

OFFICE OF SPECIAL MASTERS

No. 00-476V

(Filed: February 20, 2002)

DAWN WHITE, as Parent and Next Friend of *
Michael White, a minor child, *

Petitioner, *

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

TO BE PUBLISHED

Richard Gage, Cheyenne, Wyoming, for petitioner.

Traci Manning, 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 petitioner’s son, Michael White. On September 27, 2001, petitioner filed a “Post Hearing Memorandum” asking me to make certain findings of fact concerning what symptoms Michael suffered within 72 hours of his vaccinations of August 15, 1997. Specifically, petitioner asked me to find that Michael suffered “seizures, temperature elevation, and projectile vomiting” within seventy-two hours of those vaccinations. For the reasons stated below, I conclude that the petitioner has *not* shown it to be “more probable than not” that Michael suffered temperature elevation, projectile vomiting, or seizures within seventy-two hours of his vaccinations.

¹The 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, petitioner’s claim is that Michael’s severe neurologic condition was caused by one or more of the vaccinations that he received on August 15, 1997. Those vaccinations are all listed in the currently-applicable Vaccine Injury Table.

In her Petition filed in this case on August 8, 2000, petitioner seems to allege that Michael suffered the Table Injury known as “encephalopathy” (paragraph 2); that he suffered other unspecified Table Injuries (paragraph 8); and/or that his serious neurologic disorder was “actually caused” by one or more of his inoculations (paragraph 3). Since filing that petition, at a number of unrecorded status conferences, petitioner’s counsel explained that petitioner’s theory of the case depends on acceptance of the petitioner’s allegations that Michael suffered a high fever, projectile vomiting, and the *onset* of his seizures within 72 hours after his inoculations on August 15, 1997. Petitioner’s counsel asked that I hear the testimony of Michael’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 Michael had suffered a Table Injury encephalopathy or that his neurologic condition was vaccine-caused.

Accordingly, as requested by petitioner, I held an evidentiary hearing on March 20, 2001, hearing the testimony of both of Michael’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 December 10, 2001. Thus, in this Ruling I rule upon petitioner’s requested factual findings.

²I 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

EVIDENCE OF SYMPTOMS IN THE MEDICAL RECORDS

Michael White was born on February 27, 1996. (Ex. 10, p. 10.³) The early record of his well-baby care indicates that during 1996 Michael was assessed as “normal,” a “healthy infant,” a “well baby,” and, a “well-child,” on March 14, April 19, June 25, and August 28, respectively. (Ex. 10, pp. 3-6.) By August 28, 1996, he had received the immunizations recommended for the first six months of life, including Tetramune, OPV, and Hepatitis B. (Ex. 10, pp. 1-2.) These records do not indicate that Michael experienced any reaction to or unusual symptoms after any of these vaccinations.

Michael received MMR, DtaP, and HIB vaccinations on August 15, 1997, at the age of 18 months. (Ex. 6, pp. 1-2.) There are no medical records for the three weeks following those vaccinations. There are many medical records that document Michael’s condition during the period between September 2, 1997, and April 14, 1998, but none of those records include any references to any occurrences immediately after Michael’s 18-month vaccinations. Beginning on April 14, 1998, on the other hand, the medical records contain a number of representations concerning symptoms that Michael is said to have exhibited soon after those 18-months vaccinations. Because of this significant difference between the medical records created before and after April 14, 1998, the records from those two periods will be discussed separately.

A. Evidence of symptoms in the medical records that were created before April 14, 1998

The first medical examination that Michael received after his vaccinations occurred eighteen days later, on September 2, 1997, at the Cypress Lakewood Clinic. Dr. Jesus Beltran examined Michael and wrote down “diarrhea, vomit, loss of appetite, poss. fever, * * * for 4 days.” (Ex. 9, p. 7.) (In between “fever” and “for 4 days” there is an additional notation appearing to be “S2” or possibility “Sz.” This notation is discussed at p. 8 below.) The impression that Dr. Beltran recorded after the examination was “BOM,” meaning “Bilateral Otitis Media,” *i.e.*, bilateral infections of the inner ears. (Ex. 9, p. 7.) Dr. Beltran prescribed antibiotics to treat Michael’s ear infections.

More than three weeks later, on September 25, 1997, Michael again visited the Cypress Lakewood Clinic. The complaints recorded at that visit were “R[ight] ear infec[tion], bites on L[left] leg that need to be looked [at], got bit by another kid [at] Day Care * * * on R[ight] shoulder, cough started this AM.” (Ex. 9, p. 6.)

The first unambiguous reference to possible seizure activity in the medical records was recorded on October 15, 1997, two months after the vaccination, when Michael next visited the Cypress Lakewood Clinic. In the record of that visit, physician’s assistant Janet Greenlee wrote that Michael’s mother complained of Michael’s “odd behavior”--*i.e.*, that his eyes rolled up and he made “weird faces” every fifteen to thirty minutes. (Ex. 9, p. 5.) This behavior, she wrote, “resulted after [Michael] fell off[f] couch and landed on top of head x 2 wks.” (*Id.*) She recorded her impression

³Petitioner filed exhibits number 1 through 10 with the petition; Ex. 11 on March 6, 2001; and Ex. 12 on May 15, 2001. “Ex.” references will be to those exhibits.

as “[Rule out] seizure disorder [secondary to] head trauma.” (*Id.*) A CT scan of Michael’s head was performed on that same day, with a finding that Michael’s brain appeared “normal.” (Ex. 9, p. 1.)

On October 25, 1997, Michael returned again to the Cypress Lakewood Clinic, and medical personnel made the following notation: “[Check] ears and still having spells where eyes roll back for 15-30 min [every] day. * * * Impression: chronic OM, poss[ible] seizures.” (Ex. 9, p. 4.) Michael again visited that clinic on December 15, 1997, with complaints of vomiting, ear-pulling, loss of appetite, and diarrhea for 2-3 days; and again, ear infection was the diagnosis. (Ex. 9, p. 3.)

Due to his apparent seizure activity reported in October of 1997, Michael began to receive evaluations by neurologic specialists at the beginning of 1998. On January 8, 1998, Michael visited Dr. Leass, whose record notes “eyes rolling back in head [with] blank look few seconds, then right after [he] has falling sensation, disoriented, about 6 [months] now. Had CT scan about 3 mo. ago did not show anything.” (Ex. 8, p. 1.) Michael again visited Dr. Leass on January 22 and February 17, 1998.

Michael also visited Dr. Wheless, a neurologist, on January 12, 1998. The handwritten notes of that visit state that Michael’s episodes of eye-rolling and falling down “started 3-4 months ago.” (Ex. 11, p. 1.) Dr. Wheless also made the following notations: “sz- 6-7, ? effect on devel., fell off couch on head, [increased] freq. over mos; last 2-10 sec.” (*Id.*) These handwritten notes were supplemented by a typed report of the visit, which states that—

Michael * * * was referred by Dr. Leass for evaluation of seizure disorder. The mother states, in hindsight, that he may have been having seizures for the last six to seven months, although they were not recognized time [sic] until three or four months ago. They have slowly increased in frequency over the last couple of months.

(Ex. 11, p. 6.)

B. Evidence of symptoms in the medical records that were created after April 14, 1998

1. References to onset of symptoms soon after vaccination

As noted above, in the medical records created prior to April 14, 1998, there is no indication that seizure activity or any other symptoms occurred soon after any of Michael’s vaccinations. However, in those records created after April 14, 1998, there are frequent references indicating that Michael’s seizures or other symptoms occurred soon after his 18-month vaccinations.

The first such reference is contained in a record made when Michael visited a clinical audiologist on April 14, 1998. The audiologist noted that Michael “presents with a history of nonresponsiveness to sound and speech delay *following routine immunizations.*” (Ex. 11, p. 21, emphasis added.) The audiologist’s report, which focuses on Michael’s hearing deficit, does not refer to seizures or other symptoms.

The next such reference appears in the record of Michael’s follow-up visit to Dr. Wheless on May 11, 1998. The doctor’s handwritten notes on that date state “8/15 sz 2d p immun. MMR/DaPT + HIB.” (Ex. 11, p. 26.) It is reasonable to interpret the doctor’s shorthand as follows: “8/15” refers to August 15, 1997, the date of Michael’s vaccinations, and “sz 2d p immun” means

seizures two days after immunization. There is also a note on that date to the effect that the neurologist offered information to Mrs. White about the National Vaccine Injury Compensation Program. (*Id.*) The typed notes summarizing that visit to Dr. Wheless on May 11, 1998, provide a more complete explanation of the handwritten note. They state as follows:

The mother states that in hindsight, she believes his seizures occurred two days after his immunization on Aug. 15, 1997. She stated that he had an increased temperature at this point. At this time he was given his immunization with MMR, DaPT and HIB.

(Ex. 11, p. 47.)

Four days after this examination by Dr. Wheless, on May 15, 1998, Michael's mother filed a "Vaccine Adverse Event Reporting System" (VAERS) report. In it, she described the adverse event as "2 days post immunizations started seizures at 18 mos. age." (Ex. 1, p. 1.) From this time forward, all of Mrs. White's descriptions of Michael's seizures placed their onset at eighteen months of age.

Another example occurs in the records made at the emergency center at Hermann Hospital on July 28, 1998, after Michael was found in bed with blood on the sheets from an unknown source. The report mentions a positive history of seizures with unclear etiology, along with the notation "SZ, * * * encephalopathy (p 18 mo. immunization)." (Ex. 7, p. 23.) This could reasonably be interpreted to mean "seizures and encephalopathy after the immunizations at 18 months of age."

Similarly, on January 25, 1999, Dr. Barry Tharp examined Michael at the Blue Bird Clinic, and recorded that his symptoms "began at about 18 months of age about 72 hours after a DpaT/MMR number 2. As per mother, 72 hours after the injections, Michael was noted to have a slight rolling of the eyes and made some 'weird faces'." (Ex. 3, p. 1.)

On March 30, 1999, the Mental Health and Mental Retardation Authority of Harris County performed a psychological evaluation of Michael. The record of that evaluation indicates that Michael's mother "reported that three days after receiving his immunizations, he had his first small seizure." (Ex. 5, p. 2.)

2. Indications of seizure onset at eight or nine months of age

Certain of the medical records contain statements that Michael experienced the onset of seizures when he was "eight months old," "eight or nine months of age," or similar notations. (*E.g.*, Ex. 7, p. 4; Ex. 11, pp. 18, 46, 56, 65, 79, 87, 90, 96.) A careful review of the record, however, indicates that these statements are clearly wrong, and were due to an error made at Michael's first visit to Dr. Wheless. At that visit, Michael's birthdate was recorded as "10/27/96," instead of the correct "2/27/96." (Ex. 11, pp. 1, 3, 6.) That error was sometimes carried forward to later records concerning Michael. (*E.g.*, Ex. 11, pp. 18, 56, 65, 79; Ex. 7, p. 4.) Dr. Wheless seems to have first recorded the notation of seizures at "eight to nine months of age" in his note of Michael's visit on March 16, 1998. (Ex. 11, p. 18.) This apparently resulted from Dr. Wheless' own notation at the visit of January 12, 1998, that Michael's seizures might have been going on for "six to seven months" before January of 1998 (Ex. 11, p. 6), placing their onset at about June or July of 1997. Then, using the erroneous birthdate of "10/27/96," Dr. Wheless apparently concluded that onset in

June or July of 1997 would have been when Michael was eight or nine months old. This erroneous “8 or 9 months” calculation was then later carried forward into some additional records. Thus, I have disregarded, as incorrect, the references to seizure onset at eight or nine months of age.

III

TESTIMONY OF MICHAEL’S PARENTS

It is undisputed that Michael received his MMR, DtaP, and HIB vaccinations on August 15, 1997. (Ex. 6, pp. 1-2.) Michael’s mother and father have testified in this proceeding, both by affidavit and in oral testimony given at an evidentiary hearing in this case on March 20, 2001, that they remember certain symptoms that Michael exhibited during the initial hours and days after those vaccinations of August 15, 1997. They testified that on the very evening of the vaccination, Michael vomited explosively and began to have episodes of eye-rolling, along with fever. According to their testimony, during the following two days, Michael continued to vomit and experience eye-rolling episodes, and also experienced episodes in which he seemed to “curl up” involuntarily. They also testified that they had never observed these eye-rolling and “curling up” symptoms prior to August 15, 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 Michael suffered seizures, projectile vomiting, or significant temperature elevation during the seventy-two-hour period after his vaccinations on August 15, 1997. The reasons for this conclusion will follow.

A. Analysis of the most contemporaneous medical records

The most important factor is that the testimony of Michael’s parents was strongly contradicted in critical respects by the most contemporaneous medical records, on the crucial issue of when Michael had the onset of *seizures*. As noted above, Michael’s parents have testified in this proceeding that they first noticed unusual behavior by Michael, in the form of both unusual eye movements and unusual body movements in which he appeared to “curl up,” during the first three days after his vaccinations of August 15, 1997. The medical records made during September 1997 and the several following months, however, tell a different story.

First, as noted above, Michael visited a number of medical practitioners on numerous occasions between September 2, 1997, and April of 1998. For example, he visited the Cypress Lakewood Clinic on September 2, September 25, October 15, October 25, and December 15, 1997. (Ex. 9, pp. 3-7.) He visited Dr. Leass on January 8, January 22, and February 17, 1998. (Ex. 8,

⁴Petitioner 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).

pp. 1-3.) Michael visited Dr. Wheless on January 12 and March 16, 1998, and Dr. Wheless wrote a letter concerning Michael's case on February 9, 1998. (Ex. 11, pp. 1, 6, 11, 16, 18.) Yet in none of the records of any of these visits is there any mention that Michael suffered the onset of seizures, or any other symptoms, soon after any immunization. There is no mention of immunizations at all in connection with the discussions of his seizure disorder that was being treated throughout most of that time period.⁵

Second, and most crucial, a number of the medical records made during that time period *specifically discuss* the issue of *when* Michael had the onset of seizures, and these records do not point to the time of his immunizations, but rather to other time periods, as the likely time of onset.

For example, on October 15, 1997, when Michael visited the Cypress Lakewood Clinic, the physician's assistant wrote that Michael's recent odd behavior" --*i.e.*, eyes rolling and "weird faces"-- "resulted after [Michael] fell off [f] couch and landed on top of head x 2wks." (Ex. 9, p. 5, emphasis added.) Two weeks prior to October 15, of course, would put the onset of this activity at around October 1, not mid-August.

On January 8, 1998, Dr. Leass wrote the following notation concerning Michael--"Eyes rolling back in head [with] blank look few seconds, then right after [he] has falling sensation, disoriented, *about 6 [months] now.*" (Ex. 8, p. 1, emphasis added.) Six months prior to January 8, 1998, of course, would be in July of 1997, again contradicting the parents' current story of an abrupt onset in mid-August of 1997.

Further, on January 12, 1998, Michael was taken to see Dr. Wheless. The handwritten notes of that visit states that Michael's episodes of eye-rolling and falling down "[s]tarted 3-4 months ago." (Ex. 11, p. 1.) Dr. Wheless also made the following notations: "sz- 6-7, ? effect on devel., fell off couch on head, [increased] freq. over mos; last 2-10 sec." (*Id.*) These handwritten notes were supplemented by a typed report of the visit, which states that--

Michael * * * was referred to Dr. Leass for evaluation of seizure disorder. The mother states, in hindsight, that he may have been having seizures for the last six to seven months, although they were not recognized time [sic] until three or four months ago. They have slowly increased in frequency over the last couple of months.

(Ex. 11, p. 6.) Therefore, in January of 1998, Michael's mother told Dr. Wheless that Michael had been exhibiting seizure-like movements for probably six to seven months. And six or seven months prior to January 1998 would again put the onset in June or July of 1997, rather than in mid-August of 1997 as now alleged.

Thus, on three occasions in late 1997 and January 1998, Michael's parents specifically reported as to *when* they believed Michael's seizure-like movements had begun. On October 15, 1997, they reported that the movements had begun about the beginning of October of that year. Then on two separate occasions in January, they reported that the movements had begun about June or July

⁵To the contrary, when the medical records made during that time period relate the onset of seizures temporally to an event, they relate the seizures to a *fall and head-bump* that Michael suffered, not to his immunizations. (See Ex. 9, p. 5; Ex. 11, p. 1.)

of 1997. On these occasions, they apparently said nothing about the onset occurring abruptly after vaccinations. Instead, they could give only a vague time frame as to when the movements began. In these circumstances, it is impossible for me to credit the parents' current testimony that they can now accurately pinpoint the onset of seizure-like movements to a particular three-day period in August of 1997. If in October of 1997 and January of 1998, when as concerned parents they clearly would have wanted to give Michael's physicians an accurate history, they could not pinpoint the onset of the movements, how can they accurately do so now? I cannot accept that are able to do so.

There is another record made during the time period that also merits a specific discussion. As noted above, on September 2, 1997, at the Cypress Lakewood Clinic, Dr. Beltran examined Michael and wrote down "diarrhea, vomit, loss of appetite, poss. fever, * * * for 4 days." (Ex. 9, p. 7.) In between "fever" and "for 4 days," there is an additional notation appearing to be "S2." (*Id.*) However, if that notation was intended to be "Sz," that could be interpreted to mean seizures. I do not know what "S2" might signify; this notation could well have nothing to do with seizures. But even if it does indicate that Michael was possibly having seizures at the time, it still would not support the testimony of Michael's parents in this proceeding. Rather, the notation indicates that these symptoms had occurred for "4 days" prior to September 2, which would still put the symptoms well outside the three-day period after Michael's immunizations on August 15, 1997.

B. Analysis of records made since April of 1998 and of hearing testimony

In reaching my conclusion, I have not disregarded those medical records made since April 14, 1998, which indicate that Michael's seizures or other symptoms began immediately or soon after his immunizations. Those medical record notations are set forth at pp. 4-5, *infra*. Nor have I ignored the testimony of Michael's parents, given in this case at the evidentiary hearing held on March 20, 2001. However, in my analysis, the evidentiary value of these later medical records and the parental testimony in this proceeding is greatly outweighed by the importance of the *most contemporaneous medical records*, discussed above at pp. 6-8. In my view, by far the best evidence as to the onset of Michael's symptoms consist of the reports made by his 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 later reports given by Michael's parents would be more accurate than their initial reports.⁶

But how can these later reports in medical records and testimony be explained? Do I conclude that Michael's parents began in the spring of 1998 to intentionally give dishonest reports to physicians, and later gave dishonest testimony in this proceeding? I certainly do not. Rather, I

⁶Numerous 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).

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.

Therefore, I think it likely that such a phenomenon, as described in the paragraph above, may explain the change in the reports given by Michael's parents with regard to the onset of his seizure-like movements. Michael's parents may have been exposed to an oral report or other report suggesting that an inoculation could trigger the onset of seizures, and after that they began to conclude, in hindsight, that Michael's seizure-like movements began soon after his inoculations of August 15, 1997.

Further, I note that Michael clearly *did* experience the onset of seizure-like movements sometime during the summer or fall of 1997. I have no doubt that his parents do remember the fact that those symptoms did occur. It is simply their current testimony as to *when* the *onset* of those seizure-like activities occurred that I cannot accept as accurate.

C. Allegations concerning projectile vomiting and temperature elevation

In the last two subsections of this Ruling, I explained why I could not find it probable that Michael suffered his first *seizures* or exhibited his first seizure-like movements during the 72-hour period after his vaccinations of August 15, 1997. But petitioner has also requested that I find that Michael suffered from "projectile vomiting" and "temperature elevation" during that 72-hour period. (See Post Hearing Memorandum filed 9-27-01, p. 2.) Unfortunately for petitioner, I also cannot find it "more probable than not" that Michael suffered these other symptoms during the 72-hour post-vaccination period. The most important reason for this conclusion is that, as Michael's parents acknowledge, Michael was not brought anywhere for medical treatment during that three-day period. Nor is there any medical record indicating that during that period Michael's parents ever called the clinic where Michael received his pediatric care.

Moreover, in the medical records made throughout the fall of 1997 and early 1998, during which period it became evident that Michael had a serious neurologic disorder, there is again *absolutely no mention* of vomiting, fever, or any other symptoms as having occurred soon after the August inoculations. For example, when Michael was brought to the clinic for the first time after his August 15 vaccinations, on September 2, 1997, there was no record made that Michael experienced *any* problem in the days after the inoculations 18 days earlier. Rather, it was reported that Michael had suffered from diarrhea, vomiting, loss of appetite, possible fever, and perhaps other symptoms for the *past four days*. (Ex. 9, p. 7.) Similarly, in the records of Michael's many other

visits in the fall of 1997 and early 1998 (those records and visits are enumerated above at pp. 3-4), there is again no mention of vomiting or fever after the August inoculations.

As to “projectile vomiting,” I have heard repeated testimony during numerous Program proceedings that *projectile* vomiting is a dramatic symptom, quite distinct from the ordinary vomiting that virtually all children experience at some time or other. I find it very unlikely that Michael could have experienced true *projectile* vomiting, and yet his parents did not take him for medical attention, even accounting for the fact that they had no medical insurance in August of 1997.

Further, as to *both* projectile vomiting and fever, I note that, as explained above, I have already found grave reason to doubt the current testimony of Michael’s parents that his *seizure-like movements* began shortly after his August 15 inoculations. As explained above, I doubt the accuracy of the parents’ current story as to the *timing* of Michael’s seizure-like symptoms. And this same doubt as to *timing* applies to the parental testimony concerning vomiting and fever. I do not doubt that they do remember Michael as vomiting and experiencing fever at *some* point during that general time period. But the medical records show that Michael suffered vomiting and fever during the four-day period prior to September 2, 1997 (see Ex. 9, p. 7), not during mid-August. Quite possibly, Michael’s parents are now misremembering the symptoms of August 29 to September 2 as having occurred two weeks earlier.⁷

D. Summary of factual conclusions

For the reasons set forth above, on the basis of the record before me, I cannot find it “more probable than not” that Michael suffered from projectile vomiting, temperature elevation, or seizures during the 72-hour period after his inoculations of August 15, 1997. As to the seizures, I note that in the histories given in January of 1998, it is recorded that Michael’s first seizure-like movements might have begun as early as six to seven months beforehand (see Ex. 8, p. 1; Ex. 11, pp. 1, 6), which might put their onset as early as June or July of 1997. Therefore, it is quite *possible* that Michael did experience very subtle seizure-like movements during the three-day post-inoculation period in mid-August of that year, because they might have been *already* occurring since an *earlier* date. But based on the record before me I cannot find that possibility to be “more probable than not.” More importantly, I find that petitioners have *completely* failed to demonstrate that the *onset* of Michael’s seizures occurred during the three-day post-inoculation period.

V

ADDITIONAL DISCUSSION

As noted above, in her petition filed in this case on August 8, 2000, petitioner seemed to allege that Michael suffered the Table Injury known as “encephalopathy” (paragraph 2); that he suffered other unspecified Table Injuries (paragraph 8); and/or that his serious neurologic disorder was “actually caused” by one or more of his inoculations (paragraph 3). Since filing that petition,

⁷Moreover, we know that Michael’s parents *did* bring him for medical attention on September 2, 1997, after vomiting and “possible” fever. (Ex. 9, p. 7.) Given that fact, how likely is it that they would *not* have brought him for medical attention in mid-August, if he did experience very dramatic vomiting and fever symptoms at that time?

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 Michael suffered a high fever, projectile vomiting, and the *onset* of his seizures within 72 hours after his inoculations on August 15, 1997. Petitioner's counsel asked that I hear the testimony of Michael'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 Michael suffered a Table Injury encephalopathy or that his 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 Michael's condition is vaccine-caused.⁸

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 Michael and his parents, I simply have found those factual allegations to be quite 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.

George L. Hastings, Jr.
Special Master

⁸I note that contained in the record is a letter of Dr. Wheless, a neurologist who has treated Michael, which includes the statement that "I believe that Michael's 18 months vaccinations are the most likely cause of his seizures." (Ex. 12, p. 1.) However, in that letter Dr. Wheless also explains that he bases that opinion principally upon the representation of Michael's mother that Michael's seizures "began with fever after his immunization in August of 1997." (*Id.*) And I have rejected, as very unlikely, that factual representation of Michael's mother that the seizures had their onset soon after the August 1997 vaccinations. Therefore, this opinion of Dr. Wheless, based upon a factual premise which I find to be incorrect, provides no substantial support for petitioner's claim.