



Initially, it must be observed that hindsight shows that the processing of this case could have been improved. Virtually everyone involved, including people within the Office of Special Masters, could have done something differently that would have made the case better to some degree. As discussed below, one issue is that petitioners' case depends largely upon the testimony of Ilya's mother, Ms. Dobrydneva, who made assertions about Ilya's health that were, at a minimum, inconsistent with medical records. However, the special master, who conducted the hearing and who observed Ms. Dobrydneva's demeanor, did not issue findings of fact. Another issue is that petitioners permitted one witness whom they called, Dr. Oleske, to leave a hearing before its conclusion. His absence made him unavailable to rebut a particular point raised by a witness called by respondent – how a medication called acyclovir affected Ilya.

The undersigned has considered carefully the potential effect of these defects and whether these flaws should be corrected. Ultimately, the undersigned concludes that correcting the flaws would not affect the outcome. As discussed below, petitioners have failed to present a preponderant amount of evidence for one of the elements that they are required to prove – an appropriate temporal relationship between the vaccination and the onset of Ilya's condition. Even if Ms. Dobrydneva's testimony were fully credited, her testimony could not fill this gap in petitioners' proof. Similarly, even if Dr. Oleske were permitted to rebut the testimony about acyclovir, the scope of Dr. Oleske's requested rebuttal would not encompass the appropriate temporal relationship. For these reasons, the undersigned has concluded that the record, while not perfect, is more than adequate to resolve the case. See Environ. Products Inc. v. Furon, Co., 215 F.3d 1261, 1267 (Fed. Cir. 2000). Additional proceedings to correct certain flaws in the process would needlessly delay resolution of the case and increase the costs for the litigants. Thus, in accord with the parties' stated desire, the undersigned has resolved the case on the record as it stands now.

## **I. Factual History**

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

The present case, however, falls into the minority of cases in which the parties rigorously dispute the accuracy of the medical records. Ms. Dobrydneva and Mr. Dobrydnev contend that Ilya suffered health problems that are not discussed in medical records. Respondent argues that the petitioners have not rebutted the presumed accuracy of Ilya's medical records.

To resolve the dispute about facts, the assigned special master, Special Master Edwards, held a hearing on April 25 and 26, 2007, in Norfolk, Virginia. See Campbell v. Sec'y of Health & Human Servs., 69 Fed. Cl. 775, 779-80 (2006); Skinner v. Sec'y of Health & Human Servs., 30 Fed. Cl. 402, 410 (1994). Ms. Dobrydneva testified. Ilya's treating pediatrician, Robert Fink,

also testified. Mr. Dobrydnev and Ms. Dobrydneva also called two expert witnesses, Dr. David Bell and Dr. James Oleske. Respondent called two expert witnesses, Dr. Raoul Wientzen and Dr. Alan Brenner.

Special Master Edwards's tenure as a special master concluded before he resolved this case. It was assigned to the undersigned. The undersigned offered the parties an opportunity for another hearing. Both parties declined this opportunity.<sup>1</sup> After the record closed, the parties submitted briefs in response to questions posed by the undersigned.

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

Petitioners are required to establish their cases by a preponderance of the evidence. 42 U.S.C. § 300aa-13(1)(a). The preponderance of the evidence standard requires that the Special Master "believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence." In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965)).

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

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

Appellate authorities have accepted the reasoning supporting a presumption that medical records created contemporaneously with the events being described are accurate and complete. A notable example is Cucuras in which petitioners asserted that their daughter, Nicole, began to have seizures within one day of receiving a vaccination, although medical records created around that time suggest that the seizures began at least one week after the vaccination. Cucuras, 993 F.3d at 1527. A judge reviewing the special master's decision stated that "In light of [the parents'] concern for Nicole's treatment . . . it strains reason to conclude that petitioners would fail to accurately report the onset of their daughter's symptoms. It is equally unlikely that

---

<sup>1</sup> The petitioners' declination was qualified because petitioners requested an opportunity to present additional testimony from Dr. Oleske. As explained in the procedural history below, this qualification does not require an additional hearing.

pediatric neurologists, who are trained in taking medical histories concerning the onset of neurologically significant symptoms, would consistently but erroneously report the onset of seizures a week after they in fact occurred.” Cucuras v. Sec’y of Health & Human Servs., 26 Cl. Ct. 537, 543 (1992), aff’d, 993 F.2d 1525 (Fed. Cir. 1993). Decisions by judges of the Court of Federal Claims have followed Cucuras in affirming findings by special masters that the lack of a contemporaneously created medical record can contradict an assertion that symptoms appeared on a certain date. E.g. Doe/17 v. Sec’y of Health & Human Servs., 84 Fed. Cl. 691, 711 (2008); Ryman v. Sec’y of Health & Human Servs., 65 Fed. Cl. 35, 41 (2005); Snyder v. Sec’y of Health & Human Servs., 36 Fed. Cl. 461, 465 (1996), aff’d, 117 F.3d 545, 547-48 (Fed. Cir. 1997).

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

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

An assessment of a fact witness’s credibility usually involves consideration of the person’s demeanor while testifying. Bradley v. Sec’y of Health & Human Servs., 991 F.2d 1570, 1575 (Fed. Cir. 1993). Here, however, the undersigned did not observe the witnesses testifying. The witnesses testified before Special Master Edwards, who did not make any findings of fact.<sup>2</sup> The undersigned, of course, reviewed the evidence, including the transcript of the witnesses’ testimony, in great detail. The undersigned also afforded the parties an opportunity to conduct another hearing at which the witnesses could testify. The parties declined. Thus, the undersigned must make findings of fact without the benefit of having seen or heard the witnesses. See Vaccine Rule 3(c) (“In the absence of the assigned special master, the chief

---

<sup>2</sup> The lack of any findings of fact by the predecessor special master distinguishes this case from Andreu in which a judge of the Court of Federal Claims found that a successor special master erred in “embellishing” findings made by the first special master. Andreu v. Sec’y of Health & Human Servs., No. 98-817V, 2008 WL 2009746, at \*2-4 (Mar. 3, 2008), after remand, 569 F.3d 1367 (Fed. Cir. 2009).

special master may . . . designate another special master to act.”); cf. Egan v. Sec’y of Health & Human Servs., No. 05-1032V, 2009 WL 1440240, at \*1 (Fed. Cl. Spec. Mstr. May 1, 2009).

Having been assigned to this case, the undersigned will find facts in accord with the criteria set forth above. The undersigned has considered the evidence, including not only the testimony presented by the five witnesses, but also all the exhibits filed by the parties.

**B. Facts as Found**

The relevant time period surrounding Ilya’s health is divided into two broad periods – first, his health before the November 5, 2001 vaccination, and second, his health after the vaccination. This second period is further divided into time periods becoming successively more remote from November 5, 2001.

**1. History Before Vaccination**

Ilya was born in April 1991. Ilya came to the United States in 1992, when he was 15 months old. Tr. 30. His health from 1992 through 1995 appears to be within normal limits. Tr. 31 (testimony of Ms. Dobrydneva); tr. 142-45 (testimony of Dr. Fink).

In 1992 and 1993, Ilya received three doses of the hepatitis B vaccine. The records present inconsistent information as presented in the following chart:

<b>Vaccination Records for Ilya Dobrydnev</b>			
source	Dr. Fink	School Records & Dr. Robert D. Lehman	Virginia Health Department
citation	Exhibit 7 at 17 (dated Jan. 7, 1997)	Exhibit 7 at 15; exhibit 9(a) at 37	Exhibit 9 at 3
first dose	9/25/92	9/25/92	??
second dose	11/6/92	11/6/92	11/6/92
third dose	8/6/92 *[sic. should be 8/6/93?]	8/6/93	8/6/93

Whether Ilya received two or three or four doses of the hepatitis B vaccine in 1992-93 is probably not material. To the extent that it is material, the record that is most likely to be correct is the record created by Dr. Lehman, which indicates that Ilya received three doses.<sup>3</sup> The dates of

---

<sup>3</sup> The petitioners maintain that the November 5, 2001 dose of the hepatitis B vaccine was the fifth dose. Pet’r Post Hearing Br. at 10, at 12. However, for reasons explained in the text,

vaccination appearing in Dr. Lehman's chart conform to the standard schedule for hepatitis B immunization, which is a total of three doses of vaccination with the second dose administered approximately one month after the first dose and the third dose administered approximately six months after the second dose. Dr. Lehman's record also closely matches Dr. Fink's record. Dr. Fink's record appears to contain an error, however, in that Dr. Fink's record says a dose was given to Ilya on August 6, 1992. Actually, the dose was given on August 6, 1993, one year later. In any event, a preponderance of evidence supports a finding that Ilya received at least two doses of the hepatitis B vaccine in 1992-93. No evidence indicates that Ilya had an adverse reaction to any dose of the hepatitis B vaccine in 1992-93. See exhibit 19 at 8 (statement of Ms. Dobrydneva saying that Ilya had not experienced any reactions to previous vaccinations).

In July 1996, Ms. Dobrydneva completed a form as part of the process for registering Ilya for kindergarten. Ms. Dobrydneva reported that Ilya had "frequent colds," a "frequent sore throat," and a "frequent ear infection." Ms. Dobrydneva did not recall filling out this form. Tr. 64. Because this record was created relatively contemporaneously, this form is accepted as accurately presenting Ilya's medical history. See Cucuras, 993 F.2d at 1528.

From October 1996 to October 2000, Ilya saw a pediatrician 12 times. Ilya presented a range of different complaints, including fever, sore throat and/or weakness. Exhibit 5 at 44-48; see also tr. 144-45 (testimony of Dr. Fink). In early 1997, Ilya was having problems sleeping. Exhibit 7 at 103.

In early 2001, Ilya started to experience health problems, which, arguably, have more significance to his claim for compensation. He saw a pediatrician for problems in his upper respiratory system at least eight times in that year. Exhibit 5 at 40-44. On February 25, 2001, Ilya was noted to be in the "convalescent phase" of a "recent [Epstein-Barr virus] infection." Exhibit 5 at 40. The Epstein-Barr virus ("EBV") causes infectious mononucleosis. Tr. 561-62 (Dr. Brenner). Ilya missed more than 20 days of school in January and February 2001. Exhibit 7 at 6.

Reports from around this time indicate that Ilya experienced fatigue. E.g., exhibit 6 at 366 (Dr. Fisher); see tr. 73 (testimony of Ms. Dobrydneva about this visit).

In March 2001, Ilya saw Dr. Thomas Rubio at the Pediatric Infectious Disease Clinic of the Children's Hospital in Norfolk, Virginia. Ms. Dobrydneva informed Dr. Rubio that Ilya appeared very weak and could not walk. Dr. Rubio was concerned that Ilya had a severe disease and anticipated admitting him to the hospital. Dr. Rubio recounted that Ilya, after being informed that he would have procedures done in the hospital, "[a]ll of a sudden at this time the child 'recovered' all his strength. He was able to walk normally, jump, and had normal strength in his lower extremities." Exhibit 6 at 359. Dr. Rubio stated "I believe that this child is still suffering from some sort of psychological maladjustment perhaps with some fatigue. However, he appears

---

this assertion is not correct.

to be safe from suffering from a definite neurological syndrome.” *Id.* at 359-60. As will be discussed in the subsequent sections, other doctors also wondered if Ilya’s problems were mainly psychological.

Ms. Dobrydneva provided different information about the visit with Dr. Rubio. According to Ms. Dobrydneva, Ilya became frightened and cried after Dr. Rubio had told Ilya that he would need to have a spinal tap. Tr. 37-38; see also tr. 74-76. Whether Dr. Rubio told Ilya that he would receive a “spinal tap” or Dr. Rubio used a more vague term is not material. The important assertion contained in Dr. Rubio’s note – which Ms. Dobrydneva did not contradict – is that Ilya could walk, even though his mother had reported that he could not. (As will be discussed, Ms. Dobrydneva was not an accurate historian.)

In April 2001, Ilya returned to school. Exhibit 7 at 6. On April 23, 2001, Ilya saw Dr. Fink again for a sore throat, being tired, having a fever and coughing. Dr. Fink diagnosed Ilya as having a viral illness. Exhibit 5 at 39. Dr. Fink testified that this visit was not connected to the mononucleosis. Tr. 182.

Dr. Fink stated that Ilya was cured of the mononucleosis by April or May 2001. Tr. 149; tr. 181. The doctors who were retained for purposes of providing opinions in this litigation differed about whether Ilya’s mononucleosis was cured. Dr. Bell thought the mononucleosis was cured in May 2001. Tr. 259. In contrast, the two doctors retained by respondent opined that Ilya continued to show signs of Epstein-Barr infection for months later. Exhibit A at 2 (Dr. Weitzen’s opinion); exhibit D at 1-2 (Dr. Brenner’s opinion).

On May 30, 2001, Ilya saw Dr. Fink. Dr. Fink was informed that Ilya had a five-day history of fever, headache, white patches on his throat, and hallucinations. Dr. Fink recommended that Ms. Dobrydneva take Ilya to a hospital. However, Ms. Dobrydneva did not. Instead, Ms. Dobrydneva “treated him with some leftover Cefzil that she had for one to two months.” Dr. Fink told Ms. Dobrydneva that he had “difficulty of making a diagnosis with her self-medicating him.” Exhibit 5 at 39; tr. 100-1; tr. 182-83.

Ilya had blood drawn and blood tests were performed on June 7, 2001. The titers for EBV were 37 arbitrary units (“AU”). The contained “EBV Interpretation Chart” indicates that any value exceeding 20 AU is positive for acute infection. Exhibit 6 at 351; see also tr. 717 (discussing this lab test).

When presented with his notes discussing this test result, Dr. Fink’s testimony was ambiguous.

THE COURT: In your June 6, 2001, note of, and it’s Exhibit 5, it’s your records at page 38, you at least raise the possibility that Ilya has presented with a recurrent febrile illness, possible persistence of EBV?

THE WITNESS: I guess it would have probably have been either persistence or recurrence or exacerbation would probably have been a better word to use.

THE COURT: So that's possibly in conflict with your view that it actually had resolved by April or May of 2001?

THE WITNESSES: If we had confirmed persistent to EBV, it would have, yes.

Tr. 220 (testimony of Dr. Fink); see also tr. 183-84 (testimony of Dr. Fink about his notes).

Dr. Fink's testimony is ambiguous in that his answer is qualified by saying "If we had confirmed persistent [titer] to EBV." However, he did not explain (nor was he asked to explain) why the serological test did not confirm that the EBV was persisting in Ilya in the form of an acute infection.

On July 2, 2001, Ilya saw Dr. Fink. Dr. Fink was informed that Ilya "is fatigued again. At time he has to be carried around." Exhibit 5 at 38. Dr. Fink did not actually observe Ilya experiencing fatigue, but fatigue was reported to him. Tr. 184-85. Because lab testing presented a result that was lower than normal, Dr. Fink referred Ilya to Dr. Cynthia Kelly, an allergist / immunologist at Children's Hospital. Tr. 185.

Dr. Kelly saw Ilya on July 23, 2001, although the ensuing dictated letter is dated September 5, 2001. Dr. Kelly reported that Ms. Dobrydneva had told her that "Ilya has been sick with infectious mononucleosis since December."<sup>4</sup> Dr. Kelly ordered certain types of blood tests. However, Ms. Dobrydneva refused to have the blood drawn. Exhibit 6 at 341-42; see also tr. 186-87 (testimony of Dr. Fink about Dr. Kelly's letter).

In the summer of 2001, Ilya attended a summer camp for academically gifted children. He also played tennis and swam. Tr. 40-41.

In the fall 2001, Ilya was starting fifth grade. Tr. 43. In September, his family took a vacation to Florida. Tr. 39; tr. 136. Ilya missed school from October 1 through October 4, 2001. Exhibit 7 at 5; tr. 137.

## **2. History After Vaccination**

For purposes of analysis, Ilya's remaining medical history can be divided into three different periods of time. The first period covers November 5, 2001, to November 8, 2001. This span is important because Ilya allegedly was ill after receiving another dose of the hepatitis B vaccine on November 5, 2001. The second period covers from November 9, 2001 through January 2002. During a portion of this time, Ilya visited a hospital for a condition diagnosed as

---

<sup>4</sup> Ms. Dobrydneva did not recall telling Dr. Kelly that Ilya had been sick since December. Tr. 70. However, Ms. Dobrydneva's lack of recollection does not mean that Dr. Kelly's record is not accurate. See Cucuras, 993 F.2d at 1528.

vestibular neuritis. The third period covers Ilya's health from February 2002 to the present. Because this time is relatively distant from the vaccination, it is less relevant to determining whether the November 5, 2001 vaccination caused any adverse reaction in Ilya.

**a. November 5, 2001 to November 8, 2001**

On November 5, 2001, Ilya received another dose of the hepatitis B vaccine. Exhibit 9 at 3. As discussed below, Ilya's health in the days following November 5, 2001, is a point of great contention between the parties and was identified by the predecessor special master as an issue to be resolved. Tr. 592. For the reasons explained in the following paragraphs, a preponderance of the evidence establishes that Ilya was in his usual state of health.

Petitioners claim that Ilya suffered many problems immediately after the November 5, 2001 hepatitis B vaccination. Pet'r Post Hearing Br. at 2. In some respects, the position advanced by petitioners in their post hearing brief is an evolution of the assertions made by Ms. Dobrydneva in two affidavits filed before trial and in her testimony offered during the hearing. This shift is important because the petitioners' experts, Dr. Bell and Dr. Oleske, assume the accuracy of Ms. Dobrydneva's account in presenting their opinions. Tr. 329-30 (Dr. Bell); tr. 501-06 (Dr. Oleske). Thus, for purposes of analysis, the factual assertions made in petitioners' brief are separated from Ms. Dobrydneva's testimony.

**(1) Assertions in Petitioners' Brief**

Petitioners' brief asserts that following the November 5, 2001 vaccination, Ilya had "malaise [citing exhibit 5 at 34, 53], flu-like discomfort, and was out of school for two days [citing exhibit 3 at 1-2], but he continued to have symptoms of intermittent malaise, sore throat [citing exhibit 5 at 37], lymph node swelling [citing exhibit 5 at 35], and marked pallor." Pet'r Post Hearing Br. at 2 (information presented in footnotes in petitioners' brief transferred to bracketed material). Notably, petitioners' brief does not cite Ms. Dobrydneva's testimony. The brief cites only medical records. However, the cited documents are not persuasive evidence for various reasons.

Exhibit 5 at 34 is an entry for January 9, 2002, and was cited for the proposition that Ilya had "malaise." The January 9, 2002 note does not mention the word "malaise" at all. It states that according to Ms. Dobrydneva, for the last week, Ilya "has been so weak [that he] has needed to crawl." However, the doctor examined Ilya and said that Ilya "showed no evidence of muscle weakness." Thus, even if "weakness" were the same as "malaise," this record does not establish that Ilya had malaise starting around November 5, 2001.

Exhibit 5 at 53 was also cited to support a finding that Ilya had "malaise." This document is a series of notes from phone calls by Dr. Fink. The predominant information communicated are results from lab tests between January 15, 2002 and February 1, 2003. Again, there is no persuasive evidence that Ilya experienced "malaise."

Petitioners cite Ms. Dobrydneva's diary, exhibit 3 at 2, to show that Ilya missed two days of schools. Ilya did, in fact, miss school on November 6-7, 2001. The persuasive source for this fact is the record of attendance from Ilya's school. Exhibit 7 at 5.<sup>5</sup>

For the proposition that Ilya "continued to have symptoms of intermittent . . . sore throat," the petitioners cite to exhibit 5 at 37. This page contains notes from a visit on November 19, 2001, stating that Ilya has "a 2-3 day history of low grade temperature elevation along with [a] sore throat." Exhibit 5 at 37. Thus, Ms. Dobrydneva indicated that Ilya's sore throat began on November 16 or 17, 2001, not immediately following the November 5, 2001 vaccination. If Ilya truly had a sore throat from November 6, 2001, Ms. Dobrydneva would have reported that Ilya's sore throat lasted about two weeks. She did not offer any persuasive reason why the pediatrician's record says "a 2-3 day history" of a sore throat instead of two weeks. Thus, Ms. Dobrydneva has not rebutted the presumption that the November 19, 2001 record accurately described Ilya's condition.

The petitioners also assert that following the November 5, 2001 vaccination, Ilya had "lymph node swelling" and cite exhibit 5 at 35 for that assertion. Exhibit 5 at 35 is the record from Dr. Holland dated January 2, 2002. Dr. Holland noted that Ilya had "some anterior lymphadenopathy." However, Dr. Holland did not report when this problem began and the overall context of the record seems to set the onset as two weeks after the hepatitis B vaccination. Furthermore, when Ilya went to the Emergency Department on November 30, 2001, the doctor noted that Ilya had "no lymphadenopathy of the neck." Exhibit 11 at 1.

Finally, petitioners' brief also mentions that Ilya had "flu-like discomfort" and "marked pallor." However, the brief omits any citation to any evidence for these problems. A review of the records did not identify any place in which Ilya was reported to have these problems in November 2001. Thus, the petitioners have failed to meet their burden of presenting preponderant evidence to support a finding that Ilya had either "flu-like discomfort" or "marked pallor." See Vaccine Rule 8(f).

Consequently, although petitioners' brief asserts that immediately after November 5, 2001, Ilya suffered five problems (malaise, flu-like discomfort, sore throat, lymph node swelling, and marked pallor), the medical records cited in petitioners' brief do not support any of these contentions. The only event asserted in petitioners' brief that is supported by records created contemporaneously is that Ilya missed two days of school.

**(2) Ms. Dobrydneva's Testimony**

---

<sup>5</sup> As discussed below, the reliability of the diary kept by Ms. Dobrydneva in Russian is questionable.

In their brief, petitioners did not cite information for which the direct source is Ms. Dobrydneva. See Pet'r Post Hearing Br. at 2.<sup>6</sup> Because special masters are required to consider the record "as a whole," 42 U.S.C. § 300aa-13(a); the undersigned has located additional evidence about Ilya's condition after November 5, 2001. Ms. Dobrydneva provided information in three places: first, in a ten-paragraph affidavit, signed October 13, 2004, which was filed with the petition but not assigned an exhibit number; second, a 23-page affidavit, signed October 14, 2004, which was filed as exhibit 19; and, third, in her oral testimony during a hearing on April 25, 2007.

Generally, Ms. Dobrydneva asserted that Ilya was not well after the vaccination. However, Ms. Dobrydneva's testimony is not reliable for several reasons. Ms. Dobrydneva's accuracy is questionable in general, her general assertions are inconsistent with conduct, her testimony is inconsistent, and the only document supporting Ms. Dobrydneva's assertion, her diary, is inaccurate. These points are explained below.

**(a) Ms. Dobrydneva's Accuracy Is Questionable**

Overall, Ms. Dobrydneva's recounting of past events has been less than accurate. The medical records contain numerous examples of information from Ms. Dobrydneva that is contradicted by other records. One clear example is the January 9, 2002 statement by Ms. Dobrydneva that Ilya "has not been to school since the end of November when he was [diagnosed] with vertigo." Exhibit 5 at 34. This statement is contradicted by the school's attendance records. Exhibit 7 at 5. Another example is the January 9, 2002 visit to Dr. Fink's colleague, Dr. Holland, in which Dr. Holland was told (presumably by Ms. Dobrydneva) that Ilya "has been so weak [he] has needed to crawl." However, Dr. Holland actually observed that "Ilya showed no evidence of any muscle weakness. Was jumping up and down off the table. Was bouncing around the table." Exhibit 5 at 34; see also tr. 196; tr. 687. These are only examples to demonstrate that outside of the courtroom setting Ms. Dobrydneva has provided information that appears to be inaccurate.

During cross-examination, Ms. Dobrydneva was evasive. Repeatedly, Ms. Dobrydneva attempted to avoid answering questions. At various times, the special master and even her counsel encouraged and/or instructed Ms. Dobrydneva to answer the question. Tr. 82 (special master); tr. 84; tr. 96 (counsel); tr. 120-21. As mentioned earlier, the undersigned did not observe Ms. Dobrydneva testify. However, a thorough review of the transcript leaves the impression that Ms. Dobrydneva was frequently not presenting accurate information.

---

<sup>6</sup> On the other hand, respondent's brief extensively challenged the accuracy of Ms. Dobrydneva's testimony generally, see Resp't Post Hearing Br. at 24-28; and particularly raised the events following Ilya's November 5, 2001 vaccination specifically, id. at 26 & 41. Given the force of respondent's challenge, a reply brief from Mr. Dobrydnev and Ms. Dobrydneva was anticipated. However, one was not filed.

**(b) Ms. Dobrydneva's Assertions Do Not Match Her Actions**

Although Ms. Dobrydneva often provided information that was not accurate, the main reason for not crediting her testimony that Ilya was sick from November 5-7, 2001, is that her decision not to take Ilya to a doctor is inconsistent with a well-established pattern of behavior. In the past, Ms. Dobrydneva brought Ilya to the doctor's office for relatively small concerns. Dr. Fink's records contain numerous examples of Ms. Dobrydneva bringing Ilya to the doctor's office for concerns such as fever. E.g., exhibit 5 at 37-40. This pattern raises an expectation that when Ilya is sick, Ms. Dobrydneva brings him to a doctor.

However, Ms. Dobrydneva did not bring Ilya to a doctor on November 6-8, 2001. Tr. 81-82; see also exhibit 5 at 37-40 (records of Dr. Fink). The fact that Ms. Dobrydneva did not seek medical attention for Ilya until November 19, 2001, strongly implies that Ilya was not sick from November 5-7, 2001. Ms. Dobrydneva was questioned about her recollection of Ilya's health after November 5, 2001, on direct examination. Tr. 47. However, Ms. Dobrydneva's counsel did not ask her to explain why she did not take Ilya to see Dr. Fink. See id. The cross-examination on this topic effectively revealed inconsistencies between Ms. Dobrydneva's actions in November 2001 and her testimony years later. Tr. 76-84. Surprisingly, although petitioners were offered an opportunity, Ms. Dobrydneva did not testify on redirect. Tr. 138. Further, when Ms. Dobrydneva actually brought Ilya to Dr. Fink's office on November 17, 2001, the history does not mention that Ilya had a fever approximately two weeks earlier. See exhibit 5 at 37. This omission further undermines the persuasiveness of Ms. Dobrydneva's assertion that Ilya was sick around November 6, 2001. Under circumstances in which Ms. Dobrydneva's behavior does not match what she would have done if her testimony were correct, crediting her testimony is difficult.

**(c) Ms. Dobrydneva's Testimony Is Inconsistent**

Ms. Dobrydneva's accounts about the details of Ilya's health immediately following the November 5, 2001 vaccination varied. In her affidavit that accompanied the petition, Ms. Dobrydneva asserted that on the night of the vaccination, Ilya had "a sore throat, low-grade fever and generalized malaise." Affidavit, signed October 13, 2004, ¶ 2. In an affidavit signed the next day, Ms. Dobrydneva stated that Ilya had "high fever," without mentioning a sore throat. Exhibit 19 at 7-8. In the hearing on April 25, 2007, Ms. Dobrydneva stated that Ilya had a "burning" fever. Tr. 47. On cross-examination, although this testimony is not as clear as it might have been, Ms. Dobrydneva's testimony appears to indicate that Ilya did not have a sore throat. Tr. 78-79.

These inconsistencies suggest that Ms. Dobrydneva's recollection is not set firmly in her memory and reduce the persuasive value of Ms. Dobrydneva's accounts. See Doe/17, 84 Fed. Cl. at 704 (finding that special master could note inconsistencies in petitioner's records without conducting a hearing to resolve the inconsistencies); Camery, 42 Fed. Cl. at 391 (stating that

“Oral testimony that is inconsistent with medical records must be consistent, clear, cogent and compelling to outweigh medical records prepared for the purpose of diagnosis and treatment”); Ankenbauer v. Sec’y of Health & Human Servs., 31 Fed. Cl. 637, 640-41 (1994).

**(d) Ms. Dobrydneva’s Diary Is Not Reliable**

Admittedly, one document – Ms. Dobrydneva’s diary – appears to support Ms. Dobrydneva’s assertion that Ilya was not well. The translated entry for November 5, 2001 reads “Temperature in the evening.” The entries for November 6 & 7, 2001 read “Ilya is sick. Ilya did not go to school.” Exhibit 3 at 2; accord exhibit 24 at 93-94. The school record confirms that Ilya did not go to school on November 6 & 7, 2001. Exhibit 7 at 5. However, the school record does not explain why Ilya missed school and Ms. Dobrydneva was not questioned about the school attendance record. Although children miss school because they are sick, they also miss school for other reasons.

The diary is not dispositive because it contains information that is not accurate. For example, the diary states that Ilya did not go to school from December 3 through December 14, 2001. Exhibit 3 at 3. However, the school records show that Ilya attended school for this period of time. Exhibit 7 at 5. Thus, at a minimum, the diary contains some inaccurate information, reducing its persuasive value.<sup>7</sup> Because the diary is relatively weak evidence, it does not overcome the other evidence in the record that supports a finding that Ilya was not sick in the three days following the November 5, 2001 vaccination.

**(3) Conclusion regarding November 5, 2001 to November 7, 2001**

Relatively little evidence supports the petitioners’ assertions regarding Ilya’s health from November 5, 2001 to November 7, 2001. The medical records cited in petitioners’ brief do not support the propositions for which they were cited. Ms. Dobrydneva’s version of events is also not persuasive. Thus, a preponderance of evidence supports a finding that Ilya was in his usual state of health, and did not have a fever, between November 5, 2001 and November 7, 2001.

**b. November 8, 2001 to January 2002**

The dispute about Ilya’s health from November 5, 2001 to November 7, 2001, carries over, to some extent, to the period from November 8, 2001 to November 16, 2001. Ms. Dobrydneva asserted that Ilya “continued to be sick on a daily basis until November 30, 2001.” Affidavit, signed October 13, 2004, ¶ 3. This statement is not correct. In her second affidavit, Ms. Dobrydneva stated that Ilya returned to school on November 8, 2001. Exhibit 19 at 8. The school records confirm that Ilya attended school that day. Exhibit 7 at 5.

---

<sup>7</sup> Apparently, the predecessor special master had some question about the authenticity of this diary. See tr. 9. However, Ms. Dobrydneva was not questioned about her diary.

Largely for the reasons discussed in the preceding section, the petitioners have not established, by a preponderance of evidence, that Ilya was unhealthy from November 8, 2001 to November 16, 2001. Ms. Dobrydneva's testimony was not credible and was not supported by records from Dr. Fink's office. Thus, a preponderance of evidence supports a finding that from November 8, 2001 until November 16, 2001, Ilya's health was normal. See exhibit 5 at 37; tr. 188.

On November 17, 2001, Ilya began having a "low grade temperature" and a "sore throat." Ms. Dobrydneva sought treatment with Dr. Fink, who diagnosed Ilya as having "febrile illness/viral pharyngitis." Exhibit 5 at 37. The fever appears to have continued until November 24, 2001. Id. (note from November 26, 2001, stating that Ilya had a fever, which lasted for seven days until two days earlier).

In addition to having just recovered from a fever, Ilya, on November 26, 2001, had yellow nasal discharge and a frontal headache. Tr. 83. Dr. Fink believed that Ilya had an upper respiratory infection. Tr. 189-90. Dr. Fink also noted that Ms. Dobrydneva was using an "immunomodulator/stimulant that is made in France." Exhibit 5 at 37; see also exhibit 11 at 120; tr. 189-90 (Dr. Fink's testimony about this visit); but see tr. 100-01 (testimony of Ms. Dobrydneva contesting the accuracy of Dr. Fink's statement about the immunomodulator/stimulant).

On November 30, 2001, Ilya had severe dizziness and nausea. An ambulance brought him to the Children's Hospital. Exhibit 10 at 1; tr. 85. The doctors eventually diagnosed him with vestibular neuronitis. Exhibit 11 at 1-2. Dr. Fink explained that "the vestibular system relates to the inner ear, and if there is an inflammation of the nerves that lead to the inner ear, it can lead to a problem with dizziness. It can lead to a problem with the eyes moving back and forth. It can lead to vomiting." Tr. 152. Ilya was given prescriptions for scopolamine and acyclovir. Exhibit 11 at 2. Scopolamine is a drug used as an antiemetic, particularly with motion sickness. See Dorland's Illustrated Medical Dictionary (30<sup>th</sup> ed. 2002) at 1670. Acyclovir is an antiviral drug often used to treat herpes simplex virus and Epstein-Barr virus. See Dorland's at 25. Ilya was discharged from the emergency room and was not admitted to the hospital. Tr. 49-51.

The experts disagreed about the significance of the vestibular neuronitis. Petitioners' experts, Dr. Bell and Dr. Oleske, indicated that the vestibular neuronitis was caused by the hepatitis B vaccine. Respondent's experts, Dr. Brenner and Dr. Wientzen, disagree.

Ilya took the medications prescribed for him, but avoided movements. Tr. 51. He returned to school on Monday, December 3, 2001. Exhibit 7 at 5.

On December 10, 2001, Ilya saw Dr. Fink because of a sore throat and "white patches" on his throat. Ms. Dobrydneva told Dr. Fink that she had been giving Ilya Cefzil, which Dr. Fink had not prescribed. Dr. Fink believed that Ilya had tonsillitis. Exhibit 5 at 36; tr. 191.

On December 27, 2001, blood was drawn from Ilya. Tests indicated that the IgM titers for EBV were elevated (22 AU). Exhibit 6 at 326; see also tr. 133; tr. 639; tr. 674.

Ms. Dobrydneva testified that shortly before the end of the year, Ilya became “abruptly, suddenly ill.” “He just woke up one morning and could not turn in his bed. He woke up with excruciating fatigue. He was burning with fever. . . . [H]e basically just couldn’t get out of bed.” Tr. 52; accord tr. 95.

This testimony is not credited. Ms. Dobrydneva recognized that she did not take Ilya to the doctor’s office immediately. Tr. 52. (Dr. Fink explained that his office is open between Christmas and New Year’s Day. Tr. 191). If Ilya, in fact, had an abrupt onset of a condition as severe as described by Ms. Dobrydneva in her testimony, then Ms. Dobrydneva would have brought Ilya to the doctor’s office. See exhibit 5 at 38-39 (notes from visits with Dr. Fink in which Ilya had a fever or low energy).

The finding that Ilya did not suffer an episode of excruciating fatigue and burning fever is reinforced by the notes from Ilya’s visit to Dr. Fink’s office on January 2, 2002. On that day, Dr. Fink’s partner, Dr. Holland, saw Ilya. The history recorded by Dr. Holland indicates that Ilya “has been having problems on and off for a while. He had some blood work done on the 27th of December and mom was wondering . . . why he is still tired.” Dr. Holland also recorded that Ilya had “no real fevers.” Exhibit 5 at 35-36. Dr. Fink testified that he saw nothing in Dr. Holland’s note indicating that Ilya required urgent attention. Tr. 192. If Ilya were truly as ill as Ms. Dobrydneva testified that he was, then, at a minimum, Ms. Dobrydneva would have informed Ilya’s doctor when he saw her approximately four days later. See Cucuras, 993 F.2d at 1528. For these reasons, the petitioners have failed to establish, by a preponderance of the evidence, that Ilya suffered “excruciating fatigue” between December 27, 2001 and January 2, 2002.<sup>8</sup>

During the January 2, 2002 visit, Ms. Dobrydneva discussed whether the hepatitis B vaccine could be causing Ilya’s health problems. Ms. Dobrydneva told Dr. Holland that Ilya began to get sick “two weeks after” the November 5, 2001 vaccination. Exhibit 5 at 35.

Ilya saw Dr. Holland one week later, on January 9, 2002. Dr. Holland recorded that Ms. Dobrydneva reported that since January 2, 2002, Ilya had worsened. Dr. Holland also stated that Ms. Dobrydneva stated that Ilya “is better today.” The main complaint was tiredness and weakness, such that Ilya could not get out of bed. Dr. Holland’s examination, among other things, informed her that Ilya had “normal strength in upper and lower extremities.” Dr. Holland also stated that “Ilya showed no evidence of any muscle weakness. Was jumping up and down off the table. Was bouncing around on the table.” Dr. Holland also stated that Ilya “is not showing any signs of being dizzy.” Finally, Dr. Holland noted that “at this time the mono could still be giving him some weakness.” Exhibit 5 at 34.

---

<sup>8</sup> Petitioners did not assert that Ilya had these health problems in their post hearing brief.

In the following week, Ilya was again seen by a pediatrician, probably Dr. Fink. The doctor's note begins by stating that Ilya has been out of school for "two months." Exhibit 5 at 33. This information, however, is not accurate. The school records show that Ilya was attending school. He had been in school on January 7-11, 2002. Exhibit 7 at 5. The primary complaint appears to be that Ilya has been weak in his legs. The doctor also reported that Ilya has "not been able to lie down completely at all because he gets dizzy."

Ms. Dobrydneva provided some opinions about Ilya's health. Ilya's mother reported that Ilya "has been on acyclovir since January 2nd for [Epstein-Barr virus] and mom feels it seems to help." Ms. Dobrydneva was also "quite concerned about Ilya's immune status and the possibility that EBV is suppressing his immune system. . . . [She] has been getting information regarding immunology from a web site and then oral discussion." Ms. Dobrydneva was also "concerned that the vestibular neuronitis occurred after a recent [hepatitis B] vaccine. . . . Mother is concerned that his vestibular neuronitis may have resulted from being immunized with HEPB vaccine while having suppression of his immune system by EBV." Exhibit 5 at 33.

The doctor's assessment included "Recent EBV with possible recurrence versus exacerbation." The doctor referred Ilya to two other doctors, Dr. Cynthia Kelly and Dr. Doug Mitchell. Exhibit 5 at 33. Dr. Mitchell specializes in infectious diseases. Id. at 29.

On January 17, 2002, Ilya was tested for the Epstein-Barr virus by using polymerase chain reaction ("PCR"). This test did not detect the presence of the Epstein-Barr virus. Exhibit 6 at 310.<sup>9</sup>

Ilya saw Dr. Kelly, who is a pediatric immunologist, on January 23, 2002. Dr. Kelly mentioned that Ms. Dobrydneva believed that the hepatitis B vaccine was the cause of Ilya's problems. Dr. Kelly stated that "Ilya does look allergic to me." Ms. Dobrydneva, however, did not want a prick skin test. Dr. Kelly proposed examining Ilya's B-cell function. (B-cells and T-cells are two components of the immune system.) Dr. Kelly expected to see Ilya in one month. Exhibit 6 at 276-77.

Ilya's return visit to Dr. Kelly happened on February 19, 2002. Dr. Kelly noted that "many of [Ilya's] vestibular complaints have improved. . . . He still fatigues easily and has been maintained on homebound [schooling?]." Dr. Kelly also stated that Ms. Dobrydneva

---

<sup>9</sup> Dr. Wientzen opined that Ilya's use of acyclovir depressed the amount of Epstein-Barr virus. Tr. 675. This testimony from Dr. Wientzen prompted the petitioners to request an additional hearing to allow Dr. Oleske to rebut this testimony. For the reasons explained in section III.A. below, the petitioners have not established that they are entitled to compensation regardless of whether acyclovir affected the production of the Epstein-Barr virus.

“attribute[d] the improvement in his symptoms to a dose of acyclovir at 400 mg q.i.d.” Ilya was also taking Augmentin. Exhibit 6 at 278.<sup>10</sup>

Based upon some laboratory tests, Dr. Kelly determined that Ilya’s B-cells functioned reasonably well. Thus, Dr. Kelly wanted to see whether Ilya’s T-cell system functioned normally. Dr. Kelly also wanted to see if Ilya had any allergies. However, Ms. Dobrydneva appears to have refused these approaches. Id. at 278-79.

Between the two visits with Dr. Kelly, Ilya saw Dr. Mitchell on February 11, 2002. Tr. 203; see also exhibit 6 at 250-51. Dr. Mitchell recommended that Ms. Dobrydneva stop giving Ilya acyclovir. Apparently, Ms. Dobrydneva did stop giving Ilya acyclovir for some time but then restarted the medication. Tr. 203; see also exhibit 6 at 278 (Dr. Kelly’s February 19, 2002 record noting that Ms. Dobrydneva believed Ilya had improved when he was taking acyclovir).

Ilya saw Dr. Mitchell as a follow-up appointment on March 20, 2002. Dr. Mitchell stated that “The majority of the symptoms are achy legs. He is very fatigued and tired.” Dr. Mitchell stated that Ilya is still taking acyclovir, “which mother is giving against my advice.” During Dr. Mitchell’s examination, “When asked to hop on one foot, [Ilya] displayed evidence of fatigue. It should be noted that when he was asked to leave the examination table[,] he [hopped] down without difficulty.” Exhibit 6 at 250.

Dr. Mitchell’s impression included that “Ilya continues to have subjective findings of disease. There have been, in my repeated examinations and discussions, no objective findings to support evidence of infectious process. . . . The other possibilities include a chronic EBV have been discussed and we will pursue looking for obtaining EBV titers in the very near future.” Dr. Mitchell also stated that Ms. Dobrydneva “is convinced that he continues to have HSV [sic, probably an abbreviation for herpes simplex virus] viremia explaining his symptoms. Therefore, she intends to continue him on acyclovir therapy against medical advice.” Exhibit 6 at 251.

Dr. Mitchell’s recommendation began by stating that he believed that “there is a behavioral psychological component contributing to this continued subjective fatigue and possibly school avoidance. Chronic fatigue syndrome itself may be considered in this child.” Id. Dr. Mitchell planned to coordinate Ilya’s care with Dr. Fink.

In addition to Dr. Mitchell and Dr. Kelly, in February and March 2002, Ilya saw Dr. Fink several times. Exhibit 5 at 28-31. These visits provide relatively few details beyond what has been presented by Dr. Mitchell and Dr. Kelly.

**c. April 2002 to the present**

---

<sup>10</sup> Dr. Fink did not prescribe Augmentin at this time. Tr. 202 (testimony of Dr. Fink). Instead, Ms. Dobrydneva gave Ilya doses that were left over from an earlier prescription. Exhibit 6 at 250.

Ilya saw Dr. Fink on April 1, 2002. Much of the information is repetitive.<sup>11</sup> Dr. Fink discussed discontinuing the use of acyclovir and stated that his parents “are experimenting with him by placing him on the acyclovir.” The new information is that Dr. Fink’s assessment included “[p]ossible chronic fatigue secondary to chronic EBV or HSV, though doubt.” Exhibit 5 at 28.

After this visit with Dr. Fink, Ilya saw more doctors. These records provide relatively little, if any, support for the proposition that the November 5, 2001 hepatitis B vaccination caused problems in Ilya’s health in April 2002. In their posthearing brief, petitioners did not cite any medical records created after April 2002 as supporting their claim of entitlement. See Pet’r Post Hearing Br. This omission suggests that these records are relatively less important because petitioners were specifically encouraged to present a “detailed chronology of facts.” Order, filed April 24, 2009; see also Vaccine Rule 8(f). Respondent summarized medical records about Ilya’s health after April 2002. Resp’t Post Hearing Br. at 9-16.

A concise summary of Ilya’s condition after April 2002 is that doctors continued to record that he was fatigued and/or weak. See exhibit 5 at 25-26 (Dr. Fink’s May 20, 2002 record); id. at 25 (Dr. Fink’s June 3, 2002 record); exhibit 6 at 112-13 (Dr. Gabriel’s July 8, 2002 record); exhibit 5 at 20 (Dr. Fink’s Sept. 23, 2002 record); id. at 17-18 (Dr. Fink’s Dec. 16, 2002 record).

Concurrently, some doctors suggested that Ilya’s problems originated with a psychological problem. Exhibit 5 at 26 (Dr. Fink’s May 20, 2002 record); id. at 25 (Dr. Fink’s June 3, 2002 record); exhibit 6 at 112-13 (Dr. Gabriel’s July 8, 2002 record); exhibit 6 at 69-70 (Dr. Gyuricski’s Jan. 22, 2003 record).

Concerns about what was happening to Ilya culminated in a referral to Child Protective Services. Dr. Randall Fisher, a specialist in pediatric infectious diseases, stated that Ms. Dobrydneva’s behavior “borders on Munchausen’s syndrome by proxy or factitious disorder by proxy.” Exhibit 6 at 43 (report dated June 10, 2003). Child Protective Services eventually investigated and found the report of child abuse to be “unfounded – lack of evidence.” CPS Investigation Report, issued Sept. 30, 2003, at 16.<sup>12</sup>

At the time of the hearing, relatively little information about Ilya’s current condition was provided. He was not taking any medications. Tr. 99.

---

<sup>11</sup> Although this decision does not summarize the numerous medical records for after 2002, the undersigned has considered them. See Len-Ron Mfg. Co., Inc. v. United States, 334 F.3d 1304, 1310 n.5 (Fed. Cir. 2003); Gonzales v. West, 218 F.3d 1378, 1381 (Fed. Cir. 2000).

<sup>12</sup> Petitioners filed this document on August 27, 2007, but did not assign it an exhibit number.

## II. Procedural History

### A. Pre-Trial and Trial

Ms. Dobrydneva and Mr. Dobrydnev filed their petition on October 25, 2004. They filed more than fifteen medical records, including material from Dr. David Bell, with their petition. They filed a report from Dr. Nancy Klimas on February 7, 2005.<sup>13</sup>

In March 2005, respondent filed her report pursuant to Vaccine Rule 4 and a report from Dr. Raoul Wientzen. Exhibit A. The primary thrust of Dr. Wientzen's report was that "[i]t is not proper to diagnose Ilya's disorder as CFS – this diagnosis can only be made after alternative medical and psychiatric causes of chronic fatigue have been excluded. In Ilya's case, the latter has not been excluded." Exhibit A at 4. In the last paragraph of Dr. Wientzen's report, he added "if there hypothetically were a CFS to be diagnosed in Ilya, the precipitating event would have been not the vaccine he was given, but one of the two closely spaced viral illness[es] that occurred between that night and the onset of vestibular neuronitis." Id. at 5.

Ms. Dobrydneva and Mr. Dobrydnev filed a report from Dr. James Oleske on February 23, 2006. Pet'r Expert Rep't, filed Feb. 23, 2006. Respondent filed a supplemental report from Dr. Wientzen in response. Exhibit C. Respondent also filed a report from Dr. Alan Brenner. Exhibit D.

Beginning no later than October 2006, the parties and the special master to whom the case was assigned were discussing the need for a hearing to determine whether Ms. Dobrydneva and Mr. Dobrydnev were entitled to compensation. This hearing was eventually scheduled for April 25, 2007, in Norfolk, Virginia. Order, filed Feb.15, 2007. Both parties filed a memorandum before trial.

The hearing was held on two days, April 25-26, 2007, in Norfolk. Ms. Dobrydneva; Dr. Fink, one of the doctors who treated Ilya; and Dr. Bell testified on the first day. Dr. Oleske, Dr. Brenner, and Dr. Wientzen testified on the second day. When Dr. Oleske finished testifying, counsel for the petitioners permitted him to leave the courtroom. They did not ask Dr. Oleske to hear the testimony of respondent's experts. See tr. 552. Dr. Oleske did not hear Dr. Wientzen assert that Ilya's use of acyclovir depressed the amount of Epstein-Barr virus in his body. Tr. 675. This situation caused disputes between the parties after the hearing.

---

<sup>13</sup> Dr. Klimas withdrew from the case. See order, filed Nov. 23, 2005. However, her report was the basis for the report filed by Dr. Oleske. Tr. 550-51.

## **B. After Trial**

Within a week of the hearing, the special master issued an order directing Ms. Dobrydneva and Mr. Dobrydnev to file certain items that were discussed during the hearing. Order, filed May 4, 2007. Such orders are frequently issued after hearings in Vaccine Program cases when witnesses refer to documents that were not previously produced.

Ms. Dobrydneva and Mr. Dobrydnev filed some information that was requested. Ms. Dobrydneva and Mr. Dobrydnev also filed some information that was not requested, such as a report by Dr. Charles Parker. Pet'r Expert Rep't, filed Aug. 22, 2007. (Petitioners did not assign Dr. Parker's report an exhibit number.)

On August 21, 2007, the assigned special master conducted an unrecorded status conference. Following this status conference, Ms. Dobrydneva and Mr. Dobrydnev filed a motion requesting permission to file a supplemental report addressing whether Ilya suffered from the Epstein-Barr virus. Pet'r Mot., filed Sept. 10, 2007. Respondent objected. Respondent also noted that if Ms. Dobrydneva and Mr. Dobrydnev submitted additional information, she "will likely have to ask the court to conduct another hearing to examine the supplemental report's contents, and possibly present rebuttal testimony." Resp't Resp., filed Sep. 18, 2007.

Ms. Dobrydneva and Mr. Dobrydnev filed a letter from Dr. Oleske on October 1, 2007. Dr. Oleske asserts that the Epstein-Barr virus did not cause Ilya's chronic fatigue syndrome. Exhibit 23.

In February 2008, a supplemental hearing was scheduled for June 17, 2008. The hearing was supposed to be conducted by telephone. Order, filed March 12, 2008.

On May 2, 2008, Ms. Dobrydneva and Mr. Dobrydnev requested an interim award of costs. Application for Interim Payment of Medical Expert Witness Costs ("Pet'r Application"). Ms. Dobrydneva and Mr. Dobrydnev made this request pursuant to Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1352 (Fed. Cir. 2008), which discussed whether special masters possess the authority to award attorneys' fees and costs on an interim basis. Ms. Dobrydneva and Mr. Dobrydnev requested only the amount owed to Dr. Oleske for his work in the case to date. Ms. Dobrydneva and Mr. Dobrydnev asserted that Dr. Oleske stated that he would not continue to participate in the case unless his outstanding bill was paid. Pet'r Application at 1-2.

Respondent opposed the interim award of costs. Respondent argued, as she had argued in other related filings described above, that Ms. Dobrydneva and Mr. Dobrydnev created the need for an additional hearing when their attorneys permitted Dr. Oleske to leave the hearing before respondent's witnesses testified. Resp't Opp., filed May 20, 2008, at 3-4. Respondent also objected to the amount of compensation sought for Dr. Oleske as unreasonable. Id. at 5-7.

Ms. Dobrydneva and Mr. Dobrydnev requested that the June 17, 2008 hearing be postponed until their motion for an interim award of costs was resolved. Pet'r Mot., filed June 9, 2008. This request was granted. Order, filed June 17, 2008.

The previously assigned special master resigned. This case was assigned to the undersigned on August 1, 2008. Order, filed Aug. 1, 2008. An unrecorded status conference was held following which the undersigned asked for additional briefs addressing the question of whether a supplemental hearing was necessary.

Respondent stated that a new hearing is not necessary. Resp't Status Rep't, filed Jan. 9, 2009, at 1. Respondent's position seems to have been a change from the position she took in the Sept. 18, 2007 status report. In the earlier status report, respondent stated that if Ms. Dobrydneva and Mr. Dobrydnev filed a supplemental report from Dr. Oleske, then respondent "will likely have to ask the court to conduct another hearing." Resp't Resp., filed Sep. 18, 2007. Now, after the petitioners had filed a supplemental report, respondent maintained that a new hearing is not necessary.

Ms. Dobrydneva and Mr. Dobrydnev responded to respondent's position. They stated that "there is adequate evidence in the record to permit the [successor] Special Master to resolve the issues . . . provided Petitioners are allowed to offer rebuttal to address" Dr. Wientzen's opinion. Pet'r Resp., filed Jan. 30, 2009, at 1.

However, Ms. Dobrydneva and Mr. Dobrydnev did not respond to a particular topic in the December 11, 2008 order. Ms. Dobrydneva and Mr. Dobrydnev were ordered to explain "whether exhibit 23 [Dr. Oleske's supplemental report] eliminates the need for a hearing to present rebuttal testimony." Order, filed Dec. 11, 2008, ¶ 2.b.

The undersigned determined that exhibit 23 adequately presented petitioners' position with regard to the Epstein-Barr virus. The petitioners also failed to establish that a supplemental hearing was necessary. Ruling, 2009 WL 1137915 (April 7, 2009).

A status conference was held to discuss the record. The parties generally agreed that the record was complete.<sup>14</sup> Thus, a schedule for filing briefs was established. Order, filed April 24, 2009. Each party filed one brief. Thus, the case is ready for adjudication.

### **III. Analysis**

The petitioners do not allege that Ilya suffered a Table injury. Thus, the petitioners must establish that the hepatitis B vaccine "caused" Ilya an injury.

---

<sup>14</sup> The only qualification was that petitioners preserved their request for a supplemental hearing to present testimony from Dr. Oleske about whether acyclovir affects the Epstein-Barr virus.

To prove causation in fact, a petitioner must establish at least three elements. The petitioner's

burden is to show by preponderant evidence that the vaccination brought about [the] injury by providing: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.

Althen v. Sec'y of Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec'y of Health and Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991).

In this case, petitioners have failed to establish the third element from Althen for the reasons explained in section A below. Petitioners' failure of proof on this element is dispositive. Consequently, only this element is analyzed in detail. However, some additional comments about other aspects of petitioners' case are provided in section B below.

#### **A. Temporal Relationship**

Petitioners have failed to establish, by a preponderance of the evidence, the third prong from Althen. Petitioners are required to establish "a showing of a proximate temporal relationship between vaccination and injury." Althen, 418 F.3d at 1278. The Federal Circuit has elaborated that this aspect of the Althen test requires "preponderant proof that the onset of symptoms occurred within a timeframe which, given the medical understanding of the disorder's etiology, it is medically acceptable to infer causation." Bazan v. Sec'y of Health & Human Servs., 539 F.3d 1347, 1352 (Fed. Cir. 2008). When petitioners fail to establish this element, they are not entitled to compensation. Pafford v. Sec'y of Health & Human Servs., 451 F.3d 1352, 1358-59 (Fed. Cir. 2006).

Respondent's posthearing brief insightfully argues why petitioners' proof on this element is lacking. See Resp't Post Hearing Br. at 44-46. At various times, petitioners have alleged that the November 5, 2001 hepatitis B vaccination caused Ilya to suffer three injuries each of which became manifest on different dates. First, the injury may be a problem developing on the evening of November 5, 2001. If so, the time between vaccination and onset of these problems would be relatively short – approximately six hours. Second, petitioners allege that the vestibular dysfunction, which occurred on November 30, 2001, was caused by the hepatitis B vaccine. If so, the relevant time interval is 25 days. Third, petitioners allege that Ilya experienced chronic fatigue and/or suffered from chronic fatigue syndrome due to the hepatitis B vaccine. With regard to chronic fatigue syndrome, petitioners did not establish clearly whether their theory was that the chronic fatigue was a sequella to the vestibular dysfunction or whether the hepatitis B vaccine caused the chronic fatigue directly. In any event, after the November 5,

2001 vaccination, Ilya began to experience tiredness at the end of December 2001. If this is petitioners' theory, then the window between vaccination and manifestation of chronic fatigue is seven weeks.

Although respondent's brief argues that for the third prong of Althen, the "fatal deficiency likely stems from petitioners' lack of clarity regarding precisely what injury the vaccine is alleged to have caused," Resp't Post Hearing Br. at 45; petitioners did not file a reply brief. Petitioners have not provided any clarification. See Vaccine Rule 8(f). Petitioners have not presented any evidence suggesting that the three time periods (six hours, 25 days, and seven weeks) are so similar that it would be medically acceptable to infer that the hepatitis B vaccine caused any injury within any of these time periods.

Significantly, in their only posthearing brief, petitioners cite only one piece of evidence that allegedly fulfills their burden on this prong. Petitioners cite Dr. Bell's expert report, stating "I feel that the temporal relationship between the administration of the vaccine as well as what is known about antigenic stimuli causing CFS creates a definitive link between the vaccine administration and the illness." Pet'r Post Hearing Br. at 12 (quoting exhibit 17 (Dr. Bell's expert report, dated Oct. 11, 2004) at 4).

This statement is not persuasive for two reasons. The first flaw in Dr. Bell's statement is that he does not specify when he believes that Ilya's chronic fatigue syndrome began. Even in cases in which determining when a condition began is difficult, petitioners bear the burden of determining that the onset of the disease occurred within the time expected by medical science. Hopkins v. Sec'y of Health & Human Servs., 84 Fed. Cl. 517, 524-27 (2008) (affirming special master's denial of compensation when "the onset of [the child's] hearing loss is unknown").

On the issue of chronic fatigue, Ilya's case demonstrates the need for petitioners and their experts to be explicit about when they believe a particular condition started.<sup>15</sup> Dr. Bell recognized that diagnosing a person with chronic fatigue is not easy. Tr. 238; tr. 293. This task is made more difficult because of the complexity of Ilya's medical history. Before the November 5, 2001 vaccination, Ilya suffered from an infection by the Epstein-Barr virus, which causes fatigue. Some evidence suggests that Ilya was not suffering from the consequences of this infection when he received the November 5, 2001 vaccination. E.g. tr. 149 (testimony of Dr. Fink); tr. 181 (same); tr. 229 (same); tr. 259 (testimony of Dr. Bell); tr. 328 (same); tr. 719 (testimony of Dr. Wientzen). Other evidence tends to contradict this statement. E.g. exhibit 6 at

---

<sup>15</sup> "Explicit" does not mean scientifically certain. Petitioners do not have to establish any element of their case to a level of scientific certainty. Andreu v. Sec'y of Health & Human Servs., 569 F.3d 1367,1380 (Fed. Cir. 2009); Bunting, 931 F.2d at 873. Petitioners can fulfill their burden of proof by providing preponderant evidence that a condition began on a particular date. For example, Dr. Bell could have testified that "I believe that it is more likely than not that Ilya's chronic fatigue began on [this date] for the following reasons." However, Dr. Bell did not provide this type of evidence.

326 (lab report from June 2001) and exhibit 6 at 351 (lab report from December 2001). Testimony from the hearing also supports a finding that Ilya had not recovered from the infection with the Epstein-Barr virus. Tr. 201 (Dr. Fink); tr. 565-66 (Dr. Brenner); tr. 639-641 (Dr. Wientzen). Ilya's treating doctors expressed concerns that Ilya was having an exacerbation of the Epstein-Barr virus. Exhibit 5 at 33; exhibit 6 at 251 (Dr. Mitchell); exhibit 5 at 28 (Dr. Fink's notes for April 1, 2002).

Determining the state of Ilya's health after the November 5, 2001 vaccination is made more challenging by the inconsistent and, at times, inaccurate histories given by Ms. Dobryднеva to various treating doctors. More than one treating doctor questioned whether Ilya was truly experiencing the problems, such as fatigue and weakness, for which Ms. Dobryднеva was seeking treatment for Ilya. Exhibit 6 at 250 (Dr. Mitchell); exhibit 6 at 43-44 (Dr. Fisher's note wondering whether Ilya should be referred to Child Protective Services because of his mother's behavior that "borders on Munchhausen's by proxy or factitious disorder by proxy"); see also exhibit 6 at 359-60 (Dr. Rubio's notes from March 8, 2001).

These circumstances, admittedly, present challenges for the petitioners and any expert they retained. However, the challenges are not insurmountable. For example, petitioners could have requested a hearing for the presiding special master to determine the facts before retaining an expert. Another alternative was for the petitioners to ask Dr. Bell when he believed that Ilya's chronic fatigue (or chronic fatigue syndrome) began. It appears that Dr. Bell did not assert when he thought Ilya's chronic fatigue syndrome began, other than stating that Ilya's chronic fatigue syndrome began after the November 5, 2001 hepatitis B vaccination. See tr. 260-61; tr. 280 (Dr. Bell stating "You place the start time at a time when there is sustained disruption of a person's life"). To the extent that Dr. Bell believed that Ilya began suffering from chronic fatigue syndrome after receiving the November 5, 2001 hepatitis B vaccination, Dr. Bell's testimony during cross-examination about Ilya's symptoms before the vaccination was muddled. Dr. Bell did not explain persuasively why Ilya's ancillary problems, such as sore throats, were different after the vaccination. See tr. 283-90. More clarity from Dr. Bell would have been helpful. Petitioners have not established, by a preponderance of the evidence, when Ilya first experienced a problem attributable to chronic fatigue syndrome.

The second flaw in Dr. Bell's report is that Dr. Bell did not specify the medically appropriate interval between vaccination and the onset of Ilya's problem. The interval for which the medical community would agree that it is acceptable to infer causation is one aspect of petitioners' case. Bazan, 539 F.3d at 1352. Dr. Bell's report does not explain what the medically appropriate interval is. See exhibit 17.<sup>16</sup>

---

<sup>16</sup> At best, Dr. Bell's testimony suggests that the medically appropriate time is "one day." Tr. 263; accord tr. 298 ("the cytokine storm which can occur starts immediately").

Whether petitioners are advancing this theory is not clear. As mentioned in the text, petitioners did not file a reply brief to explain their theory. See Resp't Post Hearing Br. at 44-46 (noting uncertainty in petitioners' theory).

In the way that Dr. Bell's opinion is silent with respect to the time interval that doctors believe is appropriate to infer that the vaccination caused Ilya's condition, this case is comparable to Pafford. In Pafford, the petitioners introduced evidence that a vaccine caused Still's disease through two experts, Dr. Levin and Dr. Geier. Pafford, 451 F.3d at 1356. Dr. Geier's testimony was rejected as unpersuasive. Id. at 1359. Eliminating Dr. Geier left Dr. Levin's testimony. Presumably, Dr. Levin believed that the temporal sequence was appropriate. Otherwise, he could not have expressed an opinion about causation. However, he did not express an opinion about the appropriate temporal relationship. Id. at 1358. Consequently, in that case, the special master found that the petitioners did not satisfy their burden of proof "due, in part, to the absence of 'evidence indicating an appropriate time frame in which Still's disease will manifest subsequent to a triggering event.'" Id. (quoting special master's decision). The Federal Circuit held that the special master's reasoning complied with the test established in Althen. Id. at 1358-59.

In short, Dr. Bell neither stated when Ilya's alleged chronic fatigue syndrome began, nor provided an opinion about the medically appropriate time. Consequently, Dr. Bell's conclusory statement that the timing is appropriate does not satisfy petitioners' burden to produce preponderant evidence that the onset of the condition for which petitioners seek compensation occurred within the time expected by the medical community.

Although petitioners' posthearing brief cited only one piece of evidence about the appropriate timing (Dr. Bell's report), the entire record has been reviewed. See 42 U.S.C. § 300aa-13(a). Additional information about the time that the medical community would accept as an appropriate interval between vaccination and the onset of the condition for which petitioners seek compensation comes from Dr. Oleske. He testified about the amount of time that is expected: "We know that in usually less than one percent of recipients there can and will be adverse reactions. . . . The adverse reactions usually occur within the immediate to [sic] days and a week after receipt of the vaccine." Tr. 476.

Consistent with his understanding that the adverse reaction is usually apparent within "a week after receipt of the vaccine," Dr. Oleske opined that the November 5, 2001 vaccination caused Ilya an adverse reaction. Tr. 465-66. Dr. Oleske assumed that Ilya had an array of problems described by his mother. Tr. 501-06; tr. 540-45; Dr. Oleske's report, filed Feb. 23,

---

Even if this were Dr. Bell's idea, a one-day interval would not assist petitioners in establishing their case. Dr. Bell's theory proposes that "when somebody develops chronic fatigue syndrome, they stay sick, just as Ilya has stayed sick since that vaccination." Tr. 281. Dr. Bell accepted assertions by Ms. Dobrydneva that Ilya was sick on the night of the vaccination. Tr. 329. But, petitioners have not established the accuracy of Ms. Dobrydneva's assertions. Additionally, Ilya's health from November 8 to November 16, 2001 was normal. See section I.B.2. Consequently, Ilya's history does not match the theory that Dr. Bell may (or may not) have offered.

2006, at 2. When pressed on cross-examination, Dr. Oleske stated that “It was important that there was development of symptoms temporal to the immunization procedure.” Tr. 506.

Petitioners bear the burden of establishing the time interval that the medical community accepts as a reasonable interval between vaccination and the onset of problems. Bazan, 539 F.3d at 1352. Here, assuming that Dr. Oleske’s opinion that the appropriate time is as long as “a week” were accepted as constituting a preponderance of the evidence, this finding would not assist the petitioners in establishing that they are entitled to compensation. For reasons discussed earlier, some of Ms. Dobryднеva’s statements about Ilya’s condition between November 5, 2001, and November 8, 2001, are not credible. See section I.B.2.a. When an expert, such as Dr. Oleske, relies upon assertions that are not accurate, the expert’s opinion is undermined. Perreria v. Sec’y of Health & Human Servs., 33 F.3d 1375, 1377 n.6 (Fed. Cir. 1994); Burns v. Sec’y of Health & Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993).

To be sure, Dr. Oleske discussed Ilya’s vestibular dysfunction in his testimony. Dr. Oleske opined that the November 5, 2001 hepatitis B vaccination caused Ilya’s vestibular neuritis. Tr. 467; tr. 499-500; tr. 505-15; tr. 540-44. But, the onset of vestibular neuritis was on November 30, 2001. Exhibit 11 at 1-2. November 30, 2001 is 25 days after November 5, 2001.

The petitioners have not identified any evidence that shows that 25 days is an appropriate interval between vaccination and the onset of vestibular neuritis. See Pet’r Post Hearing Br. at 12. The undersigned’s review of the record has not located any evidence to support such a finding.

To the extent that Dr. Oleske’s opinion that the hepatitis B vaccine caused Ilya’s vestibular dysfunction implicitly assumes that the timing is appropriate, such an approach is not persuasive. As discussed with regard to Dr. Bell’s opinion that the hepatitis B vaccine caused Ilya to suffer chronic fatigue syndrome, an implicit presentation of expert opinion on the temporal element is not sufficient. Pafford, 451 F.3d at 1358-59.

In conclusion, Ms. Dobryднеva and Mr. Dobryднеv failed to present preponderant evidence that Ilya’s problems arose within the appropriate temporal window. The undersigned has considered the portion of the record advanced in the their brief – Dr. Bell’s expert report. As explained above, Dr. Bell’s expert report is not persuasive. The undersigned has also considered other evidence in the record, including Dr. Oleske’s testimony. This evidence, too, is not persuasive. Thus, Ms. Dobryднеva and Mr. Dobryднеv have failed to meet their burden of proof and are not entitled to compensation.

## **B. Additional Issues**

Pafford and Bazan demonstrate that petitioners’ failure to establish, by a preponderance of the evidence, that the condition for which they seek compensation developed during the time expected by the medical community means that petitioners are not entitled to compensation. For

the reasons explained in the preceding section, Mr. Dobrydnev and Ms. Dobrydneva have failed to make that evidentiary showing. Although this finding is sufficient for this decision, the undersigned will mention some of the issues that are not resolved in this decision. See Doe v. Sec’y of Health & Human Servs., 76 Fed. Cl. 328, 334-35 (2007) (stating “There is no requirement that decisions of the Special Master be more thorough and comprehensive than necessary to decide the merits of a petition.”).

In addition to the timing prong from Althen, the parties disagree about many other aspects of Ilya’s case. Resolution of these issues is not necessary because even if petitioners had established their position on each of the following topics, the result would not change. The list of topics about which the parties disagree includes:

1. Whether Ilya's previous infection with Epstein-Barr virus in early 2001 contributed to his health after November 5, 2001;
2. Whether Ilya suffered from chronic fatigue syndrome;
3. Whether the hepatitis B vaccine can cause chronic fatigue syndrome, and;
4. What are the causes of vestibular neuritis?

The witnesses answered these questions differently. However, evaluating how the evidence preponderates on these questions would not affect the outcome. Even if petitioners’ experts were credited on each point, the gap in the petitioners’ proof – the failure to establish that Ilya developed a problem within the time expected by the medical community – would remain.

#### **IV. Conclusion**

A challenge in Ilya’s case was finding the facts about Ilya’s condition. At a minimum, some of Ilya’s treating doctors questioned the accuracy of information being presented to them. Sometimes, the information presented to the treating doctors was not correct. Thus, relying on medical records even created relatively close in time to the event being described was more difficult than usual. The testimony of Ms. Dobrydneva added another layer of complexity.

Ultimately, the findings of fact did not match much of the testimony given by Ms. Dobrydneva at the hearing. Again, the undersigned did not conduct the hearing in this case. However, both parties were given an opportunity to request an additional hearing and both parties were encouraged to address Ms. Dobrydneva’s credibility in the posthearing brief. See orders filed December 11, 2008 & April 24, 2009. Neither party requested an additional hearing to present testimony from Ms. Dobrydneva.<sup>17</sup> Petitioners’ brief largely overlooks challenges to the credibility of Ilya’s mother.

---

<sup>17</sup> Petitioners did request an opportunity to present more testimony from only Dr. Oleske. Petitioners wanted Dr. Oleske to address whether acyclovir depresses the amount of Epstein-Barr virus. Due to the resolution of this case on the timing prong, additional information about acyclovir is not needed.

Given the uncertainty about the true facts of Ilya's health, the opinion of Dr. Bell and the opinion of Dr. Oleske that the November 5, 2001 hepatitis B vaccination caused Ilya some adverse reaction necessarily rest on shaky premises. Greater clarity would have strengthened the persuasive value of their opinions. The cloudiness of their opinions is most apparent with regard to the third prong from Althen. On this point, neither Dr. Bell nor Dr. Oleske (singularly or jointly) satisfied petitioners' burden. Thus, petitioners are not entitled to compensation. The Clerk's Office is ordered to enter judgment in accord with this decision unless a motion for review is filed within the time permitted.

IT IS SO ORDERED.

---

Christian J. Moran  
Special Master