

OFFICE OF SPECIAL MASTERS

(Filed: December 21, 2005)

MARTY and KELLIE AVERA,)	
as parents and next friends of their son,)	
CONNOR AVERA,)	
)	
Petitioners,)	
)	
v.)	No. 04-1385V
)	DO NOT PUBLISH
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

DECISION¹

Petitioners, Marty Avera and Kellie Avera (Mr. Avera and Ms. Avera or the Averas), as next friends of their son, Connor Avera (Connor), seek compensation under the National Vaccine Injury Compensation Program (Program).² The Averas filed their Program petition on August 26, 2004. They alleged that Connor “suffered an encephalopathy as described by” the Vaccine Injury Table (Table), 42 C.F.R. §§ 100.3(a)(2) & (b)(2), “[w]ithin 72 hours” after he received a diphtheria-tetanus-acellular pertussis (DTaP) vaccination on August 29, 2001. Petition (Pet.) ¶¶ 3, 7. In the alternative, the Averas alleged that Connor’s August 29, 2001 DTaP vaccination caused actually Connor’s condition. Pet. ¶ 11.

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

Special Master E. LaVon French, and then, this special master, directed the development of the Averas' case. On August 24, 2005, the Averas represented that they had decided "to abandon the Table 'encephalopathy' claim" that they asserted in their petition, opting instead to "proceed with the 'causation in fact' claim." Status Report, filed August 24, 2005, at 2. The Averas stated that they had retained an expert to review the case. *See id.* On November 28, 2005, the Averas represented essentially that their retained medical expert could not offer an opinion supporting an actual causation claim. *See* Status Report, filed November 28, 2005. They requested a ruling "on the merits with the current state of the record." *See id.*

Respondent denies that the Averas are entitled to Program compensation. *See generally* Respondent's Report/Motion to Dismiss (Report), filed December 14, 2005. Respondent contends that "Connor's condition does not qualify as an" encephalopathy as defined by the Table. Report at 4. In addition, respondent contends that the Averas "have provided no credible or reliable evidence to support a cause in fact case." Report at 5.

Congress prohibited special masters from awarding compensation "based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." § 300aa-13(a). Numerous cases construe § 300aa-13(a). The cases reason uniformly that "special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone." *Raley v. Secretary of HHS*, No. 91-0732V, 1998 WL 681467, at *9 (Fed. Cl. Spec. Mstr. Aug. 31, 1998); *see also Camery v. Secretary of HHS*, 42 Fed. Cl. 381, 389 (1998).

This special master has canvassed completely the record. He determines that Connor's medical records alone do not reflect an independent basis for him to conclude more likely than not that Connor's August 29, 2001 DTaP vaccination caused actually Connor's condition. *See* § 300aa-11(c)(1)(A) & (C)(ii)(I). As a consequence, the Averas require necessarily medical expert opinion to establish their claim. However, despite adequate opportunity to adduce medical expert opinion, the Averas cannot obtain medical expert opinion that supports the petition. Thus, this special master is constrained to conclude that the Averas are not entitled to Program compensation.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send the Averas' copy of this decision to the Averas by overnight express delivery.

John F. Edwards
Special Master