OFFICE OF SPECIAL MASTERS

Filed: August 30, 2005

KIMBERLY SCHNEIDER, as the legal representative of her minor son, TROY SCHNEIDER,	*	
Petitioner,	*	
	*	No. 03-2648V
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Curtis R. Webb, Twin Falls, Idaho, for Petitioner.

Catharine E. Reeves, United States Department of Justice, Washington, D.C., for Respondent.

RULING REGARDING ONSET OF SYMPTOMS[1]

SWEENEY, Special Master

On November 10, 2003, Kimberly Schneider, as the legal representative of her son Troy Schneider ("Troy"), filed a petition for compensation under the National Childhood Vaccine Injury Act ("Vaccine Act"). 42 U.S.C. § 300aa-1 to -34 (2000 & Supp. II 2003). The timely-filed petition alleges that as a result of the measles, mumps, and rubella ("MMR")[2] vaccination

[1] The court encourages the parties to review Vaccine Rule 18, which affords each party 14 days to object to disclosure of (1) trade secret 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 MMR vaccine is "a combination of live attenuated measles, mumps, and rubella viruses, administered subcutaneously for simultaneous immunization against measles, mumps, and rubella." Dorland's Illustrated Medical Dictionary 1999 (30th ed. 2003).

Troy received on November 3, 2000, Troy suffered from cerebellar encephalitis,[3] resulting in his legal blindness.

Subsequent to the filing of the petition, respondent's counsel filed respondent's Rule 4(b) Report, indicating that in the government's view, this case was not appropriate for compensation because petitioner had proved neither a Table injury nor actual causation. At the May 27, 2004 Rule 5 status conference, counsel informed the court that a fact hearing was necessary to determine the onset of Troy's symptoms. In particular, the parties requested that the court make the following determinations: (1) what behaviors did Troy exhibit leading up to his December 7, 2000 hospitalization and (2) when those events occurred.

FACTUAL BACKGROUND

Medical Records and Affidavits

Troy was born on March 30, 1993.[4] Pet. at 1. His birth was uneventful and no abnormalities were noted. Pet. Ex. 6 at 1-25. When Troy was four months old, he fell out of a car seat that his father was carrying and landed on his head. Id. at 27, 32. A computed tomography scan ("CT scan")[5] of Troy's head was performed and the results were normal. Id. at 28-30.

Around the age of 20 months, Troy was diagnosed with autism. Pet. at 1. Troy's autism was evidenced by delays in language, cognition, and social development. Id. An "Information Form," dated July 4, 1995, and included in the records of pediatrician Ricki Robinson, M.D., indicates that Troy disliked making eye contact (but was getting better) and occasionally caught his mother's eyes. Pet. Ex. 7 at 6, 10. In addition, it was noted that Troy liked to watch videos and "seem[ed] to have strong visual tendencies/learning abilities." Id. at 6. Troy's vision had

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[3] Encephalitis is the "inflammation of the brain." Dorland's Illustrated Medical Dictionary, supra note 2, at 608. Cerebellar refers to the cerebellum, which is the part of the brain "concerned in the coordination of movements." Id. at 336.

[4] All references to the petition shall be designated herein as "Pet. at __." All references to the pertinent Petitioner's Exhibit shall be designated herein as "Pet. Ex. __ at __."

[5] A CT scan is a "recording of internal body images at a predetermined plane by means of the tomograph." Dorland's Illustrated Medical Dictionary, supra note 2, at 1919. A tomograph is "an apparatus for moving an x-ray source in one direction as the film is moved in the opposite direction, thus showing in detail a predetermined plane of tissue while blurring or eliminating detail in other planes." Id. In a CT scan, "the emergent x-ray beam is measured by a scintillation counter; the electronic impulses are recorded on a magnetic disk and then are processed by a mini-computer for reconstruction display of the body in cross-section on a cathode ray tube." Id.

not been tested; however, Troy's hearing was tested and found to be normal. Id.; see also Pet. Ex. 6 at 35 (brainstem auditory evoked response test revealed no hearing loss and no disturbance of Troy's brainstem auditory pathway).

Troy first had his vision screened in March 1996 and he was able to fixate and track visual stimuli. Pet. Ex. 12 at 2. Troy had another vision screening, performed by J. Ryan, O.D., on February 12, 1997. Pet. Ex. 18-C-4 at 1. Dr. Ryan performed a Developmental Vision Screening that showed age-appropriate vision. Id. Further, despite his language, cognitive, and social delays, Troy's motor skills were seen to be a strength; he was described by his mother as an active child. Pet. Ex. 9 at 1, 3; Pet. Ex. 10 at 1, 5, 7; Pet. Ex. 12 at 7; Pet. Ex. 18-B-1 at 12-15; Pet. Ex. 18-B-5 at 12, 16; Pet. Ex. 18-B-6 at 39.

In a "New Patient Questionnaire" for South Orange County Pediatrics in Lake Forest, California, likely filled out in April 1998,[6] Ms. Schneider reported that Troy had frequent ear infections, but had not had any previous serious vaccine reactions or any previous eye problems. Pet. Ex. 1 at 5. Additionally, Troy maintained good eye contact with his mother. Pet. at 1.

On November 3, 2000, Troy visited South Orange County Pediatrics for a well-child visit. Pet. Ex. 1 at 24. The history reveals that Troy had eating difficulties, but that he was performing well at the special school he attended. Id. Troy was given diagnoses of an ear infection and infantile autism, but was declared a well child. Id. Troy received his second MMR vaccination at this visit. Id. at 4, 28-29; Pet. at 1-2.

According to Ms. Schneider, at some time between November 10, 2000, and November 17, 2000, Troy showed symptoms of "poor coordination, an awkward gait, running into doors, falling down stairs, difficulty picking up toys, feeling his way around, and loss of eye contact with his mother." Pet. at 2; see also Pet. Ex. 19 at 2. Specifically, about one week after Troy had his MMR vaccination, he developed a fever and lethargy. Pet. Ex. 19 at 2. In addition, Troy had difficulties with his mobility: he fell off of the curb, ran into a car, and felt his way around. Id. In addition to the deterioration of his eye contact, Troy had trouble finding items his mother handed to him and he began to watch the television from a few inches away. Id.

According to Ms. Schneider, Troy's symptoms worsened over the following three weeks. Id.; Pet. at 2. Troy stopped making eye contact and required assistance in climbing stairs. Pet. Ex. 19 at 2. Jan Benner, a speech therapist in Troy's classroom, noticed that Troy began to exhibit uncharacteristic behaviors about two weeks before Thanksgiving.[7] Pet. Ex. 20 at 1-2. In particular, Troy stopped doing puzzles that he used to do on a daily basis and he required

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[6] The form is undated. However, a "Patient Information Sheet" included in South Orange County Pediatrics's records is dated April 13, 1998. Pet. Ex. 1 at 2. The court surmises that these forms were filled out at or around the same time.

[7] In 2000, Thanksgiving fell on November 23.

assistance in walking to the classroom after recess. Id. at 2. Ms. Benner and Troy's teacher, Nancy Wilson, both noticed the changes in Troy before being asked about them by Ms. Schneider. Id. Troy's teachers expressed concern to Ms. Schneider that he was disoriented during the week after Thanksgiving. Pet. Ex. 19 at 2. Ms. Schneider interpreted these behavioral changes as problems with Troy's eyesight and began to believe that Troy had become blind. Id. at 3; Pet. at 2.

Thus, on December 3 or 4, 2000,[8] Ms. Schneider took Troy to see her ophthalmologist,[9] Dr. Brown. Pet. Ex. 19 at 3. Dr. Brown attempted to examine Troy's eyes, but was unable to see much because Troy was uncooperative. Id. Dr. Brown told Ms. Schneider that he did not believe that there was anything wrong with Troy's eyes and recommended that she take Troy to see his pediatrician to explore a neurological cause of Troy's problems. Id.; Pet. Ex. 1 at 32.

Ms. Schneider took Troy to see pediatrician Clyde E. Wesp Jr., M.D., on December 4, 2000.[10] Pet. Ex. 1 at 32; Pet. Ex. 19 at 3. In his history, Dr. Wesp reported: "Mother states that Troy is having a new onset of vision problems. He is having difficulty grasping objects. There is some questionable crossing of eyes." Pet. Ex. 1 at 32 (emphasis added). Dr. Wesp made a referral to a neurologist and an appointment was scheduled for December 7, 2000. Id.; Pet. at 2; Pet. Ex. 19 at 3.

However, because she believed that Troy was getting worse, Ms. Schneider brought Troy to the emergency department at Saddleback Memorial Medical Center in Laguna Hills, California, on December 5, 2000.[11] Pet. at 2; Pet. Ex. 2 at 1-15; Pet. Ex. 19 at 3. The Nursing Flow Sheet reports that Troy presented to the emergency department screaming and hitting himself, and had a three-day history of decreased vision. Pet. Ex. 2 at 4. The history was provided by Troy's aunt. Id. A CT scan was performed and the results were normal. Id. at 5, 7. Troy was discharged after about five hours. Id. at 4-5.

Because Ms. Schneider continued to have concerns about Troy's eyesight, the next day, December 6, 2000, she brought Troy to the emergency department at the University of California, Irvine ("UCI") Medical Center. Id. at 16-30; Pet. at 2; Pet. Ex. 19 at 3. The

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[8] Petitioner's affidavit states that this visit occurred on December 3, 2000. Pet. Ex. 19 at 3. However, December 3, 2000, was a Sunday. The petition dates the visit to Dr. Brown on December 4, 2000. Pet. at 2.

[9] The petition and the records from Southern Orange County Pediatrics refer to Dr. Brown as an optometrist. Pet. at 2; Pet. Ex. 1 at 32.

[10] The petition erroneously dates this visit as December 5, 2000. Pet. at 2.

[11] The petition erroneously indicates that this visit was to the emergency department at the University of California, Irvine Medical Center. Pet. at 2.

emergency department history reported that Troy did not have any problems "until [about] 11/26/00 when mother noted child running into doors/falling on steps 'feeling way around [with] hands' [with] eyes rolling up [with] moving head back/forth." Pet. Ex. 2 at 18 (emphasis added). In addition, Troy had a 101-degree temperature and had stopped eating the day before. Id. However, on the recommendation of the consulting neurologist, who noted that Troy was not in any distress and had a neurological appointment the next day, the emergency room physicians discharged him with a diagnosis of possible blindness. Id.; Pet. Ex. 14 at 3; Pet. Ex. 19 at 3.

Ms. Schneider called Southern Orange County Pediatrics on December 7, 2000, and spoke with John Mersch, M.D. Pet. Ex. 1 at 34. The notes from the telephone call indicate that Troy had a fever and loose stools, but no vomiting. Id.

On December 7, 2000, Troy was seen by pediatric neurologist Pauline A. Filipek, M.D., at the UCI Medical Center. Pet. at 2; Pet. Ex. 2 at 31-34; Pet. Ex. 19 at 4. In her consultation notes, Dr. Filipek noted that Troy began experiencing symptoms such as falling off of the curb, running into the car, and feeling his way around with his hands in the time period she labeled: "week prior to Thanksgiving." Pet. Ex. 2 at 33 (emphasis added). Dr. Filipek also noted that on November 26, 2000, Troy's school noticed visual problems.[12] Id. Further, Dr. Filipek reported that Troy slept 16 hours per day, was lethargic, and was possibly photophobic. Id. Dr. Filipek decided to admit Troy to the hospital to rule out meningitis,[13] encephalitis, and vision loss. Id.; Pet. at 2-3; Pet. Ex. 19 at 4.

Troy was taken to the emergency department, where he was sedated to facilitate a lumbar puncture and a CT scan of his brain. Pet. Ex. 2 at 38-44; Pet. Ex. 19 at 4. The lumbar puncture and CT scan were normal. Pet. at 3; Pet. Ex. 2 at 47, 57, 91. Troy was then admitted to the pediatric department. Pet. Ex. 2 at 45-121. In her history and physical examination, pediatrician Valerie Josephson, M.D., noted that Troy's problems began "approximately three weeks prior to admission."[14] Id. at 46 (emphasis added). Dr. Josephson also recorded that "over the last week," Troy's gait and vision deteriorated even more and Ms. Schneider noticed increased somnolence

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[12] November 26, 2000, was a Sunday. Thus, although not impossible, it is highly unlikely that school personnel noticed or shared information about Troy's behavior with Ms. Schneider on this day.

[13] Meningitis is the inflammation of the three membranes that cover the brain and spinal cord, usually by either a bacterium or virus. Dorland's Illustrated Medical Dictionary, supra note 2, at 1124-25.

[14] It appears that a medical student also took a history and performed a physical examination of Troy upon his admission. Pet. Ex. 2 at 52-54. The student noted, in the section labeled "history of present illness," that Troy was in his usual state of health until November 23, 2000. Id. at 52. And, in the "History and Physical" section, the student noted that Troy had a two-week history of worsening symptoms. Id. at 54.

and possible photophobia. Id. Dr. Josephson noted that during both of her examinations of Troy, he hid beneath his blankets. Id. at 48. In her impression, Dr. Josephson wrote:

> This is a 7-year-old autistic male presenting with acute neurologic change marked by unsteady gait and possible visual change. On our examination it seems that the patient is able to see. It is doubtful that he is blind. It is difficult to tell if he is having decreased visual acuity secondary to his inability to communicate with us. However, it is quite possible that his apparent change in mental status is actually secondary to a cerebritis[15] or acute cerebellar ataxia.[16] Most likely this would be a postviral process that would cause unsteadiness of gait. Because of his difficulty in balance, it may be that he appears to be having difficulty focusing because he is trying to compensate for his unsteadiness. Another possibility is that he truly has a change in his visual acuity, though he does not appear to be blind. Optic neuritis[17] can also be a cause of this. Other causes, such as stroke, or intracranial bleeds or hemorrhage are much less likely. The patient has no focal neurologic signs, and the CT scan is negative.

Id. at 48-49 (footnotes added).

During his admission, Troy underwent ophthalmological and neurological evaluations. Ophthalmologist Jennifer L. Simpson, M.D., evaluated Troy, noting that Ms. Schneider was "concerned of lost vision, falls into things, [illegible] for [about] 2 weeks now." Pet. Ex. 14 at 5 (emphasis added). Troy was uncooperative and photophobic, but Dr. Simpson reported a normal eye examination. Id. at 5-6. Neurologist Sergey E. Akopov, M.D., noted in his history that Troy had a two-to-three week history of visual problems, fever, irritability, and sleepiness. Pet. Ex. 2 at 55. However, Dr. Akopov also noted that Troy's symptoms, including periodic fevers, began

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[15] Cerebritis refers to either (1) a brain abscess or (2) encephalitis. See William Ernoehazy, Jr., M.D., Brain Abscess, at http://www.emedicine.com/emerg/topic67.htm (last updated Aug. 10, 2004); Marjorie Lazoff, M.D., Encephalitis, at http://www.emedicine.com/emerg/topic163.htm (last updated Jan. 10, 2005). A brain abscess is "a localized collection of pus" that affects "the brain as a result of extension of an infection . . . from an adjacent area or through a bloodborne infection." Dorland's Illustrated Medical Dictionary, supra note 2, at 6.

[16] Cerebellar ataxia is the "failure of muscular coordination" that is "due to disease of the cerebellum." Dorland's Illustrated Medical Dictionary, supra note 2, at 170-71. Acute cerebellar ataxia is typically unilateral, and is "associated with infectious disease, tumor, or trauma, resulting in marked hypotonia of muscles on the affected side, asynergy, and assumption of a characteristic posture." Id. at 170.

[17] Optic neuritis is the "inflammation of the optic nerve." Dorland's Illustrated Medical Dictionary, supra note 2, at 1252.

one-to-two weeks after his MMR vaccination.[18] Id. Dr. Akopov recommended that optic neuritis secondary to a viral infection be ruled out. Id. at 56. Thus, Troy had a magnetic resonance image ("MRI")[19] of his brain. Id. at 58; Pet. Ex. 19 at 4. The MRI was normal. Pet. at 3; Pet. Ex. 2 at 58. While Troy was sedated for his MRI,[20] he was evaluated by another ophthalmologist. Pet. Ex. 2 at 61. The ophthalmologist found "no evidence of optic edema or media opacity." Id.

Troy was discharged on December 9, 2000. Id. at 110; Pet. Ex. 19 at 4. The discharge summary states that Troy was admitted with a three-week history of vision loss, worsening gait, photophobia, and increased somnolence. Pet. Ex. 2 at 110. The discharge diagnoses included a postviral syndrome, possible cerebellitis,[21] and possible refractive errors. Id.

On December 12, 2000, Troy was evaluated by Joseph L. Demer, M.D., Ph.D., an ophthalmologist at the Jules Stein Eye Institute at UCLA School of Medicine. Pet. Ex. 3 at 1-4, 4. Dr. Demer noted that Troy had an MMR vaccination on November 3, 2000, and that according to Ms. Schneider, Troy began showing signs of vision loss on November 10, 2000. Id. at 1. Dr. Demer also noted that Troy's symptoms began "1 week post MMR," when Troy had two episodes of vomiting and was very lethargic. Id. (emphasis added). Dr. Demer was unable to determine Troy's visual function due to Troy's uncooperativeness, but suspected that Troy's problem was not organic. Id. at 4.

Then, on December 15, 2000, at the recommendation of Dr. Filipek, Ms. Schneider took Troy to see dermatologist Vandana Nanda, M.D., at the UCI Medical Center due to a rash he had for the previous two weeks. Pet. Ex. 14 at 7. Dr. Nanda wrote that Ms. Schneider was convinced that Troy was diagnosed with autism at age two, after his first MMR vaccination. Id. Dr. Nanda continued: "Recently, Nov. 3rd, child had another booster and is having significant behavior [changes] as well as eye problems–banging into things, can't see." Id.

Ms. Schneider took Troy to the Dermatology & Laser Group of Irvine on December 18, 2000, due to a rash he had all over his body for the last five days. Pet. Ex. 4 at 1. The record

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[18] Dr. Akopov also wrote: "According to mom [patient] was at his baseline [illegible] Thanksgiving." Pet. Ex. 2 at 55.

[19] An MRI is "a method of visualizing soft tissues of the body by applying an external magnetic field that makes it possible to distinguish between hydrogen atoms in different environments." Dorland's Illustrated Medical Dictionary, supra note 2, at 908.

[20] The anesthesia records note that Troy had a two-week history of uncoordinated movement and new onset of blindness. Pet. Ex. 2 at 87.

[21] Cerebelllitis is the "inflammation of the cerebellum." Dorland's Illustrated Medical Dictionary, supra note 2, at 336.

from the visit noted that Troy experienced vision loss one week after his November 3, 2000 MMR vaccination. Id.

According to Ms. Schneider, Troy appeared to be blind to her until February or March, 2001, when he made some improvement. Pet. Ex. 19 at 4. Troy began to look at things, although he always held objects close and watched television within about an inch of the screen. Id.

Ms. Schneider brought Troy back to see Dr. Demer on May 31, 2001, because even though there was some visual improvement, Troy continued to lack eye contact and needed to bring objects close to his right eye to see them. Pet. Ex. 3 at 5-6, 8. Due to Troy's poor visual functioning, Dr. Demer performed an examination under anesthesia on June 6, 2001. Id. at 8; Pet. Ex. 15 at 2-3. Dr. Demer's surgical report indicates that Troy's visual loss began on November 10, 2000. Pet. Ex. 15 at 2. Dr. Demer then indicated in his report that Troy had profound bilateral optic atrophy,[22] which was "consistent with a possibility of acute visual loss due to optic neuritis some months earlier." Id. at 2; Pet. at 3; Pet. Ex. 3 at 8. In a letter to a colleague, Dr. Demer noted Ms. Schneider's concern that Troy's visual problems were related to his MMR vaccination, and wrote that his findings were "consistent with an acute insult to the optic nerves occurring 6 or more months ago." Pet. Ex. 3 at 8.

Troy's vision has not improved since March 2001, and he is now legally blind. Pet. at 3; Pet. Ex. 19 at 4. Ms. Schneider believes that Troy does not see anything out of his left eye and sees mostly shadows in his right eye. Pet. at 3; Pet. Ex. 19 at 4. Troy's severe visual impairment appears to be permanent. Pet. at 3.

Testimony at the September 16, 2005 Hearing

The special master conducted a hearing on September 16, 2004, in Santa Ana, California. The two witnesses testifying on Troy's behalf, Jan Benner and petitioner Kimberly Schneider, provided additional information not specifically found in the medical records. Their testimony was very helpful in resolving the conflicts and gaps in those records.

Ms. Benner, the speech therapist in Troy's classroom, testified first. She explained that Troy's typical daily routine before November 2000 was to "come in off the bus in the morning, check his schedule, . . . pick some activity to calm himself, and then follow the daily routine that was set up on his schedule."[23] Tr. at 9. Troy would put together a puzzle in order to calm

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[22] Optic atrophy is the wasting away "of the optic disk resulting from degeneration of the nerve fibers of the optic nerve and optic tract." Dorland's Illustrated Medical Dictionary, supra note 2, at 175-76.

[23] All references to the Transcript of the hearing conducted on September 16, 2004, shall be designated herein as "Tr. at __."

himself. Id. at 10. Troy also enjoyed looking at books, playing computer games, and listening to stories. Id. In regards to eye contact, Ms. Benner stated that Troy "had more of an eye gaze . . . than eye contact," explaining that if she spoke with Troy, he would look up at her and make a fleeting look into her eyes. Id. at 11.

Ms. Benner began to notice changes in Troy's behavior "in the two weeks before Thanksgiving." Id. at 15. Ms. Benner was sure that the changes occurred in the two weeks prior to Thanksgiving because immediately after Troy was hospitalized in early December, she tried to remember when she first had begun seeing changes in him and was able to recall when those events occurred. Id. at 19-20.

The first change Ms. Benner noted was that Troy stopped putting together the puzzles when he arrived in the morning. Id. at 12. Ms. Benner characterized this as a dramatic change in Troy's behavior. Id. at 13. Ms. Benner also noticed that Troy began to require more assistance exiting and entering the classroom at recess breaks–he clung to the adults. Id. at 12. With regards to his eye gaze, Ms. Benner testified that Troy no longer made that same type of eye contact with her. Id. at 13. Further, Troy began to pull papers and books up close to the side of his eyes, as if he was trying to see them with his peripheral vision. Id. at 13-14. Additionally, Troy was no longer as interested in computer games as he had been before; he regained his interest when a magnifying program was placed on the computer. Id. at 12, 14. Ms. Benner attributed the changes in Troy's behavior as resulting from a loss in vision. Id. at 14-15.

Ms. Benner discussed Troy's behavioral changes with his teacher, Nancy Wilson, "before that period of time before Thanksgiving," as the changes were occurring. Id. at 15, 17. They discussed their observations and concluded that Troy's changes were not due to his autism. Id. at 16. Ms. Benner remembers discussing Troy's changes with Ms. Schneider but could not remember whether the discussion took place before or after Thanksgiving. Id. Further, Ms. Benner could not remember who instigated the discussion, whether it was her and Ms. Wilson or Ms. Schneider. Id. at 18-19. Finally, Ms. Benner stated that none of Troy's behavioral changes caused her to believe that Troy required medical attention. Id. at 20. Ms. Benner was a compelling witness and the undersigned found her testimony trustworthy and credible.

Next, Ms. Schneider testified. She described Troy as a "happy young man," who was able to navigate around his surroundings, play like other children, make good eye contact, and communicate his needs despite his lack of language. Id. at 21-22, 27. Prior to November 2000, Ms. Schneider did not have any concerns about Troy's vision. Id. at 22. He was able to watch television from a normal distance, for example, from six feet away, and see the computer screen from about two-to-three feet away. Id. at 26.

Within seven days after Troy received his MMR vaccination, Ms. Schneider began noticing changes in Troy's behavior. Id. at 22-23. The first change she noticed was that Troy became very lethargic and experienced high fevers and rashes. Id. at 23, 32. Troy would just lay in his bed under the covers instead of pursuing his normal activities, like watching videos and

playing on the computer. Id. at 23, 31-32. He would no longer make himself laugh and giggle. Id. at 32. Ms. Schneider interpreted Troy's changed behavior as an indication that Troy no longer felt safe and that he did not have the willpower to get out of bed. Id. at 23, 31-32. The fever lasted for about three days. Id. at 23-24. Ms. Schneider treated it with Motrin or Tylenol. Id. Ms. Schneider remembers the fever occurring the Friday following Troy's MMR vaccination, i.e., on November 10, 2000. Id. at 24.

After the fever resolved, Ms. Schneider noticed signs that indicated to her that Troy's vision was deteriorating. Ms. Schneider believes that these changes in Troy's behavior began during the week of November 13, 2000. Id. at 28. Troy no longer wanted to go out and socialize. Id. at 24. He was not able to get around, asking his mother to carry him, or using his hands to feel his way around. Id. at 24, 28-29. He would no longer walk down the stairs without assistance. Id. at 25, 88. He would fall off of the curb and run onto the car. Id. at 45. Troy would not go to the bathroom by himself. Id. at 25. He sat with his nose and forehead touching the television and computer screens. Id. Troy turned his head to the side to attempt to use the bottom of his right eye to see the computer screen. Id. In fact, Troy lost his ability to see images on a computer screen, even with the magnification provided at his school. Id. at 27. When Ms. Schneider put pictures or objects in front of Troy, he was unable to identify them. Id. at 24, 28. And, Troy's eye contact changed. Id. at 29. Ms. Schneider stated that Troy did not display any signs that his motor skills were impaired. Id. at 29-31.

Ms. Schneider discussed Troy's behavioral changes with Ms. Benner and Ms. Wilson, who had seen similar changes. Id. at 33. All three agreed that something was wrong with Troy's vision. Id. Ms. Schneider stated that the conversation took place before the Thanksgiving school break, but she could not recall the exact date. Id. at 33-34.

There was no doubt in Ms. Schneider's mind that Troy's behavior began to change prior to Thanksgiving. Id. at 29-30. On Thanksgiving day, Ms. Schneider's family was at her house. Id. at 29. As her family was sitting in the living room, Troy would use his hands to feel their faces and hair. Id. Ms. Schneider testified that Troy's vision had been deteriorating gradually and his lack of vision was obvious to everyone at her home on Thanksgiving. Id. at 30. Ms. Schneider told her family that she thought Troy was blind. Id. at 31.

Because she feared that Troy had lost his eyesight, Ms. Schneider contacted a group called Cure Autism Now for advice. Id. at 34. One of the members recommended that Ms. Schneider take Troy to see Dr. Demer, who, as a parent of an autistic child, would understand Troy's situation and would be better positioned to examine and treat an autistic child. Id. Unfortunately, Ms. Schneider was not able to get an appointment with Dr. Demer until December 12, 2000. Id.

However, prior to Troy's examination by Dr. Demer, Ms. Schneider's grave concerns about her son's condition increased. Id. at 35. As a result, she took him to see her own

ophthalmologist, Dr. Brown.[24] Id. at 35, 39. Due to his uncooperativeness, Dr. Brown was unable to examine Troy. Id. at 39-40. Later that day, December 4, 2000, Ms. Schneider took Troy to see Dr. Wesp. Id. at 41.

Ms. Schneider next confirmed that she took Troy to the emergency department at Saddleback Memorial Medical Center on December 5, 2000. Id. at 41-42. However, she was unaware that the person who recorded her complaint noted that Troy had a three-day history of decreased vision. Id. at 42. In fact, Ms. Schneider testified that her sister accompanied her to the emergency department and likely was the person who answered the nurse's questions about Troy because Ms. Schneider was focused on keeping Troy calm. Id. at 52-53. Similarly, Ms. Schneider was unaware that the personnel at the emergency department at the UCI Medical Center recorded on December 6, 2000, that Troy was fine until November 26, 2000. Id. at 42-43. And again, Ms. Schneider did not know that during Troy's hospitalization, the UCI medical student recorded that Troy's problems began on November 23, 2000, and that Troy's problems began about two weeks prior to his admission. Id. at 43-45. Further, Ms. Schneider disagreed that she told the physicians that Troy's loss of vision occurred on November 23, 2000. Id. at 45. Finally, in reference to Dr. Filipek's December 7, 2000 notes, Ms. Schneider agreed that Troy's problems began the week prior to Thanksgiving, but disagreed that the school personnel noticed Troy's problems on November 26, 2000. Id. at 45-46. The special master notes that November 26, 2000, was a Sunday, not a school day.[25]

With regard to the notation in Dr. Demer's December 12, 2000 notes indicating that Troy had a "[l]ong [history of] multiple eye visits/exams for [visual acuity] loss," Ms. Schneider testified that prior to Troy's recent onset of vision loss, she had not taken Troy to see a physician regarding any eye problems.[26] Id. at 47-48.

Ms. Schneider testified that she was the one who contacted Ms. Benner and Ms. Wilson to talk about Troy's behavioral changes. Id. at 46. She also stated that she believed she

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[24] Ms. Schneider verified that Dr. Brown was an ophthalmologist. Tr. at 39. Furthermore, Ms. Schneider indicated that she was certain that the visit took place on Monday, December 4, 2000. Id. at 40.

[25] During cross-examination, respondent's counsel questioned Ms. Schneider about, inter alia, a notation in Dr. Filipek's record that on November 26, 2000, the "school noticed visual things, no lunch at school, not communicative." Tr. at 46. Respondent's counsel noted that the date was a Sunday. Id.; see also Pet. Ex. 2 at 33.

[26] The medical records support Ms. Schneider's testimony. Ms. Schneider first took Troy to an ophthalmologist for vision problems on December 4, 2000. However, the ophthalmologist, Dr. Brown, was unable to examine Troy due to Troy's uncooperativeness. Troy also had two ophthalmological examinations during his December 7-9, 2000 hospitalization. Only one of these examinations was performed while Troy was sedated.

telephoned the school on the Thursday before Thanksgiving, which would be November 16, 2000. Id. at 47.

Ms. Schneider is uncertain whether Troy's vision has improved since November 2000. Id. at 35. However, she does believe that Troy has adapted to his visual impairment. Id.

DISCUSSION

Given the posture of this case, the court must now make certain factual determinations: (1) what behaviors did Troy exhibit leading up to his December 7, 2000 hospitalization and (2) when those events occurred. Petitioner urges the special master to find that the events surrounding Troy's significant reduction in vision occurred sometime between November 10, 2000, and November 17, 2000. According to petitioner, the events include: (a) Troy burying himself in blankets and refusing to leave his bed; (b) Troy's decreased level of activity; (c) Troy's difficulty navigating around his home and school without assistance; (d) Troy looking at books and papers by holding them close to the side of his right eye; (e) Troy no longer putting together puzzles; (f) Troy watching television with his face laid against the screen; and (g) Troy no longer making eye contact with his mother and teachers. Pet. Post-Hearing Br. at 11. Respondent contends that the hearing testimony conflicted with the contents of the contemporaneous medical records with regards to the onset of Troy's behavioral changes; thus, the contemporaneous medical records control and onset should be found to be more than fifteen days after Troy's November 3, 2000 MMR vaccination.[27] Resp't Post-Hearing Br. at 12-13.

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

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[27] Respondent further urges that the court determine whether Troy's symptoms rise to the level of being an encephalopathy as defined in the Vaccine Injury Table ("Table"), 42 C.F.R. § 100.3. Resp't Post-Hearing Br. at 8-14; Tr. at 7. However, without the assistance of expert medical testimony regarding whether Troy's symptoms constituted a Table encephalopathy, the court cannot make that determination. Petitioner's counsel recognized this fact at hearing, as evidenced by a remark in his opening statement. Tr. at 7-8.

[28] "[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).

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). Thus, the accuracy and integrity of medical records are critical to Vaccine Program cases.

Greater Weight Is Afforded to Contemporaneous Medical Records

As explained above, 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."[29] Cucuras, 993 F.2d at

[29] The court notes that in this case, there are no true contemporaneous medical records. Contemporaneous means "[o]riginating, existing, or happening during the same period of time." The American Heritage Dictionary 316 (2d college ed. 1985). The records closest in time to petitioner's alleged date of onset (November 10, 2000, to November 17, 2000) are dated

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 Contemporaneous Medical Records Present Onset Dates Between November 10, 2000, and December 2, 2000

In December 2000, Ms. Schneider took Troy to see numerous physicians in an attempt to determine the cause of his behavioral changes. Within a span of fifteen days, from December 4, 2000, to December 18, 2000, Troy's symptoms were recorded in a multitude of medical histories. Even though the histories were recorded within a short period of time, they indicate onset dates ranging from November 10, 2000, to December 2, 2000.

The first three medical records that mention Troy's vision problem describe onset dates after Thanksgiving (November 23, 2000). First, the earliest medical record that mentions Troy's vision problem, Dr. Wesp's December 4, 2000 note, mentions "a new onset of vision problems." Dr. Wesp's record is ambiguous as to when onset occurred, but can be reasonably construed to indicate an onset date within the previous week. Next, the Nursing Flow Sheet from Saddleback Memorial Medical Center, dated December 5, 2000, indicates a three-day history of decreased vision. This history, likely reported by Ms. Schneider's sister, places onset on or about December 2, 2000. Finally, the history from the UCI Medical Center Emergency Department Medical Record, dated December 6, 2000, indicates that Troy was healthy until about November 26, 2000.

December 4, 2000. While it is somewhat problematic to label records created several weeks later as "contemporaneous," the notion that medical records closest in time to the event in question should be given more credence should still be respected. And, of course, the notes taken during the various hospital or office visits were made contemporaneously, that is, at the time Troy was examined or treated.

The next medical record, Dr. Filipek's December 7, 2000 notes, describes the date of onset as: "week prior to Thanksgiving." This phrase has four possible interpretations. First, Dr. Filipek may have meant that Troy's symptoms began one week prior to Thanksgiving, or November 16, 2000. Or, Dr. Filipek may have meant that Troy's symptoms began during the week before the week of Thanksgiving, or November 12, 2000, to November 18, 2000. Alternately, Dr. Filipek may have meant that Troy's symptoms began in the seven days immediately preceding Thanksgiving, or November 16, 2000, to November 22, 2000. Finally, and as urged by respondent, Dr. Filipek may have meant that Troy's symptoms began in the four days leading up to Thanksgiving, or November 19, 2000, to November 22, 2000. Respondent's interpretation is the least reasonable. The undersigned interprets Dr. Filipek's note to indicate on or about November 16, 2000.

The records from Troy's December 7-9, 2000 admission to the UCI Medical Center are no more consistent than the records leading up to the admission. Dr. Josephson's typewritten record reports that Troy's symptoms began "approximately three weeks prior to admission." Dr. Josephson is thus indicating an onset date of approximately November 16, 2000. However, a history taken by a medical student[30] reports that Troy's problems began on November 23, 2000. Likewise, Dr. Simpson's notes indicate that Troy's symptoms had been occurring "for [about] 2 weeks now," indicating a November 23, 2000 onset date.

Within the same hospital admission, however, Dr. Akopov indicates two other possible onset periods. Dr. Akropov reports that Troy had a two-to-three week history of symptoms, placing onset as either November 16, 2000, or November 23, 2000. Dr. Akopov also reports that Troy's symptoms began one-to-two weeks after his MMR vaccination, placing onset as either November 10, 2000, or November 17, 2000.

Two additional records from Troy's hospital admission mention an onset date. One is the anesthesiologist's record regarding Troy's sedation for the MRI. This record mentions a two-week history of onset, suggesting an onset date of November 23, 2000. The other record is the discharge summary, which indicates that Troy was admitted with a three-week history of symptoms. Thus, the discharge summary places onset on or about November 16, 2000.

The final medical records from December 2000 that mention an onset date are Dr. Demer's December 12, 2000 notes and the December 18, 2000 notes from Dermatology & Laser Group of Irvine. Dr. Demer's record contains two notes pertaining to onset. He mentions that Troy's vision loss began on November 10, 2000, and that Troy's symptoms began one week after his MMR vaccination, which is also November 10, 2000. The record from Dermatology & Laser Group of Irvine notes an onset date of one week postvaccination, or November 10, 2000. All three of these notations are consistent and were recorded 40-50 days postvaccination and a mere

[30] Both petitioner and respondent refer to this record as being written by a medical resident. However, the record is clearly signed by a person with the designation "MS3." This designation represents a third-year medical student.

three to nine days after Troy's discharge from the hospital. Because these histories are consistent and were taken at a time when Ms. Schneider was the historian and under a somewhat less stressful environment than an emergency room, the special master believes that this information is more accurate.

The contemporaneous medical records, recorded by a variety of providers–physicians, nurses, and medical students– at multiple institutions, are clearly inconsistent. The court has no precise mechanism for determining which medical records should be believed and which should be discredited. Thus, the court looks to the medical records to find their discrepancies, as well as the affidavits and witness testimony, to "fill in the blanks."

The Credible Testimony of Kimberly Schneider Indicates that Troy Experienced a Fever and Lethargy Beginning on November 10, 2000

Ms. Schneider testified that Troy began to experience fever and lethargy beginning within seven days of Troy's November 3, 2000 MMR vaccination.[31] Ms. Schneider described how she treated the fevers with Motrin or Tylenol. Ms. Schneider also described in detail the manifestation of Troy's lethargy. She interpreted Troy's remaining in bed underneath the covers as his reaction to no longer feeling safe in his environment. The medical records do not contradict Ms. Schneider's testimony. In fact, the notes of Dr. Akopov and Dr. Demer support Ms. Schneider's testimony. Accordingly, the court finds Ms. Schneider's testimony regarding the onset of fever and lethargy to be credible and is accepted by the special master as true.

The Credible Testimony of Jan Benner and Kimberly Schneider Indicates that Troy's Behavioral Changes Occurred in the Two Weeks Prior to Thanksgiving, Which Occurred on November 23, 2000

Ms. Benner and Ms. Schneider both testified that Troy began to exhibit symptoms of vision loss in the two weeks prior to Thanksgiving, which occurred on November 23, 2000.[32] The court finds their testimony concerning these events to be truthful and credible.

One of the most convincing aspects of the two witnesses' testimony was their respective statements regarding how they were able to recall specifically that Troy's behavioral changes began before Thanksgiving. Ms. Benner explained that once Troy was hospitalized, she was able to remember back to when the symptoms began and, at that time, was sure that they began in the two weeks before Thanksgiving. There was no evidence presented at hearing that changed her memory of these events. She further explained that she specifically recalled speaking with her

[31] Ms. Schneider's testimony was consistent with what she affirmed in her affidavit. Thus, the court will concentrate on Ms. Schneider's testimony.

[32] Like the testimony of Ms. Schneider, Ms. Benner's testimony was consistent with what she affirmed in her affidavit. Thus, the court will concentrate on Ms. Benner's testimony.

colleague, Ms. Wilson, about Troy before Thanksgiving, which was the period when Troy's behavior was changing.

Ms. Schneider testified that she entertained her family on Thanksgiving and explained to those present that she believed Troy had become blind. Making an announcement of that magnitude to family on, of all days, our nation's day of giving thanks for our blessings and good fortune, would be deeply ingrained in one's memory. Ms. Schneider stated that Troy's vision had deteriorated to the point where it was obvious to her family members on Thanksgiving. The specter of Troy feeling his way along the couch, making his way to various relatives and feeling their faces, is not a vignette easily forgotten. Furthermore, Ms. Schneider was certain that she initiated the discussion with Ms. Benner and Ms. Wilson before Thanksgiving. But regardless, Ms. Benner specifically recalled that Troy lost his vision before Thanksgiving.

The court believes that the witnesses were able to correctly recall whether Troy's behavioral changes occurred before or after Thanksgiving. Thanksgiving is a major holiday and serves as a significant point of reference when referring to past events. Both witnesses were clear, coherent, and unwavering in their description of the time line of Troy's changes. And, Ms. Benner is a disinterested witness and has no apparent reason to mislead the court.

Significantly, the court notes that there is substantial support in the contemporaneous medical records for the witnesses' testimony. The records of Dr. Filipek, Dr. Josephson, Dr. Akopov, Dr. Demer, and the Dermatology & Laser Group of Irvine all place onset before November 23, 2000. Thus, for all of the foregoing reasons, the special master credits the testimony placing the onset of Troy's symptoms in the two weeks preceding Thanksgiving, which occurred on November 23, 2000.

CONCLUSION

The court finds petitioner's explanation regarding the date of onset of Troy's change in behavior, as embodied in the petition, the supporting affidavits, certain medical records, and accompanying testimony, to be reasonable and credible. The special master finds that there is a preponderance of evidence that:

1. Troy experienced a fever on November 10, 2000, which lasted for three days.

2. Troy experienced lethargy beginning on November 10, 2000, which was characterized by (a) burying himself in blankets and refusing to leave his bed and (b) a decreased level of activity.

3. Troy experienced the following changes in behavior in the two weeks prior to November 23, 2000: (a) difficulty navigating around his home and school without assistance; (b) no longer putting together puzzles; (c) looking at books and papers by holding them close to the side of his right eye; (d) watching television with his

face against the screen; (e) using the computer with his face against the screen; and (f) no longer making eye contact with his mother and teachers.

The special master cannot make findings with respect to whether the above-described symptoms rise to the level of an encephalopathy as defined by the Table or whether the November 3, 2000 MMR vaccination caused the above-described symptoms.

Petitioner's counsel shall confer with respondent's counsel and then contact the court to schedule a status conference to discuss further action in this case

IT IS SO ORDERED.

Margaret M. Sweeney
Special Master