OFFICE OF SPECIAL MASTERS

No. 00-14V

(Filed: May 1, 2002)

* *	*	
BERNADETTE I. ELKINS, Parent and Next Friend of Jaclyn Cristine Elkins, a minor,	*	
Petitioner,	*	
v.	*	**TO BE PUBLISHED**
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *	*	

Richard Gage, Cheyenne, Wyoming, for petitioner.

Lisa Watts, Department of Justice, Washington, D.C., for respondent.

RULING ON FACTUAL ISSUES

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]) on account of an injury to the petitioner's daughter, Jaclyn Christine Elkins. On December 26, 2001, petitioner filed a "Post Trial Memorandum" asking me to make certain findings of fact concerning what symptoms Jaclyn suffered immediately after receiving her vaccinations of January 24, 1997. Specifically, petitioner asked me to find that Jaclyn suffered "a high fever (104 degrees), a change in personality, and a regression in communication skills immediately after receipt of her January 24, 1997, DPT vaccination." For the reasons stated below, I conclude that the petitioner has *not* shown that it is "more probable than not" that Jaclyn suffered a 104° fever, a change in personality, or a regression in communication skills at any time soon after receiving her vaccinations on January 24, 1997.

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

I

STATUTORY BACKGROUND AND PROCEDURAL HISTORY

Under the National Vaccine Injury Compensation Program (hereinafter "the Program"), compensation awards are made to individuals who have suffered injuries after receiving certain vaccines. There are two separate means of establishing entitlement to compensation. First, if an injury specified in the "Vaccine Injury Table," originally established by statute at § 300aa-14(a) and since modified administratively, occurred within the time period from vaccination prescribed in that Table, then that injury may be *presumed* to qualify for compensation. § 300aa-13(a)(1)(A); § 300aa-11(c)(1)(C)(i); § 300aa-14(a). If a person qualifies under this presumption, he or she is said to have suffered a "Table Injury." Alternatively, compensation may also be awarded for injuries not listed in the Table, but entitlement in such cases is dependent upon proof that the vaccine *actually caused* the injury. § 300aa-13(a)(1); § 300aa-11(c)(1)(C)(ii).

In this case, the "Petition for Vaccine Compensation" filed by the petitioner, Bernadette I. Elkins, on behalf of her daughter, Jaclyn, states that Jaclyn suffered "an encephalopathy within the time set forth in the Vaccine Injury Table." (Petition, para. 2.) Thus, the petition seems to allege the occurrence of the Table Injury known as "encephalopathy" with respect to the pertussis portion of the DPT (diphtheria, pertussis, tetanus--also known as "DTP") vaccination that Jaclyn received on January 24, 1997. (See 42 C.F.R. § 100.3(a)(II) (10-1-97 edition of C.F.R.).) In the alternative, the petition alleges that Jaclyn's "encephalopathy was in fact caused by her DTP, Hib and OPV vaccinations." (Petition, para. 3.) Since filing the petition, at a number of unrecorded status conferences, petitioner's counsel explained that petitioner's theory of the case depends on acceptance of petitioner's allegations that Jaclyn suffered not only a high fever, but also a change in personality and a regression in communication skills, within a very short time after receiving her vaccinations on January 24, 1997. Petitioner's counsel asked that I hear the testimony of Jaclyn's parents by videoconference, and thereafter make a ruling as to whether I can accept as accurate these basic factual allegations of petitioner. Petitioner's counsel explained that if I could accept these allegations, he could then obtain expert testimony supporting either or both the theories that Jaclyn had suffered a "Table Injury encephalopathy" or that her neurologic condition was vaccine-caused.

Accordingly, as requested by petitioner, I held an evidentiary hearing on May 24, 2001, hearing the testimony of both of Jaclyn's parents via videoconference.[2] At petitioner's further request, post-hearing briefs were filed concerning the factual issues, with petitioner's last brief having been filed on April 5, 2002. In this Ruling, I rule upon petitioner's requested factual findings as set forth in petitioner's memorandum filed on December 26, 2001.

[2]I note that I was able to see and hear the witnesses very well. I found that the videoconference testimony was virtually equivalent to taking the witnesses' testimony "in person."

II

FACTUAL BACKGROUND IN THE MEDICAL RECORDS

Petitioner gave birth to Jaclyn Elkins (Jaclyn) in a normal delivery on February 17, 1996. (Ex. 2, pp. 2-4.[3]) During Jaclyn's first eleven months of life (up until January 20, 1997), Dr. Romman, her pediatrician, examined her on a number of occasions, and she received a number of routine immunizations. (Ex. 2, pp. 6-15.) Other than a number of upper respiratory infections and ear infections, Jaclyn generally seemed to be a normal, healthy infant. There were no growth or developmental irregularities noted by the pediatrician during any of these examinations. On January 20, 1997, Dr. Romman checked Jaclyn's ears and gave his approval for her to receive further vaccinations. (Ex. 2, p. 15.)

On January 24, 1997, Jaclyn received her third DTP vaccination and also received Hib and OPV vaccinations. (Ex 2, p. 27.) The following day, Jaclyn's mother brought her to the emergency room of the Columbia Bayshore Medical Center because the child had a fever, which was recorded as 102°. (Ex. 4, p. 2.) The doctor's notes for this examination state "runny nose, congested, coughing, fever to 102°" (Ex. 4, p. 1.) No irregularities of speech or behavior were recorded at that time. At discharge, the medical staff instructed Mrs. Elkins to treat her daughter's fever with alternating doses of Tylenol and Motrin every four hours, and to see Dr. Romman in three days. (*Id*.)

Mrs. Elkins did not bring Jaclyn to Dr. Romman's office until eighteen days later, on February 12, 1997. During that visit, the pediatrician noted that Jaclyn "is pulling at ears, has high fever, * * * congested, not very active, eating OK, has redness both eyes." (Ex. 2, p. 16.) Her temperature during the physical exam registered at 99.2° Fahrenheit, and the diagnosis was upper respiratory infection ("URI") and "dull left ear." (*Id.*) Dr. Romman reexamined Jaclyn on February 18, February 26, March 14, March 20, and April 3, 1997. On each of those occasions, the physician noted two or more of the following symptoms: coughing, congestion, runny nose, ears bothering her, poor sleep, poor appetite, fever, crankiness. (Ex. 2, pp. 16-18.) The doctor diagnosed upper respiratory infection, ear infection, or pharyngitis at each presentation, and treated Jaclyn accordingly. There are no notes in these medical records concerning any developmental or communication problems manifested by Jaclyn.

On April 17, 1997, Mrs. Elkins brought Jaclyn to the Bayshore Medical Center Emergency Department for treatment of an electrical burn on her mouth. (Ex. 5, pp. 1-2.) She reported that Jaclyn had bitten into an electrical cord and suffered a shock. The medical staff kept her hospitalized overnight and treated a blister on Jaclyn's lip. (*Id*.) The hospital discharged the child April 18, with written instructions that the parents must "notify Dr. if [Jaclyn] has any behavioral changes." (Ex. 5, p. 1.)

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[3]Petitioner filed exhibits numbered 1 through 3 with the petition, and additional consecutively-numbered exhibits on several occasions thereafter. "Ex." references will be to those exhibits. "Tr." references will be to the pages of the transcript of the evidentiary hearing on May 24, 2001.

While Jaclyn was in the hospital for her electrical burn, she also was examined by Dr. Lawrence Clarke, an ear, nose, and throat specialist, who evaluated her "recurring episodes of acute otitis media." (Ex. 6, p. 1.) Dr. Clarke's initial evaluation mention did not record any developmental or communication deficits. (*Id.*) He noted that:

> Otologic history is of recurrent bouts of acute otitis media. The parents report approximately 10-12 episodes of acute otitis media within the last 12 months. She has been on multiple prolonged course of antibiotics without resolution. She also has a history of facial eczema, nasal airway obstruction and rhinorrhea. The mother reports she awakes frequently during the night which she attributes to her inability to breathe well through her nose. The mother reports that she is awakened approximately 6-8 times per night. She has a history of near constant rhinorrhea.

(*Id.*) His records do not mention any recent behavioral changes other than the sleep disturbance. (Ex. 6, pp. 1-3.) Dr. Clarke concluded that the best treatment for the ear infection would be surgical placement of pressure equalization tubes in both ears combined with an adenoidectomy. (*Id.*) He conducted an extensive pre-operative evaluation of Jaclyn during at least four visits in April and early May of 1997. (Ex. 6, pp. 3-10.) The bilateral tube placement and adenoidectomy was performed on May 14, 1997. (Ex. 6, pp. 4-5.) Dr. Clarke examined Jaclyn post-operatively on both May 22 and August 22, 1997, both times noting that she was "doing well." (Ex. 6, p. 11-12.) Nowhere in these pre and post-operative records concerning Jaclyn by an ear, nose, and throat specialist is there any comment about communication, hearing, or developmental deficits.

Following her tube placement surgery, Jaclyn continued to receive general pediatric treatment from Dr. Romman. He saw her for low grade fever, sore throat, coughing, or congestion on June 14, July 3, July 10, August 16, August 27, September 10, and October 6, 1997. Jaclyn's physical examination in August of 1997 was "within normal limits," and the "speech" category was marked "normal Inf[ant]." (Ex. 4, p. 18.)

On December 1, 1997, Dr. Clarke conducted a follow-up exam on Jaclyn and concluded that her tubes were functioning perfectly. He quoted the following statement, presumably from Mrs. Elkins: "Doing great. No ear infection since tubes. We sleep at night. It's great." (Ex. 6, p. 13.) But, a month later, on January 5, 1998, the first medical record notation concerning a problem with Jaclyn's speech appears in his notes. (Ex. 6, p. 14.) Dr. Clarke wrote that Jaclyn "was exposed to electrical shock in April of 1997 * * * [the mother] wants to know if this could have something to do with her speech." (Ex. 6, p. 14.) On January 7, 1998, Dr. Romman also first recorded a concern about whether Jaclyn's speech was age-appropriate. (Ex. 2, p. 21.) His note states that she "sat up [at] 5-6 months, walked [at] 9-10 m, said Dada [at] age 10 m, now total words 1-2 words. Hearing checked--OK." (*Id.*) He planned to make a referral to pediatric neurology. (Ex. 2, p. 22.)

Over the following year, Jaclyn received a number of extensive evaluations in an effort to determine the source of her delayed speech. Histories were taken at these evaluations. For example, Jaclyn was evaluated on April 15, 1998, at the Bay Area Rehabilitation Center, where it was recorded that--

> Jaclyn had P.E. tubes put in at 12 mos. She's also had an MRI March 1998 which was normal. She had an MRI to see if there was any damage after she had an electrical shock @ 12 mos. of age. She had a lot of ear infections before the tubes were put in * * *. She uses a lot of babbling. She doesn't have any real words. She had 5-10 words when she was around a year [old] until she had an electrical shock, and then she stopped grouping those words & stopped doing a lot of things she used to do.

(Ex. 7, pp. 3-4.) She was also evaluated on April 29, 1998, at Texas Children's Hospital, where Dr. Sherry Sellers of the Developmental Pediatrics Clinic interviewed Jaclyn's mother and recorded the following history:

> Jaclyn's mother says that Jaclyn seemed to have normal language development although by 14 months of age she still was not saying "mama or "dada" appropriately. However, by 14 months of age she was immature jargoning and saying "fish", "duck", "bear", and "bye-bye". Her mother also notes that Jaclyn seemed to have appropriate interaction with others including laughing aloud at 4 months of age. When Jaclyn was 14 months of age she bit into an electric cord which gave her a shock, knocking her backwards, making a hole in her lip, and making her bottom teeth loose. This shock did not cause Jaclyn to lose consciousness however. After the shock Jaclyn never again used her previously known single vocabulary words. Even at her present age, she only babbles. Approximately 4 months ago Jaclyn began using gesture language, taking her caretaker's hands to place them on items which Jaclyn wanted * * *.

(Ex. 9, p. 1.) Jaclyn was evaluated on February 4, 1999, by a psychologist, who recorded the following history:

> Briefly, Jaclyn's medical history includes having her umbilical cord around her neck. Jaclyn bit an electric cord and received a significant shock at age 12 months. She had numerous ear infections before tube insertion in April, 1997. Jaclyn had an MRI in March, 1998, with normal results. Developmentally, motor milestones were within average limits. Jaclyn had five to ten words, but not "mama" or "dada," prior to the electric shock. Jaclyn did not regain the words. She verbalized with babbling, instead. Shortly before age two she began communicating by taking her caretaker's hand and placing it on items she wanted. There was almost no eye contact for her first two and a half years.

(Ex. 8, p. 19.) The Mental Health and Mental Retardation Authority of Harris County evaluated Jaclyn on March 11, 1999 (Ex. 12, pp. 14-15), and the report of that evaluation includes the following passage:

> Medical records indicate that Jaclyn appeared to have normal language development, although by 14 months of age she was still not saying "mama" or "dada" appropriately. However, by 14 months of age, she was immature jargoning and saying many simple words such as "duck," "bear," and "bye bye." Mrs. Elkins indicated that Jaclyn also seemed to have appropriate social interaction with others, including social smile and laughing by 4 months of age. When Jaclyn was 14 months

> of age, she bit into an electric cord, which gave her a significant shock, knocking her backwards, making a hole in her lip, and making her bottom teeth loose. According to medical reports, Jaclyn did not lose consciousness, although after the shock, Jaclyn never again used her previously known single vocabulary words.

(Ex. 12, p. 10) In its "summary" section, this last report again notes the "medical history significant for electric shock at an early age," after which "Jaclyn lost a significant amount of her language abilities and other development skills." (Ex. 12, p. 14.)

In all of these extensive histories quoted in the previous paragraph, no mention is made of any vaccination, any vaccine reaction, any change in personality, or any sudden regression in communication skills beginning in early 1997. A number of physicians who evaluated Jaclyn described her condition as "Pervasive Developmental Disorder," a condition of significant, widespread delay in her development. (*E.g.*, Ex. 12, p. 15; Ex. 9, p. 5; Ex. 11, pp. 1, 3.) The records do not show that her physicians have ever definitely determined a *cause* for her developmental disorder.

III

TESTIMONY OF FAMILY MEMBERS CONCERNING JACLYN'S SYMPTOMS

It is undisputed that Jaclyn received a DPT vaccination on January 24, 1997. Jaclyn's mother, father, and sister have testified in this proceeding, both by affidavit and in oral testimony given at an evidentiary hearing in this case on May 24, 2001, that they remember certain symptoms that Jaclyn exhibited during the initial hours and days after her vaccinations of January 24, 1997. They described the fever that caused Jaclyn to be brought to the hospital on January 25, 1997, stating that her temperature spiked as high as 103° or 104° Fahrenheit on that day. (See Ex. 16, para. 2; Tr. 17, 19, 53, 60.) They also testified that Jaclyn's ability to speak declined abruptly after that fever incident, and that she immediately became much less active than she had been before. Essentially, the witnesses testified generally that the onset of Jaclyn's speech and development problems occurred immediately after the vaccination on January 24, 1997.

IV

DISCUSSION

After careful consideration, I cannot make the factual findings that petitioner has requested. Specifically, I cannot find it "more probable than not"[4] that Jaclyn suffered a "change in personality" or an abrupt "regression in communication skills" either "immediately" after or anytime soon after her vaccinations of January 24, 1997. I do find it certain that Jaclyn suffered a fever of at least 102° on January 25, 1997, and quite *possible* that such fever spiked a degree or two higher, but on the

[4]Petitioner has the burden of demonstrating the facts necessary for entitlement to an award by a "preponderance of the evidence." § 300aa-13(a)(1)(A). Under that standard, the existence of a fact must be shown to be "more probable than not." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

record before me I cannot find it "more probable than not" that she suffered a fever of 104°. The reasons for these conclusions will follow.

A. Analysis of the contemporaneous medical records

The most important factor is that the testimony of Jaclyn's family members was strongly contradicted by the contemporaneous medical records. While the family members now testify that Jaclyn abruptly lost her speaking ability and became suddenly inactive, the medical records made in 1997, 1998, and early 1999 tell a distinctly different story. Those medical records do not contain any support whatsoever for the family's current story of an abrupt developmental decline in Jaclyn beginning in late January of 1997.

The records, of course, do document the fever episode that caused Jaclyn to be taken to an emergency room on January 25, 1997, the day after her vaccinations in question. But they also show that after that Jaclyn was not taken for medical attention again until 18 days later, on February 12, 1997, when it was noted by the pediatrician that Jaclyn was "pulling at ears, has high fever * * *, congested, not very active, eating OK, has redness both eyes." (Ex. 2, p. 16.) The diagnosis at that visit was upper respiratory infection ("URI") and "dull left ear" (*id.*), and no symptoms of change in Jaclyn's speech activity or any general change in behavior were reported at that time.

Jaclyn saw her pediatrician several times over the next few months, on February 18, February 26, March 14, March 20, and April 3, 1997. (Ex. 2, pp. 16-18.) On each of those occasions, the physician diagnosed upper respiratory infection, ear infection, or pharyngitis, but there are no notes in these medical records concerning any developmental or communication problems manifested by Jaclyn.

On April 17, 1997, Jaclyn suffered her unfortunate incident of the electrical burn, and the hospital discharged her on April 18, with written instructions that her parents must "notify Dr. if [Jaclyn] has any behavioral changes." (Ex. 5, p. 1.) But no record exists of any report to any doctor of behavioral changes.

While in the hospital for her electrical burn, Jaclyn also was examined by an ear, nose, and throat (ENT) specialist, who recorded a history of her ear infections but made no note of any recent behavioral changes other than the sleep disturbance. (Ex. 6, pp. 1-3.) Jaclyn's ear tube placement occurred the following month, and the ENT specialist examined Jaclyn pre-operatively on four visits and post-operatively on two more occasions. (Ex. 6, pp. 3-12.) Yet, nowhere in these records concerning Jaclyn by an ear, nose, and throat specialist is there any comment about communication or developmental deficits.

During the remainder of 1997, Jaclyn continued to receive general care from her pediatrician. He saw her for low grade fever, sore throat, coughing, or congestion on June 14, July 3, July 10, August 16, August 27, September 10, and October 6, 1997. Jaclyn's physical examination in August of 1997 was "within normal limits," and the "speech" category was marked "normal Inf[ant]." (Ex. 4, p. 18.) Again, no concerns about speech or developmental problems were recorded in the records of any of these visits. On January 5, 1998, the first medical record notation concerning a problem with Jaclyn's speech appears in the notes of the ENT specialist, Dr. Clarke. (Ex. 6, p. 14.) Dr. Clarke wrote that Jaclyn "was exposed to electrical shock in April of 1997 * * * [the mother] wants to know if this could have something to do with her speech." (*Id.*) On January 7, 1998,

Jaclyn's pediatrician, Dr. Romman, also first recorded a concern about whether her speech was age-appropriate. (Ex. 2, p. 21.) His notes state that she "sat up [at] 5-6 months, walked [at] 9-10 m, said Dada [at] age 10 m, now total words 1-2 words. Hearing checked--OK." (*Id.*) But there is no notation in the records of either physician that the speech problem came on abruptly after a vaccination or in early 1997. To the contrary, the only specific event mentioned was the "electrical shock" notation in Dr. Clarke's record noted above.

Over the following year, Jaclyn received a number of extensive evaluations in an effort to determine the source of her delayed speech. Notations of her speech history were made at each evaluation, which I have quoted at pp. 5-6, above. All of those histories mention the electrical shock incident as the potential cause of the problem, and *none* mention any vaccination. None of the histories relate the onset as occurring in early 1997. None describe an *abrupt* decline in activity or developmental skills.

In the face of these medical records described above, it is impossible for me to credit the current testimony of Jaclyn's parents and sister that they can now accurately pinpoint the onset of Jaclyn's speech problems and other developmental delay to the period immediately after her vaccinations of January 24, 1997. In 1997, 1998, and 1999, when as concerned parents they clearly would have wanted to give Jaclyn's physicians an accurate history, Jaclyn's parents could not pinpoint the onset of the symptoms. So how can they at this time accurately pinpoint the onset of symptoms? I cannot accept that they can do so.

B. Analysis of family members' testimony

In reaching my conclusion, I have not disregarded the testimony of Jaclyn's parents, given in this case at the evidentiary hearing held on May 24, 2001, nor the affidavit of Jaclyn's sister. (Ex. 18.)

However, in my analysis, the evidentiary value of the family's testimony in this proceeding is greatly outweighed by the importance of the *contemporaneous medical records,* discussed above. In my view, by far the best evidence as to the onset of Jaclyn's problems consists of the reports made by her parents to physicians at the time when their memories were most fresh and when they would obviously be eager to provide accurate information for diagnostic purposes. I cannot accept that the testimony now given by Jaclyn's family would be more accurate than these initial reports.[5]

[5]Numerous Program decisions have noted the general principle that contemporaneously-recorded records should ordinarily be given greater evidentiary weight than witness recollections offered long after the event in question. See, *e.g.*, *Cucuras v. Secretary of HHS*, 26 Cl. Ct. 537, 542 (1992), *aff'd*. 993 F. 2d 1525, 1528 (Fed. Cir. 1993); *Beddingfield v. Secretary of HHS*, 50 Fed. Cl. 520, 523-524 (2001); *Estate of Arrowood v. Secretary of HHS*, 28 Fed. Cl. 453, 458 (1993); *Reusser v. Secretary of HHS*, 28 Fed. Cl. 516, 523 (1993); *Murphy v. Secretary of HHS*, 23 Cl. Ct. 726, 733 (1991), *aff'd*, 968 F.2d 1226 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 974 (1992). See also the same principle noted in non-Program decisions such as *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1947); *Montgomery Coca Cola Bottling Co. v. United States*, 222 Ct. Cl. 356, 615 F. 2d 1318, 1328 (Ct. Cl. 1980).

But how can this testimony of the family be explained? Do I conclude that Jaclyn's family members gave deliberately false testimony in this proceeding? I certainly do not. Rather, I note a pattern that I have observed in a great many Program cases, in which family members' statements about the *timing* of an infant's symptoms in relation to an inoculation often change, sometimes abruptly, months or years after the vaccination. In these situations, the family's change in story quite often seems to have corresponded to the family's exposure to articles, television programs, or other reports suggesting a link between inoculations and neurologic problems. After such an exposure, the family begins for the first time to "remember" in hindsight that the infant's symptoms first occurred shortly after a vaccination. In the large majority of these cases, I do not think that there is any dishonesty involved in such changes of story. Rather, in most cases it is likely that a family whose child has a serious disorder, having been told that no one knows the cause of that disorder, simply reacts when later informed about a possible cause--*i.e.*, the possibility that a vaccination could cause a neurologic disorder. To me, it seems understandable and human that loving families, desperate to pinpoint a cause for an awful disorder, will often begin in such circumstances to "remember" the onset of symptoms as having occurred closer in time to a vaccination than actually was the case.

I think it likely that such a phenomenon, as described in the paragraph above, explains the family testimony in this case. Indeed, the petitioner acknowledged that around the middle of 1999 (*i.e.*, about two years before the evidentiary hearing on May 24, 2001), she was made aware of the possibility that a DPT vaccination might cause the type of condition from which Jaclyn suffers. (Tr. 36-37.) This was just after the last of the histories quoted above at pp. 5-6. It was apparently only after this point that petitioner thought back and began to "remember" that all of Jaclyn's problems began after her DPT vaccination on January 24, 1997. But I cannot find that this type of "remembering" in this type of circumstance can yield an accurate picture of the course of Jaclyn's condition.

Further, I note that Jaclyn clearly *did* experience an episode of significant fever one day after the vaccination. (See part IV(D) of this Ruling, below.) And clearly she *did* either lose speaking ability or fail to gain the communication abilities that most children gain in their second year of life. I do not doubt the occurrence of either the fever episode or the general regression of Jaclyn's communication abilities. It is, rather, the *timing* aspect of family's current story--*i.e.*, their contention that Jaclyn had an *abrupt and sudden* change of personality and/or loss of developmental skills after the vaccination of January 24, 1997--that I simply cannot accept as accurate.

C. Petitioner's arguments

Petitioner, in her memorandums filed on December 26, 2001, and April 5, 2002, points to two items of the medical records as allegedly supportive of her proposed factual findings. First, petitioner notes that in the records of Jaclyn's pediatrician visit on February 12, 1997, her next pediatrician visit after the vaccination of January 24, 1997, there is a notation among the symptoms that Jaclyn was "not very active." (Ex. 2, p. 16.)

I have not disregarded that notation. Indeed, if there had been any similar notations in the records of Jaclyn's many health care visits in 1997, such notations might have afforded significant support to the petitioner's factual claim. However, I have found no similar notations, no indication of a sustained, general decline in Jaclyn's activity level after the January 1997 vaccinations. Nor does the notation in record of February 12, 1997, state *how long* Jaclyn had been inactive; it does not

trace the onset of inactivity to the first few days after the January 24 vaccination. Moreover, the other symptoms described on February 12, 1997--*i.e.*, "pulling at ears, has high fever, * * * congested, * * * redness both eyes" (*id*.)--and the pediatrician diagnosis at that visit--*i.e.*, upper respiratory infection ("URI") and ear infection ("dull left ear") (*id*.)--indicate that Jaclyn had an *infection* on that date, which logically accounts for why she was somewhat less active than usual on that day. Thus, in the overall context of the record of this case, I must conclude that this isolated notation of "not very active" most likely relates to the *infection* symptoms from which Jaclyn had been suffering just prior to February 12, 1997, and does not provide significant support to the family's current allegation that Jaclyn suffered an abrupt developmental decline in late January of 1997.

Second, petitioner points to the fact that in April of 1998 Jaclyn's parents reported that Jaclyn had about "5-10 words" at around age one, then "stopped saying those words and stopped doing a lot of things she used to do." (Ex. 7, pp. 3-4.) But again, as I have noted above, there is no doubt that at *some time* during Jaclyn's second year of life her development diverged from that of a normal child, and she lost vocabulary. The notations quoted above support this unquestionable fact. The problem, however, is that I cannot accept the family's current story that these problems had a *sudden and abrupt onset* shortly after January 24, 1997. And these record quotations offer no support to that crucial part of the family's allegations.

D. Allegation of "high fever (104°)"

In the last three subsections of this Ruling, I explained why I can not find it probable that Jaclyn experienced, "immediately after" her vaccinations of January 24, 1997, either "a change in personality" or an abrupt "regression in communication skills." But petitioner has also requested that I find that Jaclyn suffered a "high fever (104°)" immediately after that vaccination. This requires additional discussion.

Obviously, Jaclyn was taken to the hospital on January 25, 1997, with a primary symptom of fever, and her temperature taken at the hospital was 102°. (Ex. 4, p. 2.) So clearly she did have a "high fever" of at least 102° Fahrenheit on that day. Further, it is quite possible that Jaclyn's fever was a degree or two higher before she arrived at the hospital, so it is *possible* that her fever had been as high as 104°. However, given my problems with the *accuracy* of the testimony of Jaclyn's parents in the other particulars of their testimony,[6] on the record before me I cannot find it "more probable than not" that Jaclyn's fever ranged as high as 104°.

E. Summary of factual conclusions

For the reasons set forth above, on the basis of the record before me, I cannot make the factual findings that petitioner has requested. Specifically, I cannot find it "more probable than not" that Jaclyn suffered a "change in personality" or an abrupt "regression in communication skills" either "immediately" after or anytime soon after her vaccinations of January 24, 1997. I do find it

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[6]At the evidentiary hearing, Jaclyn's mother remembered a reading of 104°. (Tr. 17.) Jaclyn's father, on the other hand, first testified that the fever was 103° (Tr. 52-53), then later agreed to a figure of 104°. (Tr. 60.) He had earlier filed an affidavit in which he said 104°. (Ex. 16, para. 2.)

certain that Jaclyn suffered a fever of at least 102° on January 25, 1997, and quite *possible* that such fever spiked a degree or two higher, but on the record before me I cannot find it "more probable than not" that she suffered a fever as high as 104°.

V

ADDITIONAL DISCUSSION

As noted above, in her petition filed in this case on January 10, 2000, petitioner seemed to allege that Jaclyn suffered the Table Injury known as "encephalopathy," and/or that her serious neurologic disorder was "actually caused" by one or more of her inoculations. Since filing that petition, at a number of unrecorded status conferences, petitioner's counsel has explained that petitioner's theory of the case depends completely on acceptance of the petitioner's allegations that Jaclyn not only suffered a high fever after her inoculations of January 24, 1997, but also suffered, very soon after that fever episode, a sudden and dramatic regression of communication skills and decline in activity level. Petitioner's counsel asked that I hear the testimony of Jaclyn's parents, and thereafter make a ruling as to whether I can accept as accurate these basic factual allegations of petitioner. Petitioner's counsel explained that if I could accept these allegations, he could then obtain expert testimony supporting either or both the theories that Jaclyn suffered a "Table Injury encephalopathy" or that her neurologic condition was vaccine-caused. Petitioner's counsel also seemed to acknowledge, on the other hand, that if I ruled *against* petitioner on these factual allegations, the petition would have to be voluntarily dismissed or denied, because if I ruled against petitioner on those factual allegations it would appear virtually impossible for petitioner to either demonstrate a Table Injury or to submit an expert opinion supporting a theory that Jaclyn's condition is vaccine-caused.

Now, unfortunately for petitioner, after careful review of the evidence before me I cannot make the factual findings requested by petitioner. Although I have great sympathy for Jaclyn and her family, I simply have found those factual allegations to be unlikely. Therefore, it appears that at this time the petitioner may wish to voluntarily dismiss her claim, or that I should enter my own decision denying her claim because I am unable to accept her factual allegations.

Accordingly, petitioner is hereby given 30 days in which to voluntarily dismiss her claim or to state why I should not dismiss her claim for failure to prove that claim. If petitioner makes no filing during that period, I will have no choice but to dismiss her claim.

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George L. Hastings, Jr.
Special Master