

OFFICE OF SPECIAL MASTERS

No. 99-495V

Filed: August 31, 2006

Not for Publication

JONATHAN CARRINGTON, a minor, by his *

mother and natural guardian, TAMMY *

CARRINGTON, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT *

OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Onset; Hepatitis B; Protracted
Crying; Factual Findings;
Resolving Conflicting Evidence

Clifford Shoemaker, Vienna, VA, for Petitioner

Althea Davis, Washington DC, for Respondent

ONSET RULING

VOWELL, Special Master:

On July 26, 1999, Mrs. Tammy Carrington timely filed a petition under the National Vaccine Injury Compensation Act, 42 U.S.C. § 300aa-10 et. seq.¹ on behalf of her minor son, Jonathan, alleging that the hepatitis B vaccinations he received on August 3, 1997 and October

¹ Hereinafter, for ease of citation, all “§” references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. 300aa (2000 ed.).

13, 1997 were the cause in fact of a brain injury² he suffered on December 10 or 11, 1997. Because there were significant differences among the affidavits filed by petitioner and the contemporaneous medical records concerning Jonathan's condition prior to his medical evacuation to Schumpert Medical Center on December 11, 1997, I ordered a hearing to resolve those discrepancies prior to receiving expert opinions on causation. At the May 16, 2006 hearing in Lufkin, TX, I heard testimony from Mr. and Mrs. Carrington and from several of their friends and neighbors concerning the events of Jonathan's first four and one half months of life.

I. Facts not Reasonably Subject to Dispute

Based on the testimony and exhibits, the following events do not appear to be in dispute.

Jonathan was the product of an uncomplicated pregnancy and delivery. Transcript ["Tr."]² at 5; Petitioner's Exhibit ["Pet. Ex."]³ 47; Pet. Ex. 7, pp. 9-10. At birth on July 31, 1997, he weighed nine pounds, seven ounces, and his Apgar³ scores of 9 and 9 indicated that he was healthy at birth. His neonatal course was largely uneventful, although a Dr. Jacob noted some mild jaundice on August 3, 1997, and expressed concern about his poor urinary output.⁴ Pet. Ex.

² Jonathan's injury is variously described in the medical records as a ruptured aneurysm or as an arterial-venous malformation. Solely for the purposes of this opinion, I refer to this tragic occurrence as a ruptured aneurysm. I am not making a factual conclusion that Jonathan experienced a ruptured aneurysm. Although the medical records clearly establish that Jonathan experienced bleeding in his brain, what caused the bleeding and the subsequent brain injury are to be determined in further proceedings in this case.

³ The Apgar score is a numerical assessment of a newborn's condition, usually taken at one minute and five minutes after birth. The score is derived from the infant's heart rate, respiration, muscle tone, reflex irritability, and color, with a range from zero to two points awarded in each of the five categories. See *Dorland's Illustrated Medical Dictionary* ["*Dorland's Medical Dictionary*"] at 1670 (30th ed. 2003). Jonathan's scores are documented at Pet. Ex. 7, pp. 1 and 7.

⁴ The entry is handwritten and the signature is not clear, but appears to be "Jacob" or "Jacobs." The handwriting differs from that of the two entries just above it on Pet. Ex. 7, p. 1, both made by Dr. Patricia Nicol. Doctor Nicol was Jonathan's primary pediatrician until December 11, 1997. Tr. at 11, 85-86. The note reads "Continues [symbol meaning "with"] BF [breast feeding]-very rigid in schedule. Resists idea of supplemental H₂O [water] per nursing. PE [physical exam] stable [symbol meaning "except"] mild jaundice. 4 UOP [urinary output] last 24^o [meaning "hours"]. Will discuss breast feeding starvation syndrome [symbol meaning "with"] parents. Will f/u [follow up] 2 days @ [at] office." From the reference to following up with Jonathan's parents in two days at the office and from the fact that Jonathan had an appointment two days later at The Children's Clinic of Lufkin ["Children's Clinic"], I conclude that whoever made the entry was someone associated with that medical practice. The nursing

7, p. 1.

Other than when he was brought to his mother to nurse and to bond with his parents for periods of an hour or two, Jonathan stayed in the newborn nursery. Pet. Ex. 7, pp. 13-18. Mr. and Mrs. Carrington did not perform other childcare activities, such as bathing Jonathan while at the hospital. They did not change any of Jonathan's diapers until just before his discharge.⁵ Tr. at 8, 69.

Although the nursing records reflect that he cried in the nursery (*see, e.g.*, Pet. Ex.7, pp. 13-18), his parents and visitors did not recall any unusual crying or irritability prior to his discharge from the hospital on August 3, 1997. The records contain no indication of any protracted crying and I find that his crying while at the hospital nursery was not unusual for a neonate. The nursing notes reflect that Jonathan slept in the crib in the nursery. One member of the nursery staff noted that he seemed easily aroused from sleep. Pet. Ex. 7, p. 15 (entry from Aug 2, 1997). Later that same day, the nursing staff and his mother had difficulty waking him to nurse. *Id.*, pp. 16, 18. The physicians who examined Jonathan throughout this period did not comment on his crying or sleeping. I therefore find that his behavior in the newborn nursery was not out of the ordinary for a neonate.

At some time between 11:00 and 11:45 A.M. on Sunday, August 3, 1997, Jonathan received his first hepatitis B vaccination. At approximately 1:00 P.M. that same afternoon, Jonathan was discharged from Columbia/Woodland Heights Medical Center. Pet. Ex. 7, p. 18.

Jonathan began crying while his mother was being wheeled out of the hospital. One of the nurses suggested that Mrs. Carrington put her finger in his mouth to calm him. Tr. at 8. The nursing staff also provided Mr. and Mrs. Carrington with a phone number to the nursery for questions that might arise concerning infant care after discharge. *Id.* at 153. After completing hospital paperwork and taking pictures with friends at the car, Mr. and Mrs. Carrington drove the short distance from the hospital to their home, arriving at around 2:00 P.M. *Id.* at 165, 167.

Within an hour of their arrival home, Jonathan began crying in a manner that differed

notes at Pet. Ex. 7, p. 18, indicate that a Dr. Jacob examined Jonathan on August 3, 1997 prior to his discharge from the hospital.

⁵ I do not mean to suggest that Mr. and Mrs. Carrington were not good and caring parents, merely that they were inexperienced ones at that time--a fact that they acknowledged in their testimony. Tr. at 8, 155. At the conclusion of the onset hearing, counsel for both sides and I visited the Carrington family home and observed Jonathan. It was obvious that his parents are extraordinarily caring and committed people who are devoted to Jonathan and focused on his welfare. The household revolves around meeting Jonathan's overwhelming physical needs. The home contains numerous pieces of equipment designed to stimulate and care for Jonathan and it is filled with pictures of him from birth to the present. He is clearly a much-loved little boy.

from the crying his parents had observed in the hospital. Tr. at 46, 153. After efforts to console him were unsuccessful, Mr. Carrington called the newborn nursery for advice. This call occurred approximately two to three hours after their arrival home, or between 4:00 and 5:00 P.M. on the afternoon of August 3, 1997. *Id.* at 9-10, 153. Mr. Carrington asked if the crying was normal and was told that Jonathan might have colic⁶ or might be reacting to a new and strange environment. Testimony from Carla Arnold corroborated that Jonathan was crying between 6:00 and 7:00 P.M. that evening when she telephoned. *Id.* at 89, 97.

While this telephone call to the nursery is not documented in Jonathan's medical records, I have no difficulty in concluding that the call was made. It is not unreasonable to conclude that inexperienced parents who are alone for the first time with a crying infant might seek assistance from the experienced nursing staff at the hospital that they had just left. Additionally, Pet. Ex. 3, p. 28, reflects a telephone call to Jonathan's pediatrician for a similar concern (not sleeping) on the following day, indicating that Jonathan's parents were actively seeking advice and assistance in caring for him.

Several experienced parents visited the Carrington home over the next four months and babysat on occasion for Jonathan. Their testimony buttresses the testimony of Mr. and Mrs. Carrington that Jonathan cried frequently and loudly and was difficult to console other than by breast-feeding. *See, e.g.*, Tr. at 90, 99, and 105-06 (testimony of Mrs. Arnold); at 112, 118-19 (testimony of Mrs. Glover); and at 138-40 (testimony of Mrs. Hayes). With the exception of Mrs. Arnold, these friends and neighbors were only present in the Carrington home for fifteen minutes to an hour or two, once or twice a week. Mrs. Arnold spent two weekends in the Carrington home during Jonathan's first two or three weeks of life.

The testimony of these friends and neighbors about Jonathan's crying during their visits is remarkably similar. Mrs. Glover testified that she visited one to two times a week, at around 10:00 A.M., and most of the time, Jonathan was crying. Tr. at 113, 118. She cared for Jonathan on December 10, 1997, at around 5:30 or 6:00 P.M. for a few minutes while Mrs. Carrington ran an errand. She described him as "really fretting" and "screaming" that night. *Id.* at 115, 125. Mrs. Hayes, who lives next door to the Carringtons, saw Jonathan two to three times a month and he was crying every time she saw him. *Id.* at 138-40. Mrs. Youngblood saw him about once a week after work, when he would either be asleep or crying. *Id.* at 199-200.

I find that, during the period between his arrival at home and December 11, 1997, Jonathan cried more often and more robustly than most infants of similar age within the collective knowledge of the witnesses. The medical records do not conflict with the testimony about extensive and prolonged crying. While the records do not directly reference Jonathan's

⁶ Infantile colic is defined as "a benign paroxysmal abdominal pain during the first three months of life. *Dorland's Medical Dictionary* at 387. It is presumably of intestinal origin and includes severe crying. *Nelson Textbook of Pediatrics* at 128 (Richard E. Behrman *et al.* eds., 14th ed., 1992).

extensive crying, they do mention “colic,” a term often used to describe prolonged crying in infants. Pet. Ex. 3, p. 27. The records also indicate that he would get “fussy” and “wiggly.” *Id.*, p. 26.

The evidence regarding the quality and nature of his crying is less clear, and will thus be discussed in Part II, *infra*.

Jonathan visited his pediatrician, Dr. Nicol, on at least five occasions after his parents brought him home from the hospital. Other than a concern about constipation, discussed *infra*, the records do not reflect any specific problems regarding Jonathan’s health and development. He was circumcised on August 11, 1997 and received his two-month vaccinations⁷ on October 13, 1997. Pet. Ex. 3, p. 27, 25. There are no records of other calls or visits to The Children’s Clinic of Lufkin [“Children’s Clinic”] between the October 13 visit and December 11, 1997.

On December 11, 1997, Mrs. Carrington observed some unusual behavior⁸ in Jonathan and contacted the Children’s Clinic. Doctor Nicol was unavailable and Dr. Fidone agreed to see Jonathan that morning. After a series of other medical tests did not explain Jonathan’s symptoms, Dr. Fidone performed a lumbar puncture.⁹ The spinal fluid was bloody, signifying a possible cerebral hemorrhage.¹⁰ Doctor Fidone arranged for an emergent computed tomography (CT) scan,¹¹ which confirmed bleeding within Jonathan’s brain. Pet. Ex. 7, p. 35.

Jonathan was admitted to the intensive care unit and intubated. Pet. Ex. 7, pp. 34-35. He was transferred by helicopter to Schumpert Medical Center in Shreveport, LA, that same evening and arrived in critical condition. *Id.*, p. 36. His subsequent medical treatment and current medical condition were briefly discussed by Mrs. Carrington during her testimony, but are not currently at issue in this case and I will not, therefore, summarize them here.

⁷ Jonathan received vaccinations for diphtheria, tetanus, pertussis, hemophilus influenzae type b, and polio, in addition to his second hepatitis B vaccination.

⁸ Because there are some discrepancies between the symptoms reported in the records and what Mrs. Carrington reported elsewhere, I discuss the nature of those symptoms and the factual conclusions I have drawn in Part II, *infra*.

⁹ A lumbar puncture involves placing a needle in the subarachnoid space of the spinal column to measure pressure and to obtain cerebrospinal fluid for laboratory examination. *Mosby’s Manual of Diagnostic and Laboratory Tests* [“*Mosby’s Labs*”] at 678-679 (3d ed. 2006).

¹⁰ *Id.* at 678.

¹¹ A brain CT scan is used to diagnose tumors, aneurysms, and hemorrhage in the brain. *Mosby’s Labs* at 1095-96.

II. Resolution of Disputed Factual Issues

The hearing failed to harmonize several significant discrepancies among the contemporaneous medical records and the statements and affidavits of Mr. and Mrs. Carrington and their neighbors and friends regarding Jonathan's behavior during his first four months of life. It is therefore necessary for me to resolve those conflicts by making the factual determinations upon which the expert opinions will be based. Of the voluminous medical records filed in this case to date, three are of primary relevance to this issue: the pediatric records found in Pet. Ex. 3 from the Children's Clinic; Pet. Ex. 7, the neonatal records from Columbia/Woodland Heights Medical Center; and Pet. Ex. 12, the Schumpert Medical Center records from Jonathan's admission on December 11, 1997. However, in making these factual findings, I have considered all of the medical records, the hearing testimony, and the affidavits and other statements of the witnesses.

The points of conflict concern (1) the nature of Jonathan's crying; (2) the nature of Jonathan's sleeping patterns; and (3) the impact, if any, of the second hepatitis B vaccination on Jonathan's behavior. In making my factual findings, I have elected to summarize the evidence before indicating which factual conclusions I have drawn.

(1) Evidence Regarding the Nature of Jonathan's Crying.

Most of the witnesses indicated they had experience with babies with colic and thought Jonathan's behavior was different from that of their own colicky infants or those for whom they had cared. While I believe their testimony that Jonathan's behavior was different from their own experiences, I do not—at present—accept the underlying premise that Jonathan's crying was caused by something other than colic. In the absence of medical testimony concerning the causes and symptoms of colic, I would not presume to diagnose colic and will not accept lay testimony that purports to do the same. The term “colic” appears to mean different things to different people. For example, Mrs. Youngblood testified that her daughter had colic, but when questioned about the symptoms her daughter displayed, she discussed only one night of protracted crying. Tr. at 201. Mr. Youngblood, Mrs. Youngblood's husband, recalled that all three of their children had colic. *Id.* at 212-13. Mrs. Arnold mentioned that her first child had colic for four to five days and seemed to believe that colic should not last longer than that. *Id.* at 94. In the absence of medical testimony regarding the symptoms of colic, it is at least equally probable that Jonathan had colic and the other infants discussed were crying for some other reason. Certainly Jonathan's described behavior more closely resembles the pediatric medical textbook and medical dictionary definitions of colic than that of the other infants discussed. *See* n. 6, *supra*.

The witnesses described Jonathan's cry as one of an infant in pain, or as a scream. *See, e.g.,* Tr. at 92, 120, 205. Mr. Youngblood testified that he told Mr. and Mrs. Carrington that there was something wrong with Jonathan. *Id.* at 209. I am unable to make any specific findings as to the character of Jonathan's regular cry based solely on the testimony. Not only were the descriptions vague, the term “scream” was used to describe different events. Mrs. Carrington

characterized his customary cry as a scream, as if he were in pain, but she also testified that his cries of pain after his circumcision were screaming, in a context and tone that suggested the two cries were different from one another. Mrs. Carrington also testified that Jonathan's screaming in pain after his aneurysm ruptured (*see* Pet. Ex. 13, pp. 3-4) was a different type of scream or cry. Tr. at 80-82. Mrs. Carrington's statements on her Vaccine Adverse Event Reporting System ["VAERS"] Form 1 reflects that Jonathan screamed at the top of his lungs from his first day at home until December 11, 1997 and that he screamed 90% of his walking hours. Pet. Ex. 10, p. 4. She testified that his cry was unrelenting and that it went on around the clock. Tr. at 17, 20.

While there is no specific evidence that Dr. Nicol or the office staff heard Jonathan's usual cry¹² during any of his medical appointments, the high likelihood is that they did. Mrs. Carrington testified that her usual procedure was to check in, then go to the nursing room and feed Jonathan before he saw the doctor. This would give a brief window of time after nursing when he would be calm. Tr. at 50. However, it is unlikely that a child who cried as much as the witnesses all indicated that Jonathan did would not have cried at some point during any of these office visits. Mrs. Carrington did not deny that probability during her testimony (Tr. at 47, 49), but suggested that his cry would not have been the same as his usual cry because he was partially content from having nursed. *Id.* at 50. Had the nature of his crying been markedly different from other infants, I think it likely that the medical personnel would have remarked upon it. I find some inconsistency in the efforts Mrs. Carrington testified that she made to avoid having Jonathan cry at the doctor's office and her concern over his crying.

Fortunately, Pet. Ex. 35¹³ contains an audio tape of Jonathan crying. Mrs. Carrington testified that this audio tape was representative of Jonathan's typical daily crying and was recorded sometime before October 13, 1997. Tr. at 26, 70. I find that the tape was made between August 5 and October 13, 1997. She recorded it to play for Dr. Nicol, but Dr. Nicol did not have time to listen to it. *Id.* at 26. Having listened to the tape several times, I cannot definitively characterize the cry as representative of a child in pain. The tenor, pitch, and intensity of the cry do not appear to me to be markedly different from that of other crying infants.

I find the tape to be the best evidence for the nature and character of Jonathan's crying during the period between his arrival at home and mid-October, 1997. I strongly encourage the parties to provide Pet. Ex. 35 to their experts for an opinion on whether the type of crying on the tape has any medical significance and whether it could trigger the rupture of an aneurysm.

¹² Doctor Nicol certainly heard his crying during the circumcision, as Mrs. Carrington testified that she could hear him screaming down the hall. This screaming was worse than his usual crying. Tr. at 53, 72.

¹³ This exhibit is primarily a video tape of Mrs. Carrington holding Jonathan and discussing his condition and care and her beliefs regarding the cause of his condition. I viewed the video tape in its entirety. At the conclusion of Mrs. Carrington's narrative, she played the audiotape she had made years earlier of Jonathan's crying.

Regardless of the factual findings I make here, a causation hearing must answer the question of whether the hepatitis B vaccine triggered Jonathan's crying and whether that crying could cause the bleeding in his brain. Assuming, *arguendo*, that the vaccine could cause Jonathan's prolonged crying, the nature of that crying may be significant to the expert witnesses in determining whether it could cause an aneurysm to rupture or otherwise cause bleeding in Jonathan's brain.

Both Mr. and Mrs. Carrington testified that Dr. Fidone listened to the audio tape, although they differed on when he did so. Tr. at 71, 155-56. I did not, however, rely in any way on Mrs. Carrington's testimony that Dr. Fidone agreed with her that Jonathan's cry was abnormal. While the rules of evidence do not apply to the Vaccine Program, I am unwilling to accept testimony from a lay witness about a doctor's diagnosis when that doctor is available to testify. Too many "errors in translation" are possible—even probable—for me to find such evidence reliable.

(2) Jonathan's Sleeping.

Mr. and Mrs. Carrington were adamant that Jonathan slept only fitfully, for five to thirty minutes at a time, and not more than four or five hours in a day, during his first four and a half months of life. Tr. at 55, 154. In what can only be considered hyperbole, Mrs. Carrington made a statement in her pre-hearing affidavit that Jonathan "literally never slept,"¹⁴ followed by a statement that he slept for short periods. Her "never slept" statement also conflicted with her testimony and that of her husband at the hearing that Jonathan did sleep, albeit fitfully and for very short periods of time.

Mr. and Mrs. Carrington's testimony also conflicts with some of the contemporaneous and later medical records. The contemporaneous ones were primarily generated at the Children's Clinic. While Dr. Nicol's records of Jonathan's well-baby visits are not particularly comprehensive (they do not, for example, contain checklists for developmental milestones commonly seen in pediatric records), they do contain basic information regarding height, weight, head circumference, problems discussed, sleeping, behavior, and appetite, as well as other matters occurring during the visits. There is no evidence that the persons¹⁵ making the entries were careless or inattentive.

I find that Mrs. Carrington did discuss Jonathan's poor sleeping with his pediatricians.

¹⁴ See, e. g., Pet. Ex. 39, Mrs. Carrington's affidavit.

¹⁵ The entries reflect the handwriting of several different individuals. Doctor Nicol signed her entries "P. Nicol." Other entries, such as the one dated August 11, 1997, found at Ex. 3, p. 27, contain only initials and I was not able to determine who made the entries. It appears that Dr. Jacobs saw Jonathan on September 20, 1997, or that he was the doctor who prescribed Zantac for him. Pet. Ex. 3, p. 26.

The earliest entry in the Children's Clinic records is Pet. Ex. 3, p. 28, dated August 4, 1997, the day after Jonathan came home from the hospital. It documents a telephone call from Mrs. Carrington to the Children's Clinic concerning two issues: blood in Jonathan's urine and "not sleeping." While lack of sleep is common for both newborns and parents, as any parent can attest, I conclude that this entry refers to Jonathan's sleeping problems, rather than to his parents' lack of sleep.

Petitioner's Exhibit 3, p. 27 also supports the testimony that Jonathan was a poor sleeper, at least during the first few weeks of his life. The checklist entry dated August 14, 1997, when he was 2 weeks old, notes that his behavior, activity, and appetite were all "good" but notes his sleeping as "poor." While the chart does not expressly diagnose Jonathan as having colic, it notes his "colic sy's sl improved," an entry I interpret as Jonathan's colic symptoms showing slight improvement. This would suggest that Mrs. Carrington had informed Dr. Nicol about Jonathan's prolonged and vigorous crying and poor sleeping, and supports Mrs. Carrington's testimony that she was told Jonathan had colic.

The most significant discrepancies between the testimony and the medical records regarding Jonathan's sleeping begin at the October 13, 1997 visit. In the upper right hand corner of Pet. Ex. 3, p. 25, there is a note indicating that Jonathan was nursing on demand and sleeping 10-11 hours through the night. There is no stamped checklist of symptoms for this visit and there are no other notes regarding sleeping patterns. Mrs. Carrington testified that this entry was simply incorrect, as Jonathan never slept through the night until the evening of December 10th, and in fact never slept more than four to five hours in any 24-hour period until that evening. Tr. at 28; Pet. Ex. 10, p. 4. I do not accept her testimony as factual in this regard.¹⁶

The medical record entries for December 11, 1997, were also significant in my decision to reject Mrs. Carrington's testimony on this point. The other symptoms in the record track Mrs. Carrington's testimony describing Jonathan's symptoms that morning. They include a decrease in appetite, vomiting, and rubbing his eye "x 10 day".¹⁷ Pet. Ex. 3, p. 25. Mrs. Carrington testified that Jonathan refused to nurse that morning, vomited twice, and rubbed his eye frequently. Tr. at 28-29. However, the medical record also notes that Jonathan's sleeping was "good," a characterization completely at odds with the testimony, but in harmony with the previous entry regarding Jonathan's sleeping.

¹⁶ While Mr. Carrington's testimony supported that of his wife with regard to Jonathan's sleeping, Mr. Carrington also testified that he himself was a heavy sleeper and once he went to bed in the evening, he did not awaken until the next morning. Tr. at 174. He also testified that he observed that Jonathan was asleep in his crib when he left for work on the morning of December 11, 1997.

¹⁷ This entry could be interpreted as rubbing his eye for 10 days or for 10 times that day. Based on Mrs. Carrington's testimony, the latter interpretation is more likely.

Four other factors make it difficult for me to completely credit the Carringtons' testimony about Jonathan's sleeping patterns from October 13, 1997 through December 11, 1997 instead of the medical records. The first is the absence of an entry on December 11, 1997 that this was the first night Jonathan had slept for such an extended period. For a parent as sleep-deprived as Mrs. Carrington must have been, based on her testimony that Jonathan slept only fitfully for his first four months, an evening with a full night's rest would have been a significant change. It would also have been a significant source of discomfort for a breast-feeding mother, particularly since Jonathan refused to nurse that morning. I think it extremely unlikely that Mrs. Carrington would have failed to emphasize to Dr. Fidone that this was the first time Jonathan had slept for twelve hours straight or that Dr. Fidone would have failed to record such a dramatic change in his sleeping pattern as he attempted to discover what was wrong with Jonathan. I also note that the records from Schumpert Medical Center reflect a history, apparently from his parents, (*see* Tr. at 60-62, 177-78) that Jonathan was irritable, refused to nurse, and crying more than usual, but do not reference his first twelve hours of uninterrupted sleep. *See, e.g.*, Pet. Ex. 12, pp. 3, 6, 98.

Dr. Fidone's notes are at odds with Mrs. Carrington's testimony that Jonathan's behavior was entirely normal on the evening of December 10, 1997. The first entry on that date (Ex. 3, p. 25) is a note regarding a telephone call from Mrs. Carrington. It relates that Jonathan had two teeth and might be cutting more, but also describes high-pitched screaming and shaking, 20-25 minutes at a time the morning of the call and the evening before. It also describes Jonathan as extending his legs. Mrs. Glover testified that Jonathan screamed that evening during part of the 30-45 minutes that she spent with him. Mrs. Carrington's description during her telephone call to the Children's Clinic of Jonathan's crying ("more high pitched screaming") coincides with her other descriptions of how Jonathan cried on most occasions. If this was his normal cry, then it seems odd that Mrs. Carrington, the person noted as making the telephone report, would specify it as a reason to call the doctor, rather than Jonathan's failure to nurse, which was the reason for concern she gave during her hearing testimony.

The medical records from December 11, 1997 also indicate that Jonathan had been "crying x3 day." Whether this entry means that Jonathan had been crying for three days or had been crying three times that day, it is yet one more record at odds with testimony about his frequent and unrelenting crying.

The second factor that convinces me to accept the contemporaneous records as more accurate are the other discrepancies between Mrs. Carrington's testimony, given eight years after the events, and the contemporaneous records of those same events. While it would not be unheard of to have some erroneous or incomplete entries in medical records, I find it unlikely in the extreme that there would be so many discrepancies with several different health care providers. For example, Mrs. Carrington testified that Jonathan did not have any bowel movements between his discharge from the hospital and the office visit on August 11, 1997. Tr. at 14-15. In contrast, the medical records for August 5, 1997 indicate Jonathan was having daily bowel movements. This entry is in a handwriting different from that of Dr. Nicol's note below it. *Compare* the first six lines of Pet. Ex. 3, p. 27 *with* the following four lines. The entry for

August 11, 1997, in Dr. Nicol's handwriting, indicates that Jonathan had been constipated for three days, placing onset of his constipation on or about August 8, 1997. A follow-up telephone inquiry by Mrs. Carrington on August 18, 1997, indicated that the rectal dilation was working, as Jonathan was having bowel movements, and inquired if she should continue the dilation. This conflicts with her testimony that they continued to dig the stool out with a thermometer. Tr. at 20.

Another example is Mrs. Carrington's testimony that, during the first office visit after Jonathan's birth, Dr. Nicol discouraged her from using a pacifier or giving supplemental water. Tr. at 12-13. The tenor of her testimony was that she wanted to use a pacifier to console Jonathan, but was discouraged from doing so by the doctor. However, in the hospital after Jonathan's birth, a note by Dr. Jacob indicates that the nursing staff had noted that Mrs. Carrington was "rigid" in her opposition to supplemental water for Jonathan. Pet. Ex. 7, p. 1. His note is substantiated by a nursing note recording a parental request that no pacifier or nipples be used with Jonathan. *Id.*, p. 11. Mrs. Carrington never indicated in her testimony that she, herself, had been adamantly opposed to the use of pacifiers just days before. During the weekend after this breast-feeding discussion, Mrs. Arnold apparently used a pacifier with Jonathan. Tr. at 90.

The third factor is that, other than Mrs. Arnold, there is little corroboration for Jonathan's failure to sleep. While witnesses testified that Jonathan was crying during their visits, those visits did not last longer than an hour or two at most. Mrs. Arnold's testimony about his failure to sleep was based on her observations concerning the first few weeks of his life. She later observed him sleeping in his car seat (Tr. at 95-96), Mrs. Carrington's testimony that he only slept when held, notwithstanding. I also note that, at least on the evening of December 10, 1997, Jonathan was sleeping in his crib. Tr. at 174.

The fourth factor is a checklist that Mrs. Carrington prepared for Dr. Andrew Campbell when Jonathan was 20 months old and just a few months before the petition was filed in this case. In response to a question about sleeping, Mrs. Carrington wrote "not sleeping well since 12/11/97." Pet. Ex. 8, p. 9. That would imply that there was a time prior to December 11, 1997, when Jonathan did sleep well, and would be consistent with the medical records on October 13 and December 11, 1997.¹⁸

(3) Jonathan's Symptoms after Subsequent Hepatitis B Vaccinations.

Mrs. Carrington indicated in her affidavit (Pet. Ex. 39) and on the VAERS Form 1 (Pet. Ex. 10, p. 4) that Jonathan's crying got worse after the second hepatitis B vaccination. She also testified that after that vaccination on October 12, 1997, that his crying became more intense. Tr. at 27. However, in the medical history she provided to Dr. Campbell in July 1999, she indicated

¹⁸ In a later history provided to Dr. Campbell, Mrs. Carrington apparently told him that Jonathan didn't "sleep much." Pet. Ex. 8, p. 5.

that his crying continued to be very intense after his second hepatitis B vaccination, not that it got worse. Pet. Ex. 8, p. 5. Mr. Carrington, however, testified that Jonathan's crying was pretty much the same during the whole period before his aneurysm ruptured. Tr. at 86. Mrs. Youngblood testified that Jonathan's crying did not change over time. Tr. at 203-04.

Mrs. Carrington did not, however, note any increase in his crying or other symptoms after the third hepatitis B vaccination in April 1998. Tr. at 79-80.

There are no entries in the medical records between October 13 and December 11, 1997. At the hearing, no one, other than Mrs. Carrington, testified that Jonathan's crying became worse after the second hepatitis B vaccination. I find no contemporaneous evidence to support that assertion. Had his crying—by her testimony, already close to intolerable—increased in pitch, tone, or duration after the shot, I think it more probable than not that she would have brought this to his doctor's attention at some point between October 13 and December 11, 1997.

In reaching this conclusion, I have carefully considered the testimony offered at the hearing as well as the contemporaneous medical records. Jonathan was seen for problems as well as for routine care during his first four months. The problems included blood in his urine, constipation, and spitting up. By their own testimony, Mr. and Mrs. Carrington were told that Jonathan's colic would likely resolve when he was 3-6 months old (Tr. at 10, 172-73) and at this point, he was well into the period when they could expect improvement. A marked increase in symptoms could be expected to prompt a telephone call or visit. There is no record of any. In drawing this conclusion, I have also specifically considered the testimony of Mrs. Easter, a long-time friend of Mrs. Carrington, that Mrs. Carrington was proactive in seeking answers for Jonathan's problems. Tr. at 134.

The absence of an entry in the medical records is less significant than the presence of one that conflicts with the testimony. *See, e.g., Murphy v. Sec'y, HHS*, 23 Cl. Ct. 726, 733 (1991) *aff'd*, 968 F.2d 1226 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 974 (1992) (“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.”). Here, however, the absence of an entry regarding Jonathan's first-ever twelve hour period of sleep is too significant to have been an oversight. Any such entry would have conflicted with the October 13, 1997 entry regarding ten to eleven hours of sleep. Furthermore, the absence of any reference to increased screaming after the second hepatitis B vaccination at a time when his parents could have reasonably expected Jonathan's crying to subside, coupled with the lack of testimony by others that his condition worsened, leads me to reject Mrs. Carrington's testimony that it did.¹⁹

¹⁹ The VAERS report at Pet. Ex. 10, p. 4, indicates that his constipation, agitation, and hair loss also increased after the second hepatitis B vaccination. There was no testimony at the hearing that his constipation or agitation increased after the second shot and no testimony or other records ever established that Jonathan suffered from hair loss.

Special masters frequently accord more weight to contemporaneously recorded medical symptoms than those recounted in later medical histories, in affidavits, or in trial testimony. “It has generally been held that oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight.” *Murphy*, 23 Cl. Ct. at 733. *See also, Cucuras v. Sec’y, HHS*, 993 F.2d 1525, 1528 (Fed. Cir. 1993). Memories are generally better the closer in time to the occurrence and the motivation for accurate explication of symptoms is more immediate. *Reusser v. Sec’y, HHS.*, 28 Fed. Cl. 516, 523 (1993). I have found compelling reasons to accord greater weight to the contemporaneous medical records in this case.

III. Summary

The factual findings are summarized below:

1. Jonathan was the product of an uncomplicated pregnancy and delivery.
2. At his birth on July 31, 1997, he weighed nine pounds, seven ounces.
3. His Apgar scores were nine at one minute and nine at five minutes, indicating he appeared healthy at birth.
4. Jonathan nursed shortly after his birth. He subsisted solely on breast milk during his neonatal period. At his parents’ request, the nursing staff did not supply him with supplemental water or nipples or pacifiers.
5. Jonathan’s parents did not engage in many child care activities, such as bathing or diapering him, while they remained at the hospital. He did not “room in” with his mother. Instead, he slept in the newborn nursery and was taken to his mother for breast-feeding and bonding time.
6. While Jonathan cried in the hospital, no one noted any unusual aspects to his cry.
7. Jonathan’s behavior in the hospital was not out of the ordinary for a neonate.
8. Jonathan slept in the hospital, and was sometimes easily roused from sleep, and at others, he was difficult to arouse from sleep.
9. The only item of concern in his medical records was his poor urinary output during the twenty-four hour period prior to his examination by Dr. Jacob on the day he was discharged. This period preceded the hepatitis B vaccination.
10. Jonathan received his first hepatitis B vaccination on August 3, 1997, between 11:00 and 11:45 A.M. He was discharged from the nursery at 1:00 P.M., and arrived home with his parents at approximately 2:00 P.M. Sometime between 4:00 P.M. and 5 P.M. that evening,

Jonathan began crying more loudly than his parents had observed him to cry while at the hospital. Other than when he was nursing, he was very difficult to console.

11. Mr. Carrington contacted the hospital nursery about Jonathan's crying and was advised that he might have colic or might be reacting to his new surroundings.

12. Mrs. Arnold, a friend, called Mrs. Carrington that evening between 6:00 and 7:00 P.M. and Jonathan was crying loudly during her call.

13. Jonathan did not sleep well on the date he arrived at home and continued to be a poor sleeper through at least his first month or so of life. During the first weeks, Jonathan slept fitfully, for periods of 15-30 minutes at a time, and for approximately four to five hours during a 24-hour period.

14. Jonathan cried more often and more robustly than other babies in the collective experience of all the witnesses. All of the witnesses were experienced parents; at least one had been involved in child care for five to six week old infants. The witnesses thought Jonathan's behavior was different from that of other infants, based on the nature and duration of his crying and the difficulty in consoling him.

15. The audio tape of Jonathan crying contained within Pet. Ex. 35's video tape was made between August 5 and October 13, 1997. It constitutes the best evidence of the nature of Jonathan's crying during this period.

16. I reserve any ruling on whether Jonathan's crying constituted colic, a reaction to the hepatitis B vaccination, to both, or to some other cause. I reject the lay witness testimony that Jonathan's crying was due to something other than colic, as their definition of colic varied with their own experiences with children, and none had the requisite medical experience and training to qualify to make such a diagnosis.

17. Jonathan's doctor, Dr. Nicol, diagnosed him with colic. While the medical records do not reflect that she heard him crying, I find it highly unlikely that a child who cried as robustly and frequently as all the witnesses say the Jonathan did, would not have cried at some point during her treatment of him.

18. However the tenor and pitch of Jonathan's usual cry is characterized, during his circumcision he cried in pain, a cry that was different from his normal crying.

19. Although Jonathan continued to cry more loudly, more frequently, and more robustly than most other infants known to the witnesses, Jonathan's crying did not become worse after the second hepatitis B vaccination on October 13, 1997, and did not become worse after his third hepatitis B vaccination in April 1998.

20. Jonathan was a poor sleeper from his first evening home, but by the time of his second month checkup, he was sleeping through the night.

21. Jonathan developed problems with constipation on or about August 8, 1997. He was diagnosed with a tight rectal sphincter, and Dr. Nicol instructed Mrs. Carrington in how to stretch it. When stimulated, Jonathan began having bowel movements. Jonathan did have bowel movements between his discharge from the newborn nursery and August 8, 1997.

22. On the evening of December 10, 1997, Mrs. Glover babysat for Jonathan for 30-45 minutes. He was screaming while she cared for him. Mrs. Carrington put Jonathan to bed in his crib at around 9:00 P.M. that evening, after nursing him.

23. On December 11, 1997, Jonathan refused to nurse when he woke up at about 9:00 A.M. This was highly unusual for him. He exhibited some high-pitched crying or screaming and some shaking for 20-25 minutes at a time. He had exhibited similar symptoms the evening before. He also vomited.

24. Mrs. Carrington called the Children's Clinic and arranged for Jonathan to be seen by Dr. Fidone that morning. Pet. Ex. 3, p. 25, is an accurate reflection of what Mrs. Carrington described to Dr. Fidone and other health care providers at the Children's Clinic about Jonathan's behavior and the reason for this emergency visit.

25. When other lab tests did not reveal any reason for Jonathan's irritability, paleness, and general appearance, Dr. Fidone performed a lumbar puncture, which produced several vials of grossly bloody fluid, signifying bleeding in Jonathan's brain. After an emergency CT scan showed the area of bleeding, Jonathan was intubated and transferred by helicopter to Schumpert Medical Center in Shreveport, LA.

26. In medical histories provided to several of Jonathan's treating and consulting physicians at Schumpert, Mr. and Mrs. Carrington provided medical histories that coincided with the one provided to Dr. Fidone. In none of these histories did Mr. or Mrs. Carrington mention that the previous evening Jonathan had slept for nearly three times as long at one stretch than he usually did in an entire twenty-four hour period.

27. There is no evidence that Jonathan suffered any external head trauma prior to the events of December 11, 1997.

28. Mr. and Mrs. Carrington are dedicated and caring parents who are focused on Jonathan's welfare.

The parties shall provide a copy of these findings to any expert witness retained. Any expert reports filed with the court shall indicate that the opining expert received a copy of these factual findings.

IT IS SO ORDERED.

August 31, 2006
Date

s/Denise K. Vowell
Denise K. Vowell
Special Master