was to her first DPT vaccination. The only way to explain the discrepancy in the histories she gave is that the presence of symptoms gradually occurred over time. Presumably, the only symptoms that occurred abruptly were her post-vaccinal fever, screaming, and irritability. Dr. Benezette, Mrs. Chiaravalle's expert, found these symptoms to be insufficient to support a diagnosis of encephalopathy. Nevertheless, he still opined that Kristie suffered from ADEM. However, it is difficult to believe that Kristie would resume her normal habits on August 4, 1981, as Mrs. Chiaravalle testified, if she had the onset of ADEM on August 3, 1981.

With regard to the expert testimony in this case, the court must grant greater credibility to the testimony of Dr. Fogelson, who is not only board-certified as a pediatric neurologist, but also as a pediatrician. Tr. at 44. He testified that ADEM is a specific and very rare disease, and that the diagnosis is not made without a confirmatory MRI. Id. at 47-48. Moreover, he stated that the symptoms that Kristie had were diagnostic of a local reaction to the vaccination, rather than a neurological one. Id. at 45. Conversely, Dr. Benezette's expertise is primarily in adult neurology and only one percent of his patients are babies. Id. at 4, 6. As he admitted, the diagnosis of ADEM is usually made with laboratory confirmation. Id. at 25. Yet, an MRI was not performed in this case.

The court does not believe that Kristie suffered an on-Table encephalopathy or ADEM after her first DPT vaccination. Dr. Benezette retreated from his earlier diagnosis of on-Table encephalopathy, and his diagnosis of ADEM seems totally unsupported by credible evidence. The court understands how difficult it is for a parent to accept that no known etiology, rather than DPT, caused her child's illness. The only event that both Mrs. Chiaravalle and Dr. Benezette have to focus on is the first DPT vaccination. However, the court cannot hold for petitioner when the elements for diagnosing an on-Table neuropathy are missing. It is unfortunately common that approximately half of the children with CP do not have a known etiology for their condition. Based on the evidence this court has before it, Kristie falls within that category.

The records indicate that Kristie has a static encephalopathy whose onset occurred prior to the first DPT vaccination. Even if such occurred after the first DPT, there is no credible evidence to demonstrate that its onset occurred on-Table. Although Mrs. Chiaravalle is under the strain of caring for a handicapped child, making her situation very sympathetic to the court, her testimony is not credible as to onset of neurologic symptoms.

The court holds that petitioner has failed to satisfy her burden of proving on-Table encephalopathy. 42 U.S.C. § 300aa-11(c)(1)(C)(I) and 14(a).

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. [1] The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. § 300aa-1 et seq.

(West 1991). The National Vaccine Injury Compensation Program comprises Part 2 of the Vaccine Act. For convenience, further reference will be to the relevant subsection of 42 U.S.C. § 300aa.

2. [2] Opisthotonos "is a form of spasm in which the head and the heels are bent backward and the body bowed forward." Dorland's Illustrated Medical Dictionary, 27th ed. (1988) at 1185.

3. During the November 21, 1997 part of the hearing, Mrs. Chiaravalle testified that she put ice packs on Kristie's vaccine site. Tr. at 60.

4. Mr. Chiaravalle is not a petitioner or a witness.

5. These subsequent vaccinations were administered on October 29, 1981, January 25, 1982, and December 15, 1982.

6. These records begin on January 11, 1982, which is only five months after the first DPT.