OFFICE OF SPECIAL MASTERS

No. 92-341V

(Filed: June 26, 1997)

CHRISTIAN RHYS VANT ERVE, a minor, by and through his next friends RON VANT ERVE and CATHY VANT ERVE,	*	
Petitioners,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

A. Lerov Toliver, Atlanta, Georgia, appeared for petitioners.

Michael Milmoe, Department of Justice, Washington, D.C., appeared for respondent.

RULING ON MOTION TO REOPEN "ENTITLEMENT" ISSUE

HASTINGS, Special Master.

This is an action seeking an award under the National Vaccine Injury Compensation Program (see 42 U.S.C. § 300aa-10 *et seq.* [1]). This opinion concerns respondent's recent motion seeking that I reopen the "entitlement" issue--i. e., the question of whether petitioners are entitled to a Program award-- an issue that had previously been determined in the case.

'The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (1994 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (1994 ed.).

I

THE BASIC STATUTORY SCHEME

Under the National Vaccine Injury Compensation Program (hereinafter "the Program"), compensation awards are made to individuals who have suffered injuries thought to be caused by certain vaccines. In general, to gain an award, a petitioner must make a number of factual demonstrations, including showings that an individual received a vaccination covered by the statute; received it in the United States; suffered an injury thereafter; and has received no previous award or settlement on account of the injury. Finally--and the key question in most cases under the Program--the petitioner must also establish a link, either temporal or causal, between the vaccination and the injury. One method by which the petitioner may establish this link is by demonstrating the occurrence of what has been described as a "Table Injury." That is, it may be shown that the vaccine recipient suffered an injury of the type enumerated in § 300aa-14(a) -- the "Vaccine Injury Table" -- corresponding to the vaccination in question, and experienced the first symptoms of that injury within an applicable time period from the vaccination also specified in the Table. If so, the "Table Injury" is in effect *presumed* to have been caused by the vaccination, and the petitioner is automatically entitled to compensation, unless it is affirmatively shown that the injury was "due to factors unrelated to the administration of the vaccine." § 300aa-13(a)(l)(A); § 300aa- 11 (c)(l)(C)(i); § 300aa-14(a); § 300aa-13 (a)(l)(B).

If a special master of this court determines that a petitioner is, in fact, entitled to a Program award (either by concession by the respondent or by the master's own finding in a contested case), the case then proceeds toward a new and distinctly different stage [2] --*i.e.*, the determination of the *proper amount* of the Program award, an issue that has been termed the "damages" issue. Both parties will attempt to estimate the cost of care for the vaccinee's injury for the rest of that person's life. The parties will attempt to settle the issue, but, if they are unable to do so, the special master will resolve the issue, often after an evidentiary hearing. The master's final decision ordering compensation is then filed, closing the case.

II

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The petitioners in this case, Ron and Cathy Vant Erve, are the parents of the injured minor, Christian Vant Erve. Christian was two months old on June 23, 1989, when he received a "DPT" (diphtheria, pertussis, tetanus) inoculation. Two days later, he began to experience seizures, and since that time, tragically, he has suffered from devastating neurological abnormalities and developmental impairment. He has suffered from spastic diplegia, a condition involving severe stiffiess of limbs on both sides of his body, which makes him unable to perform almost any motor

[2] Note that it is virtually always the practice in Program cases to bifurcate the entitlement and damages issues. Because the latter issue is usually a complicated and very expensive one to resolve in a Program case, the parties, as in this case, typically do not even begin the complicated process of addressing that issue unless and until the entitlement issue has been resolved in favor of the petitioner.

functions, such as walking or crawling; he needs assistance even in holding up his head. Christian also suffers from very significantly diminished mental capacity (his intelligence is said to be at best in the "moderately retarded" range), and additionally has diminished hearing and visual capacities, all of which disabilities appear to be connected to his neurologic dysfunction.

On May 14, 1992, the petitioners filed this Program action, seeking a Program award on account of the injury to Christian. Numerous medical records pertaining to Christian's condition were filed with the petition. On September 8, 1992, respondent filed her "Respondent's Report," recommending against a Program award for Christian. At footnote 1 of that report, respondent sought a few specified additional medical records, including records of a "CT" scan and a "MRI" scan, for respondent's use in further evaluating the petition. Telephonic status conferences[3] were held on September 2 1 and October 27, 1992. At both of those conferences, the issue of the requested MRI and CT records was discussed, and at the latter conference both counsel indicated to me that the process of obtaining such records would soon be completed.

At another status conference held on December 4, 1992, counsel and I discussed an opinion of respondent's expert Dr. Arnold Gale, which had been transmitted to petitioner's counsel by "telefax" but not yet filed.[4] At the request of petitioners' counsel, proceedings were suspended for a number of months thereafter, while petitioners sought expert assistance of their own. An expert report, of Dr. Jan Mathisen, was filed by petitioners on June 11, 1993. At a status conference held on June 24, 1993, opposing counsel agreed to attempt to settle upon a date for an evidentiary hearing to decide the entitlement issue. At a status conference held on October 5, 1993, they then reported the existence of settlement negotiations, but at another conference on October 28, 1993, they indicated that settlement efforts had been unsuccessful, and that they would again seek to determine a hearing date. On or about March 30, 1994, they reported agreement upon an evidentiary hearing to be held on May 26, 1994.

On May 12, 1994, respondent filed a prehearing submission in preparation for the evidentiary hearing. That submission did not indicate in any way that respondent had wished to see any further medical records relating to Christian. Respondent filed several exhibits with the submission, including respondent's Ex. 2, which indicated that respondent indeed had received the particular CT and MRI records previously requested in the "Respondent's Report."

The evidentiary hearing was held as scheduled on May 26, 1994, and included testimony from three expert witnesses for petitioners, and two experts for respondent. At the conclusion of the hearing, I indicated orally that I would rule in petitioners' favor on the entitlement issue. I instructed the parties to begin work upon the issue of the *proper amount* of the award, *i.e., the* "damages" aspect of the case.

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[3] As is typical of Program proceedings, none of the status conferences to be mentioned in this narrative were recorded. My representations concerning these conferences result either from my written order issued after a conference, or my own handwritten notes of each conference.

[4] That report was ultimately filed in the record here, as respondent's Ex. 4, on May **12, 1994.**

On June 2 1, 1994, I filed my written Ruling concerning the entitlement issue, explaining in detail my reasoning for concluding that petitioners did qualify for a Program award on Christian's behalf. See *Vant* Ewe v. ***Secretary of HHS, No.*** 92-341, 1994 WL 325426 (Fed. Cl. Spec. Mstr. June 21, 1994). At the conclusion of that Ruling, I again urged the parties to continue their work toward resolving the damages issue. Petitioners were instructed to determine the need for future care of Christian, to submit their request to respondent, and to then begin settlement negotiations. They were instructed to request a status conference if an impasse in negotiations occurred, if they desired me to schedule an evidentiary hearing to resolve any aspects of the damages issue, or if they desired my intervention for any other reason.

Petitioners filed a "Preliminary Life Care Plan" on February 21, 1995. This document enumerated many of Christian's needs for future care, but stated that a supplemental request would be made. On September 2 1, 1995, petitioners filed another somewhat more detailed plan, but again described it as a "Preliminary Life Care Plan." On September 25 and November 20, 1995, petitioners filed brief status reports indicating that the parties were working toward possible settlement. On March 25, 1996, petitioners filed another document, entitled "1996--Life Care Plan."

Concerned over the length of settlement negotiations, I held another status conference on July 16, 1996. At that conference, both counsel indicated optimism about the prospect of settlement. They indicated that respondent had recently requested some additional records pertaining to Christian, and that petitioners had already supplied most of those records and would supply the rest within a week. At another status conference held on September 13, 1996, counsel again expressed optimism regarding settlement.

Yet another life care plan was filed by petitioners on September 19, 1996. On October 17, 1996, petitioners filed a status report indicating that respondent had on October 4 requested additional information, which petitioners had supplied. Another status report, filed on November 19, 1996, indicated that the parties had agreed that respondent's "life care planner" would soon visit Christian's home. Following that visit, which actually took place on January 23, 1997, respondent's responsive life care plan was filed on January 31, 1997, recommending a level of future care for Christian quite different from that previously recommended by petitioners' planner.

On February 19, 1997, respondent filed an application for subpoenas to obtain certain additional medical records relating to Christian. A status conference was held on that same day to discuss the issue. At that conference, petitioners' counsel argued against granting the subpoena request, expressing concern that respondent wished to use the records not for purposes of the damages issue, but in order to seek to reopen the entitlement issue. Respondent's counsel acknowledged that in light of information obtained at the visit to petitioners' home, respondent's representatives did in fact question whether additional information now existed that might demonstrate that Christian's injury was in fact caused by a non-vaccine factor. Respondent's counsel acknowledged that respondent was in fact considering whether to seek reopening of the entitlement issue. But respondent's counsel also stated that the requested records were in any event also definitely needed to properly evaluate the damages claim. On the latter basis, I granted the subpoena request, by my Order issued the following day.

Also at the conference of February 19, **1997,** petitioners' counsel requested that an evidentiary hearing be scheduled for resolution of the damages issue. The parties were instructed to immediately attempt to determine an agreeable date for that hearing. At another status conference,

held on March 20, 1997, the parties agreed to the dates of June 10 and 11, 1997, for a damages hearing, which agreement was confirmed by my Order issued on April 4, 1997.

At a status conference held on May 23, 1997, respondent's counsel informed the petitioners and me that respondent would likely soon be filing a motion asking that I reconsider the entitlement issue in the case. On June 2, 1997, respondent in fact filed such a motion, asking that I (1) cancel the damages hearing scheduled for June 10 and 11, 1997, and (2) reconsider my entitlement ruling. Respondent relied upon two new expert reports that had been filed on May 30, 1997. A status conference concerning the issue was held on June 3, 1997, at which time petitioners urged that I deny both aspects of the motion. At that conference, I denied the motion to cancel the damages hearing, and took the motion to reopen the entitlement issue under advisement.[5]

III

DISCUSSION

A. The general issue and precedent

Respondent's request raises a very difficult issue. Three years after I ruled that petitioners are entitled to a Program award--a period during which the parties have apparently been working in good faith to resolve the damages issue--respondent has asked that I reopen the entitlement issue. Respondent asserts that medical records concerning Christian that have recently come into respondent's possession substantially bolster the respondent's argument that Christian's condition is attributable to a factor unrelated to his DPT vaccination of June 23, 1989. Respondent argues that I should therefore delay resolution of the damages issue here, and instead reconsider the entitlement issue, after hearing additional testimony from respondent's two experts.

Petitioners, on the other hand, urge that I deny the motion, and argue that instead I should promptly conclude the damages aspect of the case. Petitioners argue that it would be inherently and grossly unfair to them to reopen an issue decided three years ago. They argue that reopening the entitlement issue would delay resolution of the damages issue, and, therefore, delay the flow of benefits to their gravely injured son. They also urge that the ultimate result of a reopening would be that after considerable expense, effort, and delay, I would ultimately reach the same result as I did three years ago.

1. This is a matter within my discretion

At the status conference on June 3, I suggested that resolution of this issue is a matter within my discretion, and neither counsel disagreed. I conclude that it is, indeed, a matter of discretion. Neither the applicable statute nor the Rules of this court prescribe a specific rule governing this exact sort of request. Instead, one statutory subsection and two general court rules have relevance here.

'Petitioner's counsel at the conference stated orally his reasons for opposing the motion, and waived the right to file a written opposition.

First, § 300aa-12(d)(3)(B) of the statute provides the following general description of the special master's duties in taking evidence in a Program proceeding:

> (B) In conducting a proceeding on a petition a special master--
>
> (i) may require such evidence as may be reasonable and necessary,
>
> (ii) may require the submission of such information as may be reasonable and necessary,
>
> (iii) may require the testimony of any person and the production of any documents as may be reasonable and necessary,
>
> (iv) shall afford all interested persons an opportunity to submit relevant written information--
>
> > (1) relating to the existence of the evidence described in section 300aa-13(a)(l)(B) of this title, or
> >
> > (II) relating to any allegation in a petition with respect to the matters described in section 300aa-1 l(c)(1)(C)(ii) of this title, and
>
> (v) may conduct such hearings as may be reasonable and necessary.

Second, Appendix J to the Rules of the United States Court of Federal Claims contains the "Vaccine Rules," which apply to Program proceedings before the special masters of this court. Rule 1 of the Vaccine Rules states that:

> In all matters not specifically provided for by the Vaccine Rules, the special master may regulate the applicable practice, consistent with these rules and with the purpose of the Vaccine Act, to decide cases promptly and efficiently.

Further, Rule 8 states as follows:

> 8. ***Taking of Evidence and Argument; Decision.***
>
> ***(a) General.*** The special master in each case, based on the specific circumstances thereof, shall determine the format for taking evidence and hearing argument. The particular format for each case will be ordered after consultation with the parties.
>
> ***(b) Evidence. In*** receiving evidence, the special master will not be bound by common law or statutory rules of evidence. The special master will consider all relevant, reliable evidence, governed by principles of fundamental fairness to both parties.

This statutory section and these rules, thus, clearly are intended to give a special master extremely broad discretion as to whether, when, and how to take and consider evidence in a Program case. I therefore conclude that under these guidelines the request here is one within my discretion. See also *Koston v. Secretary of HHS, 23* Cl. Ct. 597,601 (Cl. Ct. 1991), aff d on other point, 974 F. 2d 157 (Fed. Cir. 1992) (holding that the decision whether to allow respondent to withdraw a concession concerning the entitlement issue in a Program case was within the special master's discretion); *Horner v. Secretary of HHS, 35* Fed. Cl. 23, 26 (1996) (holding that the decision whether to admit new evidence after the entitlement issue had been resolved in a Program case was within the special master's discretion).

2. ***Program precedent***

Two precedential rulings under the Program have great relevance here. The first is *Koston v. Secretary of HHS, supra.* In *Koston,* the respondent initially conceded that the vaccinated individual suffered an injury falling within the Vaccine Injury Table, § 300aa-14, and that the medical records filed with the petition did not indicate that such "Table Injury" was "due to factors unrelated to the administration of the vaccine." (23 Cl. Ct. at 598.) Thus, the parties immediately thereafter proceeded to address the damages issue. When respondent's medical expert then examined the vaccinee for purposes of the compensation issue, however, that expert concluded that the child suffered from "Rett Syndrome," a condition that respondent believed would constitute a "factor unrelated" under the statute. Accordingly, at a status conference conducted less than two months after the respondent's initial concession on the entitlement issue, respondent sought to withdraw that concession. (*Id.* at 599.) The special master denied the request, proceeded to determine the damages issue, and entered decision in the petitioner's favor. (*Id.*)

On review by a judge of this court pursuant to § 300aa-12(e), Judge Nettesheim of this court concluded that the special master committed an abuse of discretion in denying the respondent's request to withdraw the concession concerning entitlement. (*Id.* at 600-603.) The judge first observed that the special master's decision whether to grant the respondent's request should be analyzed as similar to a trial court's decision whether to permit a defendant's amendment of an answer to a complaint, under Rule 15(a) of the Federal Rules of Civil Procedure (FRCP). (*Id.* at 601.) Applying the standards for making such a ruling under FRCP 15(a), the judge relied chiefly upon the factors of (1) the length of the time period between the original concession and the request to withdraw that concession; (2) the diligence of the respondent; and (3) the prejudice to the petitioners. **The judge found that all these factors weighed in favor of granting the motion, since (1)** the time period was extremely short; (2) the respondent had been extremely prompt and diligent at all stages of the proceeding; and (3) in the circumstances of that case, resolving the factual issue raised by respondent's desired new defense would *not* have materially delayed final resolution of the case. *(Id.* at *603.)*

Homer v. Secretary of HHS, supra, on the other hand, involved a situation in which the special master after an evidentiary hearing had resolved the entitlement issue against the petitioners by means of an oral bench ruling, concluding that the vaccination in question had not taken place on the date alleged by petitioners. One month after that oral ruling, at which time the special master had not as yet formalized that ruling by tiling a final written decision denying an award, the petitioners requested that the special master consider a new item of evidence that they said they had found in their papers since the hearing--i.e., a document that purported to be the actual record of

vaccination. The special master declined to consider this new item, reasoning that it had been offered too late. (35 Fed. Cl. at 24-25.)

On review, Judge Yock of this court reversed, again finding an abuse of discretion by the special master. The judge found the proffered evidence to be so critically important and so extremely probative (if it proved to be authentic) that fundamental fairness demanded that it be considered. (*Id.* at 27-28.) The judge further noted that the time period between the oral ruling and the petitioners' request to submit the new item was short (id. at 28), and that the prejudice to the respondent would not be significant (id. at 27).

These two Program decisions, then, yield the following guidance, for cases in which a party seeks to reopen the entitlement issue in a Program case once that issue has been resolved. First, the issue is one within the special master's discretion. Second, the interest in "searching for the truth" (see ***Horner, 35*** Fed. Cl. at 27) is a strong one, but is not absolute, and must be weighed against other factors. Among those other factors, the prime ones are the length of the period of time between the initial resolution of the entitlement issue and the request to reopen that issue; the prejudice that such a reopening might cause to the non-moving party; and the "reason for the delay"--i.e., whether the moving party acted diligently and in good faith, and whether there is a good reason why the evidence now sought to be introduced was not presented prior to the original resolution of the entitlement issue.

3. ***Other precedent***

As noted above, the ***Koston case*** involved a situation where the respondent, in initially ***answering*** the Program petition, ***conceded*** the entitlement issue, then later sought to rescind that concession. No hearing or trial had been held, nor had any ruling by the special master been made. Accordingly, in Koston, the judge analogized the situation to a ruling on a motion in a non-Program proceeding under FRCP 15(a), in which a defendant seeks to amend its answer to a complaint. (23 Cl. Ct. at 601.) The issue here, however, is obviously somewhat different than in ***Koston.*** In both cases, of course, the respondent was seeking, in effect, to reopen a finding of entitlement. But here, in contrast to ***Koston,*** the respondent did not initially ***concede*** entitlement, but rather strongly contested that issue. An evidentiary hearing was held, and the issue was ***decided by the undersigned special master. Thus, as*** petitioners' counsel argued at the oral argument on June 3 in this case, there would seem to be a stronger interest in the principle of the "finality" of the resolution of the entitlement issue than there is in a case such as ***Koston,*** where the entitlement issue was never resolved by a special master but merely conceded by respondent. In other words, I agree with petitioners that in the type of situation here, to obtain a reopening of the entitlement issue the respondent would need to make a somewhat stronger showing than in the case where the entitlement issue had initially been resolved by concession only.

Therefore, I note that the cases arising under FRCP 15(a), cited in ***Koston,*** cannot necessarily be directly applied to the type of situation here, but instead must be analyzed with the distinction between the two types of situations in mind. Note, for example, that a FRCP 15(a) motion most often involves a situation in which the defendant answers the complaint in one fashion, then sometime later, but ***prior to trial,*** wishes to change the stance taken in the answer. (See, for example, the cases discussed at 6 ***Wright & Miller, Federal Practice and Procedure, § 1488*** (2nd edition 1990).) That is a very different type of situation from the situation here, where a trial on the entitlement issue has already taken place. Indeed, an argument can be made that where, as here, the

issue of entitlement has already been resolved after a trial in a Program case, that issue ought to be reopened only in situations analogous to those in which a federal trial court would grant a motion *for relief from judgment* on account of newly discovered evidence, pursuant to FRCP 60(b)(2). As will be seen, I do *not* conclude that the standard for reopening the entitlement issue in a Program case should be as strict as that under FRCP 60(b)(6). The point is, rather, that the standard probably should be somewhat more stringent than that under FRCP 15(a).

Nevertheless, with that *caveat,* I note that the caselaw that has developed under FRCP 15(a) may still be instructive here, simply as enumerating the *type of factors* that should come into consideration in this situation as well. For example, in the leading Supreme Court case interpreting FRCP 15(a), *Foman v. Davis, 371* U.S. 178, 182 (1962), the court enumerated the following factors as relevant:

> undue delay, bad faith, or dilatory motive on the part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc. * * *.

Similar factors were cited in *Tenneco Resins, Inc. v. Reeves Bros., Inc., 752* F. 2d 630, 633-634 (Fed. Cir. 1985). I have considered and adopted those factors in creating the test that I have constructed for application to this case.

B. Test to be applied here

As explained above, both the *Koston* and *Horner cases* explain the factors upon which those judges relied in reviewing the discretionary decisions of the special masters in those cases. Based upon the guidance of those decisions and the factors enumerated in the cases under FRCP 15(a) also discussed above, I will next set forth the test that I believe should be applied in determining whether to grant a request to reopen an entitlement issue in a Program case.

Initially, however, I note that there are two potential approaches to this issue which are quite simple, and might have some appeal at first glance.. First, an argument could be made--as the respondent in effect seems to do in this case--that as long as a special master's final decision has not been entered, the master should *always* entertain new evidence on the entitlement issue. That is, it can be argued that the inherent interest in the "search for the truth" is so great that it automatically outweighs other considerations.

On the other hand, an argument can also be made that once a decision concerning the entitlement issue has been made, a special master should *never* reopen that issue, in the interest of the principle of "finality" of the master's entitlement ruling. It can be argued, as did the special master in *Horner*, that to allow reopening of an entitlement ruling under any circumstances would mean that "these cases would never come to completion." (See 35 Fed. Cl. at 25.)

I would reject either such approach, as simply too extreme and inflexible. The interests in pursuing the truth and in reaching finality of decisions are both important concerns in our judicial system, and, of course, sometimes come into conflict with one another. (That is, anytime that "finality" concerning a factual issue is achieved, there always exists some risk that new evidence will

thereafter be discovered that will contradict that final resolution.) When these interests conflict, an attempt simply must be made to balance them, in light of all the circumstances.

Therefore, in my view, in a Program case in which a party seeks to reopen an entitlement decision, the special master simply must consider the circumstances, and reach the result that is most fair and equitable in light of those circumstances. All relevant circumstances should be considered, but usually the relevant factors will fall within the following four categories.

- ***The nature of the proffered new evidence***

The first (though not necessarily most important) consideration should be whether the new evidence proffered by the moving party has potential to change the outcome of the entitlement issue. For example, if the proffered evidence appears on its face to be irrelevant, merely cumulative to evidence previously considered, or otherwise highly unlikely to produce a change of result, that circumstance would militate in favor of denying the motion to reopen. On the other hand, if the evidence on its face would appear to be potentially dispositive of the entitlement issue, then that circumstance would militate in favor of granting the motion.

- ***The prejudice to the parties***

There are two parts to this factor. The special master must consider both the potential prejudice to the *non-movingparty* that would or could result from *granting* the motion, and weigh that against the potential prejudice that would or could result to the *movingparty* from *denying* the motion.

- ***The length of the delay***

The special master should next consider the length of the time period between the original resolution of the entitlement issue and the point at which the moving party seeks to reopen that issue. Obviously, the longer the time period, the greater the reason for denying the motion.

- ***The reason for the delay***

Under this factor, the special master should consider why the evidence now sought to be introduced concerning the entitlement issue was not presented prior to the original resolution of that issue. Obviously, if the moving party acted in bad faith or with dilatory intent, that would be reason to deny the motion to reopen. Similarly, if the evidence in question could have been discovered and/or introduced at an earlier time, and the failure to do so was a lack of diligence on the moving party's part, then that circumstance, too, would be a reason to deny the motion. On the other hand, if the evidence in question has only recently come into existence, or for some other reason could not have been discovered earlier by even a diligent moving party, then this factor might weigh in favor of granting the motion.

These four factors, then, along with any other factors that might be relevant in a particular case, should be considered. But it should be stressed that there exists no formulaic or mechanistic way in which to weigh the various factors. For example, if three of the four factors weighed in favor of granting the motion, that would not automatically mean that the motion should be granted. Rather, in a particular case, the strength of the fourth factor might be so great as to outweigh the

other three combined. Thus, in each case, each factor simply must be given the weight that is appropriate under all the circumstances of the case, in the discretion of the special master, to reach a fair and equitable result.

C. Application of above-described test to this case

Next, I will discuss in turn each of the four factors enumerated in part III(B) of this opinion above, then weigh those considerations together to reach my conclusion.

1. Nature of the proffered new evidence

The first consideration--the nature of the new evidence proffered by respndent--would appear to weigh in *respondent's* favor here. That is, the expert reports recently filed by respondent (Exs. F, G, I and J) do seem to raise a very serious *question* about whether Christian's encephalopathy and seizure disorder, the first symptoms of which were unquestionably displayed about two days after his DPT vaccination in question, nevertheless were caused instead by a "metabolic disturbance." Ifrespondent could prove that allegation, then it would seem that Christian's injury would not fall within the category of injuries properly compensable under the Program. See § 300aa-13(a)(1) and (a)(2)(B); § 300aa-14(b)(3)(B).

2. *Prejudice to the parties*

On the other hand, the second major consideration under the test--i.e., the prejudice to the parties--seems to weigh in the *petitioners'* favor.

First, in this regard, I consider the potential prejudice to *thepetitioners* that could or would result from reopening the entitlement issue. It is clear that such prejudice would be significant. The first form of potential prejudice that leaps to mind, of course, is the fact that if I were to reopen the issue of entitlement, the petitioners *might lose the* Program award entirely. That strikes one initially as severe prejudice indeed. However, analyzing the issue in a theoretical sense, this possibility probably should not be considered prejudice at all. That is, one can say that if in fact the "truth" is that Christian's injury was "more likely than not" due to a metabolic disturbance, then petitioners simply do not "deserve" a Program award under the statute, and thus the loss of an award to which they are not rightfully entitled should not be viewed as prejudice at all. Therefore, I do *not* rely on this concept of prejudice in my analysis here.

Rather, there are other forms of potential prejudice to petitioners here. Some of these considerations are closely related to the point discussed immediately above, but should be viewed as analytically distinct. First, the very act of reopening the entitlement issue at this time would likely cause petitioners extreme mental anguish, in one or both of the following ways. First, during the period during which I took evidence and reconsidered the issue, petitioners would, undoubtedly, suffer great worry about whether this Program award for their devastatingly injured son would be rescinded. This anguish would be suffered, of course, during the period of reconsideration, *whether or not* I ultimately elected to change my earlier ruling. Second, if I were ultimately to *change* my ruling on entitlement, petitioners would suffer the special anguish of losing an award that for more than three years they were told would be made for their son. Note that this form of prejudice, of course, is analytically distinct from the first form of potential prejudice discussed above, *i.e.,* the simple fact of not receiving an award. That is, it may be considered as not "prejudicial" to be denied

an award which one does not "deserve" under the law; but it is quite another thing to suffer the cruel fate of being first told that that one is entitled to an award, only to be informed years *later* that an award will ***not*** be forthcoming. The latter situation, in my view, would be an especially agonizing form of disappointment to inflict upon a family, much worse than to simply deny the award in the first place. This would indeed result in unambiguous "prejudice" to the petitioners, leaving them emotionally more damaged than had they initially been denied an award.

There could also be another, more tangible form of prejudice to petitioners resulting from changing the entitlement ruling three years after the fact. That is, note that under § 300aa--15(a)(l)(B), in a case such as this one, where the vaccination in question occurred after October 1, 1988, petitioners can be compensated for expenses incurred for care of the injured party *prior* to the date of the judgment in this proceeding. Thus, for three years now, petitioners have incurred many thousands of dollars in expenses for Christian's care (as demonstrated at the damages hearing held on June 10, 1997), understanding that they would be reimbursed by the Program for those expenses. Yet a reversal of the entitlement ruling would deny them that reimbursement. Moreover, during the last three years petitioners may have undertaken financial or familial decisions on the assumption that an award would be forthcoming. They could thus suffer severe and grossly unfair prejudice if this reasonable assumption were to be rendered incorrect because the entitlement ruling in this case was changed.

Additionally, there is one more form of potential prejudice to the petitioners to be considered. That is, petitioners could be damaged by the delay *in resolution* of this case that would result if, as requested by respondent, I put off resolution of the damages issue while considering respondent's new theories concerning entitlement. Petitioners cannot actually *receive any* Program compensation until a judgment in this case becomes final, and resolution of respondent's new theories in this immensely complicated medical area would obviously take some time.[6] Therefore, if respondent's new theories were considered and rejected, petitioners would be prejudiced by the delay in the receipt of their Program award. And this delay would be particularly inappropriate in the context of the Program, which is intended to be a *speedy alternative* to ordinary tort litigation.[7] The petitioners in this case have already waited *much longer* for their Program compensation than

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[6]Respondent argued at the status conference on June 3 that respondent could be ready very soon to put on oral testimony from her experts. But it would obviously take a considerable amount of time *forpetitioners* to confer with experts, offer a response, and prepare for another evidentiary hearing on this very complicated issue.

[7]Note, for example, that under the statute Congress specified that Program cases would ordinarily be resolved within 240 days from tiling, plus 180 days for unusual circumstances, for a total of 420 days. See § 300aa-12(d)(3)(A)(ii) and § 300aa-12(d)(3)(C). To be sure, Congress permitted a petitioner to waive that time limit (see § 300aa-21(b)), as petitioners did here, but the obvious congressional intent was to give a petitioner a right to a *speedy* resolution. See also the legislative history indicating that Congress intended the Program to be a "swift, uncomplicated compensation system," resolving cases as "expeditiously as possible" and with "speed and reliability." See H.R. Rpt. No. 99-908, 99th Cong., 2d. Sess., pp. 16-17 (reprinted at 1986 U.S. Code Cong. and Admin. News 6357-6358).

Congress intended. It would certainly be prejudicial to them to make them wait for an additional period of time.

Thus, above I have discussed the potential prejudice to the *petitioners* that would or could result from *granting the* motion to reopen the entitlement issue. Against that, however, I must weigh the potential prejudice to the *respondent* that would or could result from *denying* the motion to reopen. Of course, because I am denying the motion, it is impossible to say for *certain* whether respondent is being prejudiced or not by the denial, because we do not know whether in fact I would have changed my entitlement ruling had I granted the motion. Obviously, if we could somehow know that after the reconsideration I would have *affirmed* my earlier entitlement ruling, then we could say that denial of the motion does not prejudice respondent at all. On the other hand, if the truth is that after a reopening I would have *changed* my entitlement ruling, then clearly there is a measurable prejudice to respondent--i.e., as a result of my denial of this motion, respondent will lose the amount of the award that will be paid to the petitioners in this case.

This potential prejudice to respondent, then, is certainly substantial, because given the terrible neurological dysfunction that afflicts Christian, it appears that the cost of this award will be very substantial--certainly in the hundreds of thousands of dollars, and perhaps more. However, it should also be noted that in Program cases like this one, where the vaccination in question was administered after October 1, 1988, the awards are paid out of a trust fund that has been very amply funded by a tax on the affected vaccines. The experience thus far, during the roughly 8 1/2 years in which the Program has been operating, is that tax payments have continually been flowing *into* that fund at a much higher rate than Program award payments have been flowing *out* of the fund.[8] Thus, there is no danger that payment of an award to the petitioners in this case might result in denial of an award to some other vaccine-injured person.

Moreover, it is also worth nothing that in setting up the Program, and particularly in setting up the Table Injury categories, Congress understood that such categories would likely be somewhat over-inclusive. That is, Congress understood that due to the Table Injury presumptions, some cases would be compensated, when brain injuries happened by *chance* to be first manifested soon after vaccination, in situations where subsequent scientific advances might ultimately point to some cause other than the vaccine.[9] Obviously, Congress did not believe that such occasional over-inclusiveness

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[8] I note that as of December 3 1, 1996, that trust fund had grown to nearly $1.1 billion, according to a report of the respondent concerning the Program dated February 12, 1997.

[9] See H.R. Rpt. No. 908, *supra,* at 18 (1986 U.S. Code Cong. and Admin. News 6359), where the committee report recommending the Program to Congress stated:

would be a particularly terrible result, since the funds would still be going to care for needy and damaged (though perhaps not vaccine-damaged) individuals. Thus, the potential prejudice to respondent here--i. e., the possibility that the award will be paid for a child whose injury may not truly have been vaccine-caused--is a substantial factor to be considered, but, considered in the overall context of the Program, may not be as large a factor as it might first appear.

In short, after weighing these forms of potential prejudice to both the petitioners and respondent, my conclusion is that on balance this factor weighs strongly in favor of *denying* the motion to reopen.

3. ***Length of the delay***

The next factor to be weighed under the balancing test is the length of the period between the original resolution of the entitlement issue and the filing of the motion for reopening of that issue. In this case, more than ***three years*** elapsed between the time that I decided the entitlement issue and the time that respondent moved for reopening of that issue. This is an extraordinarily long time. Indeed, in most Program cases the damages issue is fully resolved and the case has gone to judgment in a much shorter period of time.

It is useful to contrast the length of the delay in this case with the time periods in the cases of *Koston* and *Horner, **supra***. In *Koston*, less than two months occurred between the respondent's initial concession of entitlement (August 6, 1990) and respondent's subsequent notice of intent to revisit the issue (October 2, 1990). (See 23 Cl. Ct. at 598-599.) In *Horner*, the petitioner's request to submit new evidence occurred only one month after the special master's oral entitlement ruling. (See 35 Fed. Cl. at 25.) These brief time periods are, obviously, a far cry from the three-year period in this case.

This factor of the length of the time period, then, in my view, is a substantial one in favor of denying the motion.

4. ***The reason for the delay***

The fourth factor, obviously closely intertwined with the third one, is the reason for the delay. That is, I must consider the explanation offered by the moving party for why the evidence, in question, now sought to be offered considering the entitlement issue, was not offered at the time that the entitlement issue was first resolved.

> The committee further recognizes that the deeming of vaccine-relatedness adopted here may provide compensation to some children whose illness is not, in fact, vaccine-related. The committee anticipates that research * * * will soon provide more definitive information about the incidence of vaccine injury * * *. Until such time, however, the committee has chosen to provide compensation to all persons whose injuries meet the requirements of the petition and the Table and whose injuries cannot be demonstrated to be caused by other factors.

In this case, this factor, too, in my view, weighs quite substantially against the respondent. To be sure, there is no evidence of bad faith or dilatory intent on the part of the respondent. But the most remarkable point about the motion to reopen here is that in making that motion, respondent does not rely solely or even primarily upon new evidence only recently available. To the contrary, respondent points chiefly to evidence that *existed even prior to the entitlement hearing* that was held more than three years ago. Specifically, respondent now points to ten different items in Christian's medical records that respondent believes support a reopening of the record. Those consist of MRI test results dated August 1992, April 1993, and January 1997; letters dated March 6, 1992, October 19, 1992, April 22, 1993, May 7, 1993, September 16, 1993, and December 13, 1994; and a "history" said to have been forwarded by Dr. Mathisen on April 30, 1993. (See respondent's motion filed on June 2, 1997, p. 6; Ex. G, pp. l-2.) Obviously, eight of those ten items *predate* the entitlement evidentiary hearing in this case, held on May *26,* 1994, by many months. And even as to the MRI result of January 22, 1997, respondent states merely that such result "confirmed" the results of the two MRI tests done in 1992 and 1993.

Thus, it is clear that respondent seeks to reopen the entitlement issue now, in 1997, on the basis of evidence that respondent *could and should have been aware of,* and presented, at the evidentiary hearing held on May 26, 1994.

Respondent, perhaps anticipating that this criticism would be raised, has seemed to try to blame petitioners and Christian's treating neurologist and expert witness, Dr. Mathisen, for the fact that respondent apparently had none of those above-mentioned eight medical record items prior to the 1994 evidentiary hearing. Respondent even seems to imply that perhaps Dr. Mathisen intentionally hid the items from respondent. I must reject this suggestion, however, as totally unsubstantiated. I see no evidence of bad faith on the part of petitioners or Dr. Mathisen. The procedural record of this case, as I have recounted above at p. 3, makes it clear that petitioners filed most of the appropriate records with their petition on May 14, 1992, and that in the fall of 1992 they diligently complied with all additional record requests of respondent. Then it turned out that, for a variety of reasons, the entitlement hearing was not held until about 18 months later, on May 26, 1994. Obviously, after that hearing was scheduled via my order dated March 30, 1994, respondent should have sought from petitioners the medical records from the interim period. I am confident that petitioners would have voluntarily complied with such a request, and if they did not and I was so informed, I certainly would have ordered them to do so. However, there is no evidence that respondent did make such a request," and respondent does not now allege that respondent ever did so.

In short, the primary reason for the delay in this case plainly seems to have been *respondent's own negligence* in failing to timely seek obviously relevant records. These records obviously could and should have been obtained and presented at the entitlement hearing in 1994. Respondent cannot credibly blame anyone else for this lack of diligence. Accordingly, this final factor, in my view, also weighs heavily against granting the instant motion.

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[10]Note that respondent filed prehearing submissions on May 12, 1994, which did not mention any outstanding request for records.

5. Weighing of various factors

As noted above, in part III(B) of this opinion, there is no formulaic or mechanistic way in which to weigh the various factors. In this case, for example, I have concluded above that three of the factors weigh in petitioners' favor and only one in respondent's , but that does not automatically dictate a result in petitioners' favor. Each factor must be given the weight that is appropriate under all the circumstances of the case, in the discretion of the special master.

In this case, after careful consideration of all the factors, I conclude that respondent's motion should be denied. I do not reach this conclusion without some hesitation. It is always desirable in theory to spend as much time as is needed to evaluate all potentially relevant evidence, concerning every issue in every case, in a search for the truth. But the realities of legal proceedings dictate that there must be an end to each such proceeding, and that is doubly true in proceedings under the Program, which was intended to be an especially *simplified and speedy* legal avenue for affording compensation to families. In this case, the delay since the initial entitlement resolution has been extraordinarily long, and the petitioners are certainly entitled to a speedy conclusion to these proceedings. And because the motion to reopen the entitlement issue here was tiled just a few days before the scheduled damages hearing, there is simply no doubt that the process of reopening this complicated entitlement issue would substantially delay the filing of my final decision in this case."

Further, it would prejudice or potentially prejudice the petitioners in the additional ways described in part III(C)(2) of this opinion, above. And yet the only reason why most of the evidence now sought to be presented was not presented at the evidentiary hearing in 1994 is that respondent simply neglected to procure it in timely fashion.

Given this combination of circumstances, I conclude that it would be unfair and unwarranted to reopen the entitlement issue at this time. [12] I thus deny respondent's motion.

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[11] I note that the damages hearing was completed on June 10, 1997. My ruling on the issues argued at that hearing, and my final decision in this case, will likely follow within a matter of days after this Ruling.

In contrast, even had petitioners begun work concerning a reopened entitlement issue on the date (June 2) that respondent filed the motion (or even on May 23, when respondent's counsel indicated the intent to file such a motion), it would still likely be weeks or more from now before petitioners could even be ready for another entitlement hearing.

[12] Although this consideration has played no role in my conclusion here, I also note that if I were to grant respondent's motion to reopen the entitlement issue in this case, that result might well have a serious "side effect" on future Program cases. That is, other petitioners in Program cases might be tightened into rushing toward immediate trials on damages issues; they might worry that if they engaged in the sometimes lengthy negotiations necessary to settle Program damages issues, they would run the risk that respondent in the meanwhile might seek to reopen the entitlement issue. That, of course, would be an unfortunate result, since to this point in time parties in Program cases have been fairly successful in settling a large percentage of damages cases.

IV

CONCLUSION

For the reasons set forth above, respondent's motion to reopen the entitlement issue in this case is hereby DENIED.

George L. Hastings, Jr.
Special Master