In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-486V

Filed: April 13, 2010

ELIZABETH HUNT, parent of ANTHONY ALVA Petitioner, v. SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	)	TO BE PUBLISHED Statute of limitations; Markovich; Wilkerson; Autism Spectrum Disorder; First symptom or manifestation of onset

Edward M. Kraus, Chicago, IL, for Petitioner.
Alexis B. Babcock, United States Department of Justice, Washington, D.C., for Respondent.

DECISION[1]

Lord, Chief Special Master.

I. INTRODUCTION

Elizabeth Hunt ("Petitioner"), filed a Petition under the National Childhood Vaccine Injury Act ("Vaccine Act"), 42 U.S.C. § 300aa-10 et seq., on July 2, 2007, alleging that vaccinations caused her son, Anthony Alva, to develop autism. The issue presented is whether Petitioner filed the Petition more than 36 months after the occurrence of the first recognizable symptom of Anthony's autism disorder. As the Petition was filed on July 2, 2007, it was untimely if the first recognizable symptom of autism was manifest before July 2, 2004.

[1] As provided by Vaccine Rule 18(b), each party has fourteen days within which to request the redaction "of any information furnished by that party (1) that is trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of timely objection, the entire document will be made publicly available.

Anthony's mother noted his delayed speech and other behavioral issues by the time he reached two years of age, in December 2003. Petitioner does not dispute that speech delay is a symptom of autism, but maintains that Anthony's speech delay was not recognizable until Anthony's doctor diagnosed it as such on August 10, 2004. Petitioner asserts that prior to August 10, 2004, Anthony had been noted to have a "possible" speech delay, along with other developmental issues that could have been attributable to other causes.

Respondent maintains that Anthony's problems were manifest on April 27, 2004, and were noted by Anthony's doctor at that time. Respondent's expert reported that the speech delay and behavioral issues observed by and before that date constituted the first symptoms recognizable as autism.

Clear and binding precedent instructs that the statute of limitations starts running when a recognizable symptom first occurs. "'[T]he first symptom or manifestation of onset,' for the 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." Markovich v. Sec'y of Dep't of Health & Human Servs., 477 F.3d 1353, 1360 (Fed. Cir. 2007). Neither the petitioner nor a doctor needs to recognize the significance of the symptom at the time; instead, the proper focus is on when symptoms of autism recognizable by the medical community at large were manifested in an individual who is later diagnosed with the disorder.

The record in this case contains unchallenged expert opinion showing that speech delay and other symptomatic behaviors are recognizable by the medical community at large as early signs of autism. The evidence submitted by Petitioner does not contradict the medical record and expert evidence showing that Anthony's speech delay and behavioral problems were manifest no later than April 27, 2004. Therefore, the petition was untimely filed.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

Petitioner filed a "Short-Form Autism Petition for Vaccine Compensation" on July 2, 2007, thereby adopting the Master Autism Petition for Vaccine Compensation and alleging that Anthony developed autism from receipt of vaccines containing thimerosal. Short-Form Autism Petition at 1. On July 16, 2007, the court issued an Order requiring Petitioner to submit all available medical records and a statement regarding timely filing. Respondent filed her Rule 4(c) Report on October 11, 2007. Petitioner filed Anthony's medical records and a Statement Regarding Timely Filing on November 13, 2007. In the Statement, Petitioner stated that Anthony's first symptom of autism occurred no earlier than August 10, 2004, and therefore the Petition was filed within the 36-month statutory limitations period. Petr.'s Statement Regarding Timely Filing, Nov. 13, 2007, ¶¶ 7-8.

Respondent moved to dismiss the case as untimely filed. Respt.'s Mot. To Dismiss, Dec.

28, 2008. Respondent argued that the statute of limitations began running on April 27, 2004, which would mean that the Petition was filed two months outside the statutory period. Id. To prove the first symptom of autism occurred by April 2004, Respondent relied on written notes from an April 27, 2004 well child visit where the pediatrician noted that Anthony had a "poss[ible] speech delay" and a variety of "behavioral problem[s]." Id. at 2-3; Petr.'s Ex. 4 at 89. Petitioner objected and argued in response that the record was too ambiguous to support an April 2004 date of onset and that the limitations period did not start until Anthony was diagnosed with a speech delay in August 2004. Petr.'s Resp. to Mot. to Dismiss, Jan. 29, 2008. Petitioner placed substantial reliance on Setnes v. United States, 57 Fed. Cl. 175 (2003), in arguing against using hindsight to determine when the first symptom occurred. Id.

At a status conference, the parties were instructed to submit expert evidence to support their position on date of onset. Respondent filed, on September 22, 2009, four medical articles and an expert report from Dr. Judith Miller indicating that the symptoms of Anthony's condition documented on April 27, 2004, were recognizable as symptoms of autism. Petitioner did not file an expert report, relying instead on the filed medical records, Petitioner's affidavit, and legal arguments that the record did not support a finding that the limitations period began before August 2004. At a status conference on December 16, 2009, the parties agreed that this case was ripe for decision.[2]

B. The Vaccinee's Medical Records and History

Anthony was born on December 21, 2001. Doctors had to remove some fluid from Anthony's lungs, but his birth was otherwise problem free. Petr.'s Ex. 1 at 1, 12-14. Anthony received standard vaccinations from Children's Primary Care Medical Group, Inc., from December 21, 2001 to November 16, 2006. Petr.'s Statement Regarding Timely Filing, Nov. 13, 2007, at ¶ 3.

During his first years, Anthony saw the doctor regularly. See Petr.'s Ex. 4 at 86-87. On April 27, 2004, Ms. Hunt took Anthony to the doctor for a well child visit. Petr.'s Ex. 4 at 86-87. At that visit, Ms. Hunt expressed concern about Anthony's speech development and behavior. Hunt Aff., Apr. 18, 2008, at ¶ 3 ("I asked [the doctor] about Anthony's speech development. At that time, Anthony would repeat things I would say to him, but he did not talk on his own. Instead, if Anthony wanted something, he would point to it. If I didn't notice him, he would get upset and throw a tantrum."). The doctor noted that she "didn't hear him say any clear words" and that Anthony had a "poss[ible] speech delay" and was "very immature." Petr.'s Ex. 4 at 89. However, the doctor told Ms. Hunt not to worry about Anthony's speech development. Hunt Aff. ¶ 4.

At Anthony's next doctor's visit on August 10, 2004, Ms. Hunt reiterated her concern about Anthony's speech development. Hunt Aff. ¶ 6; Petr.'s Ex. 4 at 176. The physician noted

[2] Petitioner has not requested a hearing on the motion to dismiss.

that Anthony's "speech [was] delayed & unintelligible," and referred Anthony for speech and hearing tests. Petr.'s Ex. 6 at 31. The physician asked Ms. Hunt if Anthony responded when she called his name, and Ms. Hunt told the physician that Anthony did not. Hunt Aff. ¶ 6. On August 31, 2004, Anthony's hearing was tested and found to be normal. Petr.'s Ex. 4 at 115. Ms. Hunt was unable to have Anthony's speech evaluated until a year later. Hunt Aff. ¶ 9.

In August 2005, Ms. Hunt had the Chula Vista School District evaluate Anthony. The school district found that he had a speech problem and recommended speech therapy. Hunt Aff. ¶ 10. Soon after the evaluation, Anthony's preschool called Ms. Hunt because they were having problems with Anthony's behavior. Hunt Aff. ¶ 11. The preschool's therapist gave Anthony a referral to the Children's Hospital Health Center (CHHC), where Ms. Hunt took Anthony for a developmental evaluation on October 11, 2005.

For the developmental evaluation, the doctors at CHHC conducted an interactive interview with Anthony and Ms. Hunt, and Ms. Hunt filled out a questionnaire about Anthony's medical history. Petr.'s Ex. 4 at 40. Ms. Hunt reported that she first noticed Anthony's problems at two years of age. Petr.'s Ex. 4 at 51. She also reported that Anthony did not respond to his name and she had to "go to him or call his name a lot of times." Petr.'s Ex. 4 at 55. At this evaluation, doctors first diagnosed Anthony with autism.

In October 2005, CHHC prepared a diagnostic report containing Anthony's medical history and the doctors' findings and opinions concerning the autism diagnosis. The medical history section of the report stated that after hitting his early language milestones, such as learning "mama" and "dada" at 9 months, "Anthony did not develop any further expressive vocabulary until he was 3 years of age," and that prior to age three, Anthony communicated his needs by grunting and whining. Petr.'s Ex. 4 at 45. The report also stated that Anthony did not like to play with his peers, did not communicate well verbally, communicated with actions rather than words, was impulsive, and had a poor attention span. Petr.'s Ex. 4 at 44-50. Anthony's evaluator commented that during the evaluation interview Anthony frequently echoed words and simple phrases, often repeated a question rather than answering it, and had limited use of words, focusing on imitating or echoing the evaluator. Petr.'s Ex. 4 at 47-48. The evaluator noted that Anthony did not socially engage his mother or the evaluator, and that his eye contact was very limited. Petr.'s Ex. 4 at 48.

C. Scientific and Expert Evidence

1. DSM-IV

In Petitioner's Response to Respondent's Motion to Dismiss, Petitioner relied on the Diagnostic and Statistical Manual of Mental Disorders (4th Ed.) ("DSM-IV") to show that the symptoms observed on April 27, 2004 were not clear signs of autism. Petr.'s Resp. to Mot. to Dismiss, Jan. 29, 2008, at 2-6. The DSM-IV is a resource commonly used by the medical

community for diagnosing and evaluating patients, and it is widely accepted as an authoritative source on mental disorders.

The crux of Petitioner's argument was that Anthony could not have exhibited a symptom of autism until he presented with a symptom explicitly listed in the DSM-IV. She argued that although a delay in language is a symptom in the DSM-IV, Anthony's medical records indicated only a "possible" speech delay in April 2004, and therefore, he was not symptomatic of autism until August 2004, when his impairments were conclusively categorized as a speech delay. Petr.'s Br. at 5. She also argued that because Anthony's behavioral symptoms were not part of the DSM-IV's diagnostic criteria, they were not symptoms of the onset of autism. Id. at 6.

Petitioner submitted no evidence to substantiate the argument that symptoms in the DSM-IV must be diagnosed in order for the statute of limitations to commence. Petitioner did not offer evidence to challenge the assertion by Respondent that Anthony's documented symptoms in April 2004 constituted symptoms of autism that would be recognizable by the medical community at large. Respondent, on the other hand, filed expert testimony that Anthony's April 2004 symptoms were recognizable signs of autism.

2. Dr. Judith Miller's Expert Report

On September 9, 2009, Respondent submitted the expert report of Dr. Judith Miller to support her position that symptoms of Anthony's autism were recognizable by April 27, 2004. According to Dr. Miller's report, the behaviors observed and noted by the pediatrician on April 27, 2004, were first symptoms of autism.[3] Respt.'s Ex. A at 2. Dr. Miller based her conclusion on the pediatrician's notes dated April 27, 2004 (labeling the notes as "First documentation of developmental concerns"). Respt's. Ex. A at 1. As noted by Dr. Miller, the pediatrician documented "'poss speech delay, I don't hear him say any words, laughed at everything, very immature . . . very active, out of control . . . DX [diagnosis] Behavior problem.'" Id. Reviewing the records of the April 27, 2004 visit, Dr. Miller opined, "these are symptoms of what was eventually diagnosed as autism." Id. at 2. Dr. Miller noted further that the Affidavit filed by Petitioner "matches [the] timeline from [the] records." Id.[4]

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[3] In her report and referenced medical literature, Dr. Miller presented evidence on the autism symptoms that typically manifest first. Dr. Miller did not rely on the criteria for diagnosing autism, but instead on the symptoms commonly recognized as the first symptoms of the disorder.

[4] Dr. Miller's opinion stated, "Mom said that in April of 2004 she raised concerns with pediatrician . . . that her son was not speaking as well as his cousin, and that the doctor reassured her that milestones were being met." Id. As discussed herein, under binding precedent, the doctor's assurances are irrelevant to determining the onset of the limitations period.

3. Evidence that Speech Delay Is a Common First Sign of Autism

The Special Master also has considered four articles filed in the Omnibus Autism Proceeding ("OAP") concerning the early signs of autism.[5]

- P. A. Filipek et al., The Screening and Diagnosis of Autistic Spectrum Disorders, 29(6) J. Autism and Dev. Disorders 439 (1999); Court Ex. 1. The Child Neurology Society and American Academy of Neurology had this report created as part of their effort to "formulate Practice Parameters for the Diagnosis and Evaluation of Autism for the membership." Id. at 439. A panel prepared the report after a systematic analysis of over 2,500 relevant scientific articles. Id. The article reports that speech and language delay are recognized as among the early symptoms of autism. See id. at 449-50, 452.

- Katarzyna Chawarska, et al., Parental Recognition of Developmental Problems in Toddlers with Autism Spectrum Disorders, J. Autism Dev. Disord. (2007) 37:62-72; Court Ex. 2. The article reports the results of a longitudinal study of 75 toddlers, 51 with autism, prior to their third birthday. The study found that concerns regarding language development and social relatedness were the most frequent parental concerns in children with autism, with 70.6% of parents having had concerns about speech and language delays and 60.8% about social difficulties. Id. at 66.

- Gillian Baird, et al., Clinical Review: Diagnosis of Autism, 327 Brit. Med. J. 488 (Aug. 30, 2003); Court Ex. 3. The article discusses "the identification and assessment process for children with autism and autistic spectrum disorder." Id. The article notes that "impairment in language development" is one of the symptoms that requires "prompt referral." Id. at 490.

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[5] These articles were taken from the OAP test cases King v. Sec'y of Dep't of Health & Human Servs., No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010), Mead v. Sec'y of Dep't of Health & Human Servs., No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010), and Dwyer v. Sec'y of Dep't of Health & Human Servs., No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The articles were used to support general causation in those cases. The Special Master selected four articles from the OAP, two submitted by Petitioners' Steering Committee and two by Respondent.

A special master should endeavor to make proceedings less adversarial, expeditious, and flexible, and she "may require such evidence as may be reasonable and necessary." § 300aa-12(d)(2)-(3). Special masters traditionally have supplemented the record where necessary and appropriate and, in accordance with due process, having provided the parties an opportunity to review and respond to the court's exhibits. See generally, Snyder v. Sec'y of Dep't of Health & Human Servs., 88 Fed. Cl. 706, 712-16 (2009) (noting the "specialized knowledge" and expertise of special masters). In accordance with the traditional role of special masters, it is appropriate in this case to supplement the record with pertinent articles from the OAP.

- Catherine Rice, Prevalence of Autism Spectrum Disorders --- Autism and Developmental Disabilities Monitoring Network, Six Sites, United States, 2000, 56(SSD1) MMWR Surveillance Summaries 1 (Feb. 9, 2007); Court Ex. 4. This is an article by the CDC reporting the results of a survey of 1,252 children of 8 years of age across six different states. One finding of the study was that "[t]he majority (69%-89%) of children with ASDs had documented developmental concerns before age 3 years. Across all sites, the most commonly documented early developmental concern was for language, followed by social concerns."

III. DISCUSSION

A. Burden of Proof

The statute of limitations under the Vaccine Act is jurisdictional. See, e.g., Brice v. Sec'y of Dep't of Health & Human Servs., 358 F.3d 865, 868 (Fed. Cir. 2004) ("Brice II"). As a result, a petitioner bears the burden of establishing that her claim is timely. See Alder Terrace, Inc. v. U.S., 161 F.3d 1372, 1377 (Fed. Cir. 1998) (stating that plaintiff has the burden of establishing jurisdiction, including jurisdictional timeliness, under Tucker Act). The proponent of jurisdiction must show by a preponderance of the evidence that jurisdiction is proper. Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). In determining whether to dismiss a suit for lack of subject matter jurisdiction, the court may inquire into and resolve disputed facts. Rocovich v. U.S., 933 F.2d 991, 993-95 (Fed. Cir. 1991).

B. Applicable Law Regarding the Statute of Limitations

Under the Vaccine Program, petitioners may be compensated for injuries caused by certain vaccines. See generally §§ 300aa-10 to 34. However, to be eligible for compensation, a petitioner must meet the statutory deadlines for filing Program petitions. In pertinent part, the Vaccine Act provides that in the case of

> a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

§ 300aa-16(a)(2). Thus, for an injury putatively caused by a vaccine on the Vaccine Injury Table, the vaccinee must file a petition within 36 months of the earliest date that either a symptom or manifestation of onset first occurs. The statute of limitations under the Vaccine Act must be "strictly and narrowly construed" because it is a condition of the waiver of the government's sovereign immunity. Markovich, 477 F.3d at 1360 (quoting Brice v. Sec'y of Dep't of Health and Human Services, 240 F.3d 1367, 1370 (Fed. Cir. 2001) ("Brice I")).

The Vaccine Act's statute of limitations is triggered by "the occurrence of the first symptom or manifestation of onset of a vaccine-related injury." Wilkerson v. Sec'y of Dep't of Health & Human Servs., 593 F.3d 1343, 1344 (Fed. Cir. 2010) (quotation marks omitted). 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." Markovich, 477 F.3d at 1357. Even where the medical community would not have been able to diagnose the symptoms as manifesting a particular disorder at the time, the statute of limitations commences on the date the first symptom or manifestation of onset occurs, not on the date of its recognition. Wilkerson, 593 F.3d at 1346; see also Cloer v. Sec'y of Dep't of Health & Human Servs., 85 Fed. Cl. 141, 149 (2008), appeal docketed, No. 2009-5052 (Fed. Cir. argued Nov. 4, 2009) (upholding special master's decision that statute of limitations started running before petitioner was diagnosed with multiple sclerosis (MS) and before the medical community suspected a link between vaccines and MS). The statute of limitations starts to run on the date when the evidence of injury first occurred, not when the significance of that evidence was first appreciated. Wilkerson, 593 F.3d at 1345-46; Markovich, 477 F.3d at 1359.

The first evidence of injury is determined using an objective standard, and it "'is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.'" Wilkerson, 593 F.3d at 1346 (quoting Markovich, 477 F.3d at 1360). The Federal Circuit has explicitly rejected the use of a subjective standard based on the judgment of an individual parent or vaccinee, stating that a subjective standard would result in uneven treatment of persons based on their degree of medical awareness or training. Markovich, 477 F.3d at 1360; see also Wilkerson, 593 F.3d at 1345-46 (confirming the Markovich Court's rejection of the subjective standard used by the Court of Federal Claims in Setnes, 57 Fed. Cl. 175). It is well established that the first evidence of injury is "any observable 'symptom or manifestation,'" including "subtle symptoms that would be recognizable to the medical profession at large but not necessarily to the parent." Markovich, 477 F.3d at 1359-60 (quoting Shalala v. Whitecotton, 514 U.S. 268, 274 (1995)) (emphasis in original). These binding authorities establish that diagnosis of a disorder is not required to trigger the statute of limitations. "Congress intended the limitations 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." Markovich, 477 F.3d at 1359 (citing Brice v. Sec'y of Dep't of Health and Human Services, 36 Fed. Cl. 474, 477 (1996)).

A particular injury is "recognizable" by the medical community at large based on symptoms known to doctors and documented in a historical record of a particular patient. Therefore, in applying Markovich and Wilkerson, we review the medical record for an injury that is recognizable by the medical community, and not for recognition by the medical community that an injury is in fact related to a vaccine. See Wilkerson, 593 F.3d at 1345-46; Cloer, 85 Fed. Cl. at 149. Although medical records alone are not conclusive, contemporaneous medical records are entitled to great weight. Cucuras v. Sec'y of Dep't of Health and Human Services, 993 F.2d 1525, 1528 (Fed. Cir. 1993).

C. The Medical Profession Recognizes Speech Delay as a Symptom of Autism.

The medical literature filed in this case shows that the medical profession recognizes language delay as a first symptom of autism. Language delay is the most commonly noticed first symptom of autism, and until recently, if language delay was not present, a child often would not have been diagnosed with autism until mid-childhood. Ct. Ex. 3 at 489-90; see, e.g., Ct. Ex. 1 at 452; Ct. Ex. 4. The literature describes a variety of "classic" symptoms that are "red flags" for autism and should trigger further evaluation. Ct. Ex. 1 at 452; accord Ct. Ex. 3 at 490. Such well-recognized, "classic" symptoms include: language delay; lack of spontaneous, non-echoed speech; preference for playing alone; and deficiencies in verbal and nonverbal communication. Ct. Ex. 1 at 452; accord Ct. Ex. 3 at 490.

Dr. Miller's report provides further evidence that language delay is an early symptom of autism. In reaching her opinion, Dr. Miller relied on many of the well-recognized symptoms of autism, stating that not speaking, not responding to name, and being out of control are symptoms of autism. Respt.'s Ex. A at 2. She further recognized deficiencies in communication skills, e.g., communicating with grunts and whines, and in socialization skills, e.g., not playing with peers, as symptomatic of autism. Id.

This reliable medical evidence establishes, and the Petitioner does not dispute, that speech delay, in particular, is an "event objectively recognizable as a sign" of an autism spectrum disorder "by the medical profession at large." Markovich, 477 F.3d at 1360. Based on the holding in Markovich, "diagnosis" of a speech delay as a manifestation of autism is not needed to trigger the statute of limitations; the documented fact of the speech delay is sufficient.

D. Application of the Statute of Limitations to this Case

The basic facts in this case are not in dispute. The issue is when Anthony's observed abnormal behavior was first recognizable as a symptom of autism. Respondent has argued that the record of the April 27, 2004 doctor's visit and Ms. Hunt's October 2005 retrospective evaluation of Anthony's behaviors show that Anthony's first recognizable symptom of autism occurred by April 27, 2004. Respondent supported this argument with the expert opinion of Dr. Miller. Petitioner has argued that the April 27, 2004 record and retrospective evaluation are insufficient to show that Anthony exhibited a recognized symptom of autism in April 2004. Petitioner has further argued the first symptom of autism did not occur until Anthony received the first, definitive diagnosis of a speech delay in August of 2004. Petitioner has not submitted any supporting expert opinion. After reviewing the record, the Special Master finds that Anthony's April 27, 2004 symptoms, which subsequently were diagnosed as a speech delay and then autism, were first manifestations of Anthony's alleged vaccine injury.

1. The Record Shows That Anthony's April 2004 Symptoms Were Symptoms of Autism.

By comparing the later diagnoses of a speech delay and autism with Ms. Hunt's affidavit and the April 27, 2004 well child visit records, it is apparent that Anthony's April 2004 behaviors were the same symptoms that were later diagnosed as autism. The record shows that by December 2003, some time around Anthony's second birthday, Ms. Hunt had observed widely-recognized symptoms of autism in Anthony. See Hunt Aff. at ¶ 3 (Ms. Hunt thought he was going through his terrible two's); Petr.'s Ex. 4 at 51 (answering in the questionnaire that she first noticed the problem at two years of age). Ms. Hunt was concerned about Anthony's language skills: she was aware that he was not very talkative, she had noticed that he would repeat what she said rather than talk on his own, and she noticed he would throw a tantrum if she didn't notice him pointing at things. Hunt Aff. at ¶¶ 2-3. By the April 2004 well child visit, Ms. Hunt already had concluded that Anthony did not behave normally, and she suspected that he might have autism. Hunt Aff. at ¶¶ 2-9. Based on this evidence, it is clear that Anthony's symptoms were present and developing well before their first documentation in the pediatrician's record on April 27, 2004.

The pediatrician also observed Anthony's language difficulties and other symptoms that are widely recognized in the medical literature as first symptoms of autism. The pediatrician recorded a "possible speech delay" and behavioral problems. See Petr.'s Ex 4 at 89 (noting that Anthony did not say any clear words, laughed at everything, was immature, and was very active and out of control). Four months later, on August 6, 2004, Anthony's pediatrician noted that Anthony's speech was "delayed and unintelligible," and she diagnosed him with speech delay. Petr.'s Ex. 6 at 31. Although the pediatrician in April 2004 did not diagnose speech delay or autism as such, there is no question that Anthony suffered from the disorder and that his early symptoms, observed on and before April 2004, were indeed symptomatic of the autism subsequently diagnosed. See Respt.'s Ex. A at 2-3 (noting all the symptoms consistent with the diagnosis).

The October 2005 developmental evaluation and diagnosis confirm that the symptoms present in April 2004 were actually symptoms of Anthony's autism. As Dr. Miller stated, "at this evaluation the earlier language and behavioral concerns were now recognized as part of his autism." Respt.'s Ex. A at 2. Consistent with Ms. Hunt's earlier observations, the developmental evaluator reported that during the interview Anthony frequently echoed words and simple phrases, and Anthony would often repeat a question rather than answering it. Petr.'s Ex. 4 at 47-48. Such a stereotyped and repetitive use of language is a widely-recognized symptom of autism. See, supra, Section II. C. The evaluator observed other widely-recognized symptoms of autism in Anthony: that he did not like to play with his peers, did not communicate well verbally, communicated with actions rather than words, was impulsive, had a poor attention span, did not socially engage people, and made very limited eye contact. Petr.'s Ex. 4 at 44-50. These classic symptoms of autism, many of which were also described in the record of the April 27, 2004 visit, formed the basis of Anthony's autism diagnosis.

2. Petitioner's Argument That the Record Is Ambiguous Fails Because the Medical Records Contain No Material Inconsistencies.

In her Response to Respondent's Motion to Dismiss, Petitioner argued that the record was too ambiguous to support a finding that Anthony's first symptoms of autism were recognizable on April 27, 2004. Petitioner based her arguments in significant part on the rationale of Setnes, which the Federal Circuit recently has specifically declined to adopt. See Wilkerson, 593 F.3d at 1345. In sum, Petitioner argued that speech delay is not a symptom of autism until it is diagnosed, that Anthony's behavior on April 27, 2004 was too generic to be attributable to autism, and that the October 11, 2005 report cannot be used to establish retroactively when the first symptom occurred. Petitioner argued that because, on April 27, 2004, the pediatrician did not state conclusively that Anthony had a speech delay, and instead noted a "poss[ible] speech delay," Anthony's behavior was not a symptom of autism. While the pediatrician did not diagnose Anthony with autism on April 27, 2004, she did observe and record behaviors that are widely recognized in the medical community as first manifestations of an autism disorder. See, supra, Section II. C. (listing delay in language development, hyperactivity, lack of interest in other children, and tantrums as symptoms of autism). Under Markovich, it is irrelevant that the pediatrician did not state the words "speech delay" or diagnose autism at that time.

In essence, Petitioner argued that the Anthony could not exhibit a symptom of autism until the speech delay was diagnosed. This argument is not consistent with Federal Circuit precedent, which establishes that the statute of limitations commences when the symptoms that will later be diagnosed as autism first occurred, even if the disorder was not diagnosed at the time. Wilkerson, 593 F.3d at 1346. Not only is a diagnosis not required, but any symptom, including a subtle symptom whose significance is not realized, can trigger the statute of limitations. Markovich, 477 F.3d at 1359-60; see also Russell v. Sec'y of Dep't of Health & Human Servs., No. 02-747V, 2009 WL 5216911, at *2, *6-7 (Fed. Cl. Spec. Mstr. July 10, 2009) (dismissing petition as untimely based on expert's opinion that vaccinee's language disorder was evident at age 15 months despite petitioner's claim that first symptom could not occur until the speech delay was diagnosed at age 20 months); Hokkanen v. Sec'y of Dep't of Health & Human Servs., No. 03-1753V, 2009 WL 4857386 (Fed. Cl. Spec. Mstr. Dec. 1, 2009) (dismissing petition as untimely based on doctor's notes concerning the vaccinee's motor development, speech development, and sensitivity to food textures, and finding that the first symptom of autism occurred before a diagnosis was made).

Petitioner also argued that Anthony's behavior on April 27, 2004 was too general to be attributable to autism. This behavior included not saying any clear words, exhibiting out of control behavior, laughing at everything, and being very immature. Again, symptoms sufficiently specific to result in a definitive diagnosis are not required; only symptoms that, in retrospect, are consistent with a developing autistic disorder need to appear to trigger the statute of limitations. The medical literature and Dr. Miller's opinion establish that the medical profession recognizes Anthony's April 27, 2004 behavior as symptomatic of autism.

Petitioner argued that the report prepared by the doctors at Anthony's October 11, 2005 developmental evaluation was too unreliable to establish an April 27, 2004 onset date because it contradicted other information in the medical records, and it was retrospective. As an initial matter, the October 2005 developmental diagnostic report confirmed that the symptoms observed on April 27, 2004 were actually symptoms of autism; the report is not necessary to establish that the observed symptoms actually occurred in April 2004. Moreover, although the facts in the report differ slightly from other medical records, the difference is not so great as to call the reliability of the contemporaneous medical records into question. See Cucuras, 993 F.2d at 1528.[6] Perfect consistency in medical records is rare. Here, the two versions of the facts are not necessarily inconsistent; their consistency depends on how they are interpreted. More importantly, there are no material inconsistencies in the records. Petitioner does not dispute that she had concerns about Anthony's lack of speech at around age two, in December 2003, and had noticed his speech and behavioral problems by April 2004. It is unnecessary to resolve questions concerning the precise details of Anthony's speech problems to determine that the Petition was filed outside the limitations period.

IV. CONCLUSION

The record is clear that Anthony's April 27, 2004 symptoms were later diagnosed as a speech delay and then autism. It is irrelevant whether a doctor could definitively diagnose Anthony on April 27, 2004 with either a speech delay or autism, because a diagnosis is not required to start the statute of limitations. The statute of limitations starts on the date that "the first event objectively recognizable as a sign of vaccine injury by the medical profession at large" occurs. Markovich, 477 F.3d at 1360. Based on the entire record, the symptoms observed on April 27, 2004, later diagnosed as autism, were the first documented symptoms recognizable as a symptom of autism. The Petition was filed on July 2, 2007, more than 38 months after April 27, 2004. Therefore, this case was not timely filed.[7]

[6] Petitioner asserts that CHHC's diagnostic report states that after learning "mama" and "dada" at 9 months, "Anthony did not develop any further expressive vocabulary until he was 3 years of age." Petr.'s Ex. 4 at 45. Ms. Hunt had previously reported that Anthony said first words at one year and put words together at two and one-half years, Petr.'s Ex. 4 at 55, and that on April 27, 2004, Anthony had a vocabulary of more than 20 words and made two word sentences, Petr.'s Ex. 4 at 89.

[7] Equitable tolling does not apply to ameliorate the effect of the statute of limitations in Vaccine Act cases. Brice I, 240 F. 3d at 1368.

For the foregoing reasons, Respondent's motion to dismiss on the grounds of the statute of limitations is **GRANTED**. Petitioner's claim is **DISMISSED**. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Chief Special Master