

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

TRYSTAN SANCHEZ, by and *
through his parents, GERMAIN *
SANCHEZ and JENNIFER *
SANCHEZ, *

Petitioners, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

No. 11-685V
Special Master Christian J. Moran

Filed: April 10, 2013

UNPUBLISHED

Contemporaneous records;
Testimony contradicting
records; Developmental delay;
Onset

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RULING FINDING FACTS*

Germain and Jennifer Sanchez (“petitioners”) filed a petition for compensation under the National Childhood Vaccine Injury Compensation Program (the “Vaccine Act” or “Program”), 42 U.S.C. § 300aa-10 et seq. (2006), alleging that their son, Trystan, suffered fever, seizures, and subsequent developmental delay caused by the diphtheria-tetanus-acellular pertussis (“DTaP”), hepatitis B, Haemophilus influenzae type B (“Hib”), and pneumococcal conjugate vaccines he received on February 5, 2009. Pet. at 12.

* The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

To support their claim for compensation, the Sanchezes filed medical records and affidavits. The recitation of events in the affidavits does not match entirely with the events set forth in the medical records. Specifically, the affidavits assert that Trystan experienced some health problems that are not documented in the contemporaneously created medical records. When special masters are confronted with discrepancies between medical records and affidavits, special masters are encouraged to hold hearings to evaluate the testimony of the affiants. See Campbell v. Sec’y of Health & Human Servs., 69 Fed. Cl. 775, 779-80 (2006).

A hearing was held on May 15, 2012, during which Germain and Jennifer Sanchez testified. Also testifying for petitioners were Germain’s mother and aunt, Lupe Sanchez and Bertha Sanchez, and Jennifer’s mother, Emma Fernandez. All five witnesses appeared in person.

Following the hearing, a status conference was held, and the parties agreed to submit a statement of proposed facts. The parties filed a joint statement of uncontroverted facts (“Joint Statement”) on November 8, 2012.¹ With this proposed submission, findings of facts are ready to be made.

Standard 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).

¹ The parties’ joint statement provides a chronology of the facts as derived from the medical records and the testimony of petitioners’ witnesses. See, e.g., Joint Statement at 2, ¶ 6. Respondent states her challenges to proposed facts in footnotes. See, e.g., *id.* at 2, ¶ 6 n.1.

The parties’ use of qualifying language, such as “reported” or “recalled,” in their statement of purportedly uncontroverted facts is not helpful. For example, the parties submit that “*According to Jennifer, between her birthday and the next time she took him to the doctor nearly two months later in late April, Trystan lost control of his head.*” *Id.* at 6, ¶ 17 (citing Transcript (“Tr.”) at 78) (emphasis added). That Jennifer said this is undisputed—it is part of the transcript. However, what is relevant is the truth of the underlying assertion—“Trystan lost control of his head” between mid-February and late April.

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 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 having 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 “[i]n 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 contemporaneously created medical records can contradict a testimonial assertion that symptoms appeared on a certain date. See, e.g., Doe/70 v. Sec’y of Health & Human Servs., 95 Fed. Cl. 598, 608 (Fed. Cl. 2010) (stating “[g]iven the inconsistencies between petitioner’s testimony and his contemporaneous medical records, the special master’s decision to rely on petitioner’s medical records was rational and consistent with applicable law”), aff’d sub nom. Rickett v. Sec’y of Health & Human Servs., 468 Fed. Appx. 952 (Fed. Cir. 2011) (non-precedential opinion); 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 is rebuttable, however. 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. To overcome the presumption that written records are accurate, testimony is required to be "consistent, clear, cogent, and compelling." Blutstein v. Sec'y of Health & Human Servs., No. 90-2808V, 1998 WL 408611, at *5 (Fed. Cl. Spec. Mstr. June 30, 1998).

In determining the accuracy and completeness of medical records, special masters will consider various explanations for inconsistencies between contemporaneously created medical records and later given testimony. Recently, the Court of Federal Claims listed four such explanations. The Court noted that inconsistencies can be explained by: (1) a person's failure to recount to the medical professional everything that happened during the relevant time period; (2) the medical professional's failure to document everything reported to her or him; (3) a person's faulty recollection of the events when presenting testimony; or (4) a person's purposeful recounting of symptoms that did not exist. La Londe v. Sec'y Health & Human Servs., No. 06-435V, 2013 WL 1190784, at *17 (Fed. Cl. March 8, 2013).

In weighing divergent pieces of evidence, special masters usually find contemporaneously written medical records to be more significant than oral testimony. Cucuras, 993 F.2d at 1528. Testimony offered after the events in question is less reliable than contemporaneous reports when the motivation for accurate explication of symptoms is more immediate. Reusser v. Sec'y of Health & Human Servs., 28 Fed. Cl. 516, 523 (1993). However, compelling oral testimony may be more persuasive than written records. Campbell, 69 Fed. Cl. at 779 ("[L]ike 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) (“[T]he absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance.”) (citation omitted).

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 may involve 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).

General Assessment of Arguments and Evidence

The parties’ principal dispute concerns the value of documents created contemporaneously with events they purport to describe. Mr. and Mrs. Sanchez offer their own testimony and the testimony of their close relatives to describe the changes in Trystan’s behavior and health soon after the vaccinations he received during his six-month well-baby checkup on February 5, 2009.² The details

² The following provides a brief biographical sketch of each witness:

Germain Sanchez (father) is the husband of Jennifer Sanchez and father to their three children. Joint Statement at 2, ¶ 2; Tr. at 60.

Jennifer Sanchez (mother) is currently a stay-at-home mom. She previously worked at the post office as a mail carrier. Joint Statement at 2, ¶ 2; Tr. at 59-60.

Lupe Sanchez (“Grandma Lupe”) (paternal grandmother): cared for Trystan during the day while his parents worked, beginning on September 15, 2008, until approximately July 2009. Joint Statement at 2, ¶ 3; Tr. at 15, 63, 68. During this time, depending on Jennifer’s work schedule, Grandma Lupe would watch Trystan from one day to five days a week. Joint Statement at 2, ¶ 3; Tr. at 68.

Bertha Sanchez (“Aunt Bertha”) (paternal great aunt) first saw Trystan around the time he was three months old. Joint Statement at 2, ¶ 5; Tr. at 40. She next saw Trystan in March 2009, when the family gathered to watch a boxing match. Tr. at 43. At that time, Trystan was almost seven months old. Aunt Bertha also attended Jennifer’s baby shower on August 8, 2009. Tr. at 45. In total, she saw Trystan four or five times during his first year. Tr. at 54.

regarding petitioners' testimonial assertions are found in the section immediately below. The subsequent section lists the Secretary's challenges to petitioners' assertions. The Secretary focuses on the records created between Trystan's six-month vaccinations and his one-year well-child visit. She emphasizes the absence of reports documenting the seizure-like activity petitioners contend began soon after Trystan's vaccinations. The final section assesses the principal dispute and precedes the findings of fact.

Petitioners' Factual Assertions

Mr. Sanchez testified that Trystan began exhibiting unusual arm contortion behavior on the night of February 16, 2009, a day after his wife's birthday, and 11 days after Trystan's vaccinations. Joint Statement at 4-5, ¶ 13; Tr. at 184-86. Mrs. Sanchez testified that, during an urgent care visit the following day (February 17, 2009), she informed certified Physician Assistant Jonathan P. Luna that Trystan had been coughing, congested, and febrile. Joint Statement at 5, ¶ 15; Tr. at 74-75, 115; Exhibit 1 at 49. She also testified that she told Mr. Luna of Trystan's arm movements, but that he did not seem concerned and did not note her concerns. Joint Statement at 5, ¶ 15 n.4; Tr. at 74-75, 115.

Witnesses for petitioners testified that Trystan again exhibited arm contortion, as well as rigidity and inconsolable crying in March 2009. Joint Statement at 5-6, ¶ 16; Tr. at 25, 43, 79, 135-36, 191, 219-20. Additionally, Mrs. Sanchez testified that, between her birthday and late April 2009, when she next took Trystan to the doctor, Trystan lost head and trunk control, no longer made eye contact, did not want to play, and continued to have arm contortions. Joint Statement at 6, ¶ 17; Tr. at 76, 78, 111-12. According to Mrs. Sanchez, she did not return to the doctor until late April because she had been told by the physician assistant, whom she mistakenly thought was a doctor, that Trystan was fine. Joint Statement at 6, ¶ 17; Tr. at 75-77, 83, 134.

On April 29, 2009, Trystan, then over eight months old, was taken to Dr. Nabil Seleem. Joint Statement at 7, ¶ 18; Tr. at 80, 116, 125; Exhibit 1 at 50. Dr. Seleem noted that Trystan had been coughing and congested for two weeks. Exhibit 1 at 50. Mrs. Sanchez testified that, although she told Dr. Seleem about

Emma Fernandez ("Grandma Fernandez") (maternal grandmother): has a close relationship with her daughter and grandson; she speaks with Jennifer on the phone regularly and sees Trystan frequently, at least two or three times a week. Joint Statement at 2, ¶ 4; Tr. at 145-46, 149-50.

Trystan's arm movements, he did not note her concerns. Tr. at 80, 116, 125; see also Exhibit 1 at 50. Additionally, despite indication in the medical records that Dr. Seleem conducted a neurological exam, Mrs. Sanchez testified, based on her observation of later neurological exams, that he did not perform a neurological exam. Joint Statement at 7, ¶ 18 n.8; Tr. at 80-81, 136-37.

On May 13, 2009, two weeks after Dr. Seleem's examination of Trystan, Dr. Philip S. Brown conducted an exam. Exhibit 1 at 53. Like Dr. Seleem, Dr. Brown noted other areas of concern, but did not note Trystan's loss of eye contact, lack of speech, and other behavioral changes apparent to Mrs. Sanchez and her mother at the time. Joint Statement at 7, ¶ 19; Tr. at 85, 153-55; Exhibit 1 at 53. Mrs. Sanchez and her mother, Grandma Fernandez,³ testified that Dr. Brown was not listening, was unresponsive to the issues being brought up, and was very rude and hurried. Joint Statement at 7, ¶ 19 n.10; Tr. at 85-87, 156-58.

On August 8, 2009, during Mrs. Sanchez's baby shower, Trystan reportedly was inconsolable, crying a high-pitched cry. Joint Statement at 8, ¶ 21; Tr. at 25, 45-46, 88-89, 137, 159-60. Witnesses also testified that he was limp and was contorting his arms.⁴ Joint Statement at 8, ¶ 21; Tr. at 25, 46, 53-54, 89, 137, 160.

In summation, Mr. and Mrs. Sanchez and their close relatives testified that they noticed Trystan getting "sick all the time" in the six months after his vaccinations. Joint Statement at 8, ¶ 20; Tr. at 20, 33, 36, 70, 164-65, 181. They also stated that Trystan began to lose skills during the same six month period. Joint Statement at 8, ¶ 20; Tr. at 21-23, 33, 86, 190. According to their testimony, Trystan could no longer roll, crawl, sit, hold his bottle, make eye contact, or try to talk. He was silent and detached and lost the ability to control his head, sit, stand, talk, eat and chew. Joint Statement at 8, ¶ 20 n.12; Tr. at 21-23, 33, 86, 190. In

³ In paragraph 19 of their Joint Statement, the parties mistakenly refer to Grandma Lupe's presence at Trystan's May 13, 2009 doctor visit. Grandma Lupe, however, never went with Trystan to see a doctor. Tr. at 37. It was Grandma Fernandez who accompanied her daughter to see Dr. Brown on May 13, 2009. Id. at 155-56.

⁴ The testimony concerning Trystan's body on August 8, 2009, varies. Grandma Lupe described Trystan as uncontrollable. Tr. at 25. Aunt Bertha described him as "flexible, like it was no muscle, no body, like it was no bones, not a structure." Id. at 46. Mrs. Sanchez said he "was really tight and he was doing the contortion of his arm a lot that day." Id. at 89. Asked if she recalled if Trystan was "noodly," Mrs. Sanchez said she remembers him being "[r]eally rigid." Id. at 137. Finally, Grandma Fernandez said she "had to hold [Trystan] like he was a newborn." Id. at 160. She added that his "arms would go back and his fists would clench." Id.

support of their assertions, the Sanchezes submitted an EEG report from September 17, 2010, which notes the parental report that Trystan had been “having jerking movements at six months of age.” Exhibit 1 at 181; Joint Statement at 12, ¶ 35 n.15.

The Secretary’s Challenges

The Secretary challenges several of Mr. and Mrs. Sanchez’s assertions. Specifically, she contests the assertions that:

- the Sanchezes reported Trystan’s alleged arm contortions to Mr. Luna at his February 17, 2009 urgent care visit, Joint Statement at 5, ¶ 15 n.4;
- Dr. Seleem did not conduct a neurological exam at Trystan’s April 29, 2009 visit,⁵ Joint Statement at 7, ¶ 18 n.8;
- Dr. Brown was not responsive to the concerns of Mrs. Sanchez and Grandma Fernandez at Trystan’s May 13, 2009 visit, Joint Statement at 7, ¶ 19 n.10;
- Trystan began “having jerking movements at six months of age,” Joint Statement at 12, ¶ 35 n.15; and
- after his February 5, 2009 vaccinations, Trystan was sick all the time, Joint Statement at 8, ¶ 20 n. 11, and began to lose skills, Id. at 8, ¶ 20 n. 12.

To each of these assertions, respondent accurately “contends that there is an absence of contemporaneous medical records, or any other documentation, to support this proposed fact.” See, e.g., Joint Statement at 5, ¶ 15 n.4.

Discussion

As discussed above, the inconsistency between contemporaneous medical records and a witness’s testimony concerning symptoms can be explained in

⁵ Mrs. Sanchez testified that Dr. Seleem did not note her concerns about Trystan’s arm movements or development during his April 29, 2009 visit. Joint Statement at 7, ¶ 18; Exhibit 1 at 50-52; Tr. at 70, 80-83, 116, 125. Unlike other instances where the Secretary challenges petitioners’ assertions about unreported complaints, she did not do so with this assertion.

various ways. La Londe, 2013 WL 1190784, at *17. Although more explanations may exist, the four listed in La Londe provide a suitable framework for assessing this case. These four explanations can be divided into two groups. The first group (“group one”) holds that the medical records are incomplete, either because a person failed to recount to the doctor everything that happened during the relevant time period, or because the doctor failed to record everything reported to her or him. The second group (“group two”) holds that the testimony offered is unpersuasive, either because a witness failed to recollect the events accurately, or because a witness fabricated a condition that did not exist. The Sanchezes are claiming that they belong to group one.

In some cases, petitioners offer a reason for not reporting the observance of an unusual behavior to a doctor. For example, parents may not recognize the significance of a behavior. See, e.g., Markovich v. Sec’y of Health & Human Servs., 477 F.3d 1353, 1354 (Fed. Cir. 2007) (“The Markoviches allege that, at the time, they were not concerned by the eye blinking episodes because they thought the episodes were merely an indication that Ashlyn was tired.”). The Sanchezes generally do not claim that they failed to recognize the significance of Trystan’s behaviors, nor could they given the drastic problems they allege he exhibited. Further, they testified that they were aware Trystan was not well. When a child is sick, loving parents like the Sanchezes typically call their doctor to complain of the persistence of an abnormal behavior.⁶ The Sanchezes did not testify to having called Trystan’s doctor when his arm contorting persisted or when new conditions arose. The medical records reflect this inaction.

Although the Sanchezes provided a reason for not seeking medical attention after the February 17, 2009 appointment with Mr. Luna, a “failure to report” is not their primary claim to inclusion in group one. Rather, Mr. and Mrs. Sanchez testified that three different health care providers, on three different occasions, failed to document their complaints about Trystan’s unusual behaviors. Tr. at 74-75, 115 (Mr. Luna); Tr. at 80, 116, 125 (Dr. Seleem); Tr. at 85-87 (Dr. Brown).

Finding in favor of petitioners’ testimony could be within reason had only one medical professional failed to document a complaint. It is unlikely, however, that each of the relevant medical professionals failed to record what was reported

⁶ Mrs. Sanchez testified that she did not contact the doctor in the two months after Trystan’s February 17, 2009 urgent care visit because she was told by Mr. Luna, whom she thought was a doctor, that Trystan was okay. When new conditions (e.g., loss of head control and eye contact) manifest, however, the justification for not reporting to a doctor because of a previous assurance of normalcy is lost.

to him. Doctors and their staff are trained to record medical histories. The repeated failure of three such trained professionals is unlikely, especially considering the potential severity of the behaviors alleged.

The absence of notation in any of the contemporaneous medical records that Trystan was exhibiting the behaviors the Sanchezes now testify having reported supports the conclusion that these reports were not made at the time alleged. Furthermore, the obvious love the Sanchezes have for Trystan provides the basis for the expectation that they would have sought medical attention for those behaviors once they occurred. Taken together, logic dictates that Trystan did not exhibit seizure-like behavior soon after his vaccinations.

Though claiming inclusion in group one, the Sanchezes belong to group two. Between faulty memory and intentional deception, the former is the more likely explanation for the inconsistencies between the contemporaneous medical records and petitioners' later offered testimony. That testimony was offered over three years after the events in question. As expected, memories dim with the passage of time.

The faultiness of the witnesses' recollection is illustrated by a repeated attribution of unrealistic abilities to Trystan. For example, three witnesses said Trystan could hold his head up at birth. Tr. at 15 (Grandma Lupe); *id.* at 60 (Mrs. Sanchez); *id.* at 174 (Mr. Sanchez). Grandma Lupe testified Trystan could say words at three months old. *Id.* at 27. It is highly unlikely that a baby could perform these activities at the time ascribed to him or her. It is much more likely that Trystan achieved these milestones at a typical age. Exhibit 1 at 44-46. Although these examples demonstrate that the witnesses could recall that events happened, they also demonstrate that the witnesses could not recall when those events happened.

The following findings of fact reflect the determinations concerning the onset of Trystan's condition. Those factual disputes not yet resolved are addressed below.

Specific Findings of Fact

Birth to Six Months – August 16, 2008 to February 5, 2009

1. Trystan was born on August 16, 2008, to Jennifer and Germain Sanchez. Exhibit 1 at 89; Tr. at 60.

2. At birth, Trystan appeared to be a normal, healthy child. Exhibit 1 at 89; Tr. at 14, 60.⁷ Trystan and his mother were discharged on August 18, 2008. Exhibit 1 at 106.

3. Four days later, on August 22, 2008, Trystan was seen by his pediatrician for a check-up and to be circumcised. The pediatrician observed that Trystan was jaundiced, but otherwise the physical exam appeared to be normal. Exhibit 1 at 34-35. During this visit, Trystan received his first dose of the hepatitis B vaccine. Id. at 35-38. No adverse response is noted in the medical records. One week later, on August 29, 2008, Trystan returned for follow-up care for his circumcision and treatment for oozing from his navel. Id. at 40. He did not return to the pediatrician again until he was nearly six months old. Id. at 44.

4. Trystan appeared healthy during his first six months. Exhibit 1 at 46; Tr. at 62. During that time, he would smile, laugh, play, and babble.⁸ Tr. at 16-17, 27, 41, 50, 62-63, 110, 147-49, 176-77. He was also making eye contact, did not cry that much, and began trying to crawl. Id. 16-17, 41, 63, 148. Additionally, he was able to roll over, hold his bottle and sippy cup, and play peekaboo. Id. at 16, 50-51, 62, 110, 148, 176.

⁷ Mr. and Mrs. Sanchez and Grandma Lupe testified to having noticed that, at birth, Trystan was strong, happy, and able to hold his head up. Tr. at 15-16, 60, 173-74. Respondent challenged this recollection based on an absence of support in the contemporaneous medical records. Joint Statement at 2, ¶ 6 n.1. The undersigned finds that Trystan was not able to hold his head up at birth. Babies do not have the necessary strength in their necks to support their heads at birth.

⁸ Witnesses for petitioners testified that Trystan was able to say “agoo,” “woo,” “mommy,” and “dada” at some point during his first six months. Tr. at 16, 27, 50, 62, 110. Grandma Lupe stated that Trystan would say “woo,” “dada,” and “mommy” during his first six months. Id. at 16. She also testified that Trystan said his first word, “dada,” at three months old. Id. at 27. Mrs. Sanchez testified, however, that Trystan would not say “dada” directly to her husband, but would babble it. Id. at 110. While Trystan may have been able to coo and babble, it is unlikely he was able to speak “mommy” and “dada” at such an early age.

5. Given that Trystan appeared so healthy, Jennifer and Germain did not take him to the doctor in his first six months. Tr. at 62, 177.

Vaccination – February 5, 2009

6. Trystan was taken to his six-month well-baby checkup with Dr. Philip Brown on February 5, 2009. Exhibit 1 at 44. His growth and development were found to be normal. *Id.* at 46; Tr. at 65. Dr. Brown noted that he was meeting his developmental milestones, including: turning to sound, self-feeding, self-comforting, responding to his name, sitting with support, grasping and mouthing objects, smiling, laughing, squealing, showing interest in toys, showing differential recognition of parents, babbling reciprocally, rolling over from back to front, and standing when placed. Trystan also had “no head lag when pulled to sit.” On this day, he received the DTaP, hepatitis B, Hib, and pneumococcal conjugate vaccines. Dr. Brown recommended that Trystan return in two months to receive further vaccinations. Exhibit 1 at 46.

Health from February 5, 2009 to April 29, 2009

7. After the wellness check with Dr. Brown, Jennifer drove to Grandma Lupe’s house, arriving at about 11:00 a.m. Tr. at 31, 67. Trystan was inconsolable, crying a loud, high-pitched cry, as if he was in pain. *Id.* at 18-19, 67, 177-79. He began to run an axillary temperature of 102.2 degrees and developed a lump on his left thigh that was “really hot.” *Id.* at 17-20, 32, 67-69, 113, 177-79. Jennifer gave Trystan Tylenol for the fever, which ebbed and flowed over the next few days. *Id.* at 20, 30, 68, 151, 178, 180.

8. On Jennifer’s birthday, February 15, 2009, Trystan had run a fever again and was congested. Tr. at 70-71. During this time, Jennifer was pregnant with her third child and suffering from nausea and headaches. *Id.* at 181. On February 16, 2009, the night after Jennifer’s birthday, Trystan’s fever became worse and, around midnight, Germain took a “loud, high-pitched” crying Trystan downstairs so that his wife could get sleep. *Id.* at 71-72, 183. After he was able to calm Trystan, he would startle awake like he could not breathe through his stuffy nose. *Id.* at 183-84. One of those times, it took Germain a bit longer to calm Trystan down and “he kept kicking his feet and jerking around” in Germain’s arms, “almost as if he didn’t want to be held.” *Id.* at 184.

9. Germain took Trystan back upstairs around one or two o'clock in the morning to tell his wife about Trystan's apparent discomfort. Tr. at 186. Trystan's temperature was 103.2 degrees. Tr. at 72, 113. The Sanchezes did not take Trystan to urgent care during the night, because after they gave him some more fever reducer and another cool bath, he fell asleep. Id. at 73-74, 187-88.

10. On the morning of February 17, 2009, Trystan returned to the pediatrician for an urgent care visit where he was examined and treated by certified Physician Assistant Jonathan P. Luna, who diagnosed Trystan with a "[c]ommon cold" and "[v]iral syndrome." Exhibit 1 at 48, Tr. at 74, 115. Trystan's temperature was 98.9 degrees and "fever" was noted. Exhibit 1 at 49; Tr. at 74, 115. Jennifer told Mr. Luna that Trystan had been coughing, congested, with fever. Exhibit 1 at 49. She did not mention anything about Trystan exhibiting unusual arm movements. See id. at 48-51.

11. At this time, Trystan did not begin to exhibit arm contortions.

12. Sometime thereafter, Trystan's extended family gathered to watch a boxing match. Tr. at 25, 219. During this gathering, Trystan was sick, crying, fussy, and congested. Id. at 191. He was not contorting his arms nor was he limp or rigid.

13. Between Jennifer's birthday and the next time she took him to the doctor nearly two months later in late April, Trystan suffered from cough and congestion episodically. Exhibit 1 at 50. During this time, he did not lose control of his head and trunk, nor did he stop making eye contact or stop wanting to play anymore. He did not exhibit arm contortions.

Health from April 29, 2009 to August 17, 2009

14. On April 29, 2009, when pediatrician Dr. Nabil R. Seleem saw Trystan, then eight and a half months old, he noted that Trystan had suffered cough and congestion for two weeks. No unusual arm movements or developmental issues were reported. In his neurological review, Dr. Seleem noted "[n]o neurological symptoms." Ultimately, he diagnosed Trystan with an ear infection and bronchitis and prescribed amoxicillin. Exhibit 1 at 50-52.

15. Trystan's mother and grandmother brought Trystan back to the clinic to see Dr. Brown on May 13, 2009. Dr. Brown observed that Trystan's infection appeared to be resolving, and recommended continued use of a humidifier. No

reports of the loss of eye contact or an inability to roll over were made at this time. Exhibit 1 at 53.

16. The visits with Mr. Luna, Dr. Seleem, and Dr. Brown show that when Trystan was sick, even with relatively routine illnesses of early childhood, his parents brought him to the doctor.

17. During the six months after Trystan's vaccinations, his parents and his grandmothers reported noticing that Trystan seemed to get "sick all the time." Tr. at 20, 33, 36, 70, 164-65, 181. This testimony is not accepted as accurate.

18. Around June 1, 2009, Trystan began losing skills. (The basis for this finding is explained in paragraph 20, below.)

19. At Jennifer's baby shower, on August 8, 2009, Trystan exhibited inconsolable crying. Tr. at 25, 45-46, 88-89, 137, 159. At times, instead of being rigid, his body was limp, as if he had no muscle tone. *Id.* at 46, 53. At other times during this day, he was contorting his arm. *Id.* at 89, 137, 160.

Second Set of Vaccinations – August 17, 2009

20. At one year old, Trystan was seen by Physician Assistant Micaela Marin-Tucker for a well-child exam. Exhibit 1 at 54-56; Tr. 89-90. Mrs. Sanchez informed Ms. Marin-Tucker that she "noticed a change in [Trystan's] development about 2-3 months ago⁹ but since she had taken [Trystan to the pediatric clinic] with Dr. Brown she thought that everything was ok."¹⁰ Exhibit 1 at 54. (This history is the basis for the conclusion in paragraph 18 that Trystan's loss of skills began around June 1, 2009.) Upon a review of systems, Ms. Marin-Tucker found that Trystan did not walk, stand, crawl, and hold his head up while sitting, or make any attempt to move his lower extremities. She also noted in her examination that his

⁹ According to this report, Trystan's developmental changes began between May 17, 2009 and June 17, 2009.

¹⁰ Mrs. Sanchez testified that she had reported to Ms. Marin-Tucker that Trystan's developmental changes began five to six months before his August 17, 2009 visit, which would be between February 17, 2009 and March 17, 2009. Tr. at 90-91. Mrs. Sanchez's August 17, 2009 recounting of the onset of Trystan's developmental delays is more reliable than testimony offered more than two years after his visit to Ms. Marin-Tucker. Testimony offered so long after the events in question is less reliable than reports provided closer in time, when the motivation for accurate explication of symptoms is more immediate.

extremities seemed soft, yet rigid at times. As the result of her examination, Ms. Marin-Tucker ordered a battery of lab tests. Exhibit 1 at 54-55. She also referred Trystan to a neurologist, physical therapist, and occupational therapist. *Id.* at 55; Tr. at 90. Additionally, Trystan received his third hepatitis B vaccine, as well as his second doses of the pneumococcal conjugate, DTaP, and Hib vaccines. Exhibit 1 at 55; Tr. at 92. Trystan was to return to the nurse the next week to receive the remaining vaccinations that were due, including the measles, mumps, and rubella, varicella, and hepatitis A vaccines. Exhibit 1 at 55.

Health from October 7, 2009 to November 12, 2009

21. About six weeks later, on October 7, 2009, both Jennifer and Germain went to see Ms. Marin-Tucker for a follow-up. In a review of Trystan's systems, Ms. Marin-Tucker noted no seizures, weakness, or tics. She made no notation of tremors or twitching. Upon neurologic examination, she found Trystan to be unable to grasp, sit, crawl, or make much eye contact. Germain reported that there was "another child in the family with the same symptoms and doctors [could] find nothing wrong." Ms. Marin-Tucker emphasized the importance of making the appointment with a neurologist as soon as possible. Exhibit 1 at 57-58.

22. Between October 7, 2009, and his neurology visit on November 12, 2009, Trystan began having "tremors" or "twitching" of his whole body.¹¹ Tr. at 199-200; Exhibit 1 at 140.

¹¹ In their Joint Statement, the parties apparently agree that Trystan "started having 'tremors' or 'twitching' of his whole body after the second set of vaccines" on August 17, 2009. Joint Statement at 9, ¶ 23. Witnesses for petitioners testified that the tremors began after the second set of vaccines and before Trystan's October 7, 2009 visit with Ms. Marin-Tucker. Grandma Lupe testified that after Trystan's second set of vaccinations "[h]e started contorting his arms back more frequently." Tr. at 26. On direct examination, Mrs. Sanchez testified that Trystan's arm contorting persisted after these vaccines, but "got worse within a few days." *Id.* at 92. On re-direct, she stated that his tremors began "a week to two weeks" after the vaccinations. *Id.* at 141. Mr. Sanchez testified that Trystan's "shaking or kind of like twitching," began after the second set of immunizations, but he did not specify how soon after the vaccinations. *Id.* at 195.

The medical record created closest in time to the vaccination does not reflect the onset of full-body spasms as soon after Trystan's second set of vaccinations as the witnesses for petitioners recall. *See supra* ¶ 20. Mrs. Sanchez testified that her husband told Ms. Marin-Tucker "what Trystan was doing with the arm contorting and the shakiness," Tr. at 141, however there is no record of these symptoms in Ms. Marin-Tucker's notes on the history of the present illness. Exhibit 1 at 57. Ms. Marin-Tucker did note, however, that Mr. Sanchez, after stating that Trystan "was normal until [] 6 months of age and got his shots," denied "any new

23. On November 12, 2009, Trystan was taken to see Dr. David J. Michelson, the neurologist to whom he was referred. Dr. Michelson recorded reports that Trystan was unable to sit independently, his hands stayed closed, and his feet went forward when at rest. He noted that, at times, Trystan could hold his mouth open tightly and drool, but at other times he could chew and swallow well. While Trystan had previously held his right arm stiffly behind him episodically, he had not done this lately. Dr. Michelson's review of systems was positive for muscle spasms, global developmental delay, weakness, walking problems, constipation and birthmarks. Dr. Michelson noted that Trystan suffered from "global developmental delay of unclear etiology, though a genetic predisposition is suspected based on the family history and a [central nervous system] cause is suggested by the physical exam findings." Exhibit 1 at 140-41.

24. The parties agree that the medical records created after Dr. Michelson saw Trystan are accurate. Thus, additional fact-finding is not needed at this time.

Conclusion

The parties are ordered to provide this ruling to any expert they retain. If the expert's opinion is not consistent with these findings of fact, the opinion is likely to not be persuasive. See Burns v. Sec'y of Health & Human Servs., 3 F.3d 415, 417 (1993) (holding that the special master did not abuse his discretion in refraining from conducting a hearing when the petitioner's expert "based his opinion on facts not substantiated by the record").

A status conference is set for **Wednesday, April 24, 2013 at 1:00 P.M.** Eastern Time. The Sanchezes should be prepared to propose the next step in this case.

IT IS SO ORDERED.

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

complaints" but reported "no improvement either." Id. Not until November 12, 2009, do the medical records show Trystan was experiencing muscle spasms. See supra ¶ 20. As discussed above, it is unlikely that loving parents like the Sanchezes would fail to report such a serious symptom until a month after observing it. This is especially true considering Trystan had been referred to a neurologist on August 17, 2009.