

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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ANTHONY HURD, by his mother \*
DELILAH HURD, \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH \*
AND HUMAN SERVICES, \*

Respondent. \*

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No. 08-65V
Special Master Christian J. Moran

Filed: July 14, 2010

Entitlement, RotaTeq,
intussusception, dispute of fact

Michael G. McLaren, William E. Cochran, Jr., and Chris J. Webb, Black McLaren Jones Rylan &
Griffee, P.C., Memphis, TN, for petitioner;
Glenn A. MacLeod, United States Dep't of Justice, Washington, D.C., for respondent.

PUBLISHED DECISION DENYING COMPENSATION\*

Delilah Hurd alleges that the RotaTeq vaccine, which was given on April 5, 2007, caused
her son, Anthony, to develop intussusception, for which he was hospitalized on June 2, 2007.1
Ms. Hurd seeks compensation pursuant to the National Vaccine Injury Compensation Program, 42

\* Because this published decision contains a reasoned explanation for the special master's
action in this case, the special master intends to post it on the United States Court of Federal
Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116
Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they
contain trade secrets or commercial or financial information that is privileged and confidential, or
medical or similar information whose disclosure would clearly be an unwarranted invasion of
privacy. When such a decision or designated substantive order is filed, a party has 14 days to
identify and to move to delete such information before the document's disclosure. If the special
master, upon review, agrees that the identified material fits within the categories listed above, the
special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4);
Vaccine Rule 18(b).

1An intussusception is defined as "the prolapse of one part of the intestine into the lumen
of an immediately adjoining part." Dorland's Illustrated Medical Dictionary (30th Ed. 2003) at
947. The intestine moves like the way an old-fashioned telescope collapses. Tr. 145.

U.S.C. § 300aa–10 *et seq.* (2006). Ms. Hurd alleges and her expert assumes a set of facts about Anthony’s health between his vaccination and his hospitalization that have not been established by a preponderance of the evidence. Consequently, Ms. Hurd is not entitled to compensation.

## **I. Factual History**

In many cases brought in the Vaccine Program, the parties agree that the medical records created contemporaneously with the events being described in the medical records accurately set forth what happened to the person receiving the vaccine. The parties’ agreement about the facts simplifies those cases.

The present case, however, falls into the minority of cases in which the parties dispute the accuracy of the medical records. Ms. Hurd contends that Anthony suffered health problems that are not discussed in medical records. Respondent argues that the Ms. Hurd has not rebutted the presumed accuracy of Anthony’s medical records.

To resolve the dispute about facts, a hearing was held. See Campbell v. Sec’y of Health & Human Servs., 69 Fed. Cl. 775, 779-80 (2006); Skinner v. Sec’y of Health & Human Servs., 30 Fed. Cl. 402, 410 (1994). Ms. Hurd testified before the undersigned in Memphis, Tennessee. The other witnesses testified via videoconferencing. This testimony and the documentary evidence are the basis for the findings of fact set forth in section B.

### **A. Standards for Finding Facts**

Petitioners are required to establish their cases by a preponderance of the evidence. 42 U.S.C. § 300aa–13(1)(a). The preponderance of the evidence standard requires a “trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the judge of the fact’s existence.” Moberly v. Sec’y of Health & Human Servs., 592 F.3d 1315, 1322 n.2 (Fed. Cir. 2010) (citations omitted).

The process for finding facts in the Vaccine Program begins with analyzing the medical records, which are required to be filed with the petition. 42 U.S.C. § 300aa–11(c)(2). Medical records that are created contemporaneously with the events that they describe are presumed to be accurate. Cucuras v. Sec’y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993).

Not only are medical records presumed to be accurate, they are also presumed to be complete, in the sense that the medical records present all the problems of the patient. Completeness is presumed due to a series of propositions. First, when people are ill, they see a medical professional. Second, when ill people see a doctor, they report all of their problems to the doctor. Third, having heard about the symptoms, the doctor records what he (or she) was told.

Appellate authorities have accepted the reasoning supporting a presumption that medical records created contemporaneously with the events being described are accurate and complete. A

notable example is Cucuras in which petitioners asserted that their daughter, Nicole, began to have seizures within one day of receiving a vaccination, although medical records created around that time suggested that the seizures began at least one week after the vaccination. Cucuras, 993 F.3d at 1527. A judge reviewing the special master's decision stated that "In light of [the parents'] concern for Nicole's treatment . . . it strains reason to conclude that petitioners would fail to accurately report the onset of their daughter's symptoms. It is equally unlikely that pediatric neurologists, who are trained in taking medical histories concerning the onset of neurologically significant symptoms, would consistently but erroneously report the onset of seizures a week after they in fact occurred." Cucuras v. Sec'y of Health & Human Servs., 26 Cl. Ct. 537, 543 (1992), aff'd, 993 F.2d 1525 (Fed. Cir. 1993). Decisions by judges of the Court of Federal Claims have followed Cucuras in affirming findings by special masters that the lack of a contemporaneously created medical record can contradict a testimonial assertion that symptoms appeared on a certain date. E.g. Doe/17 v. Sec'y of Health & Human Servs., 84 Fed. Cl. 691, 711 (2008); Ryman v. Sec'y of Health & Human Servs., 65 Fed. Cl. 35, 41-42 (2005); Snyder v. Sec'y of Health & Human Servs., 36 Fed. Cl. 461, 465 (1996) (stating "The special master apparently reasoned that, if Frank suffered such [developmental] losses immediately following the vaccination, it was more likely than not that this traumatic event, or his parents' mention of it, would have been noted by at least one of the medical record professionals who evaluated Frank during his life to date. Finding Frank's medical history silent on his loss of developmental milestones, the special master questioned petitioner's memory of the events, not her sincerity."), aff'd, 117 F.3d 545, 547-48 (Fed. Cir. 1997).

The presumption that contemporaneously created medical records are accurate and complete, however, is rebuttal. For cases alleging a condition found in the Vaccine Injury Table, special masters may find when a first symptom appeared, despite the lack of a notation in a contemporaneous medical record. 42 U.S.C. § 300aa-13(b)(2). By extension, special masters may engage in similar fact-finding for cases alleging an off-Table injury. In such cases, special masters are expected to consider whether medical records are accurate and complete.

In weighing divergent pieces of evidence, contemporaneous written medical records are usually more significant than oral testimony. Cucuras, 993 F.2d at 1528. However, compelling oral testimony may be more persuasive than written records. Campbell, 69 Fed. Cl. at 779 ("like any norm based upon common sense and experience, this rule should not be treated as an absolute and must yield where the factual predicates for its application are weak or lacking"); Camery v. Sec'y of Health & Human Servs., 42 Fed. Cl. 381, 391 (1998) (this rule "should not be applied inflexibly, because medical records may be incomplete or inaccurate"); Murphy v. Sec'y of Health & Human Servs., 23 Cl. Ct. 726, 733 (1991), aff'd, 968 F.2d 1226 (Fed. Cir. 1992).

The relative strength or weakness of the testimony of a fact witness affects whether this testimony is more probative than medical records. An assessment of a fact witness's credibility usually involves consideration of the person's demeanor while testifying. Andreu v. Sec'y of Health & Human Servs., 569 F.3d 1367, 1379 (Fed. Cir. 2009); Bradley v. Sec'y of Health & Human Servs., 991 F.2d 1570, 1575 (Fed. Cir. 1993).

The facts will be found in accord with the criteria set forth above. The record includes the medical records and the testimony of the witnesses.

**B. Facts as Found**

Anthony was born on January 31, 2007. He was a relatively small baby; at birth, he weighed 5.77 pounds. Exhibit 2 at 3.

Anthony's pediatrician, Dr. Marta Hans, saw Anthony when he was six weeks. He was a "well-baby" and no concerns were noted. At this time, he weighed nearly nine and one-half pounds (9 lbs 6.5 oz.), which placed Anthony at approximately the 15th percentile. Exhibit 3 at 4; exhibit 51 (weight chart).<sup>2</sup>

Approximately two weeks later, on April 5, 2007, Anthony was seen for his two-month well-baby check up. He was healthy. He weighed nearly 11 pounds (10 lbs 13.5 oz.). Anthony again weighed more than approximately 15 percent of children who were nine weeks old. At this visit, Anthony received the Hib, Prevnar, and rotavirus vaccine.<sup>3</sup> Exhibit 3 at 5; exhibit 51 (weight chart).<sup>4</sup> Anthony's state of health for the 57 days following his vaccination on April 5, 2007, is the subject of much debate.

Ms. Hurd presented her recollections about Anthony's health between the vaccination and the hospitalization in affidavits and in oral testimony. Initially, Ms. Hurd presented a skeletal outline of Anthony's medical history. Exhibit 1. Later, Ms. Hurd must have communicated additional information about Anthony to Dr. Gershwin, who referenced and relied upon a "second affidavit." Exhibit 8 at 2. Ms. Hurd filed this second affidavit as exhibit 35. The second affidavit added details that were not included in the initial affidavit, such as a change in Anthony's stool.

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<sup>2</sup> Respondent asserted that Anthony was in the 12th percentile. Resp't Br. at 2. While it is not clear how respondent calculated the precise figure, the exact percentile is not material.

<sup>3</sup> Anthony received a vaccine against rotavirus known as RotaTeq. An earlier vaccine against rotavirus was known as RotaShield. RotaShield has been associated with an increased number of cases of intussusception within 3-14 days of the vaccine. Exhibit A, tab 1 (Trudy V. Murphy, Intussusception Among Infants Given an Oral Rotavirus Vaccine, 344 No. 8 N Engl J Med. 564, 567-68 (2001));

RotaTeq and RotaShield are different vaccines. One way that they are different is the base material. RotaShield was derived from rhesus monkeys and RotaTeq is derived from cows. Exhibit A, tab 1 (Murphy at 564); tr. 212-15.

<sup>4</sup> For Anthony's two-month visit, Respondent asserted that Anthony was in the 13th percentile. Resp't Br. at 2. Again, the precise percentile is not material.

Ms. Hurd maintains that Anthony was ill for much of the next two months. For this case, the most pertinent problems are problems relating to Anthony's gastrointestinal system. Ms. Hurd asserted that Anthony had increased bowel movements, loose stools, black stools, and increased gas. Tr. 24-28. Ms. Hurd also said that Anthony decreased his eating after vaccination. Tr. 29-30.

Ms. Hurd also testified that after Anthony had been having these problems for approximately three weeks, she brought Anthony to see Dr. Hans. Tr. 53. Ms. Hurd had not included information about this visit to Dr. Hans in the affidavits that she filed earlier in the case. Tr. 56; see exhibit 35 (second affidavit of Ms. Hurd, dated Sept. 17, 2008) at 1-2. Ms. Hurd stated that she told Dr. Hans that Anthony was having "black and loose" stools. Tr. 33. According to Ms. Hurd, Dr. Hans did not examine Anthony and merely reassured Ms. Hurd that her son would be fine. Tr. 33-34; tr. 51-52. Dr. Hans's records do not contain any notes about a visit as described by Ms. Hurd. See exhibit 3 (records from Dr. Hans).

Ms. Hurd has not established, by a preponderance of the evidence, that Anthony suffered gastrointestinal problems between April 5, 2007 and June 1, 2007. Ms. Hurd's testimony is not consistent with three other sources of information about Anthony. As explained in the following paragraphs, these other sources are more persuasive than Ms. Hurd's account.

First, Ms. Hurd's account of Anthony's gastrointestinal problems, including frequent loose stools and decreased eating, is not consistent with Anthony's growth. As mentioned earlier, through the time of his April 5, 2007 vaccination, Anthony was a relatively small baby. At approximately two months, Anthony's weight was in the 15th percentile approximately. Yet, when Anthony arrived at the hospital on June 2, 2007, he weighed 14 pounds. Exhibit 4 at 6. This size placed Anthony in approximately the 25th percentile. Exhibit 51 at 2 (growth chart).

Thus, between early April and early June, Anthony gained slightly more than three pounds. This amount is more than would be expected normally in the sense that Anthony did not stay around the 15th percentile, which is where he was in April. Instead, Anthony moved to the 25th percentile. This amount of growth is very inconsistent with Ms. Hurd's testimony that Anthony was having problems feeding.

Ms. Hurd attempts to counter the evidence about Anthony's weight with testimony from Dr. Gershwin. After the hearing, when witnesses testified about Anthony's gain in weight between April and June, Ms. Hurd was permitted to file a supplemental report from Dr. Gershwin. Dr. Gershwin stated that Anthony's June 2, 2007 weight "is misleading as it would include fluid and fecal retention." Exhibit 50. Implicitly, Dr. Gershwin is assuming that an intussusception would cause Anthony to stop excreting urine and feces so that Anthony's weight would appear increased.

Dr. Gershwin's assertion, which was made after the hearing, is not persuasive. Dr. Halsey, respondent's expert, contradicts Dr. Gershwin's assertion and states that before being

hospitalized, Anthony “had been vomiting and had diarrhea as well as decreased food and fluid intake. These problems lead to fluid loss and weight loss, not gain.” Exhibit I at 2. Dr. Halsey’s account is more in accord with common experience – vomiting and diarrhea cause a weight loss.<sup>5</sup> In addition, Dr. Halsey is a pediatrician who has cared for patients with intussusception. Tr. 205-06. Therefore, he is more qualified to discuss the typical signs and symptoms of intussusception than Dr. Gershwin, who is not a pediatrician and has not cared for a patient with intussusception. Tr. 103-04.

Second, if Ms. Hurd had brought Anthony to Dr. Hans’s office, it is extremely likely that Dr. Hans’s office would have created some document to memorialize Anthony’s visit. Dr. Hans’s office recorded other visits. See exhibit 3. The likelihood that Dr. Hans would have noted Anthony’s visit is increased because of the possible severity of Anthony’s alleged condition. Ms. Hurd stated that she told Dr. Hans that Anthony was having “black and loose” stools. Tr. 33. Both Dr. Gershwin and Dr. Halsey indicated that “black, tarry stools” warrant additional follow-up because such stools may indicate the presence of blood. Tr. 108; tr. 195-97.<sup>6</sup> Absent any showing to the contrary, Dr. Hans is presumed to be competent. Rizzo v. Shinseki, 580 F.3d 1288, 1291-92 (Fed. Cir. 2009). The reasonable inference is that if Dr. Hans had learned that Anthony was having black stools, then Dr. Hans, as a competent doctor, would have ordered follow up treatment for Anthony just as Dr. Halsey and Dr. Gershwin would have. The omission of any record from Dr. Hans strongly suggests that Dr. Hans was not informed that Anthony was having black stools.<sup>7</sup>

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<sup>5</sup> The medical records support Dr. Halsey’s statement that Anthony was vomiting. Exhibit 52 at 6-7. The medical records do not support Dr. Halsey’s statement that Anthony had diarrhea. See exhibit 4 at 4. The source for the assertion that Anthony was having diarrhea appears to be Ms. Hurd’s testimony. Tr. 45-46.

<sup>6</sup> Ms. Hurd’s reply notes that “black and loose” stools appear to be different from “black and tarry” stools. Pet’r Reply at 7-8. The confusion seems to have originated in Ms. Hurd’s testimony that Anthony’s stools were black like “tar.” Tr. 26. Both experts seemed to recall that Ms. Hurd used “tar” to describe the cohesiveness and discussed the treatment for “black, tarry” stools. However, Ms. Hurd did not elicit any testimony from Dr. Gershwin or Dr. Halsey about whether doctors would treat a three-month-old child with black and loose stools differently from a three-month-old child with black and tarry stools.

<sup>7</sup> Ms. Hurd argues that Dr. Halsey’s statement that reports of black stools should be investigated is the universal standard of care should not be credited. Ms. Hurd argues that Dr. Halsey did not address the standard of care for “a general pediatric practice in a small, rural Mississippi community.” Pet’r Reply at 8.

Ms. Hurd’s argument is not persuasive. Ms. Hurd presented no evidence to support an argument that the standard of care in rural Mississippi with respect to a three-month-old having black stools differs from the standard of care elsewhere.

After the hearing in which Ms. Hurd described the visit with Dr. Hans, Ms. Hurd's attorneys obtained a statement from Dr. Hans. Dr. Hans stated that Anthony was given the Rotateq vaccination on August 17, 2009, and that she filed a report with Merck concerning Anthony's intussusception. Exhibit 59. Presumably, if Dr. Hans could have corroborated Ms. Hurd's account of an unrecorded visit, then Dr. Hans would have set forth her recollection in this letter.

Third, the medical record created closest in time to May 2007, when Anthony allegedly was having gastrointestinal problems, contradicts Ms. Hurd's account of Anthony being sick for nearly two months. On June 2, 2007, Anthony's grandmother (Ms. Hurd's mother) brought Anthony to the emergency room because he was having difficulty breathing, woke up with a rash, and was vomiting "green stuff." Anthony's grandmother described these problems as "moderate to severe." She said that Anthony had not been having diarrhea. Exhibit 4 at 4. Because Anthony's treatment "was hanging in the balance," her account is presumed to be accurate. Cucuras, 993 F.2d at 1528.

Ms. Hurd argues that the account given by her mother was not accurate in the sense that Anthony's grandmother knew only some information about him. Pet'r Reply at 4 ("Ms. Hurd did not tell her mother everything."), citing tr. 52. Although Ms. Hurd may not have told her mother "everything," Anthony's grandmother had ample opportunities to observe Anthony. Exhibit 4 at 4 (listing "g[rand]ma" as "other caretaker"); tr. 20; tr. 49-52; tr. 256. Therefore, Ms. Hurd has not rebutted the presumption that the medical records created at the emergency room based upon the history given by Anthony's grandmother are accurate and complete.<sup>8</sup>

In sum, a preponderance of the evidence supports a finding that between April 5, 2007 and June 1, 2007, Anthony was healthy and not experiencing any significant gastrointestinal problems. He gained weight. No medical record was created during this period to confirm Ms. Hurd's testimony that she sought medical care for Anthony. The record from Anthony's hospitalization indicates that his problems started recently. All these factors contribute to rejecting Ms. Hurd's

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<sup>8</sup> Ms. Hurd questions the accuracy of the medical records from the emergency department, stating "we do not know whether Ms. Hurd's mother reported Anthony's previous loose stools or whether the healthcare provider at the emergency room accurately recorded Ms. Hurd's mother's statements." Pet'r Reply at 6. Ms. Hurd cites Doe 21 v. Sec'y of Health & Human Servs., 84 Fed. Cl. 19, 50 (2008), as an example of a case in which the accuracy of emergency room records was questioned.

Cucuras establishes that medical records are presumptively reliable. Cucuras, 993 F.2d at 1528. As long as Cucuras remains binding precedent, then Ms. Hurd bears the burden of presenting evidence (not argument) to rebut the presumption. For the reasons explained in the text, Ms. Hurd's evidence does not meet this burden.

allegation that Anthony had gastrointestinal problems following the April 5, 2007 vaccination.<sup>9</sup> As discussed below, this factual finding determines the outcome in this case.

As alluded to earlier, on June 2, 2007, Anthony's grandmother took him to the emergency department at the Baptist Memorial Hospital-Booneville.<sup>10</sup> The reason for this trip was that Anthony was having "difficulty breathing," and he woke up from a nap "with [a] circumoral rash and vomiting green stuff." Exhibit 4 at 4. After being transferred to Children's Hospital in Birmingham, Alabama, Anthony was diagnosed as suffering from intussusception and underwent an operation. This operation reduced the intussusception. Exhibit 5 at 50.

Following the operation, Anthony's surgeon determined that he had fully recovered. Exhibit 5 at 83. On June 21, 2007, Anthony weighed approximately 15 and one half pounds, which placed him in the 35th percentile. Exhibit 3 at 6. By the time of hearing, Anthony was fine. He had a scar on his abdomen. Tr. 46.

## **II. Procedural History**

Ms. Hurd filed her petition on January 31, 2008. Seven exhibits accompanied the petition. Respondent filed her report, pursuant to Vaccine Rule 4, and maintained that Ms. Hurd was not entitled to compensation because she had not presented an opinion from an expert and the medical records did not support her claim for compensation.

The parties began filing reports from experts. Ms. Hurd filed an expert report from Dr. M. Eric Gershwin on September 15, 2008. Exhibit 8. Dr. Gershwin opined that the RotaTeq vaccine caused Anthony's intussusception. After reviewing Dr. Gershwin's report, respondent obtained and filed a report from Dr. Neal Halsey. Dr. Halsey disagreed with Dr. Gershwin's opinion. Exhibit A.

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<sup>9</sup> The finding that Ms. Hurd's account is not supported by a preponderance of the evidence is not the same as finding that Ms. Hurd's testimony was untruthful. Due to the passage of time, a witness may testify in accord with her memory yet the memory is inaccurate. See Grace v. Sec'y of Health & Human Servs., No. [redacted], 2006 WL 3499511, at \*4 (Fed. Cl. Spec. Mstr. Nov. 30, 2006); Lowrie v. Sec'y of Health & Human Servs., No. 03-1585V, 2005 WL 6117475, at \*21-22 (Fed. Cl. Spec. Mstr. Dec. 12, 2005), motion for reconsideration denied, 2006 WL 3734216 (Fed. Cl. Spec. Mstr. Nov. 29, 2006). Here, the other evidence in the record, including Anthony's gain in weight, the absence of any record from Dr. Hans about a visit for problems with Anthony's stools, and the affirmative statement from Anthony's grandmother that he had not been having diarrhea, make the accuracy of Ms. Hurd's recollection unlikely.

<sup>10</sup> The details of this hospitalization are relatively unimportant to determining whether the RotaTeq vaccine caused Anthony an adverse reaction. The doctors did not comment on what caused Anthony's intussusception.

The expert reports revealed that Dr. Gershwin and Dr. Halsey assumed a different set of facts about Anthony. Dr. Gershwin assumed, based upon Ms. Hurd's affidavit, that Anthony experienced gastrointestinal problems for 57 days following the RotaTeq vaccination. Dr. Halsey did not make this same assumption because no medical records created contemporaneously confirmed Ms. Hurd's allegations. Thus, a hearing was scheduled to receive testimony from Ms. Hurd.

In the time leading to the hearing, Dr. Gershwin and Dr. Halsey prepared supplemental reports. Exhibit 37, exhibit D, and exhibit E. The parties also filed various medical articles on which the experts relied. The hearing was held on September 17, 2009. At this hearing, Ms. Hurd, Dr. Gershwin, and Dr. Halsey testified. Following the hearing, both parties filed another set of supplemental reports from their experts and more medical literature. Both parties filed briefs. The case is ready for adjudication.

### **III. Analysis**

When experts assume facts that are not supported by a preponderance of the evidence, a finder of fact may properly reject the expert's opinion. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993) (stating "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."); Perreira v. Sec'y of Health & Human Servs., 33 F.3d 1375, 1376 n.6 (Fed. Cir. 1994) (stating "An expert opinion is no better than the soundness of the reasons supporting it."). Moreover, an expert's assumption about the accuracy of a fact witness's testimony does not "substantiate" the testimony of the fact witness. Bradley v. Sec'y of Health & Human Servs., 991 F.2d 1570, 1574 (Fed. Cir. 1993).

The finding of fact that Anthony was relatively healthy from April 5, 2007 to June 1, 2007 resolves this case. This finding is decisive because Dr. Gershwin's opinion relies upon a contrary assumption, that Anthony experienced gastrointestinal problems during this time. Dr. Gershwin recognized that if the facts were as presented in the medical records, then he could not opine that the April 5, 2007 RotaTeq vaccination caused Anthony's intussusception. Exhibit 37 (second report from Dr. Gershwin) at 1 (stating "Without [Ms. Hurd's] affidavit, I would not be able to render the opinions in my [first report]."); tr. 82 (stating "I relied quite heavily on the testimony of Mrs. Hurd. If Anthony didn't have any evidence of any intestinal problems during that window, then I wouldn't be able to site here and express that opinion."); tr. 117 (stating "if we exclude the testimony of Mrs. Hurd, I cannot give that opinion").

Ms. Hurd has not presented an alternative theory that assumed Anthony was healthy from April 5, 2007 to June 1, 2007. See Pet'r Reply (stating Ms. Hurd agrees "with Respondent that this case initially hinges on the Court's determination of Ms. Hurd's credibility. Dr. Gershwin relies on Ms. Hurd's testimony as the basis of his opinion. Therefore, this Court must determine if Ms. Hurd's testimony is reliable before moving on to the evaluate the opinion of Dr. Gershwin.").

Because the only theory presented by Ms. Hurd assumes a set of facts that is not supported by a preponderance of the evidence, Ms. Hurd cannot prevail.<sup>11</sup> Burns v. Sec’y of Health & Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993) (stating “The special master concluded that the expert based his opinion on facts not substantiated by the record. As a result, the special master properly rejected the testimony of petitioner’s medical expert.”).

#### **IV. Conclusion**

Ms. Hurd has not established that a set of facts that support the basis for her expert’s opinion that the April 5, 2007 RotaTeq vaccination caused Anthony’s intussusception. Therefore, she is not entitled to compensation. The Clerk’s Office is instructed to issue judgment in accord with this decision unless a motion for review is filed.

A status conference will be held on **Thursday, July 22, 2010 at 11:00 A.M., Eastern Time**. The purpose of this status conference will be to discuss Ms. Hurd’s pending motion for attorneys’ fees and costs.

IT IS SO ORDERED.

S/ Christian J. Moran  
Christian J. Moran  
Special Master

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<sup>11</sup> Even if Ms. Hurd’s account were credited fully, she would not necessarily be entitled to compensation. Respondent challenges whether Ms. Hurd has met her burden of establishing, by a preponderance of the evidence, the factors identified in Althen v. Sec’y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Resp’t Br. at 10-25. Respondent also argues that a virus caused Anthony’s intussusception. Resp’t Br. at 26-27. Answering these questions is not necessary because of the fact-finding set forth in the text.