In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-232V
Filed: September 30, 2008

MARY DARIN WILKERSON, as mother of her son, OTTO WILKERSON,	*	PUBLISHED
Petitioner,	*	Statute of Limitations, Use of "hindsight" Analysis under Markovich, Applicability of Setnes
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C, Boston, Massachusetts, for Petitioner.
Traci R. Patton , United States Department of Justice, Washington, D.C., for Respondent.

DECISION[1]

GOLKIEWICZ, Chief Special Master.

On February 10, 2005, petitioner, Mary Darin Wilkerson, filed a Petition pursuant to the National Vaccine Injury Compensation Program (the "Act" or "the Program"),[2] on behalf of her son, Otto Wilkerson ("Otto"). Petition ("Pet.") at 1. In her amended petition, petitioner alleged that Otto suffered mercury toxicity and attention deficit disorder ("ADHD") as a result of

[1] The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

[2] The National Vaccine Injury Compensation Program comprises 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 et seq. (West 1991 & Supp. 2002) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

receiving thimerosal containing vaccinations, including Hepatitis B ("Hep B") administered during his first six-months of life. However, before delving into the merits of the claim, based upon the Petition and medical records, a question arose as to whether the Petition was filed in accordance with §16(a)(2), the Vaccine Act's thirty-six month statute of limitations.

At the invitation of the then assigned special master,[3] respondent filed on May 1, 2006, a Motion to Dismiss petitioner's case as "it was filed outside the statute of limitations." With the motion, respondent filed the supportive expert opinion of Dr. Joel Herskowitz. Respondent's Exhibit A (hereinafter "R Ex. _"). Petitioner filed in opposition on June 30, 2006. Following this exchange of briefs, the Court of Appeals for the Federal Circuit issued an opinion in Markovich v. Sec'y of HHS, 477 F.3d 1353 (Fed. Cir. 2007). This decision was viewed as a major pronouncement by the Circuit on the issue of interpreting the limitations on actions provision in the Vaccine Act. Thus, the then assigned special master ordered respondent to file a renewed motion to dismiss based upon the Markovich decision. Respondent filed a Renewed Motion to Dismiss and Response to the Special Master's March 28, 2007 Order on April 30, 2007, moving for dismissal of the Petition as it was filed "more than thirty-six months 'after the date of the occurrence of the first symptom or manifestation of onset' of the injury alleged." Petitioner once again opposed respondent's motion in a filing of July 20, 2007.

Pursuant to the information provided in the parties' filings, the then assigned special master pursued discovery in this case, propounding interrogatories to Ms. Jennifer Checkis, the licensed clinical social worker who evaluated Otto in September 2003 when Otto was six years old, regarding her "clinical impressions about the date of the onset of Otto's ADHD." Order filed September 12, 2007. Petitioner filed Ms. Checkis' response on December 14, 2007. Petitioner Exhibit 15 (hereinafter "P Ex. _"). Following that discovery effort, the special master ordered petitioner to file an expert opinion addressing the issue of the date of onset of Otto's symptoms. Order filed February 7, 2008. Petitioner complied on April 3, 2008, with the filing of the expert report from Dr. Marcel Kinsbourne. P Ex. 17. With this filing, the special master ordered an evidentiary Hearing be conducted to hear from the respective experts. Order filed May 9, 2008.

In response to the special master's May 9, 2008 Order, petitioner filed on May 29, 2008, a Motion for a Ruling on the Existing Record (hereinafter "P Mot. at _") questioning the need for a Hearing with the experts since "[i]n Otto's view, Drs. Kinsbourne and Herskowitz are most likely in complete agreement as to when Otto's symptoms of ADHD actually began", but that the real issue to be decided is the parties' and special master's differing interpretation of the Federal Circuit's decision in Markovich. P Mot. at 4-6. In other words, petitioner sees the case as a pure legal issue. Respondent did not object to petitioner's motion, but cautioned that "it is at [petitioner's] peril" to obtain a ruling at this juncture without additional testimony. Respondent's

[3] The assigned special master resigned from the Office of Special Masters on July 18, 2008, and the case was reassigned to the undersigned on August 1, 2008.

Response to Petitioner's Motion for a Ruling on the Existing Record at 3-4 (hereinafter "R Res. at _").

With the departure of the then assigned special master, the case was reassigned to the undersigned on August 1, 2008. After discussing the state of the case at a status conference conducted on August 11, 2008, and on September 16, 2008, the undersigned agreed, with one major caveat, that the case presented a legal issue and did not require a Hearing. The caveat concerned the experts' agreement as to when the first symptom of Otto's ADHD occurred. If the doctors agreed, the case presents a purely legal issue; however, if the doctors disagree, a Hearing would be necessary to resolve the differences. However, it was not clear from Dr. Kinsbourne's report if in fact he agreed since he stated "I agree that in retrospect a pediatric neurologist, such as Dr. Herskowitz, or myself for that matter, **might well** trace back Otto's ADD to his preschool years." P Ex. 17 at 1 (emphasis added); see also P Mot. at 5 ("Drs. Kinsbourne and Herskowitz are **most likely** in complete agreement" (emphasis added)). Petitioner eliminated any concerns at the status conference of September 16, 2008, during which petitioner's counsel clarified what the undersigned was terming petitioner's "qualified concessions" with respondent's expert by stating unequivocally that Dr. Kinsbourne would say more probably than not that he agreed with Dr. Herskowitz that the first symptom of Otto's ADHD began, at the latest on November 3, 2001, at the age of four years and six months. With that clarification, there is no need for a Hearing, the case presents a pure legal issue and is ripe for decision.[4]

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[4] The undersigned notes that the arguments raised in this case are of extreme importance. While Markovich clarified greatly the legal boundaries of the Act's statute of limitation, questions persist on the proper interpretation of some of the language employed in Markovich. The undersigned has had occasion to interpret and apply Markovich in Cloer v. Sec'y of HHS, 2008 WL 2275574 at *10 (Fed. Cl. Spec. Mstr. May 15, 2008), (appeal pending). However, the case at hand raises several additional issues that must be addressed. It is noted that over 4,500 autism cases are pending before the Office of Special Masters (hereinafter "OSM"). As petitioner states, "potentially hundreds of other petitioners with claims in the [Omnibus Autism Proceeding] have similar 'Markovich' timeliness issues." P Mot. at 5. See Autism General Order #1, filed July 3, 2002, available at http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf (last visited September 30, 2008). In fact, the OSM is processing an ever increasing number of statute of limitations issues in the autism cases. Thus, the undersigned agrees completely with the importance petitioner attaches to this Motion. The undersigned is also cognizant of the practical financial stakes involved. Petitioner avers that $19,000 in fees and costs have been incurred to date. P Mot. at 4. If it is ultimately determined that this case is time-barred, existing precedence will deny an award for fees and costs since the court would not have jurisdiction over the case. Brice v. Sec'y of HHS, 358 F.3d 865 (Fed Cir. 2004). Thus, in petitioner's view, "[s]ince the experts, when viewing Otto's medical history in hindsight, are in basic agreement," "to permit petitioners, the respondent, and special masters to waste additional time and resources on these cases, without first hearing from the Federal Circuit, in indefensible." P Mot. at 7, 5. The undersigned concurs.

Issue

The sole issue presented at this stage in the proceedings is whether Otto Wilkerson's Petition for compensation was filed within "36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." §16(a)(2). For the reasons set forth below the undersigned must dismiss this Petition as untimely filed.

Facts

The parties agree on the following pertinent facts that are related to this issue. Otto Wilkerson ("Otto") was born on May 3, 1997. P Ex. 1 at 76, 107. He received his first Hepatitis B vaccination at birth. P Ex. 2 at 9. On August 12, 1997, Otto presented to his pediatrician and was given a Diphtheria-Tetanus-Acellular-Pertussis ("DTaP") vaccination, an Inactivated Polio virus ("IPV") vaccination, and a Haemophilus Influenzae type B ("Hib") vaccination. P Ex. 3 at 39. On September 29, 1997, Otto received his second DTaP, IPV and Hib. P. Ex. 3 at 2.

On November 17, 1997, Otto presented to his pediatrician for a six-month check-up and received his third DTaP and Hib vaccinations. Id. at 36. The doctor's noted concerns related to Otto having cold symptoms for two weeks and temper tantrums. Id. On January 30, 1998, Otto presented to Westside Urgent Care with complaints of vomiting, fever, tugging at his ears and symptoms of an upper respiratory infection. Id. at 31. He was diagnosed with a left ear infection and prescribed an antibiotic, Amoxicillin. Id. Otto had recurring issues with ear infections and colds. See, e.g., Id. at 29 (diagnosed with new upper respiratory infection and right ear infection); Id. at 29 ; Id. at 21 (treated for ear infection and cold); Id. at 19 (resolved otitis media).

On February 17, 1998, Otto received his second Hepatitis B vaccination. Id. at 28. On May 6, 1998, at his 12-month visit, Otto received his first measles, mumps, and rubella ("MMR") vaccination, and a varicella vaccination. Id. at 2, 26. On September 30, 1998, he received the following vaccinations: DTaP, Hepatitis B, IPV and Oral Polio virus ("OPV"). P Ex. 3 at 2. The notes from this visit indicate that Otto's growth and development was normal. Id. at 18.

On June 7, 1999, Otto presented to the emergency room at Providence Portland Medical Center ("PPMC"), where he was treated for burn injuries to his hand that were sustained from grabbing a "cooling iron." Id. at 58. On November 30, 1999, Otto presented to a physician for a foot injury after he "jumped off [a] stool" several days earlier. Id. at 12. Otto was seen on August 29, 2001, for a superficial laceration on his left eyebrow, sustained after hitting his face on the handlebars of his bicycle. Id. at 10. On September 18, 2002, Otto was administered DTaP, IPV, and MMR vaccinations. Id. at 7.

On October 3, 2002, Otto presented to Legacy Emergency Services with a laceration on his eyelid, sustained after hitting his head on the side of a swimming pool. P Ex. 3 at 56-57. Otto presented to Legacy Emergency Services on July 14, 2003, for a scalp laceration that he received after rolling off a chair onto a cement. Id. at 52. On July 21, 2003, Otto presented for his first visit at Westside Pediatric Clinic. During this visit the physician noted that "there are ADHD" issues and he was apparently referred to Western Psychological and Counseling Services for testing. P Ex. 4 at 17. On September 22, 2003, Jennifer Checkis ("Ms. Checkis"), a licensed clinical social worker, interviewed Otto at the Westside Psychological and Counseling Services. See P Ex. 4 at 27-29. Otto was six years old at the time of the interview. Id. at 27. In her report, Ms. Checkis, concluded that Otto "clearly" met the DSM IV clinical criteria for Attention Deficit Hyperactivity Disorder ("ADHD"). Id. On January 19, 2004, Otto presented to his pediatrician for an "ADD evaluation," who corroborated Otto's ADHD diagnosis and prescribed medication for Otto. P Ex. 4 at 10, 12.

Petitioner's affidavit

Petitioner described her pregnancy with Otto as a "healthy, full term pregnancy." P Ex. 12 ¶ 1. Petitioner stated that at birth, her sister said that Otto had an "easy going disposition." Id. According to petitioner, Otto began to be "constantly sick" and "remained sick for the first two years of his life." Id. at ¶ 2. At two years old, in 1999**,** petitioner enrolled Otto in the childcare facility at her job, where he "had a hard time playing" with other children, "and no one wanted him around." Id. at ¶ 3. Shortly after this experience, petitioner enrolled Otto in a tumbling preschool program, where she received daily reports of Otto disturbing the class or hurting a classmate. Id. Petitioner initially believed that Otto misbehaved because he had not been in "many playing situations." Id.

In 2001, when Otto was four years old, petitioner enrolled him in her church's preschool program. Id at ¶ 4. Petitioner described that she was often "pulled aside" and told that "Otto was disturbing the class or not following directions well." Id. Otto was "put into timeout regularly" for disobedience. Id. During a parent-teacher meeting, Otto's teacher told petitioner that Otto was "very aware" of his environment, but would often not respond to his name or the teacher's instructions. Id. Petitioner said that Otto was "very bright and could do all that was expected of him," but he was unable to keep quiet, obey commands, sit still or listen. Id. at ¶ 4.

Petitioner's expert - Dr. Marcel Kinsbourne

Petitioner's expert, Dr. Marcel Kinsbourne, stated that he agreed that a pediatric neurologist "might well" (Clarified by petitioner during the September 16, 2008 status conference to mean more probably than not. See p. 2-3, supra.), trace Otto's ADD back to pre-school years. P Ex. 17 at 1. Dr. Kinsbourne, however, opines that a diagnosis during Otto's preschool years would have been unrealistic, because it would have been unlikely that medical professionals at that time would have been consulted regarding Otto's pre-school behavior. Id. at 2.

Dr. Kinsbourne stated that he and respondent's expert are not part of the medical community at large, rather they are specialists who evaluate patients based on referrals from general physicians and pediatricians. Id. at 1. He further asserted that by the time a pediatrician refers a child to a specialist, a pediatrician has to have a "sufficient diagnostic suspicion," by which time the ADHD symptoms have "often been quite longstanding." Id.

Dr. Kinsbourne stated that all of the behavioral symptoms of ADHD can occur in a normally functioning child, and may represent a passing phase in a child's development. Id. at 2. He stated that there are no diagnostic laboratory tests to diagnose ADHD, because ADHD is often based on behavior descriptions provided by teachers. Id. He opined that experts do use "hindsight" to determine whether a child has ADHD by the age of 4 years and 6 months. Id. However, according to Dr. Kinsbourne, a clinician who observes the child in his early years does not have the benefit of hindsight and has to differentiate between ADHD and other viable disorders. Id. Dr. Kinsbourne further opined that the evidence based clinical practice guideline of the Committee on Quality Improvement of the American Academy of Pediatrics does not consider the possibility of arriving at an ADHD diagnosis before six years old. Dr. Kinsbourne opined that Otto's diagnosis made at six and one-half years old was more stable than a diagnosis made at 4 years and 6 months years old. Id. Additionally, he asserted that Otto's diagnosis at six and one-half years old is quite consistent within the medical community, and therefore, the most appropriate time-period to determine Otto's ADHD onset. Id.

Dr. Kinsbourne defends his conclusion by asserting that despite Otto's many visits to his pediatrician, there were no notes of concerns about ADHD symptoms until he was 6 years and one-half years old. Id. at 3. He asserted that the age of Otto's diagnosis, 6 and one-half years old was within the mainstream of current experience; and a diagnosis could not have been recognized as potentially a vaccine injury until after his pediatrician referred him in July 2003. Id. He opined that it was not likely that ADHD would have been the diagnosis for Otto at the time he was 4 years and 6 months old, which is in November 2001; but rather when he was diagnosed with ADHD on July 21, 2003. Id. at 2.

Respondent's expert - Dr. Joel Herskowitz

Dr. Herskowitz opined that, to a reasonable degree of medical certainty, Otto manifested symptoms of attention deficit disorder of hyperactive-impulse subtype ("ADHD")[5] by the age of 4 years and 6 months, which is in November 2001. R Ex. A at 4. Dr. Herskowitz based his opinion on behaviors documented in the contemporaneous medical records and petitioner's affidavit. Dr. Herskowitz quotes a chapter written by Drs. Marcel Kinsbourne and William D. Graf, in which the authors stated that in some instances hyperactivity may be become evident during a child's infancy. Id. at 3; see also, R Ex. C.

[5] Dr. Herskowitz prefers to use the term attention deficit disorder ("ADD) of hyperactive impulsive subtype. R Ex. A at 3. The undersigned will refer to this disorder by another common reference: Attention Deficit hyperactivity Disorder ("ADHD").

Dr. Herskowitz states that petitioner's description of Otto's difficulty with social interaction and behavior control during his early child hood is an indicator of Otto's later diagnosed ADHD. Id. Dr. Herskowitz concludes that based upon the petitioner's affidavit and the contemporaneous medical records, that Otto likely had ADHD well before he was diagnosed. Id. Dr. Herskowitz states that symptoms of Otto's ADHD are "epitomized" by petitioner's description that Otto "moves on high speed thus sending us to the emergency room five times before he was six years old." Id. Dr. Herskowitz states that symptoms of Otto's ADHD are "epitomized" by petitioner's description that Otto "moves on high speed thus sending us to the emergency room five times before he was six years old." Id. He says that his tendency to injury, and "early motoric competence" are typical symptoms of ADHD. Id.

Legal Standard

The United States is sovereign, and may not be sued without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). The Program represents a waiver of sovereign immunity. See, e.g. Markovich, 477 F.3d at 1360, citing Brice v. Sec'y of HHS, 240 F. 3d at 1370. A statute of limitations is a jurisdictional condition to the waiver of sovereign immunity. United States v. Mottaz, 476 U.S. 834, 841 (1986). Therefore, the special master must "strictly and narrowly" construe Program provisions. Markovich, 477 F.3d at 1360.

The statute of limitations period governing this petition is contained in §300aa-16(a)(2). Pursuant to §300aa-16(a)(2), a petitioner seeking compensation related to an alleged injury associated with a vaccine administered after October 1, 1988, may not file a petition "after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset" of the alleged injury.

The Federal Circuit has instructed "courts should be careful not to interpret a waiver in a manner that would extend the waiver in a manner beyond that which Congress intend." Markovich, 477 F.3d at 1360, citing Brice v. Secretary of HHS, 240 F.3d 1367, 1370 (Fed. Cir. 2001). The Circuit's decision in Markovich directly addressed the question of "what standard should be applied in determining the date of 'the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury,'" Markovich, 477 F.3d at 1356, by holding "'the first symptom or manifestation of onset,' for purposes of §300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Id. at 1360. Accordingly, petitioners have thirty-six months from the first recognizable sign of their alleged vaccine injury to file their claim.

The Circuit explained in Markovich that "the terms of the Vaccine Act demonstrate that Congress intended the limitation period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act." Id. at 1358 (citing Brice at 1370). The Circuit elaborated that by choosing to "start the running of the statute of limitations period on the date the first symptom or manifestation of the onset occurs, Congress chose to start the running of the statute

before many petitioners would be able to recognize with reasonable certainty, the nature of the injury." Id. The Court noted that the Act has "consistently been interpreted" to include "subtle" symptoms or manifestations of onset as triggers of the Act's statute of limitations. Id. The Court stressed that the words "symptom" and "manifestation of onset" are in the disjunctive as used in the Act and that the words have different meanings. Id. at 1357.

Thus, a symptom "may be indicative of a variety of conditions or ailments, and it may be difficult for lay persons to appreciate the medical significance of a symptom with regard to a particular injury," whereas a manifestation of onset "is more self-evident of an injury and may include significant symptoms that clearly evidence an injury." Id. Accordingly, the Court found that the Act's statutory standard of first symptom or manifestation of onset could include subtle symptoms that a petitioner would recognize "only with the benefit of hindsight, after a doctor makes a definitive diagnosis of the injury" and would be "recognizable to the medical profession at large but not necessarily to the parent." Id. at 1358, quoting from Brice v. Sec'y of HHS, 36 Fed. Cl. 474, 477 (1996), aff'd on other grounds, 240 F. 3d 1367(Fed. Cir. 2001). Thus, the Circuit in interpreting the Act's statute of limitations, rejected applying a "subjective standard that focuses on the parent's view" of the timing of onset in favor of an "objective standard that focuses on the recognized standards of the medical profession at large." Id. at 1360.

Parties' Arguments

In the instant case, petitioner asserts that determining the timeliness of her Petition depends upon "how one interprets Markovich." P. Mot. at 6. Petitioner argues that both experts in this case "are most likely in complete agreement" regarding the time of onset for Otto's ADHD. Id. at 5. Petitioner argues, however that only "in hindsight," can Dr. Herskowitz's opinion regarding the first symptom or manifestation of Otto's ADHD be correct. Id. at 6, 18. Petitioner asserts that it is inappropriate to use hindsight to determine the onset of the first symptom or manifestation of Otto's ADHD. Id. In petitioner's view, that the legal test for determining the first symptom or manifestation of onset is when the "medical community would have **first agreed** that Otto's symptoms were symptoms of ADHD." Id. (emphasis in original.)

Specifically, petitioner argues that the Program's statute of limitations should not begin to run until after Otto's sixth birthday, May 3, 2003. Id. at 4. Petitioner argues that the medical community at large would not have recognized his symptoms, as recorded in his medical records, as the symptoms of ADHD, until after his sixth birthday. Id. at 4. Further, petitioner argues that Otto's ADHD would not have been recognized as a vaccine injury by the medical community at-large before his sixth birthday. Id. at 18. Petitioner asserts that (before February 16, 2002 - the date should be February 10, 2002 since the Petition was filed on February 10, 2005 - the critical date for petitioner's case to be timely filed) Otto presented to his pediatrician on numerous occasions and there was "no mention of any concerns," or "referrals for evaluation." Id. Therefore, in petitioner's view, Otto did not have any "objectively recognizable" symptoms of ADHD before his sixth birthday in May 2003. Id. at 18-19.

Respondent counters that the instant case is time-barred under §16(a)(2) of the Program, as interpreted by Markovich, because petitioner filed her Petition more than thirty-six months after the presentation of the first symptom or manifestation of onset of the Otto's alleged injury. R Res. at 2. Respondent argues that the first symptom or manifestation of onset of a vaccine related injury is based upon when the "medical profession at large recognizes the first symptoms or manifestations" as initial symptoms of the alleged vaccine related injury not when the first symptom or manifestation of onset was initially recorded in the medical records. Id. at 5.

Respondent argues that the first symptoms or manifestations of onset Otto's ADHD occurred when Otto was four years and six months, "on or about November 3, 2001." Id. at 7. Therefore, according to respondent the Petition in the instant case should have been filed "no later" than November 2, 2004. Id.

Respondent's expert, Dr. Herskowitz, opined that Otto's "early motoric competence and tendency to injury," as described by petitioner, were typical symptoms of ADHD. R Ex. A at 3. The beginning of Otto's injuries, that were serious enough to require medical attention, were first noted in Otto's medical records when Otto was eleven months. Id. According to respondent's expert, this series of incidents was an early sign of ADHD. Id.; see also P Ex. 3 at 6, 10, 12, 19, 24, 58, 70. Respondent argues Otto's behavioral difficulties in his pre-school programs and his difficulties with interacting socially with other children, as described by petitioner, between age two and four, were early symptoms of ADHD. Respondent's Renewed Motion to Dismiss at 2 (hereinafter "R. Ren. Mot. D."). The cumulative nature of these symptoms led respondent's expert to state "with a reasonable degree of medical certainty", that Otto's ADHD manifested by the time he was four years and six months of age. R Ex. A at 4.

Respondent asserts that Otto's ADHD was "objectively recognizable by the medical profession at large," as early as April 1998, when Otto was eleven months, but no later than November 3, 2001, when Otto was 4 years and 6 months old. R. Ren. Mot. D. at 2; see Markovich, 477 F.3d at 1360. Therefore, according to respondent, the petition in this case should have been filed by no later than November 3, 2004 (thirty-six months beyond the outermost limit of possibility). Id. at 3. Petitioner filed the Petition in the instant case on February 10, 2005, which in respondent's view is more than thirty-six months "after the date of the occurrence of the first symptom or manifestation of onset" of Otto's alleged vaccine related injuries. Id.

The crux of respondent's argument is that:

> there is significant evidence that Otto had "problems" in his preschool years, which are discussed by Dr. Herskowitz in his review of the case. See Resp. Exh. A at 1-2. In Dr. Herskowitz's expert opinion, these "problems" are typical symptoms of ADD, even if the connection is not made at the time. Id. at 3. Furthermore, the use of hindsight, whether by parental recollection as in Markovich or by subsequent review of the record like conducted by Dr. Herskowitz is more than acceptable; it is sanctioned by the Federal Circuit. That Dr. Herskowitz and others had the benefit of

> hindsight does not detract from this argument; rather, it strengthens his conclusion that Otto manifested symptoms of ADD by four years six months of age. Resp. Exh. A at 4. The fact that a doctor may have first definitively diagnosed ADD in July 2003 is of no consequence; the relevant inquiry is when the first symptom or manifestation of the alleged vaccine injury occurred, as objectively recognizable (as opposed to observable) by the medical profession at large. Dr. Herskowitz stated, and Dr. Kinsbourne agreed, that Otto's symptoms can be traced back to his preschool years. Resp. Exh. A at 3; Pet. Exh. 17 at 1.

R Res. at 7-8.

Discussion

After considering the entire record and the parties' respective arguments, the undersigned finds that this case must be dismissed. Based upon the expert affidavits, the outermost date for the first symptoms of Otto's ADHD was November 3, 2001. R Ex. A at 4 ("Otto Wilkerson manifested symptoms of attention deficit disorder of hyperactive-impulsive subtype by 4 years 6 months of age (11/3/2001)."); P Ex. 17 at 1 ("I agree that in retrospect a pediatric neurologist such as Dr. Herskowitz, or myself for that matter, might well trace back Otto's AD[H]D to his preschool years."); see also P at 5, 6 (Drs. Kinsbourne and Herskowitz are most likely in complete agreement as to when Otto's symptoms of ADHD actually began." The words "most likely" in this statement were later clarified by petitioner's counsel at the September 16, 2008 status conference, to mean "more probably than not." See pp. 2-3, supra.) The Vaccine Act provides a window of thirty-six months from "the date of the occurrence of the first symptom or manifestation of onset" of the vaccine-related injury to file a petition. §16(a)(2). Based upon the respective experts' agreement that the first symptom of Otto's ADHD occurred no later than November 3, 2001, petitioner's window for filing any Petition for compensation ended on November 3, 2004. The Petition in this case was filed on February 10, 2005, and was thus untimely. Thus, the Petition must be dismissed.

Petitioner does not contest the above analysis and conclusion, **if** the special master applied the correct interpretation of the Federal Circuit's decision in Markovich. It is the interpretation of Markovich, which petitioner contends has been incorrectly represented by the then assigned special master, respondent, and by the undersigned at the September status conference, that is squarely at issue in this case. As petitioner succinctly states the issue, "[w]hether his claim was timely filed, Otto says, depends upon how one interprets Markovich." P Mot. at 6.

Presented through several interrelated strains of argument, the crux of petitioner's contention is that the Circuit's decision in Markovich does not sanction a retrospective - as petitioner terms it, the use of the "so-called 'retrospectoscope,'" Id - determination of when symptoms began. Instead, petitioner contends that the timing for applying the Circuit's

"objectively recognizable" test is "when the symptoms **first** appear." Id. (emphasis in original). While not perfectly clear, it appears from petitioner's arguments that petitioner is framing the dispute pursuant to Markovich as what is the record for determining the first symptom or manifestation of the injury, the totality of the medical record, including what transpired subsequent to the medical events being reviewed, or is the record "frozen" as of the time of the event being reviewed. Stated another way, are the experts reviewing a snapshot of the record (as petitioner argues, objectively recognizable means "at the time the symptoms emerged", (P Mot. at 17) or are the experts entitled to review the entire medical history, including what transpires after the signs or events at issue have emerged (as petitioner contests, "'objectively recognizable' does not mean recognizable in hindsight", Id.). The practical difference in these interpretations and their impact can be seen from the petitioner's expert opinion from Dr. Kinsbourne. See P Ex. 17. Focusing in hindsight at Otto at four and one-half years of age, Dr. Kinsbourne agrees with Dr. Herskowitz that considering Otto's medical history, that is looking retrospectively, you can diagnose Otto with ADHD at that time. Id. at 2. In fact, Dr. Kinsbourne notes that "it is usually not difficult to trace back in time the target abnormal behaviors to a child's earlier years." Id. However, using the snapshot approach, not considering what transpired after the time in question, yields a different result since "the clinician does not have the benefit of hindsight" and having to "perform a differential diagnosis between ADHD and other viable alternative diagnoses", Dr. Kinsbourne finds it "unlikely that Otto's medical advisers could have arrived at a reliable diagnosis" at this age. Id. As applied to this case, using the hindsight approach advocated by respondent results in an earlier dating of the onset of symptoms that renders this case untimely, while the snapshot approach advocated by petitioner results in a later dating of the onset of symptoms and a timely petition.

Continuing with the photography metaphor, in essence, the undersigned interprets petitioner's argument as the Markovich test of "objectively recognizable" applies to the snapshot of the injured's medical record, and those snapshots continue throughout the injured's medical course until the "medical profession at large" has sufficient "photos" to complete the picture and are able to determine whether the child is experiencing typical childhood behavior or the signs of the alleged vaccine injury. It is at this point, when the cumulative photos complete the picture, that petitioner contends the statute of limitations begins to run. The undersigned disagrees with petitioner's interpretation of Markovich and finds that the correct reading of Markovich is that the critical determination is focused solely upon when the first symptom or manifestation of onset occurred. Whether this determination can be made contemporaneously with the symptoms first occurrence or in hindsight utilizing the injured's complete medical record is irrelevant, as long as the determination is made utilizing the "recognized standards of the medical profession at large". Markovich at 1360. This interpretation is supported by the language of Markovich, and is what actually occurred in that case.

Before discussing Markovich, a brief review of the facts of Markovich will be helpful. Petitioners, Michael and Melissa Markovich, first observed repeated rapid "eye-blinking episodes," in their daughter, Ashlyn, on July 10, 2000, the day she received her vaccinations. Markovich, 477 F.3d at 1354 (Fed. Cir. 2007). These episodes were not documented

contemporaneously by medical professionals. Markovich v. Sec'y of HHS, 69 Fed. Cl. 327, 328 (2005). At the time, the parents were not concerned about the eye-blinking, instead they believed it was an indication that Ashlyn was tired. Id. These eye-blinking episodes continued. Id. Ashlyn was hospitalized as a result of her first "full blown seizure" on August 30, 2000. Id. She was later diagnosed as having suffered a grand-mal seizure. Id.

After her hospitalization, on September 8, 2000, Ashlyn presented to a physician for a well-child examination, who noted that Ashlyn's examination was normal. Id. Shortly thereafter, on September 14, 2000, Ashlyn experienced another seizure. Id. She continued to have seizures regularly, sometimes experiencing multiple seizures in one day. Id. A neurologist at the Mayo Clinic diagnosed Ashlyn's eye-blinking episodes as one of four different types of seizures that Ashlyn had been experiencing. Id. at 329-30. Petitioners filed their Program Petition on August 29, 2003. Id. at 330. Testimony from the Markovich's medical expert, reviewing the case **retrospectively**, along with medical records, established that the eye-blinking episodes were a symptom of Ashlyn's seizure activity. Markovich, 477 F3d. at 1359-60. Relying on the parental report and Dr. Corbier's testimony, the special master dismissed the petition as untimely. See generally, Markovich v. Sec'y of HHS, 2005 WL 6117470 (Fed. Cl. Spec. Mstr. July 22, 2005). The Court of Federal Claims affirmed the dismissal, the Federal Circuit affirmed and the Supreme Court denied certiorari.

In affirming the dismissal of the Markovich's Petition, the Federal Circuit rejected applying a "subjective standard that focuses on the parent's view" of the timing of onset in favor of an "objective standard that focuses on the recognized standards of the medical profession at large." Id. at 1360. Thus, the Circuit made clear that the Act's limitation period begins to run prior to the time a "petitioner has actual knowledge" of a viable vaccine claim under the Act, and can include subtle symptoms or manifestations which petitioners may recognize only in hindsight "after a doctor makes a definitive diagnosis of the injury". Id., quoting from Brice, 36 Fed. Cl. at 477. Viewing the Circuit's legal interpretation of the Act's statute of limitations in the context of the facts of Markovich makes it plain that the Circuit relied upon an objective determination by petitioner's own medical expert's, Dr. Corbier's, retrospective analysis utilizing the "recognized standards of the medical profession at large" in affirming the lower court's decision. There is no indication in the court's discussion of limiting the time period or information to be viewed by the expert in making his determination. There is nothing in the discussion, and petitioner has cited none, to support a "snapshot" approach in determining the issue of onset. In fact, reviewing the underlying decisions that the Federal Circuit was reviewing makes perfectly clear that while Dr. Corbier was able to say that Ashlyn had problematic neurological symptoms on July 10, 2000, the date of the first eye blinking episode, he was unable to say that she had a seizure disorder. Markovich, 2005 WL 6117470 at *16. However, Dr. Corbier testified that "hindsight is very important, in the sense that . . . the full-fledged seizures started on August 30th, and **looking back** . . . the eye blinking episodes had been seizures." Markovich, 69 Fed. Cl. at 333 citing the trial transcript at 23-13, 23 (emphasis in the decision). Thus, it is clear that Dr. Corbier utilized the entire record, not a snapshot, in rendering the opinion relied upon by the special master in dismissing this case. In fact, the appropriateness of relying upon Dr. Corbier's "hindsight"

review was a central issue considered by the reviewing judge of the Court of Federal Claims. Id. at 333. The special master's reliance on Dr. Corbier's retrospective analysis was affirmed. Id. at 334. Finally, the Federal Circuit relied upon Dr. Corbier's retrospective testimony in affirming the decisions from below. Markovich, 477 F.3d at 1360. Thus, while not explicitly stated, there is every indication that the Circuit sanctioned the review of the entire record, the so-called retrospective or hindsight review, in determining whether or not the eye-blinking was the first symptom of Ashlyn's seizure disorder.

Despite the facts and discussion from the lower courts' opinions in Markovich, petitioner counters that the Federal Circuit's opinion in Markovich actually provides "strong support" for her argument. P Mot. at 16. To explain herself, petitioner again turns to the facts of Markovich. Id. Petitioner notes that Ashlyn experienced an eye-blinking episode on July 10, 2000 and a grand mal seizure on August 30, 2000. In finding that the eye-blinking episode was the first symptom of the seizure disorder, petitioner argues that while untrained lay persons would not have recognized the episodes as seizures, "[t]rained medical professionals, on the other hand, had they seen Ashlyn when she experienced these episodes, would clearly have recognized them as seizures." P Mot. at 17. It was in this factual context, petitioner argues, that the Federal Circuit found Ashlyn's "eye blinking episode on July 10, 2000 **was**[6] objectively recognizable by the medical profession at large as constituting the first evidence of vaccine injury onset . . . ." Markovich, 477 F.3d at 1360 (footnote omitted, emphasis in P Mot. at 17.) Petitioner contrasts Ashlyn's medical facts to those of Otto's where Otto was seen by his pediatrician on a number of occasions prior to February 10, 2002 (the critical date for petitioner's case to be filed timely) with no mention of any concerns. P Mot. at 18. Thus, the distinction petitioner is attempting to draw is that where a medical professional can look at the snapshot and recognize a symptom as that of the alleged vaccine injury - for example seeing the eye-blinking as a sign of seizures - under Markovich that would be the first symptom; however, if the medical professional cannot determine from the snapshot that the abnormal event is a symptom of a larger problem - for example Otto's pediatricians not commenting on Otto's behavior - under Markovich that would not constitute the first symptom.

There are several problems with petitioner's argument. Chief among them is that there is no indication that the Markovich court made such a distinction in crafting its holding that the first symptom or manifestation of onset "is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Markovich, 477 F.3d at 1360. And, in fact, as discussed above the issue of hindsight review was squarely raised in the Motion for Review to the Court of Federal Claims and was rejected. The Federal Circuit thereafter affirmed relying on

[6] By highlighting the verb "was", petitioner, without explanation, appears to be attaching some significance to the Federal Circuit's use of the past tense of the verb "to be" in this sentence. However, it is clear from other parts of the Markovich decision that the tense of the verb "to be" has no meaning other than its appropriate grammatical role of indicating when the action took place or will take place. See Markovich, 477 F.3d at 1358, 1360 ("would be recognizable to the medical profession at large").

the same doctor's retrospective review. Secondly, petitioner's premise, that trained medical professionals "would clearly have recognized" the eye-blinking as seizures, is pure unsupported speculation. It is belied by the fact that while the eye-blinking was noted on August 30, 2000 with the grand mal seizure and Ashlyn was seen thereafter on numerous occasions by medical professionals, it was not until January 29, 2002 that Ashlyn's eye-blinking episode was identified as a seizure. Markovich, 69 Fed. Cl. at 330. While the Circuit noted that the eye-blinking "would have at the very least raised Dr. Corbier's suspicions," Markovich, 477 F.3d at 1360, there is nothing to support petitioner's assertion that the eye-blinking "would clearly" be recognized as seizures. Actually, experience[7] teaches the undersigned otherwise. The undersigned has handled literally hundreds of seizure disorder cases. The central argument in many of those cases was whether the twitch of the head, the momentary stare or the jerk of an arm is evidence of a seizure. One expert says yes, the other no. In each case, the expert's analysis started from a later diagnosis of a seizure disorder and looked in hindsight through the medical history back to a singular event, for example, an arm jerk. The only difference in those cases is that it was petitioner making the argument in an effort to date the seizures close in time to the immunization.[8] As the Federal Circuit noted, relying upon the Supreme Court's ruling in Shalala v. Whitecotton, 514 U.S. 268 (1995), there is no "principled basis" for interpreting the phrase "first symptom or manifestation of onset" differently for purposes of causation under §11(c)(1)(C)(i) than for the statute of limitations under §16(a)(2). Markovich, 477 F.3d at 1357.

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[7] See Hodges v. HHS, 9 F. 3d 958, 961 (Fed. Cir. 1993) ("Congress assigned a group of specialists, the special masters, . . . the unenviable job of sorting through these painful cases and, based upon their accumulated expertise in the field, judging the merits of the individual claims.").

[8] It is important to understand, and the undersigned cannot envision a serious contention to the contrary, that retrospective analysis of causation issues has been the accepted and predominate means for petitioners to establish causation under the Program from it's inception. Thus, petitioner's argument that "objectively recognizable" does not benefit from a retrospective review, but means "recognizable at the time the symptoms emerged" flies in the face of standard practice of proving causation in vaccine cases over the past 20 years and would prove devastating to petitioners' efforts to establish causation in future cases. Routine is the testimony, for example, that the pain at the site of the injection, pain in the shoulder, or general fatigue did not raise a concern, but after time, many doctors' visits and the accumulation of much information, sometimes a treating doctor but more often a hired expert reviews the case retrospectively and concludes that the vaccine was causative. Under petitioner's interpretation, such a retrospective review would be precluded, focusing instead upon the absence of notation or the inability of the medical community at large to view the symptoms "at the time", for example, a pain in the arm at the site of injection, in determining whether the vaccine caused a pain syndrome. It is only after time elapses, the injury progresses and a retrospective review is done with the benefit of all of the medical facts, that the diagnoses can be made and an opinion can be given. The vast majority of vaccine causation cases proceed as such. Petitioner is in essence requesting separate interpretations of "first symptom or manifestation" for statute of limitations and causation, the Circuit expressly rejected that argument in Markovich. Markovich, 477 F. 3d at 1359.

Thus, if hindsight review is allowable for causation, it is likewise acceptable for the statute of limitations inquiry. See Id. For all of these reasons, petitioner's contention that the Markovich decision supports their case must be rejected.

Which brings us to what the undersigned sees as petitioner's central argument, a re-argument of Setnes v. United States, 57 Fed. Cl. 175 (2003). Petitioner maintains that the Setnes decision, "however modified by Markovich, remains applicable to his case". P Mot. at 12. Before discussing Setnes' application to this case, a brief review of the pertinent facts of Setnes is required.

In Setnes, petitioners, John and Elizabeth Setnes, began to notice "significant changes" in their son's behavior after he received his immunizations on September 11, 1998. Setnes, 57 Fed. Cl. at 176. Petitioners said that after September 1998, their son, AJ, began making humming and babbling noises and eating the cardboard boxes that held video tapes. Id. They said he developed a vacant stare and stopped responding to his name and following directions. Id. at 177. Petitioners also indicated that after the vaccinations, AJ was slow to develop words. Id. At times, AJ would fight with his brother, and he started to have temper tantrums, during which he would kick and scream and become inconsolable. Id. On July 16, 1999, AJ's pediatrician noted that AJ's "poor social skills" and developmental delays, including speech delay, may be the result of a pervasive developmental disorder ("PDD"). Id. The pediatrician "characterized AJ's lack of eye contact as an abnormal physical finding." Id.

After AJ's medical evaluation on January 7, 2000, the doctor noted "probable PDD/autism." Id. On March, 3, 2000, AJ was diagnosed with autism. Id. The petitioners filed their Program Petition on July 15, 2002. Relying upon the parental affidavit, respondent contended that the onset of AJ's symptoms occurred between September 1998 and June 1999, thus making the Petition untimely by about a month. Id. at 177. Petitioner countered that the Petition was timely, relying upon the pediatrician's notation regarding AJ's possible PPD on July 16, 1999. Id. The special master, relying upon the conclusions of petitioners' medical expert, dismissed the Petition as untimely. Id. The Court of Federal Claims reversed. Id. at 181.

In Setnes, the court found that "where there is no clear start to the injury, such as in cases involving autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on the occurrence of the first symptom." Setnes, 57 Fed. Cl. at 179. In analyzing the evidence in the case, the court was critical of the hindsight review performed by the medical expert, which the court found "plainly inconsistent with AJ's contemporaneous medical records." Id. at 180. The court was very concerned that the subtle symptoms of autism could easily be confused with typical child behavior and concluded that:

> in a situation such as that before the court, where the symptoms of autism develop 'insidiously over time' and the child's behavior cannot readily be connected to an injury or disorder, the court may rely on the child's medical or psychological

evaluations for guidance in ascertaining when the 'manifestation of onset' occurred.

Id. at 181.[9] In Markovich, the Federal Circuit considered the Setnes analysis and found a "significant problem" in that it "effectively" required evidence of a "symptom and manifestation" whereas the Act requires either a symptom or manifestation of onset, whichever occurs first, to trigger the statute of limitations. Markovich, 477 F. 3d at 1358 (emphasis in the original). The court was also concerned that the Setnes rationale suggested that subtle symptoms not recognized by a parent, but recognizable "to the medical profession at large" would not be sufficient to trigger the statute of limitations. Id. The court noted that the Act has consistently been interpreted to include such subtle symptoms as sufficient evidence to trigger the statute of limitations. Id. There are a number of similarities between the case at hand and Setnes.

As in Setnes, Otto's treating doctors did not attribute his behavioral issues to any diagnosed or diagnosable syndrome. As Dr. Kinsbourne noted in his report, "it may take years before the parents bring the issue to the attention of the child's pediatrician" and that it would not be unreasonable "because all the behavioral features that characterize ADHD can also occur in normally functioning children." P Ex. 17 at 2. The Setneses faced the same challenge, as the early signs of autism are not dramatic and can easily be mistaken for early normal childhood behavior. Yet the Circuit in interpreting the Act's statute of limitations found no room in the legal standard for such a distinction and noted that the Vaccine Act "has consistently been interpreted as including subtle symptoms or manifestations of onset of the injury within the ambit of evidence that triggers the running of the statute. Markovich, 477 F.3d at 1358 citing Brice, 36 Fed. Cl. at 477 ("a petitioner typically will recognize that a particular symptom constitutes the first symptom or manifestation of the onset of a certain injury only with the benefit of hindsight, after a doctor makes a definitive diagnosis of the injury.") While the Circuit went on to distinguish Setnes from the facts of Markovich, the undersigned is unable to discern what if any of the Setnes analysis survived the Circuit's criticism. Petitioner did not attempt to analyze the impact of Markovich on Setnes, other than to say it "remains applicable" "however modified." P Mot. at 12. What is clear is that the language of Setnes that petitioner finds comfort in - that the manifestation of injury has "meaning" and means within the facts of Setnes that the thirty-six month period begins to run when the injury becomes "evident", P Mot. at 13 citing Setnes, 57 Fed. Cl. at 180, was rejected by the Markovich court's finding of a "significant problem" with that analysis since it "effectively" changes the disjunctive standard in the statute into a conjunctive requirement. Markovich, 477 F. 3d at 1358. Accordingly, the undersigned finds that Setnes provides no relief to petitioner in this case.

Dr. Kinsbourne in his report highlights another issue that is important to keep in mind during this discussion, that is the difficulty of determining the connection between a symptom of an injury versus a standard that forecloses using those symptoms as the start of the statute of limitations. For example, Dr Kinsbourne states that "[o]nce one knows that a child has ADHD, it

[9] Setnes is awaiting decision as part of the Omnibus Autism Proceeding.

is usually not difficult to trace back in time the target abnormal behaviors to a child's earlier years." P Ex. 17 at 3. While it may seem grossly unfair to petitioners, under the law as interpreted in Markovich, if the expert traces back the ADHD more probably than not to a particular symptom or behavior, that is the starting point for calculating the Act's statute of limitations. That is vastly different than the Setnes formulation rejected by the Federal Circuit whereby the Setnes court precluded the reliance upon subtle symptoms which may be confused with typical childhood behaviors. As the Setnes court stated, "[t]he court is not persuaded that this type of behavior clearly or obviously signals the onset of autism." Setnes, 57 Fed. Cl. at 175. Under Markovich, this is not a valid reason for excluding the behavior from consideration in determining the onset of the statute of limitations. However, such evidence is appropriately presented to the special master for determining more probably than not if in fact the behavior is the first symptom or manifestation of onset of the alleged injury.[10]

Petitioner presented several additional arguments that do not warrant extensive discussion. Petitioner raised a number of policy arguments in support of her arguments and urges the special master "to consider this 'larger picture' when making his ruling." P Mot. at 11. However, the special master is constrained by the law. Policy arguments concerning the wisdom of a statutory provision "must be directed to Congress, not a judiciary official." Weinstein v. Sec'y of HHS, No. 02-2059V, 2004 WL 3088663 at *3 (Fed. Cl. Spec. Mstr. Oct. 25, 2004); Beck v. Sec'y of HHS, 924 F.2d 1029, 1034 (Fed. Cir. 1991) ("Regardless of their merits, these policy arguments may be implemented only by Congress. Our duty is limited to interpreting the statute as it was enacted, not as it arguably should have been enacted.") Also, through her expert,

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[10] By way of observation, the undersigned is cognizant of the potential legal conundrum petitioners face. As the Office of Special Masters work their way through over 4,500 autism cases, hundreds of timeliness issues have begun to arise. Many of the challenges to timeliness begin with a medical record noting a speech or developmental issue. In many cases, the noted symptom was just that, a noted symptom to be watched but as of that time not of such severity to warrant medical intervention. If those symptoms progress slowly, or the family members are not astute observers, sophisticated, lacked medical resources or their doctors did not attach significance to the symptoms, it is conceivable that the case may well proceed past the thirty-six month period for filing a claim before the symptoms progressed sufficiently for a determination that the symptoms represent more than just typical childhood behavior. Stated another way, viewed contemporaneously, the behavior may not have matured sufficiently to be called abnormal, but viewed in hindsight the behavior could be seen as the first symptom of onset of a claimed injury. If the association with abnormal behavior is not made within three years, there would be no realistic opportunity to meet the Act's statute of limitations. As the Setnes court commented,

> [i]t is one thing to be unaware that an obvious injury or its onset was caused by a vaccination. It is quite another to lack knowledge, through no assignable fault, of the existence of the onset. This is especially true where the treating physician does not associate the behavior as an onset of injury.

Setnes, 57 Fed. Cl. at 181. This, however, is an issue for Congress to address, not the courts. Beck v. Sec'y of HHS, 924 F.2d 1029, 1034 (Fed. Cir. 1991).

Dr. Kinsbourne, petitioner appears to argue that date of diagnosis is the trigger for the Act's statute of limitations. P Ex. 17 at 1 ("I now address the question: In the course of prevailing standards of medical practice, at what age could Otto's ADHD have been definitively diagnosed?") Simply put, diagnosis is not the standard under Markovich. Markovich, 477 F.3d at 1357 ("[I]n this case, the eye-blinking episode was a symptom of a seizure disorder without any diagnosis . . . ."). Finally, Dr. Kinsbourne states that "Dr. Herskowitz and I are not 'the medical profession at large.'" P Ex. 17 at 1. The Federal Circuit made it pretty clear in discussing the "objective standard" that the focus was on the "recognized standards of the medical profession at large." Markovich, 477 F.3d at 1360. Clearly, as neurologists, Drs. Kinsbourne and Herskowitz are qualified to discuss and apply the relevant standards of the medical community to the medical issues presented in this case. In fact, Dr. Kinsbourne effectively concedes as much by agreeing with Dr. Herskowitz as to the symptoms of Otto's ADHD and the timing of those symptoms. P. Ex. 17 at 1.

Conclusion

This case involved interpretive issues related to the Federal Circuit's decision in Markovich. For the reasons stated above, the undersigned finds that the Circuit's holding in Markovich means just what it says, that "the first symptom or manifestation of onset . . . is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Markovich, 477 F.3d at 1380. Dr. Kinsbourne agreed with Dr. Herskowitz that the first symptom of Otto's ADHD occurred more than three years prior to the filing of the Petition in this case. Accordingly, petitioner's claim must be dismissed as untimely. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

/s/ Gary J. Golkiewicz

Gary J. Golkiewicz
Chief Special Master