OFFICE OF SPECIAL MASTERS

Filed: March 30, 2005
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GENE A. VELCHEK,	*	
	*	
Petitioner,	*	
	*	No. 02-1479V
v.	*	
	*	TO BE PUBLISHED
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

Daniel L. Gaumer, Decatur, Illinois, for Petitioner.

Julia W. McInerny, United States Department of Justice, Washington, D.C., for Respondent.

DECISION[1]

SWEENEY, Special Master

On October 31, 2002, Gene A. Velchek filed a petition[2] for compensation under the National Childhood Vaccine Injury Act ("Vaccine Act"). 42 U.S.C. § 300aa-1 to -34 (1991 & Supp. 2002). The petitioner alleges that he received a hepatitis B[3] vaccination on October 12,

* Pursuant to General Order #10, this Decision is being reissued for publication at the unopposed request of respondent's counsel.

[1] The court encourages the parties to review Vaccine Rule 18, which affords each party 14 days to object to disclosure of (1) trade secrets or commercial or financial information that is privileged or confidential or (2) medical information that would constitute "a clearly unwarranted invasion of privacy."

[2] The petition was filed pro se by Gene A. Velchek. On March 26, 2003, Daniel L. Gaumer entered his Appearance on behalf of petitioner.

[3] The hepatitis B vaccine is "a noninfectious viral vaccine derived by recombination from hepatitis B surface antigen and cloned in yeast cells; administered intramuscularly for immunization of children and adolescents and of persons at increased risk for infection." Dorland's Illustrated Medical Dictionary 1999 (30th ed. 2003).

1999, and was injured as a result of that vaccination. Specifically, petitioner alleges that he suffered from anaphylaxis on October 31, 1999, with a sequela of serum sickness, a significant aggravation of a pre-existing respiratory condition, and aggravation of his vision as a result of the hepatitis B vaccination. Subsequent to the filing of the petition, respondent's counsel filed a motion to dismiss alleging that the onset of petitioner's symptoms occurred prior to October 31, 1999, meaning that the petition was filed outside the statute of limitations and thus prevents the court from exercising jurisdiction in this matter. In response, petitioner filed six affidavits from, among others, treating physicians, which petitioner argues resolve the jurisdictional dispute in his favor. Because of the inconsistencies that exist in the medical records with regard to dates of vaccinations and onset date, a hearing was conducted on April 6, 2004. On August 9, 2004, the court issued an order granting counsels' request to dispense with posthearing briefs. As explained more fully below, the court finds that the petition filed on October 31, 1999, is not timely and must be dismissed.

FACTUAL BACKGROUND

The Petition

Petitioner was born on April 16, 1944.[4] Pet. at 1. In the five years prior to the vaccination at issue in this case, petitioner reports being in good health; he had missed no days of work and only had been treated for controlled high blood pressure and bone spurs in his feet. Id. at 3.

On October 12, 1999, petitioner received his third hepatitis B vaccination in Decatur, Illinois. Id. at 1. According to petitioner, beginning nineteen days later, on October 31, 1999, he suffered from an anaphylaxis[5] that affected his muscular, skeletal, nervous, and vascular systems. Id. Petitioner also alleges that these symptoms led to a sequela of serum sickness.[6] Id.

Specifically, petitioner alleges that at 10:00 a.m. on October 31, 1999, while playing on his living room floor with his youngest child, he experienced "complete and total muscle fatigue

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[4] All references to the Petition shall be designated herein as "Pet. at __."

[5] Anaphylaxis is "a type I hypersensitivity reaction . . . in which exposure of a sensitized individual to a specific antigen or hapten results in urticaria, pruritus, and angioedema, followed by vascular collapse and shock and often accompanied by life-threatening respiratory distress." Dorland's Illustrated Medical Dictionary, supra note 3, at 73.

[6] Serum sickness is "a hypersensitivity reaction to the administration of foreign serum or serum proteins characterized by fever, urticaria, arthralgia, edema, and lymphadenopathy. It is caused by the formation of circulating antigen-antibody complexes that are deposited in tissues and trigger tissue injury mediated by complement and polymorphonuclear leukocytes." Dorland's Illustrated Medical Dictionary, supra note 3, at 1694.

of the upper and lower extremities," which prevented him from being able "to rise from the floor and support himself." Id. Petitioner labels this event as anaphylaxis–an acute systemic type of allergic reaction–and describes the following resulting symptoms:

> Initially the petitioner was [un]able to get up from the floor; he later was unable to get out of bed unaided, was unable to lift arms to brush teeth or dress himself, was unable to move lower legs to climb stairs or get up from a chair, he experienced a rash on both arms, had swollen lymph nodes under both arms, had problems with vision or lacking the ability to focus with both eyes, was unable to sleep for days at a time, experienced pain in all joints of the body, all areas of his body were sore to touch, and he suffered from total fatigue of all muscles of the body.

Id. at 2. Petitioner also alleges that as a result of this acute anaphylaxis, he suffered from the sequela of serum sickness. Id. He described the symptoms of the serum sickness as follows:

> [T]he petitioner experienced acute pain in all joints of the body, being unable to lift arms and move legs to climb stairs or get out of a chair, was unable to get in or out of bed without assistance, nor able to dress himself. The petitioner also experienced blood in his stool, rashes, elevated blood pressure, vision problems, acute pain in joints, and general fatigue.

Id. In addition, petitioner reports that as a result of the serum sickness, he underwent surgery to remove a soft tissue tumor from his groin area, suffered from inflammation of his colon, and suffered additional blood disorders and complications associated with his heart and lungs. Id.

Further, petitioner alleges that the hepatitis B vaccination significantly aggravated his pre-existing respiratory condition, asbestosis.[7] Id. He describes his symptoms as: "experienc[ing] difficulty with breathing at times, having shortness of breath getting in and out of bed, and generally having trouble 'catching his breath.'" Id. Finally, petitioner alleges that as a result of the prednisone[8] he takes for his condition, his vision was aggravated and he now suffers from cataracts. Id.

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[7] Asbestosis is "a form of pneumoconiosis (silicatosis) caused by inhaling fibers of asbestos, marked by interstitial fibrosis of the lung varying in extent from minor involvement of the basal areas to extensive scarring." Dorland's Illustrated Medical Dictionary, supra note 3, at 161. Pneumoconiosis is the "deposition of large amounts of dust or other particulate matter in the lungs, and the subsequent tissue reaction." Id. at 1461.

[8] Prednisone is "a synthetic glucocorticoid derived from cortisone, administered orally as an anti-inflammatory and immunosuppressant in a wide variety of disorders." Dorland's Illustrated Medical Dictionary, supra note 3, at 1500.

As a result of his symptoms, petitioner reports that he has been under the care of several physicians. Id. Initially, petitioner was under the care of Ann Grootegoed, D.O. Id. Petitioner subsequently came under the care of Muhammad N. Khan, M.D., who took over Dr. Grootegoed's practice. Id. Petitioner is also under the care of Anthony F. Collins, M.D., a neurologist, for his bilateral brachial plexopathies, and Nehemiah T. Tan, M.D., a rheumatologist, for his serum sickness. Id.

The Medical Records[9]

According to the medical history taken by Dr. Grootegoed, petitioner's primary care physician, petitioner had a history of a mildly sclerotic aortic valve,[10] high blood pressure, high cholesterol, and asbestosis. Pet. Ex. 3 at 1. Further, petitioner's surgical history included an appendectomy in 1959, bilateral knee surgery in 1962 and 1964, a gall bladder removal, and back fusion in 1986. Id. Other notes by his primary care physician reveal a hernia repair in 1995 and bilateral feet pain in June 1999 that did improve. Id. at 3, 18. Other medical records indicate a history of a tonsillectomy in 1948, kidney stones in 1985, a three-day loss of consciousness in 1988, Bell's palsy and subsequent memory problems in 1991, hearing loss, and obesity. Pet. Ex. 2 at 102; Pet. Ex. 8 at 2-3; Pet. Ex. 9 at 2, 14, 20, 30-31, 44.

Petitioner had his first hepatitis B vaccination on March 30, 1999, and his second hepatitis B vaccination on April 30, 1999.[11] Pet. Ex. 1 at 1; Pet. Ex. 7 at 29. Petitioner then had his third hepatitis B vaccination, along with an influenza ("flu") vaccination, on October 12, 1999. Pet. Ex. 1 at 1; Pet. Ex. 7 at 29-30. On October 20, 1999, petitioner received a Pneumovax 23 ("pneumonia") vaccination. Pet. Ex. 7 at 31-32. All three hepatitis B vaccinations, as well as the flu and pneumonia vaccinations, were administered at Midwest Occupational Health Associates in Decatur, Illinois. Pet. Ex. 1 at 1; Pet. Ex. 7 at 29. These contemporaneous vaccination records provide irrefutable proof of petitioner's vaccination dates. However, the medical histories recorded by petitioner's health care providers contain inconsistencies both with respect to dates of vaccination and date of onset.

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[9] Petitioner filed eight exhibits, with the last exhibit subdivided into twenty-two parts, with the petition on October 31, 2002. These exhibits were refiled to comply with the Vaccine Rules and the Guidelines to Practice Under the National Vaccine Injury Compensation Program on April 14, 2003. The court will cite to the refiled exhibits; all references to the pertinent Petitioner's Exhibit shall be designated herein as "Pet. Ex.__ at __."

[10] In other words, the heart valve that prevents the backflow of blood from the aorta into the left ventricle had some mild hardening. See Dorland's Illustrated Medical Dictionary, supra note 3, at 1669, 2004.

[11] Curiously, the medical records from Midwest Occupational Health Associates indicate that petitioner received a "Hep B Booster" on September 14, 1998. Pet. Ex. 7 at 13.

On November 1, 1999, petitioner telephoned Midwest Occupational Health Associates to request a refill for Lotrisone cream. Pet. Ex. 7 at 34. **The contemporaneous note recorded by the nurse who handled the telephone call does not make any reference to the onset events petitioner alleges to have occurred just one day before, on October 31, 1999.** Id.

On November 15, 1999, petitioner saw Dr. Grootegoed complaining of bilateral shoulder and knee pain, muscle weakness, and burning and numb sensations in his hamstrings. Pet. Ex. 3 at 2-3. Dr. Grootegoed reported that petitioner had "**been noticing a weakness for 1 mo**" and had no complaints of shortness of breath or chest pain. Id. (emphasis added). Dr. Grootegoed also noted that petitioner had hepatitis B and flu vaccinations on October 12, 1999, and a **pneumonia vaccination on October 22, 1999**.[12] Id. Dr. Grootegoed referred petitioner to Dr. Collins. Id. at 3.

The next day, on November 16, 1999, petitioner saw Dr. Collins. Pet. Ex. 4 at 1-4. In a letter to Dr. Grootegoed, Dr. Collins explained petitioner's onset of symptoms in the following manner:

> However, he has had nothing similar to what **he started experiencing on October 12th.** At that time he had gotten a vaccination in the left deltoid muscle for hepatitis and also a flu vaccination. **About one or two days later** he began to notice pain in his axillary region under the left arm. This then produced weakness in the left arm particularly in the deltoid area and pain upon movement of his left arm. This then spread over the **next week or two** into the right arm with pain. However, his right arm had not been affected as badly as his left arm.

Id. at 1 (emphasis added). Dr. Collins diagnosed probable bilateral brachial plexopathies.[13] Id. at 3. This diagnosis was bolstered by the results of electrophysiological testing. Id. at 6.

Then, on November 19, 1999, Dr. Collins wrote a letter referring petitioner to Dr. Tan in order to determine whether petitioner was "developing some type of myositis or polymyalgia

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[12] Petitioner actually received the pneumonia vaccination on October 20, 1999. Pet. Ex. 7 at 32.

[13] The brachial plexus is the network of nerves "situated partly in the neck and partly in the axilla" and "originating from the ventral branches of the last four cervical spinal nerves and most of the ventral branch of the first thoracic spinal nerves." Dorland's Illustrated Medical Dictionary, supra note 3, at 1453. Brachial plexopathy is any neuropathy of the brachial plexus. Id. A neuropathy is "a functional disturbance or pathological change in the peripheral nervous system, sometimes limited to noninflammatory lesions as opposed to neuritis." Id. at 1257.

rheumatica."[14] Id. at 8-9. Dr. Collins noted: "[Petitioner] has developed some problems being able to pick up his arms **following . . . hepatitis, flu, and pneumonia vaccinations. This occurred around October 12th.**" Id. at 8 (emphasis added).

Petitioner returned to see Dr. Grootegoed on November 24, 1999. Pet. Ex. 3 at 2, 4. Petitioner's subsequent visits to a primary care physician apparently were with Dr. Khan, who took over Dr. Grootegoed's practice.[15] Id. at 5-17, 22.

Dr. Tan saw petitioner on November 30, 1999. Pet. Ex. 2 at 25-26. In a letter to Dr. Collins dated the same day, Dr. Tan explained petitioner's onset as follows:

> On October 12th, the patient had a hepatitis shot and a flu vaccine. **On October 22nd, he had a pneumonia vaccine**.[16] **About ten days later**, the patient developed flu-like symptoms. This was associated with pain first of all in one side of the body and then it became symmetrical.

Id. at 25 (emphasis & footnote added). Dr. Tan diagnosed a polymyalgia rheumatica-like illness and prescribed prednisone for treatment. Id. at 26.

At petitioner's follow-up visit with Dr. Tan on December 14, 1999, Dr. Tan noted petitioner's incomplete response to the prednisone treatment. Id. at 23. Dr. Tan explained that this reaction was "somewhat atypical for polymyalgia rheumatica" and it was therefore necessary to consider other causes of the arthritis.[17] Id. Dr. Tan wrote in a letter to Dr. Collins: "The patient is still insistent that this occurred **after his third hepatitis B vaccination.** This is an extremely rare phenomenon, but nevertheless should be considered." Id. (emphasis added).

On December 27, 1999, petitioner returned to see Dr. Tan with progressive arthritis. Id. at 21-22. In his letter to Dr. Grootegoed, Dr. Tan wrote:

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[14] Myositis is the "inflammation of a voluntary muscle." Dorland's Illustrated Medical Dictionary, supra note 3, at 1216. Myalgia is muscle pain; polymyalgia is pain that affects several muscles. Id. at 1205, 1481. Polymyalgia rheumatica is "a syndrome in the elderly characterized by proximal joint and muscle pain and a high erythrocyte sedimentation rate." Id. at 1481.

[15] The records from Dr. Grootegoed end on December 2, 1999. Pet. Ex. 3 at 4. The records for Dr. Khan begin on February 13, 2001. Id. at 5. There do not appear to be any primary care records for the gap between the two dates.

[16] See supra note 12.

[17] Arthritis is the "inflammation of a joint." Dorland's Illustrated Medical Dictionary, supra note 3, at 149.

> It is also curious to note that circulating immune complex was detected in the blood, going back to the patient's history which is **about six days after development of his arthritis after his vaccination with the hepatitis B vaccine.** This may represent a serum sickness type of reaction which is an immune complex reaction to the vaccine. It was also explained to the patient that it is an extremely rare phenomenon, but things like this do happen.

Id. (emphasis added). At petitioner's next visit with Dr. Tan on January 27, 2000, his polyarthritis was much improved and so Dr. Tan began to taper the prednisone dosage. Id. at 20. Petitioner continued to see Dr. Tan for follow-up visits through the time petitioner filed the petition in this case. See id. at 1-19. In a letter to Dr. Khan dated October 4, 2002, Dr. Tan wrote that petitioner "**still dates the onset of his illness to about 9 days after he took his third Hepatitis B vaccine.**" Id. at 2 (emphasis added). And, in a letter addressed to "To Whom it May Concern" dated October 16, 2002, Dr. Tan wrote: "**[Petitioner] dates his onset of illness about nine days after taking his 3rd Hepatitis B vaccine.**" Id. at 1 (emphasis added).

On September 18, 2000, petitioner saw Maung N. Tin, M.D., an ophthalmologist at Macon County Eye Center in Decatur, Illinois, with a six-week history of decreased visual acuity. Pet. Ex. 13 at 3-5. Petitioner reported that his vision was worse when he was taking prednisone. Id. at 3, 5. Dr. Tin reported: "**Pt had a reaction to Hep B shot 1 year ago Oct 99 sore joints.**" Id. at 3 (emphasis added). Dr. Tin explained that petitioner's symptoms were compatible with the early formation of cataracts and possible prolonged prednisone use. Id. at 5.

On October 2, 2000, petitioner returned to see Dr. Collins for the first time since November 18, 1999, due to the development of numbness in his legs and the worsening of the numbness in his hands. Pet. Ex. 4 at 11, 15. Dr. Collins diagnosed "[p]robable peripheral neuropathy related to serum sickness." Id. at 11. Electophysiological testing revealed worsening neuropathy and worsening carpal tunnel syndrome.[18] Id. at 16. As a result, Dr. Collins, in conjunction with Dr. Tan, decided to refer petitioner to the Mayo Clinic for further evaluation and to determine whether petitioner would be a candidate for "a trial of IV IG or plasma exchange."[19] Id.; Pet. Ex. 2 at 13. Thus, Dr. Collins wrote a letter to Peter J. Dyck, M.D., a

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[18] Carpal tunnel syndrome is "a complex of symptoms resulting from compression of the median nerve in the carpal tunnel, with pain and burning or tingling paresthesias in the fingers and hand, sometimes extending to the elbow." Dorland's Illustrated Medical Dictionary, supra note 3, at 1812.

[19] IVIG is an abbreviation for intravenous immunoglobulin, and is "a preparation of immune globulin suitable for intravenous administration; used in the treatment of primary immunodeficiency disorders." Dorland's Illustrated Medical Dictionary, supra note 3, at 778. Plasma exchange, or plasmapheresis, is "the removal of plasma from withdrawn blood, with retransfusion of the formed elements into the donor; generally, type specific fresh frozen plasma or albumin is used to replace the withdrawn plasma. The procedure may be done . . . for

neurologist at the Mayo Clinic, on October 11, 2000. Pet. Ex. 4 at 13-14. In explaining petitioner's onset of symptoms, Dr. Collins wrote: "**[Petitioner] had received a vaccination in the left deltoid muscle for hepatitis, along with a flu vaccination, 1-2 days before he had the onset of these symptoms.**" Id. at 13 (emphasis added). Petitioner saw Dr. Collins three more times; on November 15, 2000, December 21, 2000, and May 17, 2001. Id. at 19-21, 23-24.

On November 20, 2000, petitioner completed a Vaccine Adverse Event Reporting System ("VAERS") form. On the VAERS form, **petitioner noted the date and time of vaccination as October 12, 1999, at 4:00 p.m., and the date and time of the onset of his symptoms as October 12, 1999, at 8:00 p.m.** Pet. Ex. 15 at 1. Petitioner noted that he had been treated beginning on November 15, 1999, for "lack of mobility in extremities, loss of muscular nerve functions, blurred vision/cataracts, [and] pain in all joints." Id.

Petitioner was seen at the Mayo Clinic from December 11, 2000, through December 14, 2000. Pet. Ex. 9 at 14-19, 23, 27-32. He was initially seen by Christopher J. Klein, M.D. on December 11, 2000. Id. at 30-32. In describing petitioner's onset of symptoms, Dr. Klein wrote:

> **[Petitioner's] recent symptoms began approximately mid October 01 1999** [sic]. On October 12 of 1999 he finished a three-course injection for hepatitis B and had recently received the flu vaccination when he began developing arthralgias[20] and myalgias predominantly in the upper extremity but also including the hips and particularly the right knee. **He recalls playing with his child and having difficulty arising from the floor secondary to pain and "weakness."** Later that night in bed he again had difficulty arising from supine position.

Id. at 30 (emphasis & footnote added). Dr. Klein recommended a variety of tests and made some referrals to further clarify his diagnoses of "[m]igratory arthralgias and myalgias," "[c]arpal tunnel syndrome, distant right bells palsy, question sensory neuropathy," and "[f]oot skin changes." Id. at 32.

One of Dr. Klein's referrals was to Karen Chen, M.D., a dermatologist, to examine petitioner's feet. Id. at 23. On December 14, 2000, Dr. Chen diagnosed dermatitis and intertrigo.[21] Id. A second referral was made to Clement J. Michet, M.D., a rheumatologist. Id. at 18-19. Petitioner saw Dr. Michet on December 14, 2000. Id. Dr. Michet reported: "This very hard working 56-year-old man developed a severe generalized polymyalgia-like illness **about**

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therapeutic purposes." Id. at 1446.

[20] Arthralgia is joint pain. Dorland's Illustrated Medical Dictionary, supra note 3, at 149.

[21] Dermititis is the "inflammation of the skin." Dorland's Illustrated Medical Dictionary, supra note 3, at 495. Intertrigo is "a superficial dermatitis occurring on apposed skin surfaces." Id. at 943.

two to three days following his third series of hepatitis B vaccination." Id. at 18 (emphasis added). Dr. Michet concluded that:

> It is difficult at this point to determine what the initial illness was. It may well have been some type of serum sickness type syndrome. Currently I do not see anything objectively, both on his examination or by laboratory testing of an ongoing autoimmune or inflammatory disease. . . . In addition, his symptoms do not particularly sound like an active inflammatory disease. . . . I suspect that he got "whacked" a year ago and has just not had a full recovery.

Id. at 19.

Finally, petitioner saw Dr. Dyck on December 14, 2000. Id. at 27. Dr. Klein was also present during this visit. Id. Dr. Dyck's conclusion was: "[Petitioner] has the tail end of myalgia rheumatica, bilateral neuropathies, degenerative knee disease, especially on the right, and perhaps some systemic rheumatic disease." Id.

Subsequent to petitioner's visit to the Mayo Clinic in December 2000, petitioner experienced several other health problems that are detailed in the medical records. See Pet. Ex. 6 (records pertaining to physical therapy, toenail removals, a kidney stone, biopsy of a left pelvis mass, diverticulitis,[22] and colonoscopy); Pet. Ex. Pet. Ex. 10 at 4-13 (records pertaining to removal of left pelvic mass); Pet. Ex. 11 at 2-71 (same); Pet. Ex. 16 (records pertaining to respiratory problems).

The Affidavits

On May 9, 2003, petitioner's counsel filed Petitioner's Exhibits 20-25, a series of six affidavits addressing the onset of petitioner's symptoms.

The first affidavit was that of the petitioner. Pet. Ex. 20 at 1-3. Petitioner explains that he is the Safety Director at Decatur Foundry and that as a consequence of being a first responder at the foundry, his employer requested that he be immunized against hepatitis B. Id. at 1. Petitioner had his first two hepatitis B vaccinations in March and April, 1999, and experienced no adverse reactions. Id. Petitioner then had his third hepatitis B vaccination, along with a flu vaccination, on October 12, 1999. Id. About eight to ten days later, petitioner had a pneumonia vaccination. Id. Petitioner remained in good health. Id.

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[22] A diverticulum is "a circumscribed pouch or sac of a variable size occurring normally or created by herniation of the lining mucous membrane through a defect in the muscular coat of a tubular organ." Dorland's Illustrated Medical Dictionary, supra note 3, at 556. Diverticulitis is the "inflammation of a diverticulum, especially inflammation related to colonic diverticula." Id.

During the morning of October 31, 1999, petitioner was alone at home with his infant son, Madison. Id. Just before petitioner's wife, Dina Velchek, was due to return home from church, petitioner was playing with Madison on the floor. Id. Petitioner suddenly noticed that he was unable to get off of the floor under his own power; he felt discomfort in his chest, could hardly move his arms or legs, and experienced nearly unbearable pain. Id. at 1-2. Ms. Velchek needed to help petitioner get off of the floor. Id. at 2. Petitioner states that this was the first time he had experienced such symptoms. Id.

Petitioner states that immediately following this episode, he needed his wife to assist him in undressing and getting out of bed and that he had difficulty raising his arm to brush his teeth and moving his legs to walk and climb stairs. Id. Petitioner did go to work the next day, despite being in "a lot of pain" and being "very stiff." Id. Petitioner explained to his coworker, Bruce Johnson, about the sudden onset of symptoms he experienced the day before. Id. Petitioner did go to work for the next two weeks, but continued to have great difficulty in moving around due to the weakness and stiffness in his arms and legs. Id.

Petitioner asserts in his affidavit that he does not like going to the doctor; thus, he put off seeing a doctor hoping that the symptoms would go away. Id. The symptoms did not subside, so he saw Dr. Grootegoed on November 15, 1999. Id. This visit was the first medical care petitioner received subsequent to his onset of symptoms. Id. at 2-3. Petitioner also stated that he first saw Dr. Tan on November 30, 1999, and explained to Dr. Tan that he received hepatitis B and flu vaccinations on October 12, 1999, and a pneumonia vaccination eight to ten days later. Id. at 3.

The second affidavit was submitted by Ms. Velchek, petitioner's wife. Pet. Ex. 21 at 1-2. Ms. Velchek corroborates her husband's account of the events of October 31, 1999. Id. at 1. She explains that she found petitioner unable to get up off of the floor when she returned home from church. Id. Ms. Velchek helped petitioner up and later that night, had to help him undress. Id. Ms. Velchek states that petitioner had a great deal of difficulty moving his arms and legs. Id. The next morning, petitioner required Ms. Velchek's help to get out of bed. Id. at 2. Ms. Velchek had never before seen petitioner exhibit these symptoms. Id.

The third affidavit was submitted by Bruce Johnson, petitioner's coworker and the treasurer of Decatur Foundry. Pet. Ex. 22 at 1-2. Mr. Johnson states:

> **I recall a Monday morning around the first of November, 1999 when Gene Velchek came into my office.** Gene was obviously in pain. He demonstrated a great deal of difficulty in ambulating. He appeared to be stiff. He sat down in my office and advised me that something had occurred over the weekend when he [w]as at home [lying] on the floor with his young son, Madison. Gene Velchek told me that he was unable to get up off the floor and had to be helped up by his wife, Dina. . . . In the preceding weeks prior to November 1, 1999, Gene Velchek

had not exhibited any of these problems. Since Gene and I work together, I normally see him five or six times a day, each Monday through Friday.

Id. at 1 (emphasis added).

The fourth affidavit was submitted by Dr. Khan. Pet. Ex. 23 at 1-2. Dr. Khan explains that he took over Dr. Grootegoed's practice and as a result, the primary care of petitioner, sometime around June 2000.[23] Id. at 1. Dr. Khan states:

> In my earlier examinations of Mr. Velchek in 2001, he told me that **his symptoms began suddenly while he was on the floor at his home playing with his child. I may not have recorded that history but I do recall that Mr. Velchek gave me that history** when describing his first onset of symptoms following the Hepatitis B vaccination.

Id. at 2 (emphasis added).

The fifth affidavit was submitted by Dr. Tan. Pet. Ex. 24 at 1-2. Dr. Tan states:

> According to the initial history noted in my November 30, 1999 report, Mr. Velchek had a hepatitis B vaccination and flu vaccination on October 12, 1999. **On October 22, 1999 he had a pneumonia vaccination**.[24] **About ten days later** Mr. Velchek developed an onset of symptoms which have continued to plague him until the present time. . . .
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> . . .
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> I notice that my 10/16/02 and 10/4/02 letters contain a conflicting history regarding the timing for the first onset of Mr. Velchek's symptoms. Those reports indicate that the onset was nine days after the third hepatitis B vaccination. That third vaccination was done on 10/12/99. The reference to nine days appears to be

[23] The first record of Dr. Khan's treatment of petitioner is dated February 13, 2001. Pet. Ex. 3 at 5.

[24] See supra note 12.

a mistake on our part in recording the history. I believe that the initial history as reflected in my 11/30/99 letter to Dr. Collins is correct in that it records **the first onset of symptoms as being about ten days after the October 22, 1999 pneumonia vaccination**.[25]

Id. (emphasis & footnotes added).

Finally, the sixth affidavit was submitted by Dr. Collins. Pet. Ex. 25 at 1-2. Dr. Collins states:

> In reviewing my records, I see that there are some discrepancies concerning the history surrounding Mr. Velchek's initial onset of symptoms. In my 11-16-99 letter to Dr. Grootegoed, it is suggested that Mr. Velchek's symptoms started on October 12, 1999. However, my November 19, 1999 letter to Dr. Tan contains a history indicating that the symptoms did not begin until after Mr. Velchek had undergone Hepatitis, flu and pneumonia vaccinations. **I thought all three vaccinations occurred on October 12, 1999. Apparently, the pneumonia vaccination was not given until some eight or ten days later. I specifically recall that when Mr. Velchek and I first talked about this case, we discussed the fact that his first onset of symptoms was sometime after he had received all three vaccinations.** I recall that we had some discussions about whether the adverse symptoms that he was experiencing might be related to any one of those three vaccinations.
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> **I specifically recall that Mr. Velchek told me that it was not until he was playing on the floor with his child that he first noted any serious problems or symptoms. I do not recall the date of the episode** where Mr. Velchek was playing on the floor with his child. . . . This may have been Mr. Velchek's initial onset of symptoms. I have no reason to doubt Mr. Velchek's credibility if he says that is when his symptoms first began.

Id. (emphasis added).

The Hearing

The hearing was held on April 6, 2004, in Decatur, Illinois. Petitioner offered the testimony of the following witnesses: Dr. Collins, Dr. Tan, Ms. Velchek, Mr. Johnson, and himself. Dr. Collins was the first to testify. Dr. Collins agreed that in relating their medical

[25] See supra note 12.

history, patients may not get all of the dates right.[26] Tr. at 8, 37-38. Additionally, Dr. Collins agreed that physicians may make honest mistakes in recording a patient's history. Id. at 8, 34. Dr. Collins did recall petitioner describing the episode where he was unable to get off of the floor when playing with his son. Id. at 9-10, 29. Dr. Collins testified that petitioner stated that the episode was what caused him to seek medical assistance. Id. at 10. Dr. Collins also testified that he recalled that the initial onset of symptoms occurred after all three vaccinations–the hepatitis B, flu, and pneumonia vaccinations–had been administered. Id. at 14. Additionally, Dr. Collins testified that he initially believed that all three vaccinations occurred on the same day. Id. at 23.

On cross-examination, Dr. Collins confirmed that he had been trained to write complete, accurate, and truthful medical records upon which he and other physicians would rely. Id. at 15. Dr. Collins also stated that if he found a glaring discrepancy that was important to patient health in a report, he would inform other physicians about the discrepancy. Id. at 16-17. Dr. Collins testified that the exact date of petitioner's onset and the exact date of petitioner's vaccinations were not critical to his diagnosis. Id. at 17. Dr. Collins explained, because he was most concerned with petitioner's arm symptoms, he did not feel it was necessary to describe petitioner's episode on the floor with his son in his notes. Id. at 19. Dr. Collins further explained that he described petitioner's onset of symptoms as one to two days postvaccination due to the initial soreness petitioner felt from the vaccination. Id. at 19-20. He stated that he would generally expect other physicians to take independent histories of patients and that he would rely on histories provided by other physicians. Id. at 26-27. **Dr. Collins could not date the episode petitioner experienced on the floor with his child.** Id. at 29. Significant from the special master's perspective is that Dr. Collins neither recorded nor had any recollection that onset occurred on October 31, 1999, as petitioner claims.

Another treating physician, Dr. Tan, also testified. Dr. Tan stated that two blood tests, performed on December 14, 1999, and September 12, 2000, showed that petitioner had an elevated level of circulating immune complex which could be evidence of an immune reaction to petitioner's hepatitis B vaccination. Id. at 54-59. Dr. Tan further explained that such an adverse reaction to a hepatitis B vaccination typically occurs between one or two weeks postvaccination, but because the reaction varies among individuals, the reaction could occur as far as eighteen days to three weeks postvaccination. Id. at 59-64. Accordingly, Dr. Tan asserted that the results of the blood tests were consistent with an October 31, 1999 onset date. Id. at 59-60. **Dr. Tan also testified that he had no recollection of petitioner describing the episode on the floor with his child.** Id. at 64. Thus, like Dr. Collins, Dr. Tan could not specifically date petitioner's episode of onset to October 31, 1999.

On cross-examination, Dr. Tan confirmed that he had been trained to write complete, accurate, and truthful medical records upon which he and other physicians would rely. Id. at 69-70. Dr. Tan also testified that he had never found Dr. Collins's records, including the records

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[26] All references to the Transcript of the hearing conducted on April 6, 2004 shall be designated herein as "Tr. at __."

regarding petitioner, to contain inaccurate information. Id. at 70-71. **Dr. Tan further testified that he was unaware that October 22, 1999, was not the correct date of petitioner's pneumonia vaccination, as he reported in his November 20, 1999 letter.** Id. at 72. But, in response to the court's questioning, **Dr. Tan indicated that "[a]bout ten days later" was an approximation and was not specifically tied to the actual date of petitioner's pneumonia vaccination.** Id. at 94-95 (emphasis added). And, although Dr. Tan confirmed that some of his other medical records described the onset date as six or nine days postvaccination,[27] he stated that the most accurate record would be the November 30, 1999 letter to Dr. Collins because it was the report closest in time to petitioner's onset of symptoms. Id. at 73-79, 81, 92.

Ms. Velchek also provided testimony. She described what occurred when she found petitioner on the floor unable to get up. Id. at 39-41. Ms. Velchek testified that petitioner had not displayed similar symptoms in the three weeks prior to the episode. Id. at 40-41. Regarding the first manifestation of symptoms, Ms. Velchek testified:

> [Ms. Velchek:] **It was around Halloween time**. We would have dressed–you know, we dressed our toddler up for Halloween, and it was a couple of weeks before he finally went to the doctor.

Id. at 42 (emphasis added). The special master was concerned by Ms. Velchek's use of the qualifier "around" during her testimony regarding the date of onset. When questioned, Ms. Velchek became more specific:

> [The Court:] Did you say that you thought it was around Halloween or it was actually on Halloween when your husband had the episode . . . .
>
> [Ms. Velchek:] It was–right. It was on that Sunday, yes. It was on a Sunday.
>
> [The Court:] So you can actually peg the date that Mr. Velchek had the episode where he was unable to get off the floor, because it was Halloween and that was the same night that you took the child out–
>
> [Ms. Velchek:] Right.
>
> [The Court:] –trick-or-treating?

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[27] See Pet. Ex. 2 at 21 (letter dated December 27, 1999, placing onset six days postvaccination); id. at 2 (letter dated October 4, 2002, placing onset nine days postvaccination); id. at 1 (letter dated October 16, 2002, placing onset nine days postvaccination). Dr. Tan testified that in drafting the October 16, 2002 letter, he relied upon the October 4, 2002 letter and did not refer to the November 30, 1999 letter. Tr. at 79, 91-92.

[Ms. Velchek:] Right.

Id. at 42, 46.

Petitioner's coworker, Mr. Johnson, also testified. Mr. Johnson explained that he sees petitioner several times each day on a daily basis. Id. at 97. Mr. Johnson testified that on a Monday morning **around November 1, 1999**, petitioner entered his office and recounted the events of the prior day, explaining how he was unable to get up off of the floor. Id. at 98-99. Mr. Johnson recalled that petitioner appeared "bent and stiff." Id. at 99-100. Mr. Johnson stated that prior to November 1, 1999, he never had seen petitioner exhibit these symptoms. Id. at 101, 103. However, when pressed as to how he could be certain that petitioner came into his office on November 1, 1999, and not some other Monday, Mr. Johnson replied: "I'd made no notes at the time of what day it was. All's I know it was–you know, I'm sure it was early November." Id. at 104. Thus, Mr. Johnson was unable to articulate the basis for his assertion that his conversation with petitioner occurred in November 1999.

Petitioner was the final witness. After answering some prefatory questions, petitioner described the events that he alleges occurred on October 31, 1999. Id. at 108-12. Petitioner stated that he had never before experienced such symptoms. Id. at 109-10. As a general proposition, petitioner contended that many of the medical histories taken by his various treating physicians contained inaccuracies.[28] Id. at 136, 147. Petitioner proceeded to provide some context in which to view his medical records.

Petitioner began by discussing Dr. Grootegoed's records. He explained that the week after the episode on the floor, he had attempted to make an appointment with Dr. Sharkey, who had been his primary care physician since 1965. Id. at 113-14. Dr. Sharkey was no longer practicing so he instead made an appointment with Dr. Grootegoed. Id. at 114. When he arrived for his appointment, a nurse took his history. Id. at 115. Petitioner noted that the medical records indicated that he had all three vaccinations in one day, which is not correct, and reported that he was sure that he did not say that all three vaccinations were administered on the same day. Id. at 135-36. But, petitioner also stated that he does not know how accurate he was in providing a medical history because he was in a lot of discomfort, it hurt to talk, he was not hearing well, and he therefore lacked patience. Id. at 115, 135.

[28] Petitioner noted that he was not thinking about the Vaccine Act's statute of limitations when providing his medical history to his physicians. Tr. at 138. He further testified that he was unaware of the existence of the Vaccine Program until he was telephoned in follow-up to his submission of the VAERS form on November 20, 2000. Id. at 133-34.

Petitioner then testified that he went to see Dr. Collins the next day. Id. at 116. Dr. Collins's nurse took petitioner's history. Id. Petitioner remained in a lot of pain, and thus testified that he probably was not patient with this nurse either.[29] Id. In speaking with Dr. Collins, petitioner explained that he had recently received three vaccinations–hepatitis B, flu, and pneumonia–and that the two of them discussed how or whether the three vaccinations may have caused his symptoms. Id. at 118-20. Petitioner insists that he never told Dr. Collins that his symptoms began one to two days after his hepatitis B vaccination. Id. at 119.

Next, petitioner discussed Dr. Tan's records. Petitioner stated that Dr. Tan's nurse initially spent forty-five minutes with him taking his history. Id. at 121. Then, Dr. Tan himself spent an hour to an hour and one-half with petitioner. Id. Thus, petitioner finds Dr. Tan's November 30, 1999 letter to be the most accurate and consistent with his recollection of events.[30] Id. at 121, 145-46.

Then, petitioner discussed the records produced by the physicians at the Mayo Clinic during his December 2000 visit. Petitioner explained that Dr. Collins referred him to Dr. Dyck at the Mayo Clinic for an evaluation of whether petitioner was a candidate for a plasma freeze. Id. at 126. Petitioner described not only a "surreal" experience at the famed Mayo Clinic,[31] but also

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[29] Petitioner also testified that this nurse could not grasp the concept that he had his third in a series of three hepatitis B vaccinations as well as three vaccinations in a short period of time. He testified:

> It was the hardest thing–I remember his nurse, it was so hard to explain. Three shots–oh, you had a–well, the first nurse says, One on–I don't know what you're talking about. I says, you know, the hepatitis shot. I don't know what you're talking about. I said, Boy, I hope you had them. And I remember telling her, and she said, Well, I guess I did. And I said–well, anyways, I said I had that shot and then I had pneumonia shot, because–and the flu shot. . . . [W]hen I was telling his nurse, I had a hard time explaining it. I said, I didn't have them–they didn't seem to understand three in a series. But I also had three shots within a short number of days, and boy, I had trouble getting that across. Whether it was me or them or both of us probably–but that was very difficult.

Tr. at 120-21.

[30] Petitioner is sure he mentioned to Dr. Tan the episode on the floor, tr. at 121-22, but that information is not included in Dr. Tan's November 30, 1999 letter.

[31] Specifically, petitioner testified:

> You know, I've seen a lot of errors in these medical–I know they're supposed to be accurate, you know. I've read the medical from Mayo's, you know. They told

explained that he was unsuccessful in trying to have the inaccuracies contained in those medical records corrected. Id. at 143.

Petitioner next addressed the VAERS form he submitted on November 20, 2000. He stated that he and his wife completed the form themselves. Id. at 129. At the time they filled out the form, petitioner was most concerned with reporting the batch number of his hepatitis B vaccination due to his concern that his coworkers could have reactions similar to his own. Id. at 131, 133, 156-57. Petitioner explained that he designated 8:00 p.m. on October 12, 1999, as the time and date of onset because he did have a soreness in his arm that night, and at the time he filled out the form, he did not realize that there was a distinction between a normal reaction and an adverse reaction to vaccinations. Id. at 132, 155. Petitioner stated that the soreness in his arm went away that night. Id. Petitioner also explained that he did not describe the events of the floor episode on the form because the form only asked for the first symptoms. Id. at 156.

Petitioner testified that he did not have occasion to examine his medical records until he began compiling them in order to file his petition in the Vaccine Program. Id. at 136-37. On cross-examination, petitioner admitted to having concerns about the accuracy of some of the records. Id. at 143. As he described above, he telephoned the Mayo Clinic but was unable to reach his physician. Id. Petitioner stated that he did not know what else he could do to amend his medical records. Id. Petitioner further explained that in his job, he deals with medical

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> me I had a fungal infection in my foot and I needed a right knee replacement. Never once did anyone ask me about plasma freeze. They tried to do the same spinal on me two days in a row with–one day they told me I was somebody else. I had a doctor that took a history supposedly from me and said–I drank three beers a day for 35 years. I have not had a beer since 1965 when they took my gallbladder out. So I know that's not accurate. Dr. Dyck, who I was supposed to see, never saw me except for about five minutes. He never examined me. Dr. Klein came in the room with me, and Dr. Klein–Dr. Dyck is supposed to be the foremost authority, and he agreed with Dr. Klein that I should have an injection of this new drug called Velchek.
>
> . . .
>
> [A]nd I said, Doc, wait a minute. My name's Velchek. . . . I said–that's when I told them, I'm leaving. I said, you tried to give me two different spinals, two different names. You've had to repeat a test. You wouldn't accept a lot of the medical records I brought because you said you had to do them, and you're going to give me a shot of my wonder drug called Velchek. The man was senile.

Id. at 127-28. The special master notes for the record that Dr. Dyck is a highly regarded neurologist specializing in the area of peripheral neuropathy and co-editor of Peripheral Neuropathy (3d ed. 1993).

records on a daily basis and that there is not a day when he does not receive one that is inaccurate. Id. at 144. He stated that he tries to make some corrections, especially for the records that contain very serious errors. Id. at 145. However, petitioner stated that he often is not successful in getting the records amended. Id. Petitioner reports that in his job he tries to correct medical record errors where he has the authority or responsibility to do so; but he was unsuccessful in getting his own records amended at the Mayo Clinic. Id. at 143-45. There is no evidence that petitioner asked Drs. Collins, Tan, Dyck, Michet, or Khan[32] to correct their records.

Petitioner also discussed during cross-examination why he did not immediately call an ambulance or visit a physician after the floor episode. Petitioner stated that he does not know why he did not call a physician, although his testimony reflected a personal reluctance to seek medical help. Id. at 154. For example, petitioner related that he did not call an ambulance when he had a stroke in 1986 or when he had a heart attack in July 2003, that he did not call a physician when he broke his back at work twenty years ago, and that if symptoms similar to those he experienced in October 1999 occurred again, he probably would be "stubborn enough not to call a doctor." Id. at 153-54. Petitioner also conceded that the November 1, 1999 nursing note from Midwest Occupational Health Associates is silent as to the dramatic events that allegedly occurred the prior day. Petitioner asserted that he reported the floor incident to the telephone nurse, but acknowledged that the medical records did not reflect that fact. Id. at 157-59.

Also on cross-examination, petitioner confirmed that none of his medical records placed the date of the floor episode as October 31, 1999. Id. at 147-48. However, throughout his testimony, petitioner remained adamant that his symptoms began with the floor episode on October 31, 1999, and that he never told a medical provider otherwise. Id. at 119, 127, 134, 139-40, 142.

DISCUSSION

The question presented in this case is whether the petition was filed within the three years specified by the statute. Petitioner filed his petition on October 31, 2002. Thus, petitioner's symptoms must have began on or after October 31, 1999, in order for the petition to be considered timely filed. The parties provided differing views as to the date of onset. Respondent contends, relying on the contemporaneous medical records, that the onset of petitioner's symptoms occurred prior to October 31, 1999. Petitioner, on the other hand, asserts that his symptoms began on October 31, 1999. This factual determination is critical to the court's exercise of subject-matter jurisdiction. While it is true that there are inconsistencies in the contemporaneous medical records, the affidavits and oral testimony of the witnesses are insufficient to establish a date of onset within the limitations period. Taken as a whole, the special master is convinced that because the vast majority of the contemporaneous medical records place the date of onset outside the statute of limitations, coupled with insufficient

[32] Dr. Khan is the custodian of petitioner's primary care records, including the records of Dr. Grootegoed.

explanations concerning why those dates should be disregarded, the date of petitioner's onset occurred prior to October 31, 1999.

Sovereign Immunity and the Statute of Limitations

"The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). Specifically, "a statute of limitations is a condition on the waiver of sovereign immunity by the United States, and courts should be careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended." Brice v. Sec'y of HHS, 240 F.3d 1367, 1370 (Fed. Cir. 2001) (citations and internal quotations omitted). "The court cannot expand on the waiver of sovereign immunity explicitly stated in the statute." McGowan v. Sec'y of HHS, 31 Fed. Cl. 734, 740 (1994) (citing Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991)). Moreover, the statute of limitations may not be waived by either the court or the parties. Forman v. United States, 329 F.3d 837, 841-42 (Fed. Cir. 2003).

The Vaccine Act is a waiver of the sovereign immunity of the United States because it permits people with vaccine-related injuries, as well as the legal representatives of people who have suffered a vaccine-related death, to sue the United States for compensation. The right to sue is not unconditional–the Vaccine Act contains a statute of limitations that places a condition on the waiver of sovereign immunity. The express limitations provision of the Vaccine Act provides that for vaccines listed in the Vaccine Injury Table ("Table"):[33]

> 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 . . . .

42 U.S.C. § 300aa-16(a)(2). In other words, the United States waives its sovereign immunity only for thirty-six months in instances of vaccine-related injury. After thirty-six months, the United States is immune from suit.

The Vaccine Act's Provisions Regarding the Submission of Medical Records

The court is required to award compensation to a petitioner if the court finds, based upon the entire record,[34] that the petitioner has proven a prima facie case by a preponderance of the

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[33] 42 C.F.R. § 100.3(a). The hepatitis B vaccine is listed on the Table.

[34] "[T]he term 'record' means the record established by the special masters of the United States Court of Federal Claims in a proceeding on a petition filed under section 300aa-11 of this title." 42 U.S.C. § 300aa-13(c).

evidence as outlined in 42 U.S.C. § 300aa-11(c)(1) and there is not a preponderance of evidence indicating that the petitioner's injury was caused by factors unrelated to the vaccine. Id. § 300aa-13(a)(1). The court "may not make such a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." Id.

> Petitions in the Vaccine Program must be accompanied by
>
> maternal prenatal and delivery records, newborn hospital records (including all physicians' and nurses' notes and test results), vaccination records associated with the vaccine allegedly causing the injury, pre- and post-injury physician or clinic records (including all relevant growth charts and test results), all post-injury inpatient and outpatient records (including all provider notes, test results, and medication records), if applicable, a death certificate, and if applicable, autopsy results . . . .

Id. § 300aa-11(c)(2). Petitioners may also submit any other relevant medical records. Id. § 300aa-11(d).

Greater Weight Is Afforded to Contemporaneous Medical Records

The Vaccine Act explicitly requires that the existence of a fact must be demonstrated by a preponderance of the evidence. Id. § 300aa-13(a)(1). This standard has been explained to mean more than a possibility. The special master must "believe that the existence of a fact is more probable than its nonexistence before . . . find[ing] in favor of the party who has the burden to persuade the [special master] of the fact's existence." Ciotoli v. Sec'y of HHS, 18 Cl. Ct. 576, 588 (1989) (quoting In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965))); see also Hines ex rel. Sevier v. Sec'y of HHS, 940 F.2d 1518, 1525 (Fed. Cir. 1991). Thus, the preponderance of the evidence standard requires the petitioner to "adduce evidence that makes the existence of a contested fact more likely than not." Estate of Arrowood ex rel. Arrowood v. Sec'y of HHS, 28 Fed. Cl. 453, 458 (1993). Mere conjecture or speculation will not establish a probability. Snowbank Enters., Inc. v. United States, 6 Cl. Ct. 476, 486 (1984).

In general, testimony that conflicts with contemporaneous documentary evidence should be accorded little weight. United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948); Cucuras v. Sec'y of HHS, 993 F.2d 1525, 1528 (Fed. Cir. 1993); Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1328 (Ct. Cl. 1980). Contemporaneous records, especially contemporaneous medical records, are given greater weight because: "Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events." Cucuras, 993 F.2d at

1528. A special master need not always give more weight to the contemporaneous medical records, however:

> Written records which are, themselves, inconsistent, should be accorded less deference than those which are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the 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. Since medical records typically record only a fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant.

Murphy v. Sec'y of HHS, 23 Cl. Ct. 726, 733 (1991) (quoting with approval the standard used by the special master below), aff'd per curiam, 968 F.2d 1226 (Fed. Cir. 1992).

The Inconsistencies Are Insufficient to Bring Onset Within the Limitations Period

The medical records in this case are far from internally consistent. Indeed, several of the medical histories report incorrect dates of vaccination. For example, Dr. Grootegoed's "cover sheet" claims hepatitis B, flu, and pneumonia vaccinations were administered on October 22, 1999. See Pet. Ex. 3 at 1. Dr. Grootegoed's November 15, 1999 record notes two erroneous dates for petitioner receiving the pneumonia vaccination: (1) "4 days before or after" October 12, 1999, and (2) October 22, 1999. See id. at 2-3. Further, Dr. Collins's November 19, 1999 letter mistakenly claims that the pneumonia vaccination was administered on October 22, 1999. See Pet. Ex. 4 at 8. Similarly, Dr. Tan's November 30, 1999 letter also records an inaccurate date for the administration of the pneumonia vaccination. See Pet. Ex. 2 at 25. However, the vaccination records clearly show that petitioner received his third hepatitis B vaccination and a flu vaccination on October 12, 1999, and a pneumonia vaccination on October 20, 1999. Pet. Ex. 1 at 1; Pet. Ex. 7 at 29-32.

The inconsistencies relative to the dates of onset are of greater significance. For example, Dr. Grootegoed's November 15, 1999 report[35] documents an October 15, 1999 date of onset. See Pet. Ex. 3 at 2-3. Dr. Collins's medical histories reflect several dates of onset, all of which are close in time but outside the statute of limitations. For example, Dr. Collins's October 11, 2000 letter explains that "[petitioner] had received a vaccination in the left deltoid muscle for hepatitis, along with a flu vaccination, 1-2 days before he had the onset of these symptoms." See Pet. Ex. 4 at 13. If correct, this note places onset at October 13-14, 1999. Similarly, Dr. Collins's

[35] This medical history reflects that petitioner had "been noticing a weakness for 1 mo."

November 16, 1999 letter[36] and November 19, 1999 letter[37] both place onset at October 12, 1999. See id. at 1, 8.

Nor is there complete uniformity in the medical histories recorded by Dr. Tan. For example, his October 4, 2002, and October 16, 2002 letters both place onset at about October 21, 1999. These letters recite that petitioner, "still dates the onset of his illness to about 9 days after he took his third Hepatitis B vaccine." See Pet. Ex. 2 at 1-2. Dr. Tan's December 27, 1999 letter, which explains that "the patient's history which is about six days after development of his arthritis after his vaccination with the hepatitis B vaccine," places onset on or about October 18, 1999. See id. at 21-22. Only Dr. Tan's November 30, 1999 letter can be construed as stating a date within the statute of limitations. That history states that "On October 12th, the patient had a hepatitis shot and a flu vaccine. On October 22nd, he had a pneumonia vaccine. About ten days later, the patient developed flu-like symptoms." See id. at 25. Taken on its face, this letter appears to peg onset on or about November 1, 1999. But, petitioner actually received the pneumonia vaccine on October 20, 1999, not October 22, 1999, placing onset on or around October 30, 1999.

Other records are equally unhelpful to petitioner. For example, Dr. Klein's report from the December 11, 2000 visit asserts that the onset of petitioner's "symptoms began approximately mid October 01 1999 [sic]." See Pet. Ex. 9 at 30. Dr. Michet's report of the December 14, 2000 visit refers to an October 14-15, 1999 onset: "This very hard working 56-year-old man developed a severe generalized polymyalgia-like illness about two to three days following his third series of hepatitis B vaccination." See id. at 18. Petitioner's November 20, 2000 VAERS form dates onset at October 12, 1999. See Pet. Ex. 15 at 1. As described above, petitioner and his spouse completed that document himself.

Here, the special master is called to weigh several witnesses' testimony against the medical records. There can be no dispute that there are inconsistencies in those records. However, when viewed as a whole, all but one clearly places the date of onset outside the statute of limitations. Only one, Dr. Tan's November 30, 1999 letter, arguably can be interpreted as placing onset on or about November 1, 1999. However, that letter, which says onset occurred about ten days after petitioner received his pneumonia vaccination, identified the wrong date of vaccination. The pneumonia vaccination was administered on October 20, 1999, not October 22, 1999. Although Dr. Tan testified that the ten-day parameter was only an approximation, all of the other medical histories place onset prior to October 31, 1999.

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[36] This medical history reflects that petitioner told the doctor that "he has had nothing similar to what he started experiencing on October 12th."

[37] This medical history reflects that petitioner told the doctor that "[he] has developed some problems being able to pick up his arms following . . . hepatitis, flu, and pneumonia vaccinations. This occurred around October 12th."

There is another aspect presented by this case that the special master finds especially troubling. The special master does not find it credible that the petitioner would experience such a life-altering event as he obviously did–petitioner testified that he believed that he was going to die, tr. at 122–and that the date of such an event would not be engraved into his memory, especially when it allegedly occurred on a holiday. The special master finds it to be far more reasonable that if a dramatically adverse health event happened on a holiday, the date of injury would be very easy to remember. Given that premise, when being interviewed by a health care provider, the patient would either give the date or the name of the holiday in response to any question regarding onset. It is not credible that a patient would give approximate dates; a precise response would be so simple. Indeed, petitioner's testimony underscores this point: "the ironic thing in my mind was almost like it was a Halloween joke . . . but it wasn't . . . . Halloween stuck out . . . ." Id. at 139.

Another compelling point is that in order to credit petitioner's testimony, the special master must discredit the abilities of all of the health care providers with whom petitioner came in contact. It is not credible that all of these people were incompetent or that none of them accurately recorded what petitioner related regarding the date of onset. Assuming that petitioner told the medical historians that he had been stricken on Halloween, surely at least one of them would have recorded either the holiday's name or its date, since that holiday falls on the same date every year. As described above, the medical records contain references to various dates in October 1999. Some references are to specific dates: October 12, 13, 14, 15, 18, and 22, while other references are more general, such as "mid-October." Indeed, petitioner testified that both Dr. Tan and his nurse spent a significant amount of time taking detailed medical histories. See Tr. at 121, 145-47. Yet that history provides only approximate dates, not a specific reference to Halloween or October 31. In addition, the November 1, 1999 Midwest Occupational Health Associates telephone nursing note, while recording a request for a refill of Lotrisone cream, does not document the dramatic events of the previous day. Petitioner testified that he did relate the incident to the nurse. Id. at 157-58.

The final aspect to be addressed is that the testifying physicians are far more disinterested in the outcome of this case than petitioner, his spouse, and his coworker. Dr. Collins recalled that the onset of symptoms occurred while petitioner was playing on the floor with his child. If he remembered that detail, then why would he not recall that the incident occurred on a holiday, much less the specific holiday? Dr. Tan had no recollection of either the date or the floor incident. It is unfortunate that of all the physicians' memory fragments that could be refreshed, it was the fact that onset occurred during the floor-playing incident, and not that the unfortunate event happened on Halloween. The special master believes, based upon all of the evidence presented, that the reason not one of the physicians recalled that onset occurred on Halloween and the reason that not one of the medical records reflect October 31, 1999, as the date of onset is that onset occurred prior to that date. It may well have occurred the Sunday prior, October 24, 1999, but there is no way of knowing with certainty. It is not the special master's burden to prove the precise date of onset. That burden falls to petitioner and he has been unable to sustain it.

In sum, the court finds that petitioner's explanations for the discrepancies in the medical records regarding the date of onset of his symptoms, as embodied in his petition, the supporting affidavits, and accompanying testimony, are not reasonable or credible. This finding should not be construed as a finding that any of the witnesses lied. All of the witnesses are honest, decent people. The passage of time dulls memories; this is precisely why contemporaneous records are so vital to factual findings years after events occurred.

CONCLUSION

Although the precise date of onset remains unclear, it is petitioner's burden to prove that the petition was timely filed. Petitioner was unable to do so here and, as a consequence, the court lacks subject-matter jurisdiction. Therefore, respondent's motion to dismiss is GRANTED and the petition is DISMISSED for failure to satisfy the statute of limitations.

IT IS SO ORDERED.

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Margaret M. Sweeney
Special Master