

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 8-496V
Filed: July 26, 2011**

TAMMY RENEE CONNER and DAVID	*	
LEWIS CONNER, in their own right and	*	
as best friends of Savannah Nicole	*	Findings of Fact; Witness
Conner,	*	Credibility; Corroboration
	*	
Petitioners,	*	
	*	
v.	*	
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

John F. McHugh, Esq., New York, NY, on behalf of petitioners.
Alexis B. Babcock, Esq., U.S. Dept. of Justice, Washington, DC, on behalf of
respondent.

RULING ON FACTS PERTAINING TO ONSET¹

Vowell, Special Master:

On July 9, 2008, Tammy Renee Conner and David Lewis Conner [“petitioners” or “Mrs. and Mr. Conner”] filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*² [the “Vaccine Act” or “Program”], on behalf of their daughter Savannah Nicole Conner [“Savannah”]. The petition alleged that Savannah suffered “neurological disorders which first manifested themselves after September 1, 2005, when Savannah was 14 months old and at that

¹ Because this unpublished ruling contains a reasoned explanation for the action in this case, I intend to post it on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

time the autistic signs began to appear.” Petition at 1. Petitioners filed an amended petition on January 21, 2009. The amended petition asserts that Savannah developed normally until she was about 18 months old, other than frequent ear infections and concerns about her hearing. Amended Petition at 2. The amended petition is currently the operative claim for compensation pending before this court. A July 9, 2010 order to file a second amended petition setting forth the current theory remains pending, with petitioners contending that they are unable to comply with the order to set forth their theory of causation due to circumstances beyond their control.³

The conflict in the factual allegations regarding onset between the two petitions was a portent of things to come in the further development of petitioners’ case. At various times, petitioners have put forth more detailed and often conflicting theories than those alleged in the amended petition. With respect to the vaccines responsible, the amended petition alleges that all the vaccines Savannah received in her first year were causal, but petitioners have also asserted that the specific vaccines Savannah received in March, 2005, were the ones causal of her condition.

With respect to Savannah’s injury, the amended petition alleges that Savannah suffers from autism caused by vaccines. However, in testimony and affidavits, petitioners assert that Savannah does not have autism, but instead has an undiagnosed and unspecified mitochondrial dysfunction that was significantly aggravated by her vaccines.

With respect to the onset of Savannah’s injury, petitioners have alternatively alleged that Savannah showed no signs or symptoms of injury until September, 2005, and also that Savannah suffered an immediate adverse reaction to vaccines she received in March, 2005, and immediately thereafter displayed signs of injury.

Petitioners’ precise causation theory remains amorphous. Rather than proceeding to obtain the report of an expert to clarify the causation theory and diagnosis, the parties requested a hearing to resolve the numerous conflicts in the evidence regarding the onset of Savannah’s medical problems. See Order filed Dec. 9, 2010. The hearing was conducted in Davenport, Iowa, on April 19, 2011.

Although it is not unusual for petitioners in the Vaccine Program to change their causation theories, or for circumstances, such as a vaccinee’s diagnosis, to change with

³ Petitioners contend that Savannah suffers from a mitochondrial disorder. See Response to Order (referring to my Order to Show Cause, filed Sept. 30, 2010), filed Oct. 7, 2010, at 2 (noting that one of Savannah’s treating physicians referred Savannah for testing for a mitochondrial disorder, with inconclusive results). See *also* Pet. Exs. 21 (noting treating physician’s referral for investigation of “possible mitochondrial issues”); 10, p. 341 (specialist’s notation regarding the referral). In effect, petitioners claim that they cannot file an amended petition until mitochondrial testing is conducted and that the testing must be conducted while Savannah is febrile or stressed. I note that petitioners’ October 7, 2010 Response to Order contains mischaracterizations of what is stated in both Savannah’s medical records and the several filings of medical literature that accompanied it.

time, this is the rare case of petitioners changing the facts they have alleged. Petitioners' own factual allegations made early in the case are significantly different from those presented in their filings in anticipation of the hearing. Testimony provided at the hearing also contradicts those early allegations.

In Vaccine Act cases, it is not uncommon for petitioners to present evidence in conflict with or in addition to the matters contained in the medical records. When the facts asserted by petitioners are not recorded in, but not precluded by, the medical records, the special master may choose to rely on the facts asserted by petitioners, in addition to those in the medical records. When there are inconsistencies between testimony and contemporaneous records, the general rule that contemporaneous medical records are more reliable than testimony or affidavits made long after the events in question may be overcome by "clear, cogent, and consistent testimony" explaining the discrepancies. *Stevens v. Sec'y, HHS*, No. 90-221V, 1990 WL 608693, at *3 (Fed. Cl. Spec. Mstr. Dec. 21, 1990).

However, in this case petitioners have literally changed their own story. They now urge me to find facts that they did not mention, at all, prior to 2010, in spite of the prior filing of an initial petition, an amended petition six months later, and Mrs. Conner's first affidavit. More troubling, petitioners now urge me to find facts that directly contradict the facts they averred two and three years ago.

I. Scope of this Ruling.

As I indicated in my Order filed April 20, 2011, this ruling is limited to determining the facts surrounding onset of Savannah's condition. The evidence before me consists of Savannah's medical records; Mrs. Conner's first affidavit, dated January 15, 2009, and filed January 21, 2009 ["2009 Affidavit"]; Mrs. Conner's second affidavit, dated April 11, 2011, and filed April 12, 2011 ["2011 Affidavit"]; and Mrs. Conner's testimony at the April 19, 2011 hearing.

In their post-hearing brief, petitioners urge me to find the facts to which Mrs. Conner testified at the hearing and averred in the 2011 Affidavit. See Petitioners' Post-Hearing Brief, filed June 3, 2011 ["Pet. Post-Hearing Br."]. They ignore their earlier accounts of these events, which conflict with the testimony and the 2011 Affidavit in ways critical to this case.

In her post-hearing brief, respondent argues that I should rely on a combination of the medical records and Mrs. Conner's testimony, (see Respondent's Post-Hearing Brief, filed June 3, 2011 ["Res. Post-Hearing Br."]), but limits her own reliance on Mrs. Conner's testimony to the facts not set forth in or contradicted by the medical records.

The dispute between petitioners' two versions of events concerns whether Savannah experienced an adverse reaction to the March 2005 vaccinations, and thereafter immediately showed signs of injury. The dispute between petitioners and

respondent concerns the severity of that reaction and the onset of Savannah's symptoms.

II. Resolving Evidentiary Conflicts.

A. The Law Pertaining to Evidentiary Conflicts.

Conflicts between contemporaneous records and testimony given several years later at a hearing are common in Vaccine Act cases. The passage of time, along with the occurrence of difficult events such as a child's illness, may cloud one's memory. See, e.g., *Lowrie v. Sec'y, HHS*, No. 03-1585V, 2005 WL 6117475, at *24 (Fed. Cl. Spec. Mstr. Dec. 12, 2005). This case is one of the more striking examples of the extent of such conflicts.

Two general legal principles guide the resolution of conflicts between contemporaneous records and later-adduced evidence. The first is that the absence of a reference to specific symptoms in a medical record does not conclusively establish the absence of symptoms during that time frame. See, e.g., *Murphy v. Sec'y, HHS*, 23 Cl. Ct. 726, 733 (1991), *aff'd*, 968 F.2d 1226 (Fed. Cir. 1992) (“[T]he absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance.” (citation omitted)).

The second principle addresses the degree of reliance commonly accorded to contemporaneous records. Special masters frequently accord more weight to contemporaneously recorded medical symptoms than those recounted in later medical histories, affidavits, or 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 (citation omitted); see also *Cucuras v. Sec'y, HHS*, 993 F.2d 1525, 1528 (Fed. Cir. 1993) (medical records are generally trustworthy evidence). Memories are generally better the closer in time to the occurrence reported and when the motivation for accurate explication of symptoms is more immediate. *Reusser v. Sec'y, HHS*, 28 Fed. Cl. 516, 523 (1993). Inconsistencies between testimony and contemporaneous records may be overcome by “clear, cogent, and consistent testimony” explaining the discrepancies. *Stevens*, 1990 WL 608693, at *3. My factual conclusions are presented with these legal principles in mind.

B. Credibility Determination.

Because of the nature of this dispute, it is necessary to determine whether Mrs. Conner is a credible witness. After evaluating her affidavits, her testimony, and her demeanor during the hearing, I conclude that she is not. Her accounts of Savannah's illness have been consistently inconsistent. Comparison of the histories provided by Mrs. Conner in the 2009 Affidavit, the 2011 Affidavit, the medical records, and during

the hearing demonstrate that she remembers the timing of events inaccurately,⁴ conflates the occurrence of events,⁵ and provides incomplete accounts of events.⁶ Her tendency to remember details based on her recollected association of them with other events seemed to be a means of counteracting her trouble remembering dates, resulting in inconsistent testimony. In order to conclude that her most recent accounts are accurate, I would have to believe that her memory of events that transpired in 2005 has become more detailed over time. That is highly unlikely. I also note that some of her recollections appear to have been triggered by speakers at conferences for parents of children with autism spectrum disorders.⁷

⁴ Indeed, Mrs. Conner admitted on the stand that “dates are not my best” and “I have problems with dates.” Transcript of the Apr. 19, 2011 hearing [“Tr.”] at 27. For instance, on direct examination Mrs. Conner testified that a speech therapist from the Area Education Agency [“AEA”] evaluated Savannah when she was “about 18 months” old. Tr. at 11. Savannah would have been 18 months old in January 2006. Nonetheless, Mrs. Conner testified this occurred in “October” of an unspecified year. Tr. at 11. Mrs. Conner subsequently testified that the evaluation took place in January 2006. Tr. at 37. The earliest filed records from the AEA are for an evaluation in August 2006. See Pet. Ex. 6, p. 326 (indicating an “initial meeting” occurred in Savannah’s case on Jan. 5, 2006).

In her 2009 Affidavit, Mrs. Conner estimated that Savannah was one year old when her older brother was diagnosed with autism. 2009 Affidavit, ¶ 6. At the hearing, Mrs. Conner testified that Savannah “was not quite a year” old, and possibly “only eight months” old when Savannah’s brother was diagnosed with autism. Tr. at 44. In response to a question about why the family was on a gluten-free diet (often recommended by physicians and others involved in alternative therapies for treating autism spectrum disorders) when Savannah was seven months old, Mrs. Conner testified that Camden had not yet been diagnosed with autism at the time the family started the diet. After further questioning and review of the medical records, Mrs. Conner acknowledged that Camden was diagnosed by January, 2005, when Savannah was six months old, prompting the transition to a gluten-free diet. Tr. at 46-47; see also Pet. Ex. 11, p. 383 (noting on March 10, 2005 that his recent diagnosis was contributing to increased family stress), p. 385 (noting on February 15, 2005 that the family was beginning a gluten-free diet).

⁵ Mrs. Conner appeared to conflate visits to Dr. Usman, a treating physician. Dr. Usman’s letter to the court, filed as Pet. Ex. 21 and dated October 6, 2010, notes that Savannah had at least two visits with Dr. Usman—March 5, 2009, and August 12, 2010. Mrs. Conner testified that Savannah saw Dr. Usman in October, “and then in the following January [Dr. Usman] had suggested that, yes, [Savannah] did not look autistic and she clearly had multiple symptoms of the mitochondrial dysfunction.” Tr. at 24. Mrs. Conner did not provide a year for these October and January visits, nor did she explain whether these visits were for Savannah or for her brother, who is also a patient of Dr. Usman’s. She did, however, testify that she takes the children to see Dr. Usman separately (Tr. at 49), suggesting that either she was wrong about the dates of Savannah’s appointments, or wrong about the number of appointments Savannah has had with Dr. Usman. Although the October and January visits could have been Savannah’s brother’s appointments, it is unlikely that Dr. Usman would have opined at those visits as to whether Savannah “looked” autistic, as Savannah did not attend her brother’s appointments. No records from Dr. Usman document any of these visits, and Dr. Usman’s medical specialty, if any, is not apparent from Pet. Ex. 21.

⁶ For example, none of the allegations regarding a post-vaccinal reaction, noted in the 2011 Affidavit, appear in the 2009 Affidavit, despite their gravity and the detailed account she presents now.

⁷ Her accounts of symptoms suggesting a mitochondrial disorder appear to have been influenced by her May 2008 conversation (at a conference for parents of children with autism spectrum disorders) with another Vaccine Act petitioner who obtained compensation for her daughter’s autism. See Tr. at 22-23, 32.

I do not believe that Mrs. Conner intended to misrepresent the events that transpired. On the stand Mrs. Conner appeared genuine. She clearly believed that the testimony she was providing was true and accurate. Nonetheless, there is no reason for me to believe the version of events she set forth at the hearing, rather than her own account provided two years ago. She was led astray on occasion by her own attorney; certain factual errors in his questions, though likely inadvertent, prompted Mrs. Conner to provide testimony that conflicts with even her most recent affidavit, filed a mere week before the hearing.⁸

Mrs. Conner's conflicting accounts, coupled with her difficulty in recollecting dates and times of events, makes placing any reliance on her testimony and affidavits difficult. Thus, I rely primarily on the contemporaneous medical records.

III. Factual Findings.

A. Facts Not Reasonably Subject to Dispute.

1. During her pregnancy with Savannah, Mrs. Conner contracted cytomegalovirus ["CMV"].⁹ Petitioners' Exhibit ["Pet. Ex."] 11, p. 483.¹⁰

2. Savannah was born July 16, 2004. Pet. Ex. 11, p. 483. Her Apgar scores were 8 and 9 (Pet. Ex. 4, p. 142),¹¹ and she passed her infant hearing screen (Pet. Ex.

⁸ The 2011 Affidavit describes an incident when Savannah became overheated, lost ability to stand, became lethargic, and evinced an inability to perspire in summer 2008. Mrs. Conner further noted this event occurred when Savannah was "approximately four years old." 2011 Affidavit, ¶ 24. During the hearing, petitioners' attorney asked Mrs. Conner about an incident at an amusement park in summer 2007. The circumstances she then described match those in the affidavit for the summer 2008 episode. Mrs. Conner did not seek to correct her attorney during testimony regarding the date, and petitioners have made no other attempt to correct this discrepancy or explain that there were separate events. See Tr. at 19; see *also* Pet. Post-Hearing Br. at 4. A summer 2007 event appears nowhere else in the record. Mrs. Conner fails to mention either event in her 2009 Affidavit. The year of this event is pertinent in light of petitioners' allegations that Savannah's fatigue began soon after the March 2005 vaccinations. Further, whether it occurred in 2007 or 2008 is significant in relationship to the claim that Savannah had an undiagnosed mitochondrial dysfunction. Mrs. Conner claims she determined this in May 2008, when she heard a presentation given by the mother of a child compensated in the Program. That presentation listed symptoms of mitochondrial dysfunction that Mrs. Conner believed Savannah had exhibited. Tr. at 22-23, 32.

⁹ Mrs. Conner asserts that she did not have any "active disease," just positive titers. 2009 Affidavit, ¶ 2; see *also* Tr. at 7. Her treating physician described her condition as "CMV titers positive during pregnancy with questionable active infection." Pet. Ex. 4, p. 142.

¹⁰ I note that petitioners' exhibits contain, for the most part, page numbers that continue across exhibits, instead of beginning the numbering anew with each exhibit.

¹¹ 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

4, p. 149). She was diagnosed with mild jaundice but assessed as otherwise normal. Pet. Ex. 11, p. 485.

3. At birth, Savannah had positive antibody titers for CMV immunoglobulin G [“IgG”] and negative titers for CMV immunoglobulin M [“IgM”].¹² The report explained that positive IgG antibody titers “may indicate a current or previous CMV infection.”¹³ Pet. Ex. 4, p. 144; see also Pet. Ex. 11, p. 485 (reporting CMV titers were negative for IgM).

4. Savannah received routine childhood immunizations at two months of age and at five months of age.¹⁴ The records reflect no reported or observed adverse reactions. See Pet. Ex. 11, pp. 384-87, 390-91.

5. Mrs. Conner took Savannah to her pediatrician on February 15, 2005. Savannah had symptoms of her first ear infection, and also continued to experience a rash, first noted at her December 2, 2004 exam. Pet. Ex. 11, pp. 384-85 (Feb. 15, 2005 exam), pp. 386-87 (Dec. 2, 2004 exam). The pediatrician diagnosed otitis media¹⁵ in Savannah’s right ear and prescribed antibiotics. Pet. Ex. 11, p. 385.

6. Also at the February 15, 2005 visit, the pediatrician noted Savannah was on a gluten-free diet.¹⁶ Pet. Ex. 11, p. 385.

irritability, and color, with from zero to two points awarded in each of the five categories. See DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (31st ed. 2007) [“DORLAND’S”] at 1707.

¹² The Amended Petition asserts that Mrs. Conner had “positive titers” for CMV, and that July 21, 2004 testing on Savannah indicated Savannah “was negative for any sign of CMV infection.” Amended Petition, ¶ 1. The medical records indicate Savannah also demonstrated positive titers in testing performed July 16, 2004 (Pet. Ex. 4, p. 144), and without the opinion of a medical expert I cannot draw a conclusion regarding the significance of this test result. The medical records do not contain a July 21, 2004 test, and the pages to which petitioners cite in the Amended Petition (“pg. 93, 133-149”) do not support their claim.

¹³ I note that maternal IgG can cross the placenta, but maternal IgM cannot. See MOSBY’S MANUAL OF DIAGNOSTIC AND LABORATORY TESTS 329 (4th ed. 2010). “An IgG antibody test is of little diagnostic value [in newborns] because a positive result also reflects maternal antibodies.” NELSON TEXTBOOK OF PEDIATRICS 1378 (18th ed. 2007).

¹⁴ Both sets of immunizations included diphtheria-tetanus-acellular pertussis, haemophilus influenza type b, hepatitis B, inactivated polio, and pneumococcal conjugate. Pet. Ex. 11, pp. 387, 391. Ordinarily, these vaccinations are given at two and four months of age. See CDC, Recommended Childhood and Adolescent Immunization Schedule—United States, July-December 2004, *Morbidity and Mortality Weekly* (Apr. 30, 2004), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5316-Immunizationa1.htm>.

¹⁵ Otitis media is inflammation of the ear, often accompanied by pain and fever, commonly referred to as an “ear infection.” DORLAND’S at 1371-72.

¹⁶ During the hearing, Ms. Conner explained that the entire family converted to a gluten-free diet after Savannah’s older brother was diagnosed with autism. Tr. at 46; see also Pet. Ex. 11, p. 383 (noting the Connors were under increased stress in March 2005 due to their son’s recent autism diagnosis).

7. Mrs. Conner next took Savannah to her pediatrician on March 10, 2005, for her third set of immunizations, which are usually received at six months of age.¹⁷ Savannah was then eight months old. She received diphtheria-tetanus-acellular pertussis, inactivated polio, and pneumococcal conjugate vaccines. Pet. Ex. 11, p. 383.

8. At the March 10, 2005 visit, Mrs. Conner told the pediatrician that Savannah would undergo a hearing test the following month. Pet. Ex. 11, p. 383. No reasons for the scheduled testing were recorded.

9. On April 21, 2005, an audiologist evaluated Savannah's hearing. During the evaluation, Mrs. Conner provided a history of one ear infection and several colds. Mrs. Conner also told the audiologist that Savannah "had stopped babbling," but did not indicate when her babbling had begun or ceased. Pet. Ex. 11, p. 491. The record does not mention an adverse reaction or illness subsequent to the March 2005 vaccinations. The audiologist's impression was that Savannah had "mild hearing loss in the right ear" and recommended re-evaluation in six months. Pet. Ex. 11, p. 491.

10. Savannah returned to the pediatrician's office on April 22, 2005, accompanied by her grandmother. Savannah presented with a one-day history of fever, pulling at her ears, drainage from the ears, cough, and vomiting. Pet. Ex. 11, p. 380. The pediatrician diagnosed Savannah with an infection in her right ear and prescribed antibiotics. Pet. Ex. 11, p. 381. There was no report of an adverse reaction to the March 10, 2005 vaccines, or of an illness immediately after the vaccinations, but Savannah's grandmother did report that the hearing test had taken place the previous day.¹⁸ See Pet. Ex. 11, pp. 380-81.

11. Savannah again saw the pediatrician on May 17, 2005, for a follow up on the April 22 ear infection, accompanied this time by her mother. Mrs. Conner reported that Savannah had failed her hearing test in April. Pet. Ex. 11, p. 378. The pediatrician diagnosed bilateral otitis media and hearing loss, and prescribed more antibiotics. Pet. Ex. 11, p. 379.

¹⁷ See CDC, Recommended Childhood and Adolescent Immunization Schedule—United States, 2005, *Morbidity and Mortality Weekly* (Jan. 7, 2005), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5351-Immunizationa1.htm>.

¹⁸ Respondent's counsel asked Mrs. Conner during the hearing whether she remembered reporting a reaction to the March 2005 vaccines during this visit. Mrs. Conner testified that she didn't "recall that she did." Tr. at 37. Apparently Mrs. Conner didn't recall that she had not been present for this visit, either (see Tr. at 37 (reflecting a typographical error reporting the visit date as April 2nd instead of April 22nd)); the record reflects Savannah was accompanied by her grandmother. Curiously, Mrs. Conner testified that she was "the only one who has taken [Savannah] to her appointments," but this was not a response to questioning regarding the April 22, 2005 visit. Tr. at 34.

12. Savannah returned to the pediatrician for chronic ear infections on June 22, 2005; July 7, 2005; July 13, 2005; and July 21, 2005. None of these records reference an adverse reaction to the March 10, 2005 vaccinations. See Pet. Ex. 11, pp. 370-77.

13. Savannah's pediatrician noted that Savannah displayed abnormal behavior ("persistence") at both the June 22, 2005 visit and the July 7, 2005 visit. Pet. Ex. 11, pp. 375, 377.

14. On July 21, 2005, Savannah's pediatrician recorded that the Connors had delayed further vaccination until Savannah was older, referencing Savannah's brother's autism in connection with this request. Pet. Ex. 11, p. 371.

15. On July 28, 2005, Savannah saw an otolaryngologist for treatment of her chronic ear infections. The doctor prescribed bilateral ear tube insertion. Pet. Ex. 11, pp. 480-82. Savannah had surgery on August 4, 2005, to place the tubes, and initially experienced relief from symptoms. See Pet. Ex. 2, p. 87; Pet. Ex. 11, p. 479.

16. Savannah returned to the audiologist on March 8, 2006. Her hearing was "within broad normal limits." Pet. Ex. 11, pp. 490, 492.

17. On or about August 24, 2006, Savannah had her first documented visit with Early Access, an early intervention service provider. The Connors sought assistance with Savannah's language development. This record is the first to note that Savannah had delayed speech, although the April 21, 2005 audiologist visit records that Savannah had stopped babbling. See Pet. Ex. 6, pp. 326-33.

18. Savannah continued to suffer ear infections, and by November 2006, her otolaryngologist ordered surgery to replace her ear tubes and to remove her adenoids. See Pet. Ex. 2, pp. 71-72. Savannah underwent surgery on December 22, 2006 (Pet. Ex. 2, pp. 68-69), and has since then experienced relief from her ear problems and restoration of her hearing. See, e.g., Pet. Ex. 2, pp. 36-37, 54-55, 58-59, 61-62, 65-66; Pet. Ex. 11, pp. 478, 487-88. *But see* Pet. Ex. 11, pp. 362-63 (noting Savannah was tugging on her right ear on July 10, 2007, in connection with an upper respiratory infection).

19. A December 19, 2006 summary of Savannah's progress in early intervention noted that she had delays in communication, cognitive function, fine motor skills, social and emotional skills, adaptive and self help skills, and oral motor skills. Her gross motor skills were within normal limits; the record indicates Savannah was "run[ning] well, climb[ing] up/down stairs, kick[ing] and throw[ing] a ball." Pet. Ex. 6, p. 275. This record also indicates that Savannah exhibited "behaviors associated with PDD," or Pervasive Developmental Delay, an autism spectrum disorder. Pet. Ex. 6, p. 275.

20. On January 4, 2007, Savannah's pediatrician noted "[d]ev delay-?PDD/Autism" as a chronic problem. See Pet. Ex. 2, p. 7; see also Pet. Ex. 11, pp. 34-

65 (noting the Conners were pursuing a diagnosis, and currently treating Savannah with supplements). In the notes of a return visit on July 10, 2007, Savannah's pediatrician reported that Savannah had been diagnosed with PDD and Mrs. Conner intended to treat Savannah with the Neubrandner Protocol, which prescribes methyl-B12 supplementation as a means to treat autism spectrum disorders. See Pet. Ex. 11, pp. 362-63.

21. On January 12, 2007, Savannah was evaluated at the University of Iowa Hospitals and Clinics. She was diagnosed with Pervasive Developmental Disorder-Not Otherwise Specified, a lack of coordination, and mild mental retardation. Pet. Ex. 3, p. 118; see also *id.*, pp.114-32.

22. The filed medical records contain no opinion from a medical professional that vaccines or a vaccine caused or aggravated Savannah's medical problems. See, e.g., Pet Exs. 3, 10, 11, 21, 31.

B. Facts in Dispute Resolved in This Ruling.

The primary matters in dispute are whether Savannah experienced a reaction to her March 10, 2005 vaccinations, when certain of Savannah's symptoms began, and Savannah's current diagnoses. Because I have rejected Mrs. Conner's testimony, the conclusions that petitioners urge me to draw on each of these three issues are unsupported by any reliable evidence in the record. I have considered the record as a whole in making these factual findings.¹⁹

I reject petitioners' allegation that Savannah experienced a severe adverse reaction to her March 10, 2005 vaccinations. There is no evidence in the record to support the symptoms Mrs. Conner described in her 2011 Affidavit, and Mrs. Conner's 2009 Affidavit avers that Savannah experienced no symptoms until months later. I also reject the contention that many of the symptoms Savannah currently exhibits began in close temporal proximity to her March 10, 2005 vaccinations. On this point, the medical records provide evidence that nearly all of these symptoms began much later than Mrs. Conner alleges. Finally, I reject petitioners' characterization of Savannah's current diagnoses and accept the diagnoses documented in the medical records.²⁰ In order to

¹⁹ See § 300aa-13(a): "Compensation shall be awarded...if the special master or court finds on the record as a whole-(A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section 300aa-11(c)(1)." See also § 300aa-13(b)(1) (indicating that the court or special master shall consider the entire record in determining if petitioner is entitled to compensation).

²⁰ If petitioners produce additional evidence that changes Savannah's diagnosis, I will evaluate that evidence when it is produced, along with any expert opinions regarding whether Savannah suffers from an autism spectrum disorder, a mitochondrial disorder, or, in the words of a physician at the Cleveland Clinic, "a complex multisystem disorder involving brain, muscle and tendons." Pet. Ex. 10, p. 343. Contrary to petitioners' claims, this physician did not definitively state that Savannah does not have autism or PDD, indicating only that he did not see "overt signs" of such a condition, while stating that his examination was "not adequate" to form such a conclusion. Pet. Ex. 10, p. 343.

explain why I reach these findings, I discuss the evidentiary record and the parties' differing interpretations in more detail than I did above.

1. No Adverse Reaction to the March 10, 2005 Vaccinations.

Petitioners now urge me to find that Savannah suffered an immediate adverse reaction to her March 10, 2005 vaccinations. The only evidence in the record supporting such a finding is Mrs. Conner's account, contained both in her 2011 Affidavit and in her hearing testimony. An immediate adverse reaction was not alleged in this case for these specific vaccinations prior to a 2010 filing from the petitioners, which was made seeking to avoid dismissal of this case for a failure to prosecute. No medical record in this case reports this reaction. A review of the evidence indicates that the record is insufficient to support a finding that such a reaction occurred.

a. Mrs. Conner's Account of a Reaction.

In her 2011 Affidavit, Mrs. Conner, for the first time, presents a detailed account of an adverse reaction to the March 10, 2005 vaccines. Several paragraphs of her affidavit are set forth below:

5. Within hours of the [March 10, 2005] vaccination[s], [Savannah] began to run a fever ranging from 103.7 to 104.3 degrees. Finally, after approximately twelve hours, and after Tylenol and cool baths, the fever broke and reduced to 101.0 degrees.

6. Savannah began screaming shortly after the administration of the vaccinations and that did not stop until she fell unnaturally asleep a day and a half later. She was up all night and all efforts to console her were futile.

7. The following day, after she stopped screaming, she began to stare blankly, became sleepy and lethargic, fell asleep, and slept the rest of the day, through the next night until the following day. During this period of time, she vomited all food and medication which was provided [to] her.

8. On the third day following the administration of the vaccine, she became more alert, although continued to demonstrate fatigue and irritability, and for several months following the vaccine was agitated, and cranky. I called the doctor both while Savannah was showing these immediate symptoms and later when she started to show further problems. I was told by the nurse practitioner at Dr. Beverly Smith's office, that there was no link between Savannah's symptoms and the vaccines and that it was a coincidence that the kids had problems after the vaccination[s]. In particular I was told that it was common for children to run high fevers and for them to be lethargic following the shots. I believed

what I was told until much later. I was belittled for even considering that the vaccinations could have been connected to the condition of either of my children. She told me that I was just looking for someone to blame because I was so upset that the children were disabled. I was basically shamed away from following up on my own suspicions for a long time.

2011 Affidavit, ¶¶ 5-8.

Mrs. Conner provided similar, less detailed testimony at the hearing:

[Savanah] had quite a hard time with the eighth-month vaccinations versus the other ones that she had had. It was quite different as far as the amount of screaming and the crying and the lethargy afterwards. So, we had asked, there is a nurse practitioner at our practice and we had called and wanted to make sure that that was normal because her fevers were quite high. And she felt that that was totally normal and not to worry about it. ... [S]he was so irritable and tired and such, and she had been real sick like vomiting after the vaccinations. Once the fevers came down, she was kind of a quiet child and ... she began having some choking episodes with foods that required chewing.

Tr. at 8. Mrs. Conner also testified that after the March 10, 2005 vaccinations, Savannah “was not doing much, a lot of things right after those vaccinations. So, she was much more lethargic. She was less interactive at that point. She was very crabby.” Tr. at 36.

b. Other Evidence Pertinent to that Time Period.

(1) Petitioners’ Earlier Factual Allegations.

The two petitions filed in this case are not evidence, and thus the facts they allege cannot be considered evidence. Nonetheless, the Amended Petition was accompanied by Tammy Conner’s 2009 Affidavit, which is evidence in this case. In the 2009 Affidavit, Mrs. Conner avers “[w]hile Savannah developed normally, she did have chronic ear infections. Despite these problems she rolled over on time, crawled on time, pulled to stand on time and walked on time. Thus, **until nearly a year and a half she was meeting all her milestones....After 17 months we became concerned about her failure to speak.**” 2009 Affidavit, ¶¶ 4-5 (emphasis added). Significantly, the 2009 Affidavit fails to mention any adverse reaction to the March 2005 vaccinations, and fails to describe any symptoms or problems, other than chronic ear infections, occurring prior to 17 months of age, or December 2005.

Although the two petitions are not evidence, they, along with a 2010 brief filed by petitioners, document the conflicting positions petitioners have taken in this case. In the original petition, filed July 9, 2008, petitioners allege that Savannah “suffered neurological disorders which first manifested themselves after September 1, 2005.” Petition at 1.

They further allege that Savannah “progressed normally from birth until approximately her 14th month of life.” *Id.*, ¶ 3. At that time, September 2005, “petitioners noticed that Savannah stopped babbling and lost the few words that she had developed. She seemed in pain and bloated most of the time. At times, she cried all day.” *Id.*, ¶ 1. Accordingly, “[p]etitioners contend[ed] that their child, Savannah Nicole Conner, ...[suffered vaccine-caused] neurological deterioration which manifested itself within 6 months following the March 10, 2005 vaccination[s].” *Id.*, ¶ 9. Six months later, petitioners filed the Amended Petition, the operative petition in this case, alleging that “Savannah’s progress was unremarkable other than chronic ear infections and concern for her hearing for her first 18 months.” Amended Petition, ¶ 2. In a supplemental response to my September 30, 2010 order to show cause why this case should not be dismissed for failure to prosecute, petitioners put forth a new factual allegation, never before referenced in the record of this case. “According to her mother Savannah had a temperature of about 104 that evening [of March 10, 2005] and when she called the pediatrician’s office she was told to give her Tylenol and call if the temperature hit 105 degrees, but that 104 was normal after vaccination. Savannah lost control of her muscles at about nine months, one month after the last vaccinations.” Supplemental Response to Order, filed Oct. 29, 2010, at 3.

(2) Histories Provided in the Medical Records.

Savannah saw audiologist Margaret McDoniel on April 21, 2005, a little more than a month after the vaccinations alleged to be causal in this case.²¹ Mrs. Conner provided a history of one ear infection and several colds. Mrs. Conner also told the audiologist that Savannah had stopped babbling. Pet. Ex. 11, p. 491. Although Mrs. Conner testified that her comment regarding cessation of babbling was related to a change in Savannah’s behavior after the March 10, 2005 vaccinations, the audiologist recorded nothing regarding an adverse reaction, and she did not identify that event as the point at which Savannah stopped babbling. See *id.* As the audiology appointment was already scheduled at the time Savannah received the March 10, 2005 vaccinations, and there is no other reason in the medical records to indicate that Savannah had a hearing problem, a cessation of previous vocalizations would be a logical reason to schedule such testing.

On June 22, 2005, Savannah’s pediatrician noted that Savannah was displaying abnormal behavior (“persistence”). Ex. 11, p. 377. This observation is repeated in the

²¹ The hearing test was already scheduled at the time of Savannah’s March 2005 vaccinations. See Pet. Ex. 11, pp. 382-83. The pediatric records do not reveal any concerns about Savannah’s hearing prior to this and Savannah had only experienced one ear infection at that point. I note that the pediatrician’s visit in March occurred about two months after Savannah’s brother was diagnosed with autism. My review of the many autism cases pending before me indicates that an audiology referral is often the first step in the process of obtaining an autism diagnosis; speech and language delay is generally the first symptom noted by parents and pediatricians, and ensuring that hearing is normal helps to rule out causes other than autism for delayed speech.

record from the July 7, 2005 visit. Ex. 11, p. 375. No other behavioral changes of any kind, let alone those described by Mrs. Conner in her 2011 Affidavit and in her hearing testimony, appear in the medical records shortly after the March 10, 2005 vaccinations.

On January 11, 2010, five years after the March 10, 2005 vaccinations and 20 months after Mrs. Conner's conversation with another Vaccine Act petitioner who had obtained compensation for her child's autism, Mrs. Conner provided a history of this time period to Dr. Bruce Cohen at the Cleveland Clinic. The record only notes that Savannah's "development was normal until about six months of life" and "by nine months she began having choking spells and was having troubles using her tongue." Pet. Ex. 10, p. 341. Mrs. Conner reported a similar history to Dr. Natowicz,²² also of the Cleveland Clinic, on February 17, 2010, "[t]he first clinical concern regarding [Savannah] was at about 8 months of age when she had difficulty swallowing crackers." Pet. Ex. 31, p. 1. There is no record of Mrs. Conner reporting a post-vaccinal adverse reaction in March 2005 to either doctor. See Pet. Ex. 10, p. 341; Pet. Ex. 31, p. 1.

c. Resolution of the Conflicting Evidence.

There is no reliable evidence that Savannah suffered an adverse reaction to her March 10, 2005 vaccinations. The only evidence that Savannah suffered any reaction at all is contained in Mrs. Conner's 2011 Affidavit and reiterated in her hearing testimony. Her account describes serious symptoms: a high fever lasting twelve hours, unremitting screaming for a day and a half, consistent sleeping for more than 24 hours, and the vomiting of "all food and medication" provided. Mrs. Conner avers that she took action, calling the pediatrician to seek advice. There is no record of this call, and Mrs. Conner explained that the nurse practitioner's reaction prevented Mrs. Conner from seeking other assistance. Mrs. Conner reported the nurse practitioner "belittled [me] for even considering that the vaccinations could have been connected to the condition of either of my children. She told me that I was just looking for someone to blame because I was so upset that the children were disabled." 2011 Affidavit, ¶ 8. Although it is possible that Mrs. Conner juxtaposed what the nurse practitioner said in response to a report of Savannah's purported vaccine reaction with some later event, it is important to note that at the time of the claimed phone conversation, Savannah had not yet been diagnosed as disabled. Furthermore, it is extremely unlikely that if Savannah had actually exhibited the symptoms described, at the severity described, Mrs. Conner would not seek alternative assistance.²³

²² I note that contrary to my findings here, Dr. Natowicz indicated in his records that Mrs. Conner "was a good historian." He followed this notation with "[n]o outside medical records were available for my review, except for three lab reports," indicating he had nothing to compare with Mrs. Conner's history of events. See Pet. Ex. 31, p. 1.

²³ If the pediatrician made notes of any of the Conners' phone calls, they were not filed into the record, making verification of Mrs. Conner's account difficult.

If such a reaction to vaccination occurred, at the severity described, it would likely have been reported in her 2009 Affidavit supporting her claim that vaccines injured Savannah. That affidavit contains no allegation of an adverse reaction temporally associated with vaccines. It more or less describes a gradual manifestation of speech delay and cognitive delay first noticed no earlier than 17 months of age.

It is telling that none of the histories throughout the medical records include any hint of this adverse reaction to vaccination. Even in Savannah's most recent medical records from the Cleveland Clinic there is no mention of an adverse reaction in the histories provided by Mrs. Conner.

The first time petitioners ever mentioned this adverse reaction in the record of this case was October 29, 2010, in their supplemental response to my order to show cause. Petitioners first submitted evidence of this adverse reaction—the 2011 Affidavit—in April 2011, six years after it allegedly occurred, almost three years after this case was filed, and after they had already filed the 2009 Affidavit setting forth an alternative story. I reject the account provided in the 2011 Affidavit because it contradicts Mrs. Conner's account made just two years ago and because it has no support in the medical records.

2. Onset of Savannah's Symptoms.

Petitioners urge me to find that immediately after the March 10, 2005 vaccinations, (1) Savannah's mood and temperament changed, (2) she experienced frequent fatigue, (3) she became chronically constipated, (4) she had difficulty emptying her bladder, and (5) she had difficulty swallowing solid foods. Pet. Post-Hearing Br. at 2-3. They also assert that in either 2005 or 2006 Savannah displayed a lack of muscle tone in her legs. See *id.* at 3 (alleging occurrence in 2006); 2011 Affidavit (stating this occurred at one year of age, or summer 2005); Tr. at 12 (dating this to the time of the social services evaluation for speech delay, in late 2005 or early 2006).²⁴

I find that the record supports that Savannah exhibits most of these symptoms, and that it is insufficient to support, but does not rule out, that she suffers the other alleged symptoms. Petitioners have failed, however, to prove that onset of any of these symptoms occurred in close temporal proximity to the March 10, 2005 vaccinations.

²⁴ Petitioners further urge me to find that treatments with a hyperbaric oxygen tank temporarily improved Savannah's symptoms. Petitioners have failed to establish this fact, and they have failed to establish that Savannah has even undergone treatment with a hyperbaric oxygen tank. Mrs. Conner's testimony that the family borrowed such a tank from a friend in 2008 (2011 Affidavit, ¶ 19; Tr. at 24-25) is not bolstered by anything else in the record. With nothing more than Mrs. Conner's assertion, I cannot conclude that the record establishes that Savannah experienced temporary relief from symptoms after treatments with a hyperbaric oxygen tank.

a. Mood and Temperament Changes.

Petitioners' post-hearing brief alleges that Savannah's "mood and temperament changed" after the March 2005 vaccinations. They specifically allege that Savannah was "frequently irritable" and that she "assumed a flat affect." Pet. Post-Hearing Br. at 2. Mrs. Conner testified both that Savannah became more irritable after the March 2005 vaccinations and that she was "kind of a quiet child." Tr. at 7-8. There are no reports in the medical records that Savannah experienced a change in temperament.²⁵ The testimony on this point is frustratingly vague, and without specific examples, and other sources to substantiate Mrs. Conner's testimony, I do not find that petitioners have demonstrated that a marked change occurred in Savannah's mood and temperament immediately following the March 2005 vaccinations.

b. Fatigue.

Savannah's current trouble with fatigue is documented in the records of both Drs. Cohen and Natowicz. See Pet. Exs. 10, 31. Petitioners' brief alleges this trouble began shortly after the March 2005 vaccinations. Pet. Post-Hearing Br. at 2. In her second affidavit, Mrs. Conner states that Savannah began experiencing fatigue "the third day following the administration of the vaccine [sic]." 2011 Affidavit, ¶ 8.²⁶

Mrs. Conner illustrated Savannah's trouble with fatigue using specific anecdotes which occurred no earlier than summer 2007.²⁷ In her 2011 Affidavit, she describes an incident in summer 2008 during which Savannah became overheated, lost the ability to stand, became lethargic, and "was only able to regain muscle control after she was cooled." 2011 Affidavit, ¶ 24. During testimony, Mrs. Conner described a summer 2007 episode at an amusement park where an event similar to the 2008 event described in her 2011 Affidavit occurred. See Tr. at 19-20. Without any indication that this happened twice, I find it likely that these two descriptions pertain to one event, which either occurred in 2007 or 2008.

Mrs. Conner then noted that "[s]hortly after [Savannah's collapse] I noticed that [Savannah] seemed unable to perspire, was having difficulty awakening and formulating language after awakening in the morning, sleeping excessively, and that she seemed to find it difficult to walk even a short distance without taking frequent rest breaks." 2011 Affidavit, ¶ 25. Mrs. Conner also described a recent incident where after using a

²⁵ Mrs. Conner did not describe a mood or temperament change in her 2009 Affidavit. In her 2011 Affidavit, Mrs. Conner stated that "for several months following the vaccine [Savannah] was agitated, and cranky." She also noted that Savannah's "affect became flat and lacking in facial expression, and she did not [] smile." 2011 Affidavit, ¶¶ 8,9.

²⁶ Mrs. Conner does not mention fatigue in her 2009 Affidavit.

²⁷ Petitioners provided no evidence of fatigue symptoms prior to summer 2007. The medical records do not include any reports of fatigue in the months following the March 2005 vaccinations.

treadmill for physical therapy, Savannah collapsed as she had done at the amusement park. Mrs. Conner testified that Savannah was not perspiring when she collapsed. Tr. at 30. Mrs. Conner did not provide a date for this incident.

During the visit to Dr. Cohen, Mrs. Conner reported that Savannah “has a lot of fatigue that comes and goes.” Pet. Ex. 10, p. 341 (Jan. 11, 2010 visit). She told Dr. Natowicz that Savannah “has excessive fatigability. She is tired on awakening in the morning (and needs to be awakened).” Pet. Ex. 31, p. 2. Both doctors accepted this history, and in combination with their own observations, concluded that Savannah suffers from fatigue. See Pet. Exs. 10, p. 343; 31, p. 7.

I find that there is sufficient evidence in the record to support a finding that Savannah currently suffers from fatigue. While Mrs. Conner testified that the amusement park incident occurred in 2007, her 2011 Affidavit states it occurred in 2008. In recording Mrs. Conner’s history of Savannah’s fatigue, neither doctor recorded a date of onset. There is no reliable evidence that Savannah began to suffer fatigue shortly after her March 2005 vaccinations.

c. Chronic Constipation.

In their post-hearing brief, petitioners allege that after the March 2005 vaccinations, Savannah “became chronically constipated.” Pet. Post-Hearing Br. at 3. Mrs. Conner’s 2011 Affidavit reports that Savannah began to experience “chronic constipation” “shortly after the March 10, 2005 vaccinations.” 2011 Affidavit, ¶ 7. During her testimony, Mrs. Conner stated that Savannah “has some constant, chronic constipation that occurred from the time she was one year.” Tr. at 26. The first report of constipation in Savannah’s medical records appears in a pediatric visit on September 18, 2008, when Savannah was four years old. Savannah, accompanied by her mother, presented for a sick visit with the chief complaint of “Constipation & then gets [diarrhea] sometimes both.” Symptoms were noted to have been present for one month. Pet. Ex. 2, p. 8. Savannah returned to the pediatrician, again accompanied by her mother, on November 13, 2008, with ongoing constipation. Pet. Ex. 11, p. 354. The pediatrician then referred her for a gastrointestinal consultation. *Id.* at 355. After that point Savannah saw a gastroenterologist several times for chronic constipation. See, e.g., Pet. Ex. 11, pp. 493-500.

The records reflect Savannah began to experience chronic constipation more than three years after the March 10, 2005 vaccinations. Notably, there are medical records reflecting this problem, and Savannah’s pediatrician took action to refer Savannah after her initial treatment was ineffective. See Pet. Ex. 11, pp. 354-55. I find it extremely unlikely that Savannah was experiencing chronic constipation for three years before Mrs. Conner reported it to the pediatrician, and I also find it extremely unlikely that had she been reporting it, the pediatrician would have waited three years before referring Savannah for a gastrointestinal exam. As such, petitioners have failed to establish that Savannah’s chronic constipation began shortly after the March 2005 vaccinations.

d. Difficulty Emptying Her Bladder.

Petitioners further allege that Savannah began to experience difficulty emptying her bladder soon after the March 2005 vaccinations. Pet. Post-Hearing Br. at 3. Mrs. Conner's second affidavit states that this problem began to occur "shortly after the March 10, 2005 vaccinations." 2011 Affidavit, ¶ 7. In her testimony, however, she said this began to occur when Savannah "was about four years old" (Tr. at 19), which would have been 2008. Mrs. Conner testified that when symptoms first began, Savannah's pediatrician thought it was possibly a urinary tract infection. Tr. at 18. There is a record of a pediatric visit reporting Savannah's difficulty urinating, and reflecting the doctor's assessment of a "possible UTI." It is dated September 28, 2007. Pet. Ex. 11, pp. 358-59. It notes "[no] similar [symptoms] in past." *Id.*, p. 359. There is no follow-up report on this issue in the records that follow. See, e.g., Pet. Ex. 11, pp. 356-57 (Nov. 6, 2007 visit).

In a September 18, 2008 visit, Savannah again presented with symptoms of this problem, reporting pain with urination. Pet. Ex. 2, p. 8.²⁸ The symptoms were still present during the November 13, 2008 visit. Pet. Ex. 11, p. 355. Mrs. Conner reported this problem to Dr. Cohen at the Cleveland Clinic, explaining to him that Savannah often needs to push on her tummy to alleviate this problem. Pet. Ex. 10, p. 341.

I find that there is sufficient evidence in the medical records to establish that Savannah experiences trouble emptying her bladder. There is insufficient evidence, however, to establish that this occurred soon after the March 2005 vaccinations. To the contrary, Mrs. Conner herself testified that the problem started when Savannah was four years old, and the earliest evidence of a problem in the medical records appears in 2007.

e. Difficulty Swallowing.

Mrs. Conner testified that within six weeks of the March 10, 2005 vaccinations, Savannah began to have difficulty swallowing crackers, causing her to choke. Tr. at 8, 49-50; see also 2011 Affidavit, ¶ 4. She noted that before this time, Savannah was eating solid foods. Tr. at 51. Mrs. Conner explained that she consulted at that time with Savannah's brother's speech therapist about the problem, and the therapist opined that Savannah had trouble lateralizing, or moving food around her mouth with her tongue. Tr. at 8-9. Prior to the filing of the 2011 Affidavit, petitioners never mentioned this fact in the record of this case. The medical records contain no report of this problem prior to a September 2, 2008 occupational therapy visit more than three years later. Pet. Ex. 11,

²⁸ This record appears incomplete, as it includes a note at the bottom that it continues on to a second page, but no second page was filed. I therefore cannot determine whether the doctor also thought this occurrence was a urinary tract infection, which would support Mrs. Conner's testimony that this incident occurred when Savannah was four years old.

p. 475. There is an October 31, 2006 note from an occupational therapist that Savannah “will leave food in her mouth, per report from Mom, and requires a drink in order to clear the food.” Pet. Ex. 6, p. 299. This record talks in detail about Savannah’s feeding issues but does not mention any choking episodes. *Id.* Mrs. Conner later told Dr. Cohen at the Cleveland Clinic that this problem began around nine months of age. See Pet. Ex. 10, p. 341 (visit on Jan. 11, 2010). She also told Dr. Natowicz at the Cleveland Clinic that Savannah had difficulty swallowing crackers at eight months of age. Pet. Ex. 31, p. 1.

I conclude that there is sufficient evidence in the medical records to support a finding that Savannah currently exhibits a problem swallowing food and moving food in her mouth. Dr. Cohen’s exam in January 2010 documented Savannah’s trouble moving her tongue. See Pet. Ex. 10, p. 342 (noting inability to stick her tongue out and difficulty rapidly moving her tongue). I do not, however, find sufficient evidence to determine that this problem was evident at eight months of age. If Savannah had the ability to eat solid food, and then exhibited frequent choking, I find it unlikely that Mrs. Conner would not have brought this to the pediatrician’s attention soon after it began. While I am mindful that Mrs. Conner believes that the pediatrician’s office was hostile to her concerns regarding Savannah’s developmental delay (see 2011 Affidavit, ¶ 8), I find it unlikely that a pediatrician would not even record a parental concern of a child’s choking episodes. Furthermore, Savannah underwent an extensive evaluation at the University of Iowa Hospitals and Clinics in January 2007. That evaluation contains no report of choking episodes or problems lateralizing. See, e.g., Pet. Ex. 3, p. 114.

f. Lack of Muscle Tone in Her Legs.

Petitioners also urge me to find that “[i]n the late spring or early summer of 2006...[Mrs. Conner] began to notice symptoms consistent with lack of muscle tone, i.e. an apparent inability of the legs to hold her weight.” Pet. Post-Hearing Br. at 3. Mrs. Conner has stated that at about fourteen months of age, which would have been fall 2005, Savannah exhibited low muscle tone. 2011 Affidavit, ¶ 12; see also Tr. at 11-12 (testifying that she was concerned with Savannah’s inability to bear weight in October 2005). In the 2007 evaluation at the University of Iowa, the occupational therapist noted Savannah displayed decreased “postural muscle tone.” Pet. Ex. 3, p. 114. Also during that evaluation, a physical therapist noted “weakness in her legs as evidenced by difficulty with jumping skills.” Pet. Ex. 3, p. 116. In 2010, Dr. Cohen noted “motor strength is probably a bit weak in the following muscles: deltoids, triceps, biceps, brachioradialis, wrist extension, hand grip and interosseous groups. There is also normal strength in the hip flexors, hip extensors, iliopsoas group, quadriceps, hamstrings, gastrocnemius, anterior tibialis, EHL.” The doctor noted that Savannah’s motor tone was hypotonic and muscle strength was difficult to test because Savannah has hyperextensible joints. Pet. Ex. 10, pp. 342-43.²⁹

²⁹ In a letter dated October 6, 2010, Dr. Usman notes that her “exam revealed low muscle tone throughout and ligamentous laxity.” Pet. Ex. 21. This letter is unaccompanied by any records, and provides no date for observation of these symptoms.

Petitioners have failed to provide reliable evidence for when Savannah began to exhibit a lack of muscle tone in her legs. They allege it began in spring of 2006, but Mrs. Conner's testimony, if I believed her, would establish it began months before that. The medical records only support a lack of tone as of January 2007, when the University of Iowa evaluation took place. I cannot rely on Mrs. Conner's testimony to establish this was evident earlier, both because her testimony is generally unreliable and because petitioners' post-hearing brief urges me to find that this symptom began later. Dr. Cohen's evaluation in 2010 is sufficient to demonstrate Savannah currently experiences a lack of muscle tone, and the University of Iowa record is sufficient to demonstrate that this lack of muscle tone was present in 2007.

3. Savannah's Current Diagnosis.

Petitioners assert that Savannah "suffered an injury due to the effect of a vaccine or vaccines on an underlying mitochondrial disorder." Pet. Post-Hearing Br. at 1. Implicit in that theory is petitioners' assertion that Savannah in fact has an underlying mitochondrial disorder. Petitioners concede that they lack a "definitive diagnosis," but they assert that doctors have opined in favor of the diagnosis, and they urge me to find that Savannah currently suffers symptoms consistent with a diagnosis of mitochondrial dysfunction. See *id.* at 5.

As noted above, Savannah's current diagnoses include PDD-NOS, lack of coordination, and mild mental retardation. Pet. Ex. 3, p. 118. Medical records from Savannah's treatment at the Cleveland Clinic indicate that treating physicians are currently exploring whether Savannah has some sort of mitochondrial dysfunction, but no doctor has diagnosed one. See Pet. Exs. 10, 21, 31. Indeed, the medical records filed indicate that testing for "mitochondrial disorder" and "genetic metabolic disorder of energy homeostasis" is worth pursuing at this time, based on Savannah's clinical presentation. See Pet. Exs. 10, p. 343; 31, p. 7. Testing conducted thus far has been inconclusive (see Petitioners' Motion, filed Feb. 25, 2011, at 2; Pet. Ex. 32), and further testing requires that Savannah experience a high fever or severe gastrointestinal distress before testing can be conducted (see Pet. Ex. 31, p. 7).

In their post-hearing brief, petitioners urge me to find that Dr. Usman has determined that Savannah "is not autistic nor does she have PDD." They further urge me to find that Dr. Cohen also "agrees that [Savannah] is unlikely to have PDD or Autism." Pet. Post-Hearing Br. at 5. During her testimony, Mrs. Conner reiterated that Dr. Usman communicated to her the opinion that Savannah does not have autism or PDD. Tr. at 26.³⁰

³⁰ Mrs. Conner also suggested that Savannah's mental retardation diagnosis is incorrect, noting that Savannah has demonstrated high abilities in non-language based testing. Tr. at 21-22. Mrs. Conner later testified that Savannah currently receives supportive academic services in accordance with an individualized education plan. See Tr. at 31-32. Petitioners have not urged me to find this diagnosis is incorrect, and the record provides no basis for me to do so.

Although petitioners may hold their own beliefs regarding what ails Savannah, they are not doctors and their attempts to undiagnose or rediagnose Savannah fail without a qualified doctor's opinion to support their suspicions. While they cite Dr. Usman in support of their claim regarding a change in diagnosis, the only record from Dr. Usman filed in this case is a one-page letter, which does not reflect her specialty or qualifications. Doctor Usman does not opine that Savannah does not have PDD. The letter does note that Dr. Usman referred Savannah to the Cleveland Clinic for investigation of "unusual symptoms not consistent with PDD," but this does not amount to a rejection of the diagnosis. See Pet. Ex. 21. It is equally likely to indicate that Dr. Usman suspects problems in addition to Savannah's PDD. Further, Dr. Cohen's assessment on this point stopped short of rejecting the PDD diagnosis: "I do not see overt signs of autism or PDD but the visit is not adequate, nor is evaluating milder forms of PDD part of my practice. I defer on this part of the evaluation." Pet. Ex. 10, p. 343. As such, petitioners have failed to convince me that Savannah does not currently carry the diagnosis of PDD made at the University of Iowa Hospitals and Clinics.³¹ See Pet. Ex. 3, p. 118.

I reject petitioners' assertion that "Ms. Connor's [sic] testimony establishes that Savannah [sic] has a lack of muscle tone and control, delay in speaking, she fatigues easily, has low heat tolerance and does not sweat." See Pet. Post-Hearing Br. at 5. Because Mrs. Conner proved an unreliable witness on other issues, I cannot accept her anecdotes, contained nowhere else in the record, to establish any of Savannah's current symptoms.

IV. Orders to the Parties.

The next step in this case is for petitioners to file an amended petition setting forth the theory of causation on which they intend to rely and the report of a medical expert opining on that theory. Petitioners have previously argued that they must have a diagnosis of mitochondrial disorder, confirmed by testing, before they can formulate a causation theory. Petitioners have made it clear they cannot obtain this diagnosis without testing that may never occur. It is unreasonable to delay this case indefinitely pending this indeterminable event. If they intend to prosecute this case on a theory

³¹ For the purposes of this proceeding it seems a moot point for petitioners to quibble with Savannah's autism diagnosis. Certainly they should strive to obtain the best medical and rehabilitative care available for Savannah, and an accurate diagnosis is undoubtedly necessary for such a pursuit. In this case, however, petitioners need only identify an injury and present evidence demonstrating that injury was caused or aggravated by a vaccine. Autism spectrum disorders are often comorbid with other conditions. See, e.g., *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044, at *32 (Fed. Cl. Spec. Mstr. Feb. 12, 2009) (noting autism spectrum disorders are comorbid with mental retardation), *aff'd*, 88 Fed. Cl. 706 (2009). A PDD diagnosis does not preclude other diagnoses; it likely does not preclude a diagnosis of mitochondrial dysfunction.

involving mitochondrial disorder, they must do so now. Alternatively, they must formulate a new theory.

Petitioners shall file their amended petition by no later than **Thursday, August 25, 2011**. Petitioners shall then file their expert report by no later than **Monday, September 26, 2011**. After petitioners file their expert report, I will order respondent to file her Vaccine Rule 4 report, and an expert report, within 60 days.

The parties are directed to provide a copy of these factual findings to their respective experts, and the experts shall conform their expert opinions to these factual findings. Should an expert disagree with any factual finding herein, that expert shall clearly state in his report: (1) the finding involved; (2) the reasons for the expert's disagreement;³² and (3) the impact, if any, of my contrary finding on the expert's conclusions regarding causation.

IT IS SO ORDERED.

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

³² It will be insufficient for the expert to simply state that he disagrees with my assessment of Mrs. Conner's credibility.