

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 07-0717V

Filed: 12 April 2010

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DONALD HUNTER, JR. and ANGELA *
HUNTER, parents of ROMAN HUNTER, *
a minor, *

Petitioners, *

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

* * * * *

Sheila Ann Bjorklund, Esq., Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota, for Petitioners;
Heather Lynn Pearlman, Esq., United States Department of Justice, Washington, District of Columbia, for Respondent.

PUBLISHED DECISION

Statute of Limitations; § 16(a)(2);
Objective Test;
Autism as a Vaccine-Related Injury

**PUBLISHED DECISION AND ORDER GRANTING MOTION TO DISMISS
PURSUANT TO VACCINE RULE 8(d) AND RCFC 12¹**

On 9 October 2007, Petitioners filed (along with seven sets of medical records) a “short form autism petition” for compensation under the National Childhood Vaccine Injury Act of 1986 (“Vaccine Act” or “Act”),² alleging that their son Roman suffered from a disorder listed among the

¹ Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of this ruling 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” may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

² The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq.* (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

autism spectrum of disorders, but without any specific factual allegations, only incorporating by reference the “Master Autism Petition” form. Putatively then, Petitioners claimed compensation for an autism spectrum disorder they alleged was related to the MMR vaccine or any vaccine containing thimerosal that was administered to Roman. Eventually, the Court ordered Petitioners, on 17 October 2007, to file the relevant medical records pertaining to this Petition, and to state their position on date of onset, with which they complied on 14 November 2007, indicating 8 October 2004 as their onset date (corresponding to an evaluation at Macomb Intermediate School District Education Center).

Thereafter, on 20 December 2007, Respondent filed a Motion for an Order to Show Cause why the Petition should not be dismissed for lack of timely filing, inasmuch as Respondent’s position, based on a reading of the medical records filed up to that point, was that the Petition was filed outside of the statutory limitations period of § 16(a)(2). Petitioners filed their responsive memorandum of opposition on 7 February 2008, accompanied by an affidavit from Petitioner Donald Hunter. The matter was then reassigned to the Undersigned’s chambers on 10 March 2008. At a status conference before the Undersigned, Petitioners were ordered to file detailed fact witness affidavits regarding Roman’s development and onset of symptoms, of which one was then filed from each Petitioner on 20 June 2008. Later, the Court ordered Petitioners to file the fact witness affidavit of Roman’s treating pediatrician, Melinda E. Karam, M.D., which Petitioners filed on 15 September 2008.

Given that significant new evidence filed into the record, the Court ordered Respondent to reassess her position and file accordingly. Respondent complied by filing a Motion to Dismiss (the Motion) on 20 October 2008. Petitioners responded to the Motion with a memorandum in opposition to the Motion (the Response), filed on 12 November 2008, accompanied by an expert report by Dr. Marcel Kinsbourne, opining that Roman did not have diagnosable PDD-NOS or autism by 9 October 2004. Thereafter, Respondent filed a surresponse to the Response of Petitioners (the Reply) on 25 November 2008, which was followed soon thereafter by the filing of an expert report and medical literature from Dr. Roberto Tuchman on 24 February 2009. No further filings were desired by the parties nor ordered by the Court, and the Court must now rule on the motion based on the materials filed.

FACTUAL RECORD

Petitioners’ son Roman was born 8 October 2002. Petitioners’ Exhibit (Pet. Ex.) 1 at 36. He received the DTP/DTaP, Polio, MMR, Hib, Hep B, Varicella, and Pneumococcal vaccines, in several doses, between 9 December 2002 and 16 April 2004 (roughly from birth until about 18 months). Pet. Ex. 2 at 21.

Roman’s course is remarkable for a persistent and progressive developmental delay in certain areas. At Roman’s four-month visit with his pediatrician (Dr. Karam), his developmental milestones checklist had all been met, but for “rolls back to side or abdomen.” Pet. Ex. 2 at 14. However, all milestones on the checklist were met at his six-month visit. Pet. Ex. 2 at 11. At his nine-month visit, all milestones were met, but for “pulls to stand; crawls; creeps.” Pet. Ex. 2 at 12.

By his twelve-month visit (16 October 2003), Roman met only half (four of eight) of the milestones expected by the checklist. Pet. Ex. 2 at 10. Lacking were “few steps alone” (although he did “walk[] with support”) and capacity to point; he did not say “mama, dada correctly,” but only said “Ma” and he did not “make[] 1 to 3 words,” but only babbled. *Id.* He was able to eat table foods, but loved baby formula and hated food with texture. *Id.* However, at his fifteen-month visit he met every milestone on the checklist, even though he still hated textured food, preferring baby food. Pet. Ex. 2 at 8.

By his eighteen-month visit (on 16 April 2004), Roman missed one third (three of nine) of the listed milestones: he did not “know[] body parts,” or “pucker[] lips and kiss[],” and he did not feed himself or use a spoon because his mother had not “let him” do so. Pet. Ex. 2 at 7. He was still primarily eating baby food, and his pediatrician discussed with his mother a problem he had with “intermittent vomiting” that was particularly prevalent when he was upset, when he tasted a food texture he disliked, or when he gagged himself. *Id.*

Roman’s two-year visit had to be rescheduled from its initially-scheduled date, and when Dr. Karam spoke with Hunter’s mother on 1 October 2004 by telephone, several concerns were noted, such as “not verbalizing” and “screaming all the time,” which prompted Dr. Karam to refer Hunter to “MISD” for an evaluation for autism. Pet. Ex. 2 (Resubmission) at 38. Roman’s mother communicated her concern for “what she described as screaming spells.” Pet. Ex. 10 (Affidavit of Melinda E. Karam, M.D.) at 2.

Dr. Karam referred Roman to the Macomb Intermediate School District (MISD) Education Center “due to concerns regarding speech and language development,” and an evaluation was performed on 8 October 2004. Pet. Ex. 7 at 5. As part of that evaluation, Roman’s hearing was tested, and he “showed good hearing acuity.” *Id.* On the copy of this evaluation filed *pro se* with the Court with the original short form Petition, (presumably) Petitioners made notations in the margins and spaces to disagree or elaborate on the observations listed therein. It is unclear when these notations were made, but it was certainly sometime between 8 October 2004 and 9 October 2007. The evaluation noted that “Roman was not interested in stacking, and Roman’s mother reports that he is unable to complete this task.” *Id.* However, Petitioners noted their disagreement with this notation, adding that Roman “stacks in a row[,] not in [a] tower.” *Id.* The Educational evaluation is quite relevant to the issue presented, and is worth quoting at length:

In the area of cognitive thinking, ... Roman is not identifying body parts. Roman’s mother reports he is able to follow simple directions at home, such as “throw daddy the ball.” Roman enjoys looking at books on his own, but does not like to be read to. Roman’s mother noted that he prefers to have an object in both hands as he goes about the daily routine. During today’s evaluation, Roman did indeed have an object in both hands, including Legos and a cup and a spoon. Roman was also noted to frequently mouth toys. During today’s evaluation, Roman was unable to follow directions. Roman was unable to identify pictures as well as common objects. Roman was able to successfully place keys in a box after [being] given multiple visual cues. However, on other tasks, visual cues did not appear to assist Roman in successfully following the direction. Roman responded to his name and displayed

good eye contact. Roman's mother reports that at home he generally does not play with toys. Roman prefers to use toys to bang together and open and close doors. Roman's mother reports that he will spin for extended periods of time. Roman today was noted to visually inspect his hands. Roman reportedly will respond to the direction "be careful", when his mother uses it at home. Roman enjoys watching the "Wiggles" on television and likes to clap his hands. Roman's toy play today was judged to be poor and pretend play was absent. Roman's mother states that he will engage in activities at home for extended periods of time, such as spinning in circles, banging toys together, and stirring the inside of an empty yogurt cup with a spoon after meal time.³

...Roman currently has approximately 10 to 15 words ... which his mother reports he uses appropriately. Mrs. Hunter speaks to Roman primarily in Spanish. Her husband and daughter speak to Roman primarily in English. Mrs. Hunter states that she believes that Roman is becoming more frustrated with the inability to make himself understood, as he has recently begun to have more frequent temper tantrums.⁴ Roman will engage in babbling.

...Roman is an extremely social little boy. Roman maintained good eye contact and did attempt to engage the evaluators using facial expressions. Mrs. Hunter reports that Roman is not adverse to playing in sand, taking a bath, getting his hands dirty, or in any difficulties with clothing. Roman enjoys music and will attempt to dance. Mrs. Hunter states that Roman is very interested in other children and will come right up to them. Roman displays no stranger anxiety, and his mother states that he is very "tuned in" to people. She reports that Roman interacts well with his sister and that the two children play well together.

Pet. Ex. 7 at 6. The same comprehensive evaluation continued into its educational communication phase, which the Court quotes in relevant part:

Mrs. Hunter ... states that she is not that worried about Roman's lack of verbalization at this point, but is more concerned regarding his behavior and feeding problems. Specifically, Roman has reported temper tantrums. ... [Roman could use several one- and two-word terms and phrases.] According to Mrs. Hunter, Roman does vocalize in jargon/babbling frequently during the day using a variety of consonant sounds.

Mrs. Hunter feels that Roman does understand language spoken to him. He follows routine commands in the home. He reportedly will retrieve an object when asked.

³ Petitioners' notations note that they "disagree" with that sentence, that the mention of "extended periods of time" was "not true," and explained the phrase "banging toys together" as "clapping legos."

⁴ Petitioners' noted their disagreement with the phrase "more frequent temper tantrums," stating this was "not true – less frequent." However, this seems to be belied by the repeated presenting symptom of an increasing tantrum level that is repeated throughout the evaluation record. See *Id.* at 8.

However, Roman will not point to body parts named. He will not point to objects or pictured objects named when asked.

...He enjoys spinning in circles ... He enjoys opening and closing cupboards. he enjoys his Legos, holding them, but not really putting them together or stacking them. He enjoys looking through books independently, but does not like to be read to at this point. As stated earlier, Mrs. Hunter reports concern regarding Roman's temper tantrums. He enjoys holding his Legos and does have difficulty if someone attempts to take them away.

During today's communication evaluation, Roman did not remain engaged with toys for any length of time. He would, at times, become somewhat interested in a particular object and then remain intensely focused on it...

...He exhibited quite good eye contact and continuous smiling at the examiners. Very few single words were heard during today's communication evaluation. Roman did produce the word "no" to a couple of times. Looking at a page of pictured objects, Roman did say the word "baby", which was an item on the page. Roman's reported vocabulary does suggest he has acquired a nice variety of consonant phonemes. During today's assessment, Roman did not point or gesture to communicate his needs/wants. This corresponds with parent report in that Roman does not utilize gesture in the home environment to communicate his wants and needs. ... Roman did look at an object this clinician called attention to. Although Roman is pleasant and social, communicative turn taking did not appear to be consistent.

Roman did not appear to understand language spoken to him during today's communication evaluation. He did not point to body parts when asked. He did not point to clothing, when asked, although he did once look at his shoes. Roman did not point to pictured objects named when asked. Roman did not follow routine commands accompanied by gestural cues with the exception of placing the keys into the box. He did not follow "give me" type commands accurately. Roman did not give evidence of understanding of language spoken around him during today's assessment.

Pet. Ex. 7 at 8-9. Also, Roman underwent an occupational therapy evaluation while there:

Roman presents as a sweet, friendly little boy. He was initially shy, but quickly warmed up to the testing environment and played with most items that were presented. He was observed to hold objects in his hands throughout this evaluation, but would place them into a container or an outstretched hand, as well. He was noted to hold large Lego pieces on his fingers and click them together. He brought many toys to his lips, but did not attempt to put them in his mouth. He was also observed to look closely at toys and at his hands. Roman appeared to work to the best of his ability, and his mother stated that *this evaluation was a good representation of Roman's abilities on a daily basis.*

Pet. Ex. 7 at 11 (emphasis added).

A psychological evaluation of Roman was performed 11 October 2004, at which many of the same clinical observations were made as had been noted by other evaluators on 8 October 2004 (e.g., “His mother reports that Roman will sometimes just stare at his hands and/or spin around; he also claps his hands quite often, sometimes not in response to any stimuli.”). Pet. Ex. 7 at 14. The psychologist rated Roman on numerical scoring tables, which, for most of them, Roman was moderately, but significantly, behind the average. *Id.* at 15. Based on clinical observations and those ratings, the psychologist stated her conclusions:

Roman is a beautiful and sweet 24 month old boy. According to his mother, he motor, speech, and feeding skills have all been delayed and of concern. Currently, he appears to be significantly delayed in communication development, social/emotional development, daily living skills, motor skills, and cognitive development. The above evaluations, for which Mrs. Hunter was the primary informant, and Roman’s performance reveal that he is currently functioning in the moderately impaired range, cognitively.

...[The psychologist] felt that Roman’s impairments were not based solely on factors relating to environmental, economic, or cultural differences. It is recommended that Roman receive services as a child with the Special Education Cognitive Impairment (Moderate).

Pet. Ex. 7 at 16.

By the time of his two-year visit (on 14 October 2004), Roman’s pediatrician Dr. Karam observed that Roman met only two of nine of the listed milestones (“jumps in place” and “looks at pictures in a book”), while he was not listed as having met “stacks 5-6 blocks,” “vocabulary of 20+ words,” or “knows name.” Pet. Ex. 2 at 6. By that time, Roman had begun eating foods with texture. *Id.* Nevertheless, he was not going “up/down steps holding rail” because he was “not allowed to do this,” he was not turning doorknobs (“only levers”), he was not “pull[ing] on simple garments,” though he did “take[] off clothes,” and he did not make “horizontal or circular strokes.” *Id.* Dr. Karam’s notes point out that Roman “like[d] to spin,” and that she had seen the MISD report that had recently been composed. *Id.* In her impressions listed in her notes, Dr. Karam intended to refer Roman to the Michigan Institute for Neurological Disorders (MIND), and noted that Roman needed speech therapy and help with fine motor skills, but did not think he then fit the diagnostic criteria for autism quite yet. *Id.*

Roman was seen for a developmental evaluation in December 2005, where he was diagnosed with Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS) and Expressive Language Delay. Pet. Ex. 7 at 46, 48. In the history given when Roman was seen by an autism evaluation team in February 2006, it was noted that Roman’s parents “became concerned when Roman was 18 months old although looking back they realize there were challenges from the day he was born.” Pet. Ex. 7 at 31. Roman was eighteen months old in April 2004.

DISCUSSION

In reviewing this case, the Undersigned Special Master reminds the parties that he “may decide a case on the basis of written filings without an evidentiary hearing.” Vaccine Rule 8(d), first part.⁵

Two particular subsections of the Vaccine Act control the issue of timely filing:

In the case of ... a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

42 U.S.C. § 300aa-16(a)(2).

If at any time the Vaccine Injury Table is revised and the effect of such revision is to permit an individual who was not, before such revision, eligible to seek compensation under the Program, or to significantly increase the likelihood of obtaining compensation, such person may ... file a petition for such compensation not later than 2 years after the effective date of the revision, except that no compensation may be provided under the Program with respect to a vaccine-related injury or death covered under the revision of the table if ... the vaccine-related injury occurred more than 8 years before the date of the revision of the table.

§ 16(b).

The essential rule that these statutory provisions set forth can be summated thusly: If a petitioner receives a vaccine that is already on the Vaccine Injury Table,⁶ generally the petitioner must file the petition pertaining thereto before 36 months pass from the date of “onset” of the injury alleged, or lose the right to file the petition; however, if the petitioner has received a vaccine that is subsequently added to the Table, the petitioner may file the petition pertaining thereto within two years of that addition, but may only do so if the vaccine at issue was received eight years or less before that addition.

In this case, the relevant statute of limitation is 16(a)(2). Following 16(a)(2), the question is whether the Petition was filed before 36 months had expired “from the date of the occurrence of

⁵ The first part of Vaccine Rule 8(d) reads:

The special master may decide a case on the basis of written filings without an evidentiary hearing.

The language of the Rule continues as follows:

In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RCFC 56 modified to the needs of the case.

⁶ 42 C.F.R. § 100.3(a), hereinafter referred to as “the Table.”

the first symptom or manifestation of onset or of the significant aggravation of such injury.” Petitioners would have had three years from onset of injury symptoms to file, which means any onset of injury having occurred prior to 9 October 2004 would render the Petition untimely under that provision.

In ruling on a motion to dismiss based on the Petition and accompanying exhibits (*see* Vaccine Rule 2(e)(1)), brought pursuant to Vaccine Rule 8(d) and RCFC 12 (as with FRCP 12), the deciding court “must accept as true the allegations in the [petition] and must construe such facts in the light most favorable to the nonmoving party.” *Nelson Const. Co. v. United States*, 79 Fed. Cl. 81 (2007), citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir.1988). Therefore, in ruling on this Motion without the taking of evidence, the Court will view the date of onset for this Petition as the latest possible date, so as to construe the facts alleged therein in the light most favorable to Petitioners.

Respondent’s Motion argues that the issue presented does not require retrospective analysis of symptoms based merely on later-given medical histories or observations, but that the contemporaneous medical records indicate onset of PDD-NOS well before 9 October 2004. Motion at 5, 8, 9. Petitioners argue that “manifestation of onset” of Roman’s injury (which Petitioners claim to be autism spectrum disorder, as if that were a unitary or specific diagnosis)⁷ occurred sometime after 5 October 2004. Response at 1. Petitioners also stipulate that the facts in the record necessary to rule on this matter are undisputed. *Id.*

Petitioners in their response start out stating the correct rule governing timeliness:

There is a difference between a “symptom” and “manifestation of onset”. A symptom may be indicative of a variety of conditions or ailments, and it may be difficult for lay persons to appreciate the medical significance of a symptom with regard to a particular injury. A manifestation of onset is more self-evident of an injury and may include significant symptoms that clearly evidence an injury. *Markovich*, 477 F.3d at 1357. As the Federal Circuit noted, either of these two events can trigger the statute of limitations clock. *Id.* at 1360. The Court went on to state, the first symptom or manifestation of onset, for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.

Markovich v. Sec’y of HHS, 477 F.3d 1353, 1361 (Fed. Cir. 2007), *cert. denied sub nom., Markovich v. Leavitt*, 75 USLW 3638, 76 USLW 3020 (Oct. 1, 2007). Petitioners also correctly noted that, “[*Markovich*] specifically rejected a subjective standard that focuses on the parent's view of when

⁷ A clear problem in ruling on “short form” autism petitions is their lack of specificity in allegation, particularly in alleging a specific injury. In this case, the medical records make it clear that Roman’s injury, were it to be alleged, is PDD-NOS, which is one disorder among the autism spectrum of disorders. As the difference between these disorders is their symptoms, which serve as diagnostic criteria, delineating a specific injury is vital to ruling on onset of symptoms. Given the systemic nature of this difficulty, the Court here states its finding, based on the above presumption, that Roman’s injury is PDD-NOS. *Cf.* Response at 7 (“Roman Hunter was diagnosed with PDD-NOS in December 2005”).

the alleged vaccine injury occurred,” preferring instead “an objective standard that focuses on the recognized standards of the medical profession at large[, that] treats petitioners equally . . . [and] is consistent with the statutory requirement that the first symptom or manifestation of onset of the injury begins the running of the statute of limitations.” Response, citing and quoting *Markovich* at 1360.

From that strong foundation, Petitioners’ argumentation then descended down a precipice. Petitioners argued that the “medical profession at large does not recognize autism spectrum disorder (ASD) as a vaccine injury,” and thus “because ASD is not recognized by the medical community at large as a vaccine injury, the statute of limitations has not yet begun to accrue in this case.” Response at 4, citing *Markovich* at 1360 (holding that “‘the first symptom or manifestation of onset,’ for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.”). Petitioners’ argument alights upon one of the most obtuse and bedeviling portions in the Federal Circuit’s *Markovich* opinion, and raises an imaginative argument on that semantic foundation. However, even if Petitioners’ argument had not been squarely dispelled by Judge Hodges of the Court of Federal Claims in *Wilkerson v. Sec’y of HHS*, ___ Fed. Cl. ___, 2009 WL 1583527 (Apr. 03, 2009), the absolute authority in Program cases, the Vaccine Act itself, controls the outcome of the case through a plain reading of its statutory language, noted above. *See, e.g., Markovich*, 477 F.3d at 1357 (“We begin our analysis with the language of the Vaccine Act...”). Irrespective of any attempt at divination to assess the opinion of “the medical profession at large,”⁸ Petitioners themselves have claimed, in filing their Petition, that Roman’s autism spectrum disorder was vaccine-related. That is the injury for which they claim entitlement to compensation, and if the Petition was filed “after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset ... of such injury,” then the Petition must be dismissed for lack of timely filing. 16(a)(2).

A central premise in Petitioners’ arguments is that Roman’s PDD-NOS had not developed sufficiently for diagnosis by 5 October 2004: “According to the DSM-IV-TR published criteria, before a diagnosis of ASD can be made, a child must exhibit ‘a total of six (or more) items’ of impairment in [] three categories.” Response at 6. As most any decision in the Program’s twenty year history makes abundantly clear, onset of symptoms quite often occurs prior to the period when the condition is “full-blown” enough such that diagnosis of the injury can be rendered. *See, e.g., Shalala v. Whitecotton*, 514 U.S. 268 (1995); *Pafford v. Sec’y of HHS*, 451 F.3d 1352 (Fed. Cir. 2006); *de Bazan v. Sec’y of HHS*, 539 F. 3d 1347 (Fed. Cir. 2008); *Matkovich v. Sec’y of HHS*, No. 90-1676V, 1996 WL 251403 (Fed. Cl. Spec. Mstr. Apr. 29, 1996); *Garcia v. Sec’y of HHS*, No. 05-0720V, 2008 WL 5068934 (Fed. Cl. Spec. Mstr. (Nov. 12, 2008); *Whitener v. Sec’y of HHS*, No. 06-0477V, 2009 WL 3007380 (Sep. 02, 2009). Therefore, equating diagnosis with onset is a faulty

⁸ Whether such legendary consensus opinion is to be derived through examination of extant medical literature or by direct statistical survey (i.e., epidemiologic statistical analysis), any evidentiary burden the Court might assign to a petitioner to prove the medical community’s unified opinion would run afoul of the Federal Circuit’s established precedent in *Althen v. Sec’y of HHS*, 418 F.3d 1274 (Fed. Cir. 2005) (regarding medical literature) and *Knudsen v. Sec’y of HHS*, 35 F.3d 543 (Fed. Cir. 1994) (regarding statistical evidence), respectively.

position.⁹ Petitioners' filing of Dr. Kinsbourne's expert report, which also disputes whether Roman's injury was diagnosable by 5 October 2004, likewise falls prey to this error ("the ASD diagnosis could not have been made [on 8 October 2004]"). Pet. Ex. 12 at 2. The Court has no reason to doubt Dr. Kinsbourne's analysis about diagnosis; however, it is almost entirely irrelevant to the issue at hand.¹⁰

On the subject of Dr. Kinsbourne's report, both Petitioners and the good doctor responded to the chief factual focus of Respondent in the Motion: Roman's speech delay. Dr. Kinsbourne noted that speech delay is too nonspecific to constitute an onset symptom of a very specific injury like PDD-NOS:

In Roman's case the speech delay emerged as an isolated finding, whereas in ASD it would be accompanied by deficits in social orienting, joint attention, imitation, play and reciprocal affective behavior. Speech and language delay alone therefore cannot even retrospectively be identified as a precursor of autism, as it is so common in the general population. Nor was there anything about the quality of speech or the vocalizations which characterized them as potentially a symptom of autism: no echolalia, no abnormal tone of the vocalizations, no reluctance to communicate, no lack of eye contact, no note of any absence of the non-verbal concomitants of speech.

Pet. Ex. 12 at 3.

The Court agrees with Dr. Kinsbourne that Respondent's myopic focus on a non-specific symptom like speech delay (where there has been no speech regression) is misplaced. However, it cannot agree with him that no other symptoms were present to signal onset of PDD-NOS.

Arguably, Roman's trouble, from as early as his four-month visit, in meeting developmental milestones in more than one category could be seen as a developmental delay that was pervasive in its reach. Moreover, in the phone call on 1 October 2004, Roman's mother communicated to Dr. Karam about behaviors Roman was exhibiting which led Dr. Karam to suspect autism. And the thorough evaluation on 8 October 2004 demonstrated that Roman's symptoms were certainly not

⁹ Petitioners attempt to use selections from *Setnes v. Sec'y of HHS*, 57 Fed. Cl. 175 (2003), to support this aberrant focus, but must be reminded that, even if that were a correct reading of the *Setnes* opinion, such decision is not binding as mandatory authority on the Court here; however, *Markovich, supra*, and *Brice v. Sec'y of HHS*, 240 F.3d 1367 (Fed. Cir. 2001), *cert. denied sub nom. Brice v. Thompson*, 122 S. Ct. 614 (2001), certainly are so binding. See *Vessels v. Sec'y of HHS*, 65 Fed. Cl. 563, 569 (2005); *Hanlon v. Sec'y of HHS*, 40 Fed. Cl. 625, 630 (1998).

¹⁰ The same is true for Dr. Karam's Affidavit, in which she states that she did not believe Roman's speech delay or other health problems "were sufficient to diagnose him as autistic" when she saw him for his two-year visit on 14 October 2004. Pet. Ex. 10 at 3. As Respondent noted in her Reply, Respondent specifically requested that Dr. Karam address in her affidavit whether a first sign or symptom had appeared by 5 October, yet Dr. Karam did not address that issue, choosing instead to focus on whether a diagnosis of autism or PDD-NOS was appropriate at that time. Reply at 7.

Also, as Petitioners themselves stated in the Response, onset "must be based upon the first event objectively recognizable as a sign" of Roman's injury. Response at 5. The critical word is *recognizable*, not *recognized*. The word "recognizable" means capable of recognition, regardless of whether it was actually recognized.

limited to speech delay: It was repeated throughout the histories given to evaluators by Roman's mother that Roman had "begun to have more frequent temper tantrums," and that, even though she was "not that worried" about the speech delay, but was "concerned" about behavioral problems that had arisen (temper tantrums). Among other observations, Roman was unable to follow directions or identify pictures or common objects. Roman's trouble following directions was, for the most part, not aided by help given through visual cues. His mother reported that Roman had not been playing with toys at home, but instead limited his use of toys to banging them together. When observed, Roman's "toy play [was] poor and pretend play was absent." Roman had sustained patterns of repeatedly opening and closing doors and spinning for long periods. Although Roman's mother reported that he communicated somewhat both verbally and nonverbally, at the evaluation he "did not point or gesture to communicate his needs/wants," and his mother stipulated that he had not been employing gesture at home to communicate.

Although the evaluators' observations were made on 8 October 2004, there is nothing said within the record to presume that Roman's status had changed dramatically in the three days previous. Instead, the notations, especially the history given by Roman's mother, indicate that Roman had demonstrated the noted delays and affirmative behaviors for some larger portion of time—perhaps weeks, perhaps months. Almost to a certainty, they would have been present prior to 5 October 2004, three days preceding the evaluation.

It seems singular that Dr. Kinsbourne would not consider these phenomena in composing his report, as he did not mention them therein to discuss how they were or were not symptoms for calculating onset. Similarly, Petitioners did not mention these symptoms either. True, Respondent did not focus on these notations in her Motion, but they had been a part of the Record in this matter since the initial, *pro se* filing.

In fact, the only person who seems to have noticed these crucial references in the medical records, or at least their dispositive relevance, seems to have been Respondent's expert, Dr. Tuchman. Resp. Ex. A at 2; *see also Id.* at 4 ("I would disagree with [Dr. Kinsbourne's] statement that 'In Roman's case the speech delay emerged as an isolated finding.'"). His report was also helpful in that he provided a working definition for the injury in this case: "PDD-NOS is a behaviorally defined disorder [of which the] core features ... are qualitative impairments in social interaction, qualitative impairments in communication, and restricted repetitive and stereotyped patterns of behavior, interests, and activities." *Id.* at 3. In Dr. Tuchman's opinion, "[Roman's] developmental problems including his language disorder were the first symptoms and manifestations of his present diagnosis of PDD-NOS." *Id.* at 5.

In the absence of discussion of these delays and behaviors by Petitioners or Dr. Kinsbourne, Dr. Tuchman's analysis goes un rebutted. Neither Petitioners nor their expert ever answered the critical question presented by Respondent's Motion: Did Roman experience the first symptom(s) of his PDD-NOS prior to 5 October 2004? Instead, a patent reading of the medical records filed herein seems to speak the answer to this central query, and Dr. Tuchman's uncontested opinion only serves to reiterate and amplify that answer. The Court finds, as a matter of fact, that Roman experienced the first sign(s) or symptom(s) of his injury prior to 5 October 2004. This leads inexorably to the

legal conclusion that the Petition was therefore untimely filed. As such, the Petition is decisively time-barred. As that is the sole issue presented by the instant Motion, the Court sayeth naught else.

CONCLUSION

Accordingly, there is no reasonable alternative but to **DISMISS** this Petition.¹¹ In the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 within 30 days of this date, **the clerk shall forthwith enter judgment** in accordance herewith..

IT IS SO ORDERED.

s/ Richard B. Abell
Richard B. Abell
Special Master

¹¹ The Court reminds Petitioners of Respondent's position that a lack of timely filing is a jurisdictional defect, and takes the opportunity to restate the clear decisional law that attorneys' fees may only be recovered where the Court held jurisdiction over the underlying petition. *See Brice v. Sec'y of HHS*, 358 F.3d 865, 869 (Fed. Cir. 2004). Also, recovery of attorneys' fees and costs in cases that do not prevail on entitlement is contingent upon a factual showing that the petition was filed upon a reasonable basis with good faith. § 15(e)(1).