OFFICE OF SPECIAL MASTERS

No. 90-2923V

(Filed: October 3, 1997)

J.J. WEHMEYER on behalf of son JOSEPH T. WEHMEYER,	*	
Petitioners,	*	
vs.	*	PUBLISHED
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Paul Speziale, III., Esq., Lodi, New Jersey, for petitioner.

David L. Terzian, Esq., United States Department of Justice, Washington, D.C., for respondent.

ENTITLEMENT DECISION

ABELL, Special Master

This case concerns the eligibility of Joseph T. Wehmeyer (hereinafter Joseph) for compensation under the National Childhood Vaccine Injury Compensation Act (hereinafter Vaccine Act, or Program).[(1)] Petitioner claims that as a result of the administration of a measles vaccination on 22 March 1969, Joseph suffered a residual seizure disorder (RSD) and an encephalopathy, with permanent sequelae.

Petitioner filed a petition on behalf of his minor son on 1 October 1990. On 9 September 1994, respondent filed a report denying petitioners' eligibility for compensation. Respondent argued that Joseph's encephalopathy and RSD, which occurred within 15 days of the 22 March 1969 measles vaccination, were caused by a factor unrelated to the vaccine, to wit: hypertensive cerebral hemorrhaging due to congenital renal artery stenosis.

On 16 January 1997 the court conducted an evidentiary hearing in Philadelphia, Pennsylvania.[(2)] The court received, on behalf of the petitioner, the testimony of Mr. J.J. Wehmeyer, Joseph's father, Dr. David L. Romano, a nephrologist, and Dr. Marcel Kinsbourne, a pediatric neurologist. Dr. M. William Schwartz, a pediatric nephrologist, and Dr. Mary Anne Guggenheim, a pediatric neurologist, testified on behalf on respondent.

Following a review of the entire record, and for reasons stated below, the court finds, pursuant to § 12(d)(3)(A) and Vaccine Rule 10(a), that petitioner is not entitled to compensation.

I. STATUTORY REQUIREMENTS

A.

The Vaccine Act permits petitioners to establish causation in one of two ways: either through the statutorily prescribed presumption of causation or by proving causation-in-fact.[(3)] The Vaccine Injury Table lists specific vaccines and certain injuries or conditions that may occur as a result of the administration of a vaccination. If the first symptom or manifestation of the onset of a "Table injury" is found to occur within a prescribed time period, a rebuttable presumption is created that the vaccine caused the condition. Section 13(a)(1); §11(c)(1)(C)(i); §14(a). To meet his burden of proving that the onset of an encephalopathy or residual seizure disorder occurred on Table for a measles vaccination, petitioner must demonstrate, by a preponderance of the evidence, that the first symptom or manifestation of the onset of the alleged vaccine-related injury occurred within 15 days of the administration of the DPT vaccination. Section 11(c)(1)(C)(i).[(4)] As part of petitioner's *prima facie* case, the United States Supreme Court has held that he "must also show that no evidence of the injury appeared before the vaccination."[(5)]

B.

The statutory presumption of causation may be affirmatively defeated if a preponderance of the evidence indicates that the condition was caused by a factor unrelated to the vaccine. §13(a)(1)(B). The Vaccine Act states that, for petitioners to receive compensation under the act, the special master must find:

that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition.

Section 13(a)(1)(B). Section 13(a)(2) states that:

For purposes of [§13(a)(1)], the term "factors unrelated to the administration of the vaccine" --

(A) does not include any idiopathic, unexplained, unknown, hypothetical, or undocumentable cause, factor, injury, illness, or condition, and

(B) may, ...include infection, toxins, trauma (including birth trauma and related anoxia), or metabolic

disturbances which have no known relation to the vaccine involved, but which in the particular case are shown to have been the agent or agents principally responsible for causing the petitioner's illness, disability, injury, condition, or death.

As stated in *Knudsen v. Secretary of HHS*, 35 F.3d 543 (Fed.Cir. 1994), "the standards that apply to a petition's proof of actual causation in fact in off-table cases should be the same as those that apply to the government's proof of alternative actual causation in fact." *Id*. at 549. Respondent must prove the existence of the factor unrelated alleged, and that this alleged condition actually caused Joseph's encephalopathy and residual seizure disorder. To satisfy her burden, respondent must prove a "logical sequence of cause and effect." *Strother v. Secretary of HHS*, 18 Cl.Ct 816, 818 (1989), *decision foll. remand*, 21 Cl.Ct. 365, 370-73 (1990), *aff'd without opinion*, 950 F.2d 731 (Fed.Cir. 1991). This sequence "must be supported by a sound and reliable or scientific explanation." *Knudsen* at 548 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993)). By statutory mandate, respondent must affirmatively show that the alleged factor unrelated was the agent "principally responsible for causing" Joseph's encephalopathy and residual seizure disorder. §13(a)(2).

As conceded by respondent, "[t]here is little question that Joseph Wehmeyer suffered an encephalopathy and residual seizure disorder within 15 days" of his 22 March 1969 measles vaccination. Resp. Brief at 1. However, there are two issues that remain before the court:

(1) Whether the symptoms suffered by Joseph on-Table were the *first* symptoms or manifestations of the onset of a Table injury.

In other words, petitioner must show, according to *Whitecotton*, that there is no evidence that the injury appeared before the 22 March 1969 measles vaccination. If that issue is resolved in favor of petitioner, the remaining issue before the court is:

(2) Whether Joseph's injuries were caused by a factor unrelated to the 22 March 1969 measles vaccination.

II. FACTS

Joseph was born on 18 February 1968. His mother's pregnancy and delivery were unremarkable, as was his neonatal course. P.Exs. 5, 6. Mr. Wehmeyer testified that Joseph was always a normal baby in comparison to his siblings. Tr. at 9. Prior to five months of age, Joseph never had any adverse conditions noted at well baby visits. Tr. at 10.

On 22 March 1969 Joseph received a measles vaccination. P.Ex. 33. Approximately seven days after receiving the measles vaccination, Joseph developed a runny nose, which was followed by severe projectile vomiting. P.Ex. 3 at 2. The next day he was warm to the touch. P.Ex. 1 at 2. On the day of admission, he would not eat. *Id*. On the evening of admission he was lethargic, then, after he was put down to sleep, he was discovered screaming and shaking in his bed with his eyes rolled upward. P.Ex. 1 at 3. He was taken to Milford hospital where he received phenobarbital and was noted to be comatose. *Id*. Joseph was then transferred to Yale New Haven Hospital where he was admitted on 30 March 1969. *Id*. He arrived at the hospital in status epilepticus and was treated with Valium. *Id*. After the Valium, the

generalized seizures ceased. P.Ex. 1 at 6. He developed hemiparesis on the right side after the seizures subsided. P.Ex. 1 at 15.

While at the hospital, Joseph was noted to have severe and uncontrollable hypertension (high blood pressure). P.Ex. 3 at 2. The doctors suspected a renal etiology behind this condition and thus exploratory surgery was performed. P.Ex. 1 at 28. This surgery revealed that Joseph had left renal artery stenosis (narrowing of the arteries in the kidney). P.Ex. 3 at 2. A left nephrectomy was performed in attempt to control the hypertension. *Id*. Joseph was released from the hospital after two months. His blood pressure was continually monitored and after treatment with medications, it eventually dropped to normal. *Id*. at 3. Joseph remains severely mentally retarded with a seizure disorder and spastic right hemiparesis.

The preceding facts are not in dispute. However, an argument has arisen over what happened to Joseph at approximately five months of age -- well before the 22 March 1969 measles vaccination. At that time, an incident occurred while the family was visiting Joseph's grandparents in Cedar Falls, Iowa. That episode is the focus of much attention in this case. Apparently Joseph had stopped breathing and was taken to the hospital. Tr. at 10. The records from that hospitalization at Sartori Memorial Hospital no longer exist. Therefore, the court must reconstruct the most likely scenario from the testimony and affidavits of Mr. Wehmeyer and the references to the event in later medical records.

The testimony of Mr. Wehmeyer about the incident that occurred when Joseph was approximately 5 months of age, as augmented by the parents' affidavit of 21 May 1991,[(6)] can be summarized as follows. Joseph was asleep in his crib while Mr. Wehmeyer was eating dinner with his parents. Tr. at 10. His mother had just fed him and given him a bottle before he went to bed. Tr. at 13; P.Ex. 2 at 2. Joseph's uncle ran down and said "there's something wrong with Joseph." Tr. at 10. Mr. Wehmeyer immediately took Joseph from the crib and administered mouth-to-mouth resuscitation. *Id*. His impression was that Joseph had choked and stopped breathing. *Id*. Mr. Wehmeyer recalls Joseph as being lifeless. Tr. at 11. He stated that Joseph's color was normal but he started to turn gray when they reached the hospital. Tr. at 12. Joseph was intubated by the doctors, and some of his baby food came out of his nose. P.Ex. 2 at 2. Mr. Wehmeyer recalls the immediate diagnosis of the doctors was that Joseph had asphyxiated. It was not an object lodged in the throat, but more likely something he had "burped up." Tr. at 13. Mr. Wehmeyer recalled the words aspiration being used by the doctors, but did not hear any reference to seizures, a seizure-like event or apnea. Tr. at 13, 33. Joseph was "fine" upon discharge from the hospital, and suffered no residual effects from the episode. Tr. at 13; P.Ex. 2 at 2.

Apart from the above statements of the petitioner, there are several notations in subsequent medical records that relate to the hospitalization of Joseph at 5 months of age. While Joseph was hospitalized at Yale New Haven Hospital during March and April, 1969, four separate notations were recorded, which refer to the prior aspiration event.[(7)] They are reproduced as follows:

1) "There was a similar episode when he was 5 [months] old when he was noted to have vomited supper and was noted not to be breathing and he was given mouth-to-mouth resuscitation and was [questionable] intubated." P.Ex. 1 at 2.

2) "A similar episode [without] fever occurred at age 5 [months] associated [with] emesis [resulting in] anoxia and seizures. Subsequent EEG [questionable] abnormal." P.Ex. 1 at 3.

3) Past history -- Age 6 [months,] aspirated food [resulting in] asphyxia. Resuscitated and hospitalized [for] 2 days -- [no seizures].[(8)] Has had intermittent projectile vomiting since. P.Ex. 1 at 6.

4) "...had a history of having a seizure at 5 months...." P.Ex. 1 at 31.

In addition, a record from the New York Hospital-Cornell Medical Center dated 15 November 1971 states: "At 4 [months] -- may have had a cond." P.Ex. 7 at 1. Also from that hospital, a letter from Dr. Hart deC. Peterson, to Dr. John E. Lewy, states "[Joseph] may have suffered a convulsion at 4 months of age but at the age of 1 clearly had a seizure...." P.Ex. 7 at 31.

Joseph had well baby pediatrician visits on 12 April, 28 May, 24 July and 9 September 1968. P.Ex. 2 at 2; P.Exs. 32 & 33. There are no records of adverse findings with regard to Joseph's health from any pediatric records. Indeed, most of the pediatric records were unavailable. However, Mr. Wehmeyer testified that he was never informed of any problems with Joseph at any of those exams. Tr. at 10, 15.

III. DISCUSSION

A. Table Injury

The first issue to address is whether petitioner has proven a *prima facie* case for entitlement. As petitioner is proffering a Table injury within the Table time frames, this task is made somewhat easier by the statutory presumptions afforded. As referenced *supra*, and conceded by respondent, there is little question that petitioner has proven that symptoms of an encephalopathy and a residual seizure disorder occurred within 15 days of the administration of a measles vaccine. The inquiry, however, does not end there. As provided in the Vaccine Act, the *first* symptom or manifestation of the onset of a Table injury must occur on Table. §11(c)(1)(C)(i). To clarify that statutory mandate, the Supreme Court has held that the petitioner "must also show that no evidence of the injury appeared before the vaccination." *Whitecotton*, 115 S.Ct. at 1480. Thus to determine whether petitioner has satisfied the statutory and precedential requirements for a *prima facie* Table case in this matter, the court must determine whether the aspiration episode that occurred at approximately 5 months of age was the first symptom of Joseph's encephalopathy and RSD.

There is a paucity of documentary evidence with respect to the aspiration event. There are some references from the subsequent hospitalization in March and April of 1969, but no immediately contemporaneous records exist. Thus, the testimony of Mr. Wehmeyer becomes crucial. After a careful evaluation of his demeanor, comportment and presentment at trial, the court finds that Mr. Wehmeyer testified truthfully about all matters of which he had knowledge. The court observed no attempt to deceive, embellish or favorably reconstruct the past. His testimony is therefore given considerable weight as he was a credible witness.

The court is presented with the all too familiar problem of reconciling credible testimony with more contemporaneous documentation that is somewhat inconsistent with the statements made at trial. To resolve such conundrums, the court employs the following analysis:

It has generally been held that oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight. [Citations omitted.] That rule has been followed in Program cases. *See, e.g., Flynn v. Secretary of HHS*, No. 89-54V, slip op. at 7 (Cl. Ct. Spec. Mstr. May 17, 1990). The rule should not be applied blindly, however. Written records which are, themselves, inconsistent, should be accorded less deference than those which are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the absence of a reference to a

condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance.

Murphy v. Secretary of HHS, 23 Cl. Ct. 726, 733 (1991), *aff'd*, No. 92-5002 (Fed. Cir., May 6, 1992). There is much similarity between Mr. Wehmeyer's testimony and the excerpts from the records reprinted *supra*. They both describe aspiration, at around the same time, resulting in a two day hospitalization. The important difference is in the use of the word "seizure" in the medical documents to describe the events. Mr. Wehmeyer vehemently denies that any seizure occurred or that anyone at the time used such a description. As stated, the court finds his testimony to be truthfully presented. The question remains: What is the significance of the subsequent notations that apparently refer to seizures?

The notations at issue were recorded by different people responsible for Joseph's care some eight months after the aspiration event occurred. The persons who recorded the past history were primarily concerned with Joseph's immediate care and not necessarily with accurately preserving all ascertainable facts with regard to the past event. While Mr. Wehmeyer stated that he never described the event as a "seizure event," perhaps the physicians or nurses at Yale New Haven Hospital interpreted them as such in light of the grand mal seizures Joseph was exhibiting at the time. The court also notes, with emphasis, the apparent inconsistency between the records themselves. Specifically, the court recognizes the disparity between Petitioner's Exhibit 1 at page 6, which most likely denies that seizures occurred, and Petitioner's Exhibit 1 at page 2, which makes no mention of seizures, when juxtaposed with Petitioner's Exhibit 1 at pages 3 and 31, which refer to seizure events. In addition, that Joseph was apparently in good health immediately after the aspiration incident tends to militate against a finding of severe neurological injury at that time. The vague references to seizures that appear in the records of a later hospitalization simply do not amount to proof that seizures occurred some eight months prior. Any interpretation of those notations will go no further than speculation. The court cannot conclude, by a preponderance of the evidence, that the aspiration event was evidence of an encephalopathy or a seizure event. The court must hold that the first symptom of Joseph's encephalopathy and RSD occurred on-Table. Therefore, the court finds that petitioner has proven a *prima facie* case for entitlement under the Vaccine Act, for a Table encephalopathy and residual seizure disorder. However, before an award can be made, respondent has the opportunity to prove that the injuries were caused by a factor unrelated to the vaccine.

B. Factor Unrelated

Respondent argues that Joseph's injuries were caused, not by the measles vaccine, but by a hypertensive cerebral hemorrhage resulting from congenital renal artery stenosis. Resp. Br. at 1. It is her theory that the severe intracerebral hemorrhage suffered by Joseph caused the significant neurological sequelae. *Id*. at 5. Petitioner argues that respondent's theory should be rejected. He argues that the nephrectomy did not solve the hypertension problem and that, regardless, the hypertension was unrelated to the seizures. Pet. Br. at 5. Petitioner argues that respondent has not proven that the encephalopathy Joseph suffered was caused by a hemorrhage or had any vascular etiology. Pet.Br. at 7. To address this "factor unrelated" issue, the court will first examine the expert testimony.

1. Dr. M. William Schwartz[(9)]

Dr. Schwartz opined that Joseph, upon admission to Yale New Haven Hospital on 30 March 1969, had heart failure and cerebral hemorrhaging due to hypertension. Tr. at 80. He stated that Joseph's

hypertensive condition was congenital, and that such a dramatic crisis would be the result of months of increasing hypertension. Tr. at 81-82. The fact that Joseph's lungs were filled with fluid and his heart was so large, in Dr. Schwartz's opinion, supports his theory that this was a long process, not just an isolated event. Tr. at 83.

Dr. Schwartz opined that Joseph's hypertension was caused by his kidney defect. Tr. at 85. He observed that Joseph had abnormalities in two renal arteries and a lumbar artery which were congenital. *Id*. Because of this stenosis, or narrowing of the arteries, the kidney sensed that it was not getting enough blood. *Id*. Thus, in response, it sent hormones to attempt to raise the blood pressure. The hypertension eventually caused the congestive heart failure and cerebral hemorrhaging. Tr. at 86. Dr. Schwartz stated there were no facts to support a theory that the measles vaccination contributed to, or aggravated, Joseph's condition. Tr. at 88, 91.

Dr. Schwartz explained that 90% of hypertension cases in children are due to renal problems. Tr. at 84. He stated that in 1969, the doctors did not have available the myriad of tests and procedures we have today. Thus, what was a perplexing diagnosis that took weeks to reach back then, would be determined very quickly with modern technology and experience. Tr. at 88. That is the reason, Dr. Schwartz explained, the doctors had such difficulty with Joseph's treatment.

Dr. Schwartz stated that it is typical for hypertension to remain for a period of time after corrective surgery. Tr. at 88-89. He explained that the other arteries in the body constrict to compensate for the high blood pressure and need time to normalize. Tr. at 89-90. In addition, the kidney continues to secrete the hormones causing the hypertension for a time. *Id*. Dr. Schwartz conceded that seizures can raise blood pressure, but not to the extent suffered by Joseph during his hospitalization. Tr. at 96.

Dr. Schwartz stated that he was 99.9% certain that Joseph's injury was caused by cerebral hemorrhaging, due to hypertension, which was in turn caused by congenital renal artery stenosis. Tr. at 91. He has seen a number of similar cases, more than most people in the world, although none as serious as Joseph's.(10) Tr. at 93-94, 106. He based his opinion that Joseph had cerebral hemorrhaging on the fact that it is a typical result of hypertension; and that the damage was focal, on one side of the brain, as opposed to diffuse.(11) Tr. at 124.

2. Dr. David L. Romano(12)

Dr. Romano stated that there is no evidence that any problems with Joseph's brain preexisted the 22 March 1969 measles vaccination. Tr. at 53. He explained that renal vascular hypertension is extremely rare in infants. Tr. at 51-52. However, he agreed that Joseph's renal artery stenosis was congenital. Tr. at 53.

Dr. Romano conceded that malignant hypertension can cause an encephalopathy, but he noted that there are other causes for encephalopathy, and there is "no reason why you can't have two, rather than one, [etiologies] concurrently." Tr. at 54. Dr. Romano conceded that the kidney, which was extracted during the nephrectomy, was diseased. Tr. at 55. However, he opined that the kidney may, or may not have caused Joseph's hypertension. *Id.* Dr. Romano conceded that Joseph had a malignant hypertensive encephalopathy. Tr. at 62. In fact, he conceded that the renal artery stenosis must have been a factor in the cause of the hypertensive encephalopathy. Tr. at 57. He opined that, either the renal artery stenosis was the cause of the hypertensive encephalopathy, excluding any relationship with the vaccine, or the renal condition was a factor in conjunction with the vaccine. Tr. at 58. He could not opine, to a degree of

medical certainty, how much affect the renal artery stenosis had on Joseph's injuries in relation to other possible etiologies. Tr. at 59, 63.

When asked about the significance of the fact that Joseph's hypertension continued for a long time after the hospitalization, Dr. Romano explained that it may take some time for the pressure to normalize. Tr. at 65-66. He also opined that a seizure disorder can increase blood pressure, but he could not opine as to whether that occurred in this case. Tr. at 68-69.

In his report of 7 August 1995, Dr. Romano stated: "It is my opinion, within a reasonable degree of medical certainty: (1) That Joseph Wehmeyer's long range problems were not the result of malignant hypertensive encephalopathy; and (2) It would be medically reasonable to look for neurological cause for his present condition." P.Ex. 24. At the hearing, he explained that the majority of cases of malignant hypertension produce no adverse sequelae. Tr. at 70. Dr. Romano could not state, by a preponderance of the evidence, that a vaccination could cause a case of malignant hypertension to develop into a condition as serious as Joseph's. Tr. at 70.

Dr. Romano opined that the hypertensive event caused an intracerebral bleed, and that in turn "left much neurological sequelae." Tr. at 73. He added that there could be another type of encephalopathic event, independent of the hypertension, involved in the process. *Id.*

3. Dr. Marcel Kinsbourne[(13)]

Dr. Kinsbourne believes that both Dr. Romano and Dr. Schwartz have erred in their diagnoses of cerebral hemorrhage. Tr. at 116. Dr. Kinsbourne relies on an M.R.I. performed in 1995. Tr. at 127. The M.R.I. described a "developmental abnormality of marked left cerebral hemisphere atrophy," which he opines is not the description expected after a cerebral hemorrhage. Tr. at 127-28. He stated that he would not refer to the damage to the left hemisphere as focal and that it was consistent with measles encephalitis. Tr. at 126. He recommended that a pediatric neuroradiologist examine the M.R.I. to determine whether the encephalopathy was due to inflammation or a vascular cause. Tr. at 122.

4. Dr. Mary Anne Guggenheim[(14)]

Dr. Guggenheim opined that the 1995 M.R.I. shows that the encephalopathy was acquired not congenital. Tr. at 120. However, she stated that an M.R.I. performed 25 years after an injury may not necessarily present a clear, dispositive picture of causation. Tr. at 132. She opined that the encephalopathy was most likely due to vascular etiology. *Id*. She added that the focal atrophy was consistent with a stroke-like event. Tr. at 125. Dr. Guggenheim opined that the evidence overwhelmingly points to vascular etiology. Tr. at 130. In her expert's report, she opined that Joseph's immunizations were totally unrelated to his neurological problems. R.Ex. A.

5. 24 October 1995 M.R.I. examination -- Dr. Robert Zimmerman. [(15)]

Respondent filed the report of Dr. Robert Zimmerman, a pediatric neuroradiologist. In that report, Dr. Zimmerman stated:

...The etiology of the damage is not clearcut, and represents left hemispheric injury that should be correlated to the clinical circumstances that occurred during early childhood. The nature of the injury, predominately to the left cerebral hemisphere is not consistent with a post-vaccinal injury in my own experience.

Report of Dr. Zimmerman at 1. In his supplemental report, Dr. Kinsbourne opined that Dr. Zimmerman's report was inconclusive. Thus, Dr. Kinsbourne reiterated his belief that the encephalopathy was due to inflammatory, not vascular etiology. P.Ex. 34. Dr. Guggenheim agreed that Dr. Zimmerman's report was inclusive, and she also agreed that the entire clinical picture must be examined to form an opinion as to etiology. However, she restated her opinion that "the over-overwhelming weight of evidence, as presented by both of the renal disease specialists who testified, supports the renovascular hypertension interpretation of the event." Dr. Guggenheim's Supp. Rpt. at 1.

6.

The court finds that there is substantial evidence, from the clinical observations and expert opinions, that Joseph's encephalopathy and seizure disorder were directly related to his renal hypertensive condition. Respondent has more than met her burden of proving, by a preponderance of the evidence, that Joseph's Table injuries were caused by factors unrelated to his 22 March 1969 measles vaccination. Her theory was logical, persuasive and well supported by the medical records and credible scientific testimony.

This is indeed a tragic case. The court has no doubt that Mr. Wehmeyer was testifying truthfully as to what occurred from his perspective. Unfortunately, from the medical evidence provided, the court is convinced that the proximity of the measles vaccination to the tragic events of 30 March 1969, *et seq*., was pure coincidence. Joseph's encephalopathy and seizures were directly caused by cerebral hemorrhaging, due to hypertension caused in turn by renal artery stenosis.

Dr. Schwartz was the superior witness at this trial. His expertise on the medical issues at bar was unparalleled. Dr. Romano, also a quality witness, agreed with most of Dr. Schwartz's opinions. He agreed that Joseph had renal artery stenosis that resulted in hypertension. He agreed that Joseph had a cerebral hemorrhage which resulted in neurological damage. Dr. Romano's only additional contribution to the debate was that he would not rule out the possibility that the measles vaccination contributed to the severity of the hypertensive encephalopathy. In the opinions of both Dr. Guggenheim and Dr. Schwartz, the measles vaccination was not a factor in the hypertensive encephalopathy. Petitioner could not point to evidence in the record to rebut those credible opinions. The admitted conjecture of Dr. Romano that the vaccination might have played a part in the injury was not persuasive.

Dr. Schwartz explained well the difficulty the treating physicians experienced in attempting to diagnose and control Joseph's injuries in 1969. That year was ages ago in terms of medical technology and knowledge. They simply did not have the knowledge or resources to make a quick and decisive diagnosis. What would have been a routine call today eluded Joseph's treating physicians for some time. Though regrettable, this is understandable.

Petitioner's argument, that the failure of the hypertension to subside immediately after the nephrectomy is evidence that the hypertension was not of renal etiology, must be rejected. Dr. Schwartz cogently explained that it can take years for the blood pressure to normalize after corrective surgery. Dr. Romano, petitioner's own witness, agreed.

The court also cannot accept the opinion of Dr. Kinsbourne that Joseph did not have a cerebral hemorrhage, but suffered a typical post-measles inflammatory encephalopathy. Dr. Zimmerman's interpretation of the 1995 M.R.I. was not conclusive. However, it suggested a vascular etiology for the encephalopathy, and tended to exclude any complicity of the measles vaccine. The contemporaneous records, i.e. P.Ex. 1 at 28 (*vide supra*, note 11), and the expert opinions of Dr. Schwartz, Dr. Romano and Dr. Guggenheim outweigh Dr. Kinsbourne on this issue. The 1995 M.R.I. was not dispositive in this case. From the court's perspective, it neither proved nor disproved the issue, but it did lend support to the conclusion that the encephalopathy had a vascular etiology. By a preponderance of the evidence, the court finds that Joseph suffered a hypertensive cerebral hemorrhage, not a measles-like inflammatory encephalopathy. In addition, the court finds that his hypertension was caused by congenital renal artery stenosis, not the measles vaccine.

IV. CONCLUSION

Petitioner has proven that Joseph suffered a Table injury within 15 days of the administration of the 22 March 1969 measles vaccination. §11(c)(1)(C)(i). However, respondent has proven, by a preponderance of the evidence, that Joseph's injuries were caused by a factor unrelated to the vaccine -- a hypertensive cerebral hemorrhage, due to congenital renal artery stenosis. §13(a)(1)(B). Therefore, the court must hold that petitioner is not entitled to compensation under the Vaccine Act. Accordingly, this petition is dismissed with prejudice pursuant to Vaccine Rule 21.[(16)]

In the absence of a motion for review filed pursuant to RCFC, Appendix J, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell

Special Master

1. The statutory provisions governing the Vaccine Act are found at 42 U.S.C.A. § 300aa-1 *et. seq.* (West 1991 & Supp. 1997). Hereinafter, all references will be to the relevant subsection of 42 U.S.C.A. § 300aa.

2. Citations to the transcript will be made as "Tr. at __."

3. Petitioners must prove the statutory requirements by a preponderance of the evidence. The special master must find the existence of the factual predicates more probable than not. *See In re Winship*, 397 U.S. 358, 372-73 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965)). Mere conjecture or speculation does not meet the preponderance standard. *Snowbank Enterprises, Inc. v. United States*, 6 Cl. Ct. 476, 486 (1984).

4. Other Table vaccines may have a different corresponding Table time frame.

5. *Shalala v. Whitecotton*, 115 S.Ct. 1477, 1480 (1995).

6. Joseph's parents' affidavit is filed as P.Ex. 2.

7. As with most medical documents, certain repetitive shorthand symbols are used. In the following quotations, parenthetical interpretations are provided for clarity.

8. From the somewhat cryptic abbreviated note, the court's best translation is "no seizures." Respondent has proffered the possibility that it translates to "one seizure," however the court finds that to be unlikely due the fact that no numbers were spelled out on the entire page. Nevertheless, while the court has made its best estimate, this translation is by no means conclusive and certainly not dispositive either way.

9. Dr. Schwartz is board certified in pediatrics with a specialty in nephrology. He has practiced and taught in that discipline for over thirty years. He has been on the faculty at the University of Pennsylvania School of Medicine since 1964. He holds

editorial positions with several medical journals including Clinical Pediatrics. He is the author of numerous published articles and books.

10. Contrary to Dr. Romano's opinion, Dr. Schwartz stated that there are numerous medical articles addressing renal artery stenosis that results in encephalopathic symptoms. Tr. at 92.

11. A notation made on 7 April 1969 by a neurologist who was treating Joseph described a "clearcut vascular occlusion in [the left] middle cerebral region...." P.Ex. 1 at 28.

12. Dr. Romano is board certified in internal medicine with a specialty in nephrology. He has a large clinical practice involving approximately 100 hemodialysis patients. He also treats several thousand internal medicine patients. He has no pediatric patients.

13. Dr. Kinsbourne is a pediatric neurologist who has testified in the Vaccine Program on numerous occasions.

14. Dr. Guggenheim is a pediatric neurologist who has testified in the Vaccine Program on numerous occasions.

15. At the conclusion of the trial, respondent was ordered to file the report of Dr. Robert Zimmerman, a pediatric neuroradiologist, from the 24 October 1995 M.R.I. examination. Respondent so filed on 20 February 1997. In addition, Dr. Kinsbourne and Dr. Guggenheim were to review the M.R.I. and Dr. Zimmerman's report and file any responses. Petitioner filed the supplemental report of Dr. Kinsbourne on 17 April 1997. Respondent filed the supplemental report of Dr. Guggenheim on 25 April 1997.

16. The court has received Petitioner's Exhibit 28, and is sensitive to the concerns expressed therein. As stated throughout this opinion, the court found Mr. Wehmeyer to be a credible witness. In addition, the court finds that the measles vaccine was indeed administered on 22 March 1969 as averred by petitioner.