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

(Filed: November 29, 2006)
No. 03-1585V

JILLIAN LOWRIE, parent and next friend of EMILY PAIGE LOWRIE, a minor,	)	
Petitioner,	)	
v.	)	PUBLISH Motion for Reconsideration of Ruling Regarding Onset of Symptoms; Alternatively, Motion for Certification to Federal Circuit
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Respondent.	)	

Robert T. Moxley, Cheyenne, WY, for petitioner.

James A. Reistrup, Department of Justice, Civil Division, Torts Branch, Washington, DC, for respondent.

Ruling on Petitioner's Motion for Reconsideration of the December 12, 2005 Ruling Regarding Onset of Symptoms and Findings of Fact, and in the Alternative, for Certification to the Federal Circuit [1]

On June 1, 2006, petitioner moved for reconsideration of the special master's December 12, 2005 Ruling Regarding Onset of Symptoms and Findings of Fact.

[1] In accordance with Vaccine Rule 18(b), when a special master files a decision or substantive order with the Clerk of the Court, each party has 14 days within which to identify and move for the redaction of privileged or confidential information before the document's public disclosure. If the special master agrees, upon review of the party's motion, that the identified material falls within the described categories of protected information, the special master shall delete that material from the publicly accessible document.

Alternatively, petitioner moved for certification to the Federal Circuit. Respondent filed its objection on June 30, 2006. At petitioner's request, the undersigned heard oral argument on petitioner's motion for reconsideration on August 9, 2006. For the following reasons, petitioner's motion is **DENIED**.

I. Facts

On June 30, 2003, Jillian Lowrie (petitioner or Ms. Lowrie), as the parent and next friend of her daughter Emily Paige Lowrie (Emily), filed a petition pursuant to the National Vaccine Injury Compensation Program[2] (the Act or the Program). 42 U.S.C. §§ 300aa-10 to -34 (2000 & Supp. II 2003). Petitioner alleges that the four vaccinations[3] administered to Emily on July 6, 2000 caused Emily to suffer an encephalopathy as defined by the Vaccine Injury Table (Table), 42 C.F.R. § 100.3(a)(2).

Petitioner asserts that Emily showed symptoms and suffered an injury that her medical records did not document. See December 12, 2005 Ruling Regarding Onset of Symptoms and Findings of Fact (12/12/05 Ruling) at 1. "To determine whether [Emily's] medical records were vague, incomplete, or otherwise susceptible to interpretation," the special master conducted a fact hearing on May 24, 2005. Id. at 2. On August 31, 2005, the special master conducted a second hearing to take the testimony of Emily's pediatrician, Jean W. Bryant, M.D." Id. The parties submitted post-hearing briefing on November 15, 2005. "After reviewing the medical records, affidavits, and testimony at both hearings, the special master [found] that the medical records in this case are clear, internally consistent, and complete." Id. Based on that finding and "the opportunity to observe the witnesses and evaluate their testimony," id., the special master decided that petitioner could "not supplement the written record with contradictory testimony," id.

With respect to the onset of Emily's symptoms, the special master found that contrary to the testimony of Emily's family that she "appeared 'lifeless' or resembled a

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[2] The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10-§ 300aa-34 (West 1991 & Supp. 2002) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

[3] The administered vaccinations included a diphtheria, tetanus, and acellular pertussis (DtaP) vaccination. The DTaP vaccine is "a combination of diphtheria toxoid, tetanus toxoid, and pertussis vaccine; administered intramuscularly for simultaneous immunization against diphtheria, tetanus, and pertussis." Dorland's Illustrated Medical Dictionary 1998 (30th ed. 2003).

'CPR dummy' for much of the time after her July 6, 2000 vaccinations," id. at 26 (internal citations omitted), no contemporaneous medical records supported the assertions of petitioner and her witnesses, id. The special master also found:

> If the events of July 6-9, 2000, occurred as described, the special master believes that (1) petitioner would have taken her daughter to the hospital, despite the alleged advice of her pediatrician's office not to bother or that the crisis would pass; (2) Mrs. Lowrie, [Emily's grandmother,] a trained nurse, lactation consultant, doula, and health care educator, would have insisted on taking Emily to the hospital as she had done for her other children when they experienced possible vaccine reactions; and (3) Mr. Lowrie[, Emily's grandfather,] would not have valued his personal participation in a baseball tournament more than the health of his granddaughter. The depictions of Emily's appearance and behavior by the witnesses at hearing convinces the special master that, if true, all three family members directly responsible for Emily's well-being would have sought immediate medical attention for Emily. Yet no one did. Based on the foregoing, it is not reasonable to believe that the events occurred as described in the testimony at hearing.

Id. at 30.

The special master stated that her conclusion "should not be misconstrued as a finding that petitioner and her witnesses were untruthful." Id. Rather, the special master explained, "Given the traumatic events [that petitioner and her witnesses] endured over a compressed time period, coupled with the passage of five years, it would not be unusual for memories to fade or for witnesses to misremember." Id. at 30. The special master directed petitioner's counsel to confer with respondent's counsel and "then contact the court to schedule a status conference to discuss further action in this case." Id. at 32.

On February 8, 2006, Chief Special Master Golkiewicz reassigned this case to the undersigned. During status conferences conducted on March 9, 2006, and April 5, 2006, petitioner's counsel indicated that he might seek reconsideration of the December 12, 2005 Ruling. Respondent's counsel and the undersigned addressed possible difficulties with the proposed filing of the reconsideration motion. By Joint Status Report filed on March 31, 2006, petitioner's counsel stated that he intended to move for reconsideration of the December 12, 2005 Ruling, and respondent's counsel outlined possible objections to the anticipated filing.

On June 1, 2006, petitioner filed a Motion for Reconsideration, and in the

Alternative, for Certification to the Federal Circuit (Petr's Mot.). On June 30, 2006, respondent filed its Objection to Petitioner's Motion for Reconsideration or in the Alternative for Certification to the Federal Circuit (Resp.'s Obj.). By Joint Status Report filed July 21, 2006, the parties indicated that "the issues are adequately framed by the motion, response, and accompanying points and authorities." Joint Status Report of 7/21/06, ¶ 1. In that Joint Status Report, petitioner requested "that the pending motion be resolved via an on-the-record telephonic oral argument/hearing." Id. at ¶ 2.

The undersigned heard oral argument on August 9, 2006. Petitioner's motion is now ripe for a ruling.

II. Discussion

Petitioner argues that reconsideration of the December 12, 2005 Ruling is warranted because the special master applied "an erroneous doctrine of evidence law" that petitioner alleges was set forth in the decision of Murphy v. Secretary of HHS, 23 Cl. Ct. 726 (1991). See Petr's Mot. at 2-15. Petitioner refers to the doctrine as the Murphy rule. Id. at 2.

Petitioner asserts that the factfinding in the December 12, 2005 Ruling is "illogical" because the special master found the witnesses credible but mistaken in their recall of the details of Emily's illness. See id. at 15-22. Contending that "[r]econsideration is never foreclosed in the Program," id. at 22, petitioner states that reconsideration is "necessary" and "timely," id. at 22, 26. In support of her position, petitioner cites Hanlon v. Secretary of HHS, 40 Fed. Cl. 625 (1998), aff'd, 191 F.3d 1344 (Fed. Cir. 1999); Plavin v. Secretary of HHS, 40 Fed. Cl. 609 (1998); Vant Erve v. Secretary of HHS, 39 Fed. Cl. 607 (1997), aff'd, 2000 WL 425005 (Fed. Cir. Apr. 18, 2000); Copeland v. Secretary of HHS, 2000 WL 816829 (Fed. Cl. Spec. Mstr. 2000); Koston v. Secretary of HHS, 1991 WL 57079 (Cl. Ct. Spec. Mstr. 1991), aff'd, 23 Cl. Ct. 597, aff'd, 974 F.2d 157 (Fed. Cir. 1992).

Petitioner alternatively seeks certification to the Federal Circuit for interlocutory review. Id. at 26 (citing 28 U.S.C. §§ 1292(d)(2), 1295(a)(3)).[4] Petitioner asserts that the

[4]Section 1292(d)(2) provides in pertinent part:

> [W]hen any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance

Federal Circuits examination of the December 12, 2005 ruling will "'materially advance the ultimate termination of the litigation.'" Id. (quoting 28 U.S.C. § 1292(d)(2)).

Respondent argues that petitioner's motion is not cognizable because Vaccine Rule 10(c) authorizes a motion for review of special master's decision within twenty-one days of the issued decisions. Resp.'s Obj. at 4. Here, respondent asserts that a ruling, and not a decision for entitlement to compensation, issued on December 12, 2005. Id. Moreover, respondent asserts that, even if the ruling is deemed a decision of purposes of the Vaccine Act, petitioner's motion for reconsideration is out of time, id. at 5, and does not satisfy the standard for reconsideration, id. at 6. Respondent contends that the statutory provisions cited by petitioner do not permit certification to the Federal Circuit for interlocutory review. Id. at 8.

Respondent asserts that the ruling reflects a correct application of the legal standard for evaluating and weighing later given oral testimony that conflicts with contemporaneous medical records. See id. at 10-11.

A. Petitioner Does Not Seek Reconsideration of a Decision as Contemplated by the Vaccine Act, and Petitioner has Filed an Untimely Motion

Vaccine Rule 10(c) addresses motions for reconsideration. The rule provides, in pertinent part:

> Within 21 days after the issuance of the special master's decision, if neither a judgment nor a motion for review of the special master's decision has yet been filed, either party may file a motion for reconsideration of the special

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> the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

28 U.S.C. § 1292(d)(2).

> Section 1295(a)(3) provides in pertinent part:
> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of Federal Claims.

28 U.S.C. § 1295(a)(3).

> master's decision. The special master may seek the non-moving party's response to such a motion, determining the method of and time schedule for any such response. The special master shall have discretion to grant or deny such motion, in the interest of justice.

Vaccine Rule 10(c), Appendix B of the Rules of the Court of Federal Claims (RCFC, App. B). Vaccine Rule 10(c) permits a party to seek reconsideration of a special master's decision within a twenty-one day period of time following the issuance of the decision provided the Clerk of the Court has not entered judgment and no "motion for review of the special master's decision has yet been filed." Id. For the following reasons, the undersigned finds that petitioner has not moved for reconsideration of a decision as that term is defined by the Vaccine Act. Nor has petitioner filed a timely motion.

Section 12(d)(3)(A) of the Act states that "[a] special master to whom a petition has been assigned shall issue a decision on such petition with respect to whether compensation is to be provided under the Program and the amount of such compensation." § 300aa-12(d)(3)(A) (emphasis added). A decision issued by a special master may be reviewed by the United States Court of Federal Claims. Id.

As defined in section 12(d)(3)(A) of the Vaccine Act, a "decision" issues when a special master determines the ultimate issue in the case, specifically whether a petitioner is entitled to compensation under the Program, and if so, what is the amount of compensation owed. See Widdoss v. Secretary of HHS, 989 F.2d 1170, 1175 (Fed. Cir. 1993) (stating that "both section 300aa-12(d)(3)(A) and 300aa-12(e)(1)[5] evidence that the proceedings on a petition conclude with a special master's final act of 'issu [ing] a decision on the petition,' at which time the clock measuring the time for filing a motion to review the special master's decision begins to run.") (footnote added); see also Weiss v. Secretary of HHS, 59 Fed. Cl. 624, 626 (2004) ("[T]he statute contemplates that a 'decision' by a special master will resolve the ultimate issues in the case, including whether compensation is appropriate and if it is, its quantum."). From the statutory provisions addressing the issuance of a decision by a special master, the Court of Federal Claims has inferred that non-final decisions by a special master are not reviewable:

> The Act does not explicitly state whether the court may review interim decisions of the special master. The Act, however, implies that a final decision is required before this court can review the special master's order.

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[5] Section 12(e)(1) of the Act affords parties thirty days from the date of issuance of a special master's decision for the filing of a motion to review. §300aa-12(e)(1).

> Section 12(e)(3) provides that in the absence of a motion for review or if the court sustains the special master's decision, "the clerk of the United States Court of Federal Claims shall immediately enter judgment in accordance with the special master's decision."

Spratling v. Secretary of HHS, 37 Fed. Cl. 202, 203 (1997) (internal citation omitted). More recently in Vessel v. Secretary of HHS, 63 Fed. Cl. 563, 566 (2005), the Court of Federal Claims stated that "the principle is well-established that a pre-compensation decision properly before the special master may not be appealed to this Court." The undersigned agrees.[6]

The December 12, 2005 Ruling that petitioner challenges is not a decision on the ultimate issue of whether petitioner is entitled to compensation under the Act. Rather, the December 12, 2005 Ruling is limited to findings of fact concerning the onset of Emily's alleged symptoms. Because no decision has issued in this case, as contemplated by the Vaccine Act, petitioner's motion for reconsideration is not cognizable. Interestingly, each of the cases that petitioner has cited in support of her motion for reconsideration also contemplates that the determination that is challenged on motion for reconsideration is a finding on the issue of entitlement. See Hanlon v. Secretary of HHS, 40 Fed. Cl. 625, 629 (1998) (stating that "[w]hether or not to reconsider, prior to issuance of a final decision, the announced finding of entitlement in a vaccine case is left to the discretion of the special master"), aff'd, 191 F.3d 1344, 1350 (Fed. Cir. 1999) (stating that "it is not an abuse of discretion to consider new pertinent medical evidence that was not available at the time of the original petition"); Plavin v. Secretary of HHS, 40 Fed. Cl. 609, 622-23 (1998) (finding, based on the record in the case, that "[t]he special master acted well within her discretion in reopening the T[uberous]S[clerosis][7] entitlement proceedings" to consider new evidence after she had decided the issue of entitlement); Vant Erve v. Secretary of HHS, 39 Fed. Cl. 607, 616 (1997) (determining that denial of respondent's motion to reopen question of liability to hear new evidence was an abuse of discretion because "the information proffered was highly probative; the delay, while extensive was

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[6] Although special masters are not bound by the decisions of the Court of Federal Claims, except, of course, in the same case on remand, see Guillory v. United States, 59 Fed. Cl. 121, 124 (2003), the reasoning underlying the decisions of the Court of Federal Claims may be informative or persuasive in a particular case.

[7] Tuberous sclerosis is a disease characterized by benign tumor-like nodules, composed of overgrown tissues and mature cells, that are principally found in the brain (tubers), the retina, and the viscera. See Dorland's Illustrated Medical Dictionary, at 1669 (30th ed. 2003). The disease may result in mental retardation, seizures and skin lesions. Id.

not prejudicial to petitioners; and the delay was not the fault of the respondent"), aff'd, 2000 WL 425005, *1 (Fed. Cir. Apr. 18, 2000) (affirming decision of Court of Federal Claims finding that special master abused his discretion by failing to reopen the entitlement issue on motion of respondent); Copeland v. Secretary of HHS, 2000 WL 816829, at *2 (Fed. Cl. Spec. Mstr. 2000) (noting that the case law entrusts to the discretion of a special master the decision of whether or not to re-evaluate an announced finding of entitlement in a vaccine case that is continuing "after the accumulation of much more scientific evidence over the passage of years"); Koston v. Secretary of HHS, 1991 WL 57079, at **1-2 (Cl. Ct. Spec. Mstr. 1991) (deciding damages to which petitioner entitled after denying respondent's motion for leave to amend its Rule 4 Report to withdraw its concession of entitlement), aff'd, 23 Cl. Ct. 597, 605 (affirming the special master's decision on the limited ground that "[w]hen a party challenges the denial of a motion for leave to amend, and concurrently submits information casting doubt on its ability to prevail on its own claim or defense, the denial of the motion will be upheld as reasonable"), aff'd, 974 F.2d 157, 159 (Fed. Cir. 1992) (affirming the judgment on the basis that the amendment of the Rule 4 report "would be futile").

Additionally, petitioner has sought reconsideration nearly six months after the issuance of the December 12, 2005 Ruling. Vaccine Rule 10(c) affords parties only a twenty-one day period of time following the issuance of a decision for the filing of a motion for reconsideration. Vaccine Rule 10 (c), App. B, RCFC. Even if the December 12, 2005 Ruling constituted a decision for purposes of the Vaccine Act, petitioner has not filed a timely motion for reconsideration. Petitioner offers no explanation for the untimeliness of the filing, asserting instead that "[r]econsideration is never foreclosed in the Program, and to rule that such relief cannot be invoked would be an abuse of discretion." Id. at 22. Contrary to petitioner's bare assertion, the Vaccine Rules do prescribe a time period for the filing of a motion for reconsideration, and petitioner has not filed this motion within the prescribed time frame. The untimeliness of petitioner's motion, without explanation for the delay in filing, militates against the granting of the reconsideration motion.

B. Petitioner's Motion Does Not Meet the Standard for Reconsideration because the December 12, 2005 Ruling applies the proper legal standard for evaluating conflicting evidence.

Vaccine Rule 31 states that "[i]f a party files a motion for reconsideration of the assigned judge's decision within 10 days after entry of judgment, RCFC 59 shall apply." RCFC 59(a)(1) affords the court discretion to grant reconsideration "to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the

United States." RCFC 59(a)(1); see Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990) ("The decision whether to grant reconsideration lies largely within the discretion of the district court."). A motion for reconsideration is proper "where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." Bd. of Trustees of Bay Med. Ctr. v. Humana Military Healthcare, 447 F.3d 1370, 1377 (Fed. Cir. 2006). Reconsideration is not proper when a party merely reasserts prior arguments. See Henderson County Drainage Dist. 3 v. United States, 55 Fed. Cl. 334, 337 (2003) (By "merely reasserting arguments which were previously made and were carefully considered by the court," a party does not persuade the court on motion for reconsideration.); see also Lamle v. Mattel, Inc., 394 F.3d 1355, 1359 n.1 (Fed. Cir. 2005) (A party cannot prevail on motion for reconsideration when the party – even one who appears pro se – raises for the first time, on motion for reconsideration, an issue that could have been litigated at the time the complaint was filed). Nor is a motion for reconsideration intended to give an "unhappy litigant an additional chance to sway" the court. Froudi v. United States, 22 Cl. Ct. 290, 300 (1991); see also CW Gov't Travel, Inc. v. United States, 63 Fed. Cl. 459, 462 (2005) (noting that dissatisfaction with the conclusion reached by the court is an "improper" basis for motion for reconsideration).

Here, the basis for petitioner's motion for reconsideration appears to be "to correct a clear error of law." Bd. of Trustees of Bay Med. Ctr., 447 F.3d at 1377. Petitioner challenges "the special master's dispositive application of an erroneous doctrine of evidence law . . . referred[]to as the Murphy rule." Petr's Mot. at 2 (footnote omitted). Petitioner asserts that by applying the Murphy rule, described by petitioner as a "matter of intellectually deficient legal scholarship that has persisted in the Vaccine Program for years," id. at 3, the court improperly used "[t]he absence of a recording in a hearsay record . . . to trump sworn testimony as a matter of law," id. at 5 (footnote omitted). In particular, petitioner argues that the special master erroneously "credit[ed] hearsay medical records over the corroborated testimony of multiple witnesses, found to be credible," id. at 4.

Respondent argues that the special master applied the proper legal standard to competing evidence to make factual determinations. See Resp.'s Obj. at 10-11. Respondent asserts that "[a]s a threshold consideration, the Vaccine Act specifically provides that '[t]he special master or court may not make such a finding [of entitlement] based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.'" Id. at 10 (quoting 42 U.S.C. § 300aa-13(a)). Moreover, respondent asserts that "[c]onsistent with the Vaccine Act's provisions, . . . the Federal Circuit has observed that contemporaneous medical records warrant consideration as particularly trustworthy evidence." Id. at 10-11 (citing Cucuras v. Secretary of HHS, 993 F.2d 1525,

1528 (Fed. Cir. 1993)). Respondent contends that by applying the "appropriate" legal standard for determining the weight to be afforded medical records as set forth in the Murphy case, the special master "correctly concluded that petitioner did not meet her statutorily imposed burden to show by a preponderance [of the evidence] that the onset of Emily's symptoms was incorrectly recorded in the contemporaneous medical records." Id. at 11.

In the Murphy case, the special master evaluated conflicting evidence concerning the onset of the alleged symptoms suffered by a minor child. The parents of the minor child (the Murphys) alleged that their son had "suffered an encephalopathy[8] and the onset

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[8] Within the Vaccine Program, a vaccine recipient is deemed to have suffered an encephalopathy if such recipient manifests, within the applicable period, an injury meeting the following description of an acute encephalopathy, that persists as a chronic encephalopathy for more than 6 months beyond the date of vaccination. 42 C.F.R. §100.3(b)(2) (qualifications and aids to interpretation of the Vaccine Injury Table). An acute encephalopathy is one that is sufficiently severe that, whether or not hospitalization occurs, the condition requires hospitalization. Id.

For children less than 18 months of age who present without an associated seizure event, an acute encephalopathy is indicated by a significantly decreased level of consciousness lasting for at least 24 hours. Id. For those children less than 18 months of age who present following a seizure, the children shall be viewed as having suffered an acute encephalopathy if their significantly decreased level of consciousness persists beyond 24 hours and cannot be attributed to a seizure or medication. Id.

For adults and children 18 months of age or older, an acute encephalopathy is one that persists for at least 24 hours and is characterized by at least two of the following conditions: (1) a significant change in mental status that is not medication related; specifically a confusional state, or a delirium, or a psychosis; (2) a significantly decreased level of consciousness, which is independent of a seizure and cannot be attributed to the effects of medication; and (3) a seizure associated with loss of consciousness. Id. A "significantly decreased level of consciousness" is indicated by the presence of at least one of the following clinical signs for at least 24 hours or greater: (1) decreased or absent response to environment (responds, if at all, only to a loud voice or painful stimuli); (2) decreased or absent eye contact (does not fix gaze upon family members or other individuals); or (3) inconsistent or absent responses to external stimuli (does not recognize familiar people or things). Id.

The following clinical features, whether alone or in combination, do not demonstrate an acute encephalopathy or a significant change in either mental status or level of consciousness: sleepiness, irritability (fussiness), high-pitched and unusual screaming, persistent inconsolable crying, and a bulging fontanelle. Id. In the absence of other evidence of an acute

of a seizure disorder within three days following the administration of the DPT vaccine." Murphy v. Secretary of HHS, 1991 WL 74931, at *1 (Fed. Cl. Spec. Mstr. Apr. 25, 1991). The Murphys claimed that within eight hours of Christopher's first DPT shot, he "displayed symptoms of an encephalopathy," by screaming at an unusually high-pitch for hours, by going "completely limp for a few seconds," and by exhibiting infantile spasms. Id. at 2. The Murphys further claimed that after Christopher's second and third DPT shots, he exhibited "an immediate dramatic worsening of both the screaming and infantile spasms." The Murphys offered the affidavit testimony of a family friend and a neighbor in support of their claims about Christopher's symptoms following his vaccinations. Id. at *3. Mrs. Murphy stated in a supplemental affidavit that the Murphys had "notified 'the pediatricians' by telephone of the[] symptoms, but that they were brushed off as being insignificant." Id. at *2. The extensive medical records in the case, however, provided evidence that "contradict[ed] the fact testimony concerning the timing of the onset of seizure activity in Christopher." Id. at *3. The special master noted that "[b]ecause the claims of the petitioners are not supported by the medical records, the court must consider carefully the comparative weight to be given to the fact testimony and the medical records." Id. at 3 (citing 42 U.S.C. § 300aa-13(a) (providing that the court may not make a finding of entitlement to compensation "based on the claims of petitioner alone, unsubstantiated by medical records or medical opinion")).

In determining how the evidence should be weighed, the special master stated that a review of the case law indicated that "oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight." Id. at *4 (citing United States v. United States Gypsum Co., 333 U.S. 364, 396 (1947) ("Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."); Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1327 (Ct. Cl. 1980) (internal citations omitted) ("The subjective intent testimony of the plaintiff can only be seriously considered to the extent it is consistent with the objective evidence. . . . We also believe that [the testimony of a particular fact witness] is 'infected with self-interest'" and that while his testimony, of course, is admissible it cannot be given the weight accorded it by the trial judge; nor can [that fact witness'] testimony prevail over the inferences unavoidably drawn from the objective documentary evidence . . . ."); 32A C.J.S. Evidence §1033 (1964)). The special master cautioned that:

The rule should not be applied blindly, however. Written records which

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encephalopathy, seizures shall not be viewed as the first symptom or manifestation of the onset of an acute encephalopathy. Id.

> are, themselves, inconsistent, should be accorded less deference than those which are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance. Since medical records typically record only a fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant.

Id. at *4 (internal citation omitted). Noting that the medical records in the case were "complete," "essentially consistent with one another," and "not silent on the question of when the onset of seizures occurred," id. at *4, and noting that the contemporaneous medical records and Mrs. Murphy's own hand-recorded notes of her son's medical history contradicted the later claims of the Murphys, id. at *5, the special master found that there was "not a preponderance of evidence that Christopher suffered an encephalopathy or the onset or aggravation of a seizure disorder within 72 hours following any of the DPT vaccine administrations," id. at *8. Nor did the special master find that there was "a preponderance of the evidence linking Christopher's present condition causally to any or all of the DPT vaccine administrations." Id.

On petitioners' motion for review of the special master's decision in Murphy, the Claims Court found that the special master had "described a reasonable standard for weighing medical records and personal accounts." Murphy v. Secretary of HHS, (23 Cl. Ct. 726, 733 (1991). The Claims Court also found that the special master's decision not to credit Mrs. Murphy's most recent factual statement was not arbitrary or capricious because the special master had "evaluated the evidence of record in tracking Christopher's clinical course, with attention to evidence other than the medical records." Id. at 734. The Federal Circuit affirmed the decision of the Claims Court by table decision, see Murphy v. Secretary of HHS, 968 F.2d 1226 (1992), and the United States Supreme Court denied the Murphys' petition for writ of certiorari, see Murphy v. Sullivan, 506 U.S. 974 (1992).

Subsequently, in Cucuras v. Secretary of HHS, 993 F.2d 1525, 1528 (Fed. Cir. 1993), the Federal Circuit addressed the legal standard for weighing oral testimony that conflicts with contemporaneous documentary evidence. The Federal Circuit stated:

> Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events.

Id. at 1528. On review of the record in Cucuras, the Federal Circuit concluded:

> Neither the trial court nor the special master erred in their reliance on medical records to determine the onset of injury. The Vaccine Act expressly bars the court or a special master from finding a table injury "based on the claims of the petitioner alone, unsubstantiated by medical records or by medical opinion." 42 U.S.C. § 300aa-13(a)(1). Moreover, the Supreme Court counsels that oral testimony in conflict with contemporaneous documentary evidence deserves little weight. United States v. United States Gypsum Co., 333 U.S. 364, 396, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1947). This court's predecessor adopted the same principle. Montgomery Coca Cola Bottling Co. v. United States, 615 F.2d 1318, 1328, 222 Ct. Cl. 356 (Ct. Cl. 1980).
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> In this case, the special master heard and considered petitioners' testimony. Nonetheless the special master concluded that their testimony, in the face of contrary medical record evidence, did not carry their burden of persuasion. The Court of Federal Claims discerned nothing arbitrary, capricious, or unlawful about this finding. This court agrees. Petitioners did not show by a preponderance of evidence that the onset of Nicole's seizure injury occurred within the vaccine table's three-day limit for DPT vaccines.

Id. at 1528.

Citing Cucuras in its decision in Burns v. Secretary of HHS, 3 F.3d 415, 417 (Fed. Cir. 1993), the Federal Circuit concluded that the special master did not err in accepting the contemporaneous medical records over the testimony of fact witnesses where the special master explained that "[b]ecause of the petitioner's inconsistent affidavits and her expressed recognition of the difficulties of remembering specific dates of events that happened so long ago, [I] give greater credence and weight to the contemporaneous

medical records filed in this matter." Noting that credibility determinations are "uniquely within the purview of the special master," the Federal Circuit stated, with approval, that the special master had followed the instruction of the Federal Circuit in Cucuras by assigning little weight to petitioner's later oral testimony which conflicted with the contemporaneous medical records. Id. at 417.

In this case, contrary to petitioner's contention, the special master did not find that "[t]he absence of a recording in a hearsay record . . . trump[s] sworn testimony as a matter of law." Petr's Br. at 5 (footnote omitted). Rather, the special master applied the evidentiary standard addressed in Cucuras to evaluate the offered oral testimony regarding the onset of Emily's symptoms following her vaccination in the absence of any corroboration of petitioner's claims in the filed medical records. The circumstances of this case are distinguishable from the factual circumstances in Murphy, Cucuras, and Burns because Emily's medical records contained no mention of the severe symptoms allegedly observed by the fact witnesses within a few hours after Emily's vaccination on Thursday, July 6, 2000. Compare Petition ¶ 3 (alleging that within hours of receipt of the vaccination, Emily "was starting to run a fever and was screaming and crying as she had never done before") and Transcript of May 24, 2005 Fact Hearing at 27-45 (Emily's grandmother's testifying that she "made some mistakes" by not seeking medical intervention for Emily earlier and that Emily "was either crying or just laying there" looking "just like a rag doll" on the evening of July 6, 2000, the date of Emily's vaccination) with Petitioner's Exhibit 3 at 5 (pediatrician's office noting on the day that Emily had her vaccinations, "frustration in doing new things" and "ear piercing"), 19 (pediatrician's telephone record dated Monday, July 10, 2000, several days after Emily's vaccination, noting a call from Emily's mother who reported "bug bites on [Emily's] legs," Emily's feverish condition, a "poor app[etite] since Sat[urday]" and "ø other sym[ptoms]"), 20 (pediatrician's handwritten notes from meeting with Emily's mother and grandmother on July 18, 2000 recording Emily's six-day history of fever after her vaccination; recording the behavior observed in Emily to include "inconsist[e]nt response[,] irritable[,] unable to console[,] . . . ↓response to envir, ↓ eye contact x 2 days, blank stare, balance + walking bad since imm[unization];" and noting that Emily' mother and grandmother were "very concerned" about the response of the pediatrician's office to the expressed concerns of Emily's mother about Emily's condition). Finding that the medical records did not corroborate petitioner's claims and concluding that, based on the passage of time, petitioner had misremembered the events surrounding the alleged onset of Emily's symptoms as described during oral testimony, the special master decided that petitioner could not supplement the "clear, internally consistent, and complete" documentary record with "contradictory testimony." December 12, 2005 Ruling at 2.

As recognized by respondent, and contrary to petitioner's assertions, the Vaccine Act does not "require uncritical acceptance of medical records." Resp.'s Obj. at 14. Rather, the Vaccine Act provides that

> The special master or court may find the first symptom or manifestation of onset or significant aggravation of an injury, disability, illness, condition, or death described in a petition occurred within the time period described in the Vaccine Injury Table even though the occurrence of such symptom or manifestation was not recorded or was incorrectly recorded as having occurred outside such period. Such a finding may be made only upon demonstration by a preponderance of the evidence that the onset or significant aggravation of the injury, disability, illness, condition, or death described in the petition did in fact occur within the time period described in the Vaccine Injury Table.

42 U.S.C. § 300aa-13(b)(2) (emphasis added). Respondent points out that consistent with this statutory provision, later witness testimony regarding onset may be accepted where petitioner establishes by a preponderance of the evidence that the medical records are inconsistent, inaccurate, and irreconcilable. Resp.'s Obj at 15 (citing Konsitzke v. Secretary of HHS, 1996 WL 269487, at **3, 6 (Fed. Cl. Spec. Mstr. May 7, 1996) (finding the contemporaneous medical records to be "sketchy" and stating that "the court simply cannot rely on medical records alone to get an accurate picture of events. The medical records are internally inconsistent, inaccurate, and irreconcilable unless one takes into consideration the oral testimony. The sequence of events presented by the fact witnesses is rational -- the only one that makes sense -- and clarifies the confusion created by reading the medical records.")).

Here, although the special master did not believe that the fact witnesses were untruthful, she did not credit the offered fact testimony as being either accurate or reliable. See December 12, 2005 Ruling at 26 ("It is not reasonable to credit Petitioner's testimony that the message slips [reflecting the alleged calls of Emily's grandmother to the pediatrician's office within the three days following Emily's vaccinations] are missing from Emily's medical records when so many others are produced."), at 27 ("While the special master credits the family's testimony that Emily had blank staring spells, she rejects the contention that they explained to Dr. Bryant that Emily had seizures. . . . The special master finds that if either witness had described such significant behavior as seizures, then that description would be reflected in the medical records. The special master notes that two other aspects of the witnesses' testimony concerning the July 18, 2000, meeting suggests that the witnesses' testimony is inaccurate."), at 30 ("The special

master is hard-pressed to accept such testimony referring to Emily looking like a rag doll or a CPR dummy. . . . The depictions of Emily's appearance and behavior by the witnesses at hearing convinces the special master that if true, all three family members directly responsible for Emily's well-being would have sought attention for Emily. Yet no one did. Based on the foregoing, it is not reasonable to believe that the events occurred as described in the testimony at hearing."). To the extent that petitioner challenges the special master's reliance in the December 12, 2005 Ruling on the well-settled evidentiary doctrine that gives greater weight to contemporaneous medical records if the records conflict with the later offered oral testimony of fact witnesses, petitioner's motion for reconsideration must fail because the application of that evidentiary doctrine does not constitute legal error.

To the extent, however, petitioner challenges the application of that legal standard to the facts of this case, the undersigned cannot reconsider, as suggested by petitioner in her motion, the application of the legal standard on the factual record here without also reconsidering the factual findings underlying the December 12, 2005 Ruling. The special master's made the factual findings contained in that Ruling based, in part, on a critical credibility assessment of the fact witnesses. As the case law instructs, proper application of the evidentiary doctrine for weighing conflicting oral testimony and contemporaneous documentary evidence involves a mixed issue of law and fact. See Cucuras, 993 F.2d at 1528 (affirming the special master's decision "that [petitioners'] testimony, in the face of contrary medical record evidence, did not carry [petitioners'] burden of persuasion").

The undersigned concludes that because the proper evidentiary standard was applied, no legal error occurred. The undersigned is not persuaded to reconsider whether the application of the law on the factual record of this case was proper without an opportunity to evaluate the credibility of the fact witnesses whose testimony the special master heard but decided not to credit as accurate in the December 12, 2005 Ruling. The undersigned declines to reconsider the fact findings in the December 12, 2005 without rehearing the testimony of the fact witnesses.

C. Petitioner's Motion Does Not Satisfy the Standards for Certification to the Federal Circuit for Interlocutory Review

Petitioner alternatively moves for interlocutory review of the December 12, 2005 Ruling. Petr's Br. at 26-30. Petitioner asserts that "there is 'substantial ground for difference of opinion' with regard to the legal issues identified . . . . Yet never has the

Federal Circuit actually looked at a clear-cut articulation of the Murphy rule as presented by the [December 12, 2005] Ruling." Petr's Br. at 26.

The standards for seeking certification of an interlocutory decision are set forth at 28 U.S.C. § 1292(d)(2). In accordance with section 1292(d)(2), the Federal Circuit may, in its discretion, permit an appeal to be taken from an interlocutory order issued by a judge of the United States Court of Federal Claims if: (1) a controlling question of law is involved; (2) with respect to which there is a substantial ground for difference of opinion: and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Id.

In this case, the controlling issue of law presented is what legal standard applies for the weighing of oral testimony that conflicts with contemporaneous documentary evidence. Contrary to petitioner's assertions, the Federal Circuit has addressed that legal standard with consistency in Cucuras and in Burns. No substantial ground for a difference of opinion exists on the proper legal standard. Rather, the thrust of petitioner's motion for reconsideration appears to be a challenge to the application of the legal standard on the facts of this case. Contrary to petitioner's assertions, the undersigned cannot reconsider the factual underpinnings of the special master's December 12, 2005 Ruling without reconsidering the credibility determinations that informed the special master's decision.

III. Conclusion

For the foregoing reasons, petitioner's motion for reconsideration of the December 12, 2005 Ruling on the ground of legal error is **DENIED**. Petitioner's motion for interlocutory review is also **DENIED**. The parties shall contact chambers **on or before December 15, 2006**, to address further proceedings in this matter.

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Special Master