

OFFICE OF SPECIAL MASTERS

No. 03-1243V

(Filed: July 22, 2005)

JOSEPH AND JODI MERCADO, legal representatives of minor child, ANTHONY MERCADO,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

UNPUBLISHED

Scott E. Diamond, Esq., Philadelphia, Pennsylvania for Petitioners. Linda S. Renzi, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DECISION¹

The Vaccine Act² clearly states that a petition for a vaccine-related injury must be brought within 36 months of the first symptom or manifestation of onset. According to § 16(a)(2), “[N]o petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.” In this particular case, the petition was filed on 20 May

¹ Because this Decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this order on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, as provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq.* (West 1991 & Supp. 1997). Reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

2003. Therefore, the first symptom or manifestation of Anthony's injury must have occurred after 20 May 2000.

Petitioners allege that, as a result of three DTP vaccinations administered between 1995 and 1996, Anthony developed autism. The question to be addressed, then, is when the first symptom or manifestation of the alleged injury occurred.

The onset of autism and other developmental disorders are particularly difficult to pin down. As the Court of Federal Claims noted in *Setnes*, often "the beginning stage of autism cannot be reduced to a single, identifiable symptom." *Setnes v. Secretary of HHS*, 57 Fed. Cl. 175, 179 (2003). Accordingly, it has been suggested that one look instead for the "manifestation of onset." *Id.* In doing so, the Court may "rely on the child's medical or psychological evaluations for guidance." *Id.* at 181.

The pertinent facts as culled from the evaluations and medical records are as follows: Anthony, born 7 July 1995, received three diphtheria-pertussis-tetanus ("DPT") vaccinations between 1995 and 1996. According to the immunization records, those vaccines were received on 15 September 1995, 17 November 1995 and 6 February 1996. Pet. Ex. 4 at 3, 56. Petitioners allege that Anthony suffered seizures following the first two vaccinations. Pet. Ex. 4 at 2. Records from a medical visit on 6 November 1996 indicate a history of febrile seizures while noting that such had not occurred of late. Pet. Ex. 4 at 9. It appears that there was no lasting sequella from those seizures, and even if there were, such injuries would most definitely be time barred. § 16(a)(2). In the ensuing years, Anthony was seen for a number of garden variety illnesses.

On 14 July 1998, a week after his third birthday, Anthony was taken to see an otolaryngologist concerning the development of his language skills. Pet. Ex. 4 at 43. The doctor noted that Anthony was only "minimally verbal," diagnosed him with a speech delay, and recommended a hearing test. Pet. Ex. 4 at 44. Anthony's hearing was normal. Pet. Ex. 4 at 46, 49. At a follow up visit on 21 August 1998, the doctor noted that Anthony was "speaking somewhat better" and recommended speech therapy. Pet. Ex. 4 at 49.

On 7 May 1999, two months before his fourth birthday, Anthony was seen by Dr. Steven Portman, a neurologist, for problems relating to "hyperactivity with excessive touching and running '24 hours a day' as well as a speech delay characterized by impaired articulation." Pet. Ex. 4 at 51. Dr. Portman characterized Anthony's activity level at the upper end of normal and recommended further evaluation. Pet. Ex. 4 at 52. Due to extenuating circumstances, that evaluation never took place. However, at some point between May 1999 and August 2000, Anthony was placed on Adderall, a popular drug for treating attention-deficit/hyperactivity disorder ("ADHD"), which was later replaced with a mood stabilizer. Pet. Ex. 4 at 25, 52.

Anthony next saw Dr. Portman on 15 January 2001. Now five years old and in Kindergarten, Anthony required one-on-one assistance and had to be given instructions multiple times. He was described

as a "loner." Pet. Ex. 4 at 52. Dr. Portman believed these issues to be more "emotional than developmental," Pet. Ex. 4 at 52. The doctor prescribed a mood stabilizer and recommended speech therapy and further evaluation. Pet. Ex. 4 at 53. During a follow up visit on 23 February 2001, after the switch from Adderall to the mood stabilizer, Anthony's mother reported "a big difference." Pet. Ex. 4 at 53. Anthony had become more responsive and attentive at school, was watching television with interest, was behaving at the dinner table and at bed time. *Id.* at 53.

An evaluation by a Child Study Team took place in December 2001. According to that evaluation, Anthony exhibited receptive and expressive language delays and was functioning on the low-average range of cognitive ability. Pet. Ex. 5 at 10. He scored low on several test measures. Pet. Ex. 5 at 13, 17. Yet at no time was the specter of a pervasive developmental disorder raised in the differential diagnosis.

In March 2002, Anthony again saw Dr. Portman. At that time, the doctor noted that Anthony would "sometimes rock, confuse pronouns, show echolalia³ and various compulsions such as placing crayons in a line or objects in height." Pet. Ex. 4 at 54. However, he also remarked that Anthony did not exhibit other autistic behaviors such as walking on his toes, alteration in sensation, flapping, spinning, parallel play or poor eye contact. Even so, in a letter to the Lindenwold Board of Education dated 7 March 2002, Dr. Portman states that Anthony's condition is "consistent with a relatively mild autistic spectrum disorder co-morbid with developmental hyperactivity." *Id.* at 55.

Recognizing a potential difficulty in identifying the date of onset as per *Setnes*, this Court requested that the parties obtain a mutually agreed upon medical expert to give an objective opinion on the timing of the onset of Anthony's autism disorder. *See* Order, 9 February 2004. The parties retained, at Respondent's expense, Dr. Lawrence W. Brown, associate professor of Neurology and Pediatrics and co-director of the Pediatric Neuropsychiatry Program at the Children's Hospital of Philadelphia. Dr. Brown's opinion was filed as Respondent's exhibit A. (Hereinafter "R. Ex. A")

After reviewing the medical records, Dr. Brown voiced a strong opinion that Anthony does *not* have autism. R. Ex. A at 2.. Rather, Anthony, "has a diagnosis that includes complex attention deficit/hyperactivity disorder, social phobia, nocturnal enuresis⁴ and a developmental language disorder." *Id.* at 3. Moreover, "the first indication of any possible neuropsychiatric problem was referenced in Dr. Portman's initial evaluation in May 1999." *Id.* at 1.

Dr. Brown indicates that Anthony's condition does not comport with the definition of autism

³ Echolalia is "the often pathological repetition of what is said by other people as if echoing them." MERRIAM-WEBSTER, Medical Dictionary, available at <http://www2.merriam-webster.com/cgi-bin/mwmednrm?book=Medical&va=echolalia>.

⁴ Enuresis is "an involuntary discharge of urine." MERRIAM-WEBSTER, Medical Dictionary, available at <http://www2.merriam-webster.com/cgi-bin/mwmednrm?book=Medical&va=enuresis>.

provided in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (“DSM IV”). In particular, according to Dr. Brown:

Delays or abnormal function in social interaction, language use or social communication and/or symbolic or imaginative play must be present *before 3 years of age*. In this respect, Anthony fails the basic criteria since he was described as within the broad range of normal at 3 years 10 months by the physician who subsequently revised his opinion as mild autistic spectrum disorder. Neither the speech-language nor psychological evaluation at age 5 years supported the diagnosis of autism. Certainly some of the behavioral manifestations described at 6 years of life could be seen in pervasive developmental disorder such as rocking, pronoun reversals, echolalia, etc., but none of these are specific. Rather than autism, Anthony Mercado has a diagnosis that includes complex attention deficit/hyperactivity disorder, social phobia, nocturnal enuresis and a developmental language disorder. These symptoms certainly overlap with autism to a degree, but there is no identity.

R. Ex. A. at 2-3 (emphasis added).

Regarding the manifestation of Anthony’s condition, Dr. Brown notes, “The first indication of any possible neuropsychiatric problem was referenced in Dr. Portman’s initial evaluation in May 1999 when Anthony was 3 years 10 months of age. At that point, he was being seen for speech delay, poor articulation and hyperactivity.” R. Ex. A at 1.

Dr. Brown’s evaluation makes eminent good sense to this Court. Respondent argues that Anthony’s speech delay and audiology testing conducted in July 1998 represents the first symptom or manifestation of his developmental disorder. However, the preponderance of the evidence does not support that asseveration. Given the benefit of hindsight, the Court might say that this symptomatology is indicative of some problem, but taken in its temporal context, the parents and physicians were at best seeing through a glass, darkly. However, it eventually becomes clear in the medical records that something is amiss.

Per contra, Petitioners maintain that the first symptom or manifestation of onset dates from a 15 January 2001 evaluation which, they claim, contains the first indication of a change in Anthony’s condition. Petitioners urge the court to utilize this 15 January 2001 diagnosis date. First, it is important to note that the date of onset is not synonymous with the date of diagnosis. *Goetz v. Secretary of HHS*, 45 Fed. Cl. 340, 342 (1999) (stating that “the occurrence of an event recognizable as a sign of [an injury] by the medical profession at large, not the diagnosis that actually confirms such an injury in a specific case.”). Moreover, Petitioners’ characterization of the medical records is not entirely accurate particularly given a description by the treating neurologist in May 1999 of “hyperactivity [at the upper range of normal] with excessive touching and running ‘24 hours a day’ as well as a speech delay characterized by impaired articulation,” Pet. Ex. 4 at 51, for which he was prescribed Adderall. Pet. Ex. 4 at 25.

The Court is not particularly convinced that Anthony has an autism spectrum disorder. However, accepting *arguendo* that Dr. Portman’s conclusion is correct, despite Dr. Brown’s cogent analysis and the

DSM IV, the question is not when the parents or even Dr. Portman first came to believe that Anthony was autistic. The question is when did Anthony's present condition, whether

autism or not, first manifest itself such that the medical community should have recognized that "[s]omething is rotten in the state of Denmark?"⁵

Based on a preponderance of the evidence, this Court makes the factual finding that, more likely than not, the first sign or symptom of Anthony's current condition became evident, manifested itself, in May 1999 when he was seen by a neurologist for speech delay, poor articulation and hyperactivity – the hallmarks of his past, present and ongoing condition. This finding is based on a thorough review of Anthony's medical records and all documentation attendant to his petition considered as a whole and in their many parts. The Court also accords great weight to the opinion of Dr. Brown whose services were obtained through mutual consent for the purposes of determining the timing of onset.

Based on that factual finding, Anthony's condition first manifested prior to 20 May 2000, more than 36 months before the petition was filed. Hence, the petition was not filed in a timely manner.

Accordingly, this petition is **DISMISSED** with prejudice. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ Richard B. Abell

Richard B. Abell
Special Master

⁵ HAMLET, Act I, Scene IV.