IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

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MATTHEW and HEIDI FERGUSON, as the Parents and Natural Guardians of JACOB FERGUSON, an Infant,	*	
Petitioners,	*	No. 09-874v Special Master Christian J. Moran
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Filed: August 17, 2012 Findings of Fact.
Respondent.	*	
* *		

Mark T. Sadaka, Englewood, NJ, for petitioners,
Darryl R. Wishard, United States Dep't of Justice, Washington, DC, for respondent.

FINDINGS OF FACT[*]

Matthew and Heidi Ferguson allege that a set of vaccinations given to their son, Jacob, when he was three, six, and nine months old harmed him.[1] The Fergusons seek compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa—10 et seq. (2006).

[*] The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

[1] Mr. Ferguson's idea is that all of Jacob's symptoms were related to his gastrointestinal distress. Tr. 148.

To support their claim for compensation, the Fergusons filed medical records and affidavits. The recitation of events in their affidavits does not match entirely with the events set forth in the medical records in the sense that the affidavits assert that Jacob experienced some health problems that are not documented in a contemporaneously created medical record. The critical period starts in approximately October 2007, and ends in May 2008. When special masters are confronted with discrepancies between medical records and affidavits, special masters are encouraged to hold hearings to evaluate the testimony of the affiants. See Campbell v. Sec'y of Health & Human Servs., 69 Fed. Cl. 775, 779-80 (2006).

A hearing was held on July 14, 2011, during which the Fergusons appeared by videoconferencing as permitted by Vaccine Rule 8(b)(2). Following the hearing, the Fergusons filed additional documentary evidence. The parties submitted Proposed Findings of Fact ("PFOF") on June 29, 2012.

Standard for Finding Facts

Petitioners are required to establish their cases by a preponderance of the evidence. 42 U.S.C. § 300aa–13(1)(a). The preponderance of the evidence standard requires a "trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the judge of the fact's existence." Moberly v. Sec'y of Health & Human Servs., 592 F.3d 1315, 1322 n.2 (Fed. Cir. 2010) (citations omitted).

In determining how the evidence preponderates, special masters consider the record as a whole. 42 U.S.C. § 300aa—13(a). The record in cases in the Vaccine Program always contains medical records created from more than one provider of medical care. Consideration of multiple sources promotes fact-finding that is in accord with the weight of all the records.

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

Not only are medical records presumed to be accurate, they are also presumed to be complete, in the sense that the medical records present all the

problems of the patient. Completeness is presumed due to a series of propositions. First, when people are ill, they see a medical professional. Second, when ill people see a doctor, they report all of their problems to the doctor. Third, having heard about the symptoms, the doctor records what he (or she) was told.

Appellate authorities have accepted the reasoning supporting a presumption that medical records created contemporaneously with the events being described are accurate and complete. A notable example is Cucuras in which petitioners asserted that their daughter, Nicole, began to have seizures within one day of receiving a vaccination, although medical records created around that time suggested that the seizures began at least one week after the vaccination. Cucuras, 993 F.3d at 1527. A judge reviewing the special master's decision stated that "In light of [the parents'] concern for Nicole's treatment . . . it strains reason to conclude that petitioners would fail to accurately report the onset of their daughter's symptoms. It is equally unlikely that pediatric neurologists, who are trained in taking medical histories concerning the onset of neurologically significant symptoms, would consistently but erroneously report the onset of seizures a week after they in fact occurred." Cucuras v. Sec'y of Health & Human Servs., 26 Cl. Ct. 537, 543 (1992), aff'd, 993 F.2d 1525 (Fed. Cir. 1993). Decisions by judges of the Court of Federal Claims have followed Cucuras in affirming findings by special masters that the lack of contemporaneously created medical records can contradict a testimonial assertion that symptoms appeared on a certain date. E.g. Doe v. Sec'y of Health & Human Servs., 95 Fed. Cl. 598, 607-08 (2010); Doe/17 v. Sec'y of Health & Human Servs., 84 Fed. Cl. 691, 711 (2008); Ryman v. Sec'y of Health & Human Servs., 65 Fed. Cl. 35, 41-42 (2005); Snyder v. Sec'y of Health & Human Servs., 36 Fed. Cl. 461, 465 (1996) (stating "The special master apparently reasoned that, if Frank suffered such [developmental] losses immediately following the vaccination, it was more likely than not that this traumatic event, or his parents' mention of it, would have been noted by at least one of the medical record professionals who evaluated Frank during his life to date. Finding Frank's medical history silent on his loss of developmental milestones, the special master questioned petitioner's memory of the events, not her sincerity."), aff'd, 117 F.3d 545, 547-48 (Fed. Cir. 1997).

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

fact-finding for cases alleging an off-Table injury. In such cases, special masters are expected to consider whether medical records are accurate and complete.

In weighing divergent pieces of evidence, contemporaneous written medical records are usually more significant than oral testimony. Cucuras, 993 F.2d at 1528. However, compelling oral testimony may be more persuasive than written records. Campbell, 69 Fed. Cl. at 779 (Fed. Cl. 2006) ("like any norm based upon common sense and experience, this rule should not be treated as an absolute and must yield where the factual predicates for its application are weak or lacking"); Camery v. Sec'y of Health & Human Servs., 42 Fed. Cl. 381, 391 (1998) (this rule "should not be applied inflexibly, because medical records may be incomplete or inaccurate"); Murphy v. Sec'y of Health & Human Servs., 23 Cl. Ct. 726, 733 (1991), aff'd, 968 F.2d 1226 (Fed. Cir. 1992).

The relative strength or weakness of the testimony of a fact witness affects whether this testimony is more probative than medical records. An assessment of a fact witness's credibility usually involves consideration of the person's demeanor while testifying. Andreu v. Sec'y of Health & Human Servs., 569 F.3d 1367, 1379 (Fed. Cir. 2009); Bradley v. Sec'y of Health & Human Servs., 991 F.2d 1570, 1575 (Fed. Cir. 1993).

Summary of Parties' Arguments

The parties present different views regarding the weight to be given to medical records vis-à-vis oral testimony. Citing Cucuras, respondent relies upon statements appearing in the history and physical findings sections of medical records created contemporaneously. See, e.g., PFOF 43.

The Fergusons present two related, but slightly different, arguments. First, for records created in October and November 2007, the Fergusons say that some statements in the medical records are not accurate in the sense that doctors recorded information erroneously. E.g. tr. 58-63. Second, the Fergusons maintain that Jacob's overall medical record is not complete because between November 2007 and May 2008, he experienced health problems for which they did not seek medical attention.

With regard to the accuracy of the records from October and November 2007, the Fergusons have not presented any persuasive reason for rebutting the presumption that Jacob's health care providers created records accurately. See Cucuras, 993 F.2d at 1528. It appears that when a pediatrician saw Jacob, the

Fergusons provided a history about what had been happening to Jacob and the doctor recorded this information. This standard procedure appears to have been followed when Jacob saw doctors in October and November 2007.

Thus, oral testimony that amounts to a conflict with the contemporaneously created medical records is generally not credited. It is inevitable that the passage of time has affected the Fergusons' recollection of events in 2007. See Lowrie v. Sec'y of Health & Human Servs., No. 03-1585V, 2005 WL 6117475, at *24 (Fed. Cl. Spec. Mstr. Dec. 12, 2005).

After November 2007, the Fergusons did not bring Jacob to see a doctor until May 2008. The Fergusons did not bring Jacob to see a pediatrician because their relationship with the pediatrician was strained. Tr. 29-31; tr. 98; tr. 139. This gap between medical appointments means that there are no contemporaneously created records describing Jacob's condition. The Fergusons maintain that Jacob's medical records are incomplete for this period in the sense that Jacob was having health problems for which they were not seeking medical attention.

Because there are no records from November 2007 to May 2008, the Fergusons' testimony does not directly conflict with any record. However, their testimony that Jacob had dramatic health problems, notably "Exorcist-style vomiting" on a weekly basis, is not consistent with their actions. The Fergusons' obvious care and love for their son would have prompted them to seek medical attention from some doctor regardless of the difficult relationship with Jacob's pediatrician. For example, as discussed below, on one occasion, the Fergusons brought Jacob to an emergency room, not to Jacob's usual pediatrician. It is extremely unlikely that parents as devoted as the Fergusons are would permit their child to vomit at least once a week for many months without consulting some medical professional.

On the other hand, a lack of medical treatment for more subtle health problems, such as a lack of eye contact, is more understandable. It may be difficult for the Fergusons to detect a lack of eye contact. And, even if the Fergusons did recognize a lack of eye contact, the Fergusons may not have appreciated the significance. Thus, to the extent that the Fergusons testified about the onset of developmental problems that are either relatively hard to spot or not readily understandable, their testimony is credited.

Findings of Fact

At all relevant times, Mr. Ferguson was serving in the United States Air Force at Edwards Air Force Base in California. Mr. Ferguson attained the rank of technical sergeant before an injury forced him to be temporally separated and, then, discharged for medical reasons. Mr. Ferguson's discharge from the Air Force was honorable. Tr. 147; tr. 192.

As a member of the United States military, Mr. Ferguson was enrolled in TRICARE. Under TRICARE, Mr. Ferguson and his family were required to see medical personnel at the on-base clinic as their primary care manager. It was possible in theory, but difficult in practice, to have a doctor who did not work at the on-base clinic act as the primary care manager for a TRICARE enrollee. TRICARE permitted its participants to visit other facilities in an emergency. Tr. 190-92; see also tr. 46-47; tr. 73; tr. 165-66. For the pediatricians at Edwards, appointments were sometimes scheduled for two or more weeks after the initial inquiry. Tr. 199.

During the time for which Jacob's health is disputed, Mr. Ferguson was suffering from an illness that prevented him from serving on active duty. See tr. 194 (explaining onset date in 2005). Mr. Ferguson attended doctor's appointments with Jacob.

For the same period, Ms. Ferguson's activities are not as clear. In October or November 2007, Ms. Ferguson started a job from which she resigned effective December 28, 2007. Exhibit 18. She also was taking classes leading to her receiving a master's degree in social work in 2010. Tr. 87. Ms. Ferguson attended most of Jacob's doctor's appointments.

Jacob was born on December 17, 2006. He received a dose of the hepatitis B vaccine within hours of being born. He was discharged on December 18, 2007. Exhibit 4 at 4, 7.

Jacob was seen for well-baby visits on January 12, 2007, and February 13, 2007. These examinations were normal. At the February appointment, Jacob's pediatrician noted that his gastrointestinal system functioned normally. Exhibit 7 at 295-301.

March 12, 2007 Vaccinations

Jacob received Pediarix,[2] PedvaxHIB,[3] Prevnar,[4] and RotaTeq[5] vaccinations at the vaccine clinic at Edwards Air Force base on March 12, 2007. Exhibit 7 at 210; Tr. 35. Jacob did not experience any diarrhea or constipation. Tr. 36-37.

The parties dispute whether Jacob had any health problems in the week after this vaccination. Ms. Ferguson testified that he developed some redness at the injection site, had a fever, had a decreased appetite, was crying, and was fussy. Tr. 36. She testified that she called a nurse's hotline to seek guidance because Jacob was lethargic and crying inconsolably, and the nurse informed her that these symptoms were normal after a vaccination and she should give Jacob Tylenol. Tr. 44-45. Ms. Ferguson also testified that she reported these problems to Dr. Carpenter at Jacob's next well-baby visit, which was on June 21, 2007. Tr. 39.

The Secretary's position is that no record created around this time confirms Ms. Ferguson's assertions. For example, Dr. Carpenter's record from the June 21, 2007 visit does not memorialize any problems after the vaccination. See exhibit 7 at 294.[6]

It is likely that Ms. Ferguson accurately recalled that she called the nurse's line. Ms. Ferguson's action provides a basis for inferring that she was motivated to seek assistance because something was wrong with Jacob. Thus, Ms. Ferguson's testimony that shortly after the March 12, 2007 vaccinations, Jacob was fussy, cried, had a decreased appetite, and experienced some redness at the injection site is credited.

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[2] Pediarix is a brand name for a medication combining the diphtheria, tetanus, acellular pertussis, hepatitis B, and inactivated polio vaccines.

[3] PedvaxHIB is a brand name vaccine preventing disease caused by Haemophilus influenzae type b.

[4] Prevnar is a brand name for the pneumococcal 7-valent conjugate vaccine.

[5] RotaTeq is a brand name vaccine for the prevention of rotavirus.

[6] There also is no evidence regarding calls to a nurse's hotline. However, it appears that these discussions are typically not reduced to writing. Thus, the absence of any notation from the nurse's hotline is not meaningful.

These symptoms did not last very long. By the time Ms. Ferguson next saw Dr. Carpenter, they were not a matter of concern.[7]

June 12, 2007 Vaccinations

Jacob received Pediarix, PedvaxHIB, Prevnar, and RotaTeq vaccinations after he was examined by his pediatrician on June 21, 2007. Exhibit 7 at 294; Exhibit 2 at 1. This was the only date on which Jacob saw a pediatrician and received his vaccinations on the same day.

At this visit, which occurred when Jacob was approximately six months old, Dr. Carpenter recorded that Jacob "babbles," "rolls over from back to front," "stands when placed," "passes objects from hand to hand," "rakes small objects," and "plays peek-a-boo." Based upon this information and his examination, Dr. Carpenter concluded that Jacob was a "normal . . . well-baby." Exhibit 7 at 292-94.[8] He weighed 8.75 kg. Exhibit 7 at 407.[9]

Again, there is a dispute about whether Jacob had any problems in the week after vaccination. Ms. Ferguson testified that Jacob had redness at the injection site and other problems for one to two weeks after the vaccination. She also testified that she again called the nurse's line. Tr. 37; tr. 13. Her testimony is credited.

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[7] As mentioned, Dr. Carpenter's June 21, 2007 does not mention inconsolable crying or fussiness, etc. Exhibit 7 at 294. The reason for the omission could be either that the Fergusons did not report these problems to him or that Dr. Carpenter did not memorialize what the Fergusons told him. Explaining the omission is not necessary because this case is about what happened to Jacob, not Dr. Carpenter's record keeping.

[8] Ms. Ferguson testified that Jacob began crawling when he was approximately six months old. Factual Hr'g 123:11-14. However, crawling for a six month old is unlikely. Instead, Jacob had the more typical abilities of sitting without support and rolling over. Exhibit 7 at 407.

[9] A growth chart periodically plots Jacob's weight. It shows that he remained in approximately the fiftieth percentile from birth to around 18 months. Exhibit 7 at 339.

In August 2007, when Jacob was about eight (8) months old, he used simple baby words such as "mama," "dada," and "baba." He also tried saying "hi" and "bye", and was waving "hi" and "bye". Exhibit 6 at 182; Tr. 115-16.

September 10, 2007 Vaccinations

On September 10, 2007 Jacob received his Pediarix and Prevnar vaccinations at the base vaccination clinic. Exhibit 2 at 1; see also tr. 15. Jacob was approximately nine months old.[10]

Ms. Ferguson again testified about inconsolable crying and redness at the injection site after this vaccination and calling the nurse's line. Tr. 101; tr. 14. Here, crediting Ms. Ferguson's testimony is more difficult because other evidence contradicts her version of events. In June 2008, Ms. Ferguson told an occupational therapist that "Jacob did not have swelling on the injected site. He did not have prolonged crying. He did not have any other signs that indicated that Jacob was having a positive allergic reaction to the DTaP." Exhibit 7 at 410-11. Although the June 2008 record was not created around the time that Jacob received the second booster dose of the DTaP vaccine, see Shapiro v. Sec'y of Health & Human Servs., 101 Fed. Cl. 532, 539-40 (2011) (discussing what constitutes a contemporaneous record), this record has some probative value as it was created long before litigation began.

The overall value for the June 2008 record, however, is not great. As Ms. Ferguson pointed out in her testimony, the report was created by an occupational therapist, not a doctor. Tr. 83. It is not clear why an occupational therapist was creating a history about Jacob's immunization and there is no information about whether the therapist was trained in recording patient histories. Furthermore, the therapist's report that Jacob did not have swelling at the injection site seems to be the only place in the record that this statement appears.[11]

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[10] Although the Fergusons' sometimes referred to Jacob as having a reaction to the second dose of DTaP when he was nine months old, this dose was actually the third dose of DTaP given to Jacob. He previously received the DTaP vaccine in April and June, 2007. It is correct to refer to the September dose of the Pediarix vaccine as the second booster dose.

[11] The occupational therapist also stated that after the second booster for the DTaP vaccine, Jacob had "flue [sic] like symptoms." To the extent that "flu-like symptoms" includes something other than redness at the injection site or extensive crying, this report is again not credited. Ms. Ferguson's affidavit mentions only

So, overall, the evidence slightly preponderates in favor of finding that Jacob had some redness at his injection site and cried extensively immediately after the September 10, 2007 vaccinations. Again, Jacob did not have these problems for a very long amount of time.

Gastrointestinal Problems / Diarrhea

On approximately September 28, 2007, Jacob started having diarrhea. Exhibit 8 at 527.[12]

On October 2, 2007, while at Wal-Mart with Jacob and Mr. Ferguson, Ms. Ferguson slipped and fell in the store. Tr. 49. At the time, Jacob was strapped into the basket of the cart. The cart tipped forward and fell on top of Ms. Ferguson, who held onto Jacob as the cart was on top of her. Tr. 49. The accident caused a scratch on Ms. Ferguson's leg and no injuries to Jacob. Tr. 50.

The next day, on October 3, 2007, Mr. Ferguson was changing Jacob's diaper. Mr. Ferguson may have been expecting a watery bowel movement because Jacob had been having diarrhea. However, Mr. Ferguson saw only mucosa and blood, not any stool. Tr. 168-69; see also Exhibit 8 at 525-526; Exhibit 7 at 283. The Fergusons obtained authorization from TRICARE to bring Jacob to a local emergency room. Tr. 21.

Late in the evening of October 3, 2007, the Fergusons arrived at Antelope Valley Hospital. The triage report recounts that Jacobs parents provided a history that he has been having "diarrhea all day." There is also a circle around the word diarrhea with a handwritten note stating "x6." Exhibit 8 at 527.[13] The triage report also states "Blood in stool x1."

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lethargy and frequent crying. There was very little testimony about "flu-like symptoms," see tr. 80-83, and the limited testimony did not describe what other symptoms Jacob experienced.

[12] The complete explanation for finding when Jacob's diarrhea began is given in the text below.

[13] In the parties' proposed findings of fact, the Fergusons state that the triage report states that Jacob had diarrhea for "'x6' days." See PFOF #23.c.iv. However, in the record, the word "days" does not follow the number "6."

A doctor saw Jacob in the emergency room two minutes after midnight on October 4, 2007. This form indicates that Jacob's parents, who were his historians, stated the diarrhea started "yesterday." Under "current & associated symptoms," the word diarrhea is circled and there is a handwritten notation "x multiple." The phrase "blood in stools" is circled and there is a notation "today." There is also a notation saying "bright red." Exhibit 8 at 525.

There appears to be some ambiguity about when Jacob first started having diarrhea. The triage record (stating diarrhea "x6") and the doctor's report (stating diarrhea "x multiple") could be interpreted as indicating Jacob had several episodes of diarrhea within a single day. This day would be October 3, 2007, corresponding to the indication that the diarrhea began "yesterday," according to the early morning report made on October 4, 2007.

The other interpretation is that these records show that Jacob's diarrhea began six days earlier and that his bloody stools began on October 3, 2007. This view is more in line with Ms. Ferguson's testimony that Jacob began having diarrhea one to two weeks after his September 10, 2007 vaccination. See tr. 22-23.

Both interpretations are plausible. On the whole, the evidence favors a finding that Jacob's diarrhea began six days before October 3, 2007, that is, September 28, 2007. One reason is that diarrhea is a common enough occurrence in infants that the Fergusons would be unlikely to seek care on an emergency basis for diarrhea that was lasting for a single day, even if there were several instances of diarrhea within 24 hours. But, the Fergusons' observation of blood in Jacob's stool alarmed them to take him to Antelope Valley Hospital as soon as there was blood.

While at the hospital, in addition to having diarrhea and a bloody stool, Jacob was displaying symptoms commonly associated with diarrhea. For example, he was fussy and had a decreased appetite. Exhibit 8 at 73.

A doctor examined Jacob. Ms. Ferguson asked whether the accident she experienced at Wal-Mart could have caused Jacob's bloody stool. The attending physician at Antelope Valley Hospital inspected Jacob's anal cavity and told Ms. Ferguson that Jacob's condition could not have been caused by a fall. Tr. 24.

After the doctor examined Jacob, the doctor ordered X-rays and laboratory tests. Exhibit 8 at 526. Jacob was given a bolus of normal saline to prevent dehydration. While the laboratory results were pending, the doctor also recommended a dose of antibiotics via IV. Jacob's parents refused the antibiotics.

Exhibit 8 at 524 & 526. At the hearing, Mr. Ferguson explained that he did not want Jacob to receive antibiotics until test results (such as a high white blood count) suggested that Jacob was infected with bacteria. Factual H'rg at 55-56.

At 3:30 in the morning, the doctor noted that Jacob was "alert happy [and] smiling." The doctor indicated that she (or he) told the parents that they were "given the option to stay in hospital but [illegible] with [follow up] tomorrow." Exhibit 8 at 526. At 3:50, Ms. Ferguson told a nurse that Jacob had a "green mucous stool [with] blood." Id. at 527. At 4:10, the Fergusons left the hospital. Jacob was in improved and stable condition. Id. at 528. The hospital gave the Fergusons instructions in how to care for a child with diarrhea, including a directive to "follow up with your physician in 1-2 days." Id. at 519-20.

After the Fergusons left the hospital, Jacob's blood results later came back negative for C. difficile and his urine tests appeared normal. Jacob's blood tests came back with a high white blood cell count, a low lymphocyte percentage, and high monophil percentage. Exhibit 6 at 169-70. Additionally, Jacob's blood chemistry also showed a low BUN, low creatinine, and high calcium concentrations. Exhibit 8 at 529. An X-ray performed of Jacob's abdomen showed that his chest and abdomen were normal without any evidence of obstruction, free air, or calcifications. Exhibit 8 at 533.

After leaving the emergency room around 4:00 A.M., the Fergusons returned home for a short time and then arrived at the base clinic at approximately 7:30 A.M., when the clinic opened. Tr. 172-73. After waiting all day, Jacob was not seen by Dr. Carpenter until approximately 3:30 P.M. Tr. 173.[14]

Ms. Ferguson reported that Jacob was seen in the emergency room last night for mucousy stools tinged with blood. Ms. Ferguson also stated that Jacob has not had a bowel movement since earlier in the day. Exhibit 7 at 286. On review of systems, it is noted that since the last visit there has been "no fever, no chills," a "normal appetite," "no vomiting" and "not acting fussy." It also noted "no convulsions, no fainting, no staring spells and no decrease in consciousness." It further noted "not acting fussy and no sleep disturbances." On evaluation, Jacob was found to be "awake, alert, well developed" and "in no acute distress."

[14] The record from the clinic does not state when the Fergusons arrived. The first line states "Date: 04 Oct 2007 1530 PDT." This could refer to when the Fergusons arrived or when someone created a record for the visit. Jacob's vitals were taken at 1554, and Dr. Carpenter's note begins at 1551.

Dr. Carpenter's notes state "Parents fatigued after 18 hours obtaining care downtown then coming here. I don't know why they are here to see me." Id. at 287. The Fergusons testified that Dr. Carpenter accused them of being overbearing and overprotective. Tr. 30; tr. 139.

Dr. Carpenter's impression was that Jacob had diarrhea. He ordered a stool culture. Exhibit 7 at 286-88.

After this encounter with Dr. Carpenter, the Fergusons were very unhappy with him. They testified that they requested that Jacob see Dr. Powell, the other pediatrician at Edwards. Tr. 24.

On October 24, 2007, Jacob had another appointment at the clinic. On this occasion, Dr. Powell saw him. The chief complaint was "stool issues." Ms. Ferguson reported that Jacob did not defecate every day and experienced severe pain during defecation. She also indicated that the stool was hard and bulb-sized. Jacob also cried when Ms. Ferguson attempted to push or massage his abdomen. Exhibit 7 at 282-83.

Jacob weighed 10.25 kg. Id. In the review of systems, Jacob was generally evaluated as normal. For gastrointestinal symptoms, Jacob had "Normal appetite. No vomiting. Abdominal pain, flatus, and constipation." Dr. Powell's physical findings also were generally normal. Id. at 283.[15]

The prominent exception to the normal results concerned Jacob's rectum. He had an "abnormal rectal tear." Dr. Powell manually removed a hard stool from Jacob's rectal vault. Id.; see also tr. 25.

An x-ray performed during the October 24, 2007 visit provided no evidence of acute obstruction or ileus. Exhibit 7 at 282-83. However, Jacob's large intestine was filled with stool. He was prescribed Miralax. Exhibit 7 at 282-83, 440.

In November 2007, Ms. Ferguson was working as a Case Manager at Optimist Youth Homes & Family Services. Exactly when Ms. Ferguson started is

[15] Ms. Ferguson declined to authorize an influenza vaccination for patient (Jacob). The reasons for Ms. Ferguson's decision are not provided. Exhibit 7 at 283.

not readily apparent. The offer letter states that her starting date was contingent upon passing a Department of Justice response. Exhibit 18 at 900. The Department of Justice completed an investigation on November 14, 2007. Id. at 888.

On or about November 17, 2007, a large television fell onto the ground and rolled onto Jacob's left leg. Two days later, Jacob went to the clinic. Dr. Powell saw him. Jacob's weight was 10.55 kg. Exhibit 7 at 278-279.

Although the accident with the television prompted the visit, Dr. Powell inquired about Jacob's diarrhea and constipation.[16] Mr. Ferguson told Dr. Powell that Jacob was doing well with Miralax and had soft stools without blood. Exhibit 7 at 278. For the review of systems, Jacob had a "Normal appetite. No vomiting, no diarrhea, and no constipation." Id. at 279.[17]

After Jacob's November 19, 2007 appointment, Jacob did not see another health care provider until May 2008. Tr. 73. Mr. Ferguson testified that they did not take Jacob to his 12 and 15 month checkups because the Fergusons

> [R]efused any further vaccinations and we were bothered about vaccinating our child, and the second was for the attitude we were given. We were trying to seek out a civilian doctor to see.

Tr. 73. During this time, Mr. and Ms. Ferguson attempted to seek out a civilian doctor rather than the pediatricians at Edwards. Tr. 73. Due to the Fergusons' belief that Jacob's gastrointestinal issues were a result of an adverse reaction to the vaccines he received, the Fergusons declined to continue vaccinating their son. Id.

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[16] The television did not cause any lasting problems for Jacob's leg.

[17] Dr. Powell's November 17, 2007 report constitutes persuasive evidence that Jacob was not vomiting extensively. See Curcuras, 993 F.3d at 1525. This finding --- that Jacob was not vomiting --- is made despite some evidence to the contrary. Unpersuasive evidence about Jacob's vomiting includes the parents' report from May 2008 that starting in October 2007, Jacob was vomiting one to two times per week. Exhibit 7 at 264. At hearing, the Fergusons elaborated and described Jacob's vomiting as "violent . . . exorcist style" vomiting. Tr. 25-26; tr. 69-70. It is highly unlikely that parents would allow their infant son, whom they loved and cared for, to vomit one to two times per week from October to May without seeking any medical attention.

December 2007 / Jacob's First Birthday

In December 2007, the Fergusons celebrated Jacob's first birthday. Mr. Ferguson vividly testified that Jacob "did not acknowledge anyone. He fixated on objects." Mr. Ferguson described this as an "aha moment." Tr. 197. Nevertheless, the Fergusons did not seek medical treatment for Jacob because, in part, Mr. Ferguson was, in his words, "in denial," and they were trying to arrange for Jacob to see a doctor other than Dr. Carpenter. Tr. 198.

The Fergusons testified that around December 2007, they started having concerns about how Jacob was developing. This portion of their testimony was vague and not particularly strong.

For example, evidence about Jacob's ability to walk is inconsistent. Ms. Ferguson testified that at age 10 months (September), Jacob was able to walk. When asked to explain, Ms. Ferguson said that Jacob could walk five or six steps independently. Tr. 116-17. This recollection is supported by a report from July 2008 in which Ms. Ferguson told a speech therapist that Jacob "walked at 10 and-a-half months, and then stopped walking after a few days. He didn't walk again for about 2-3 weeks."

An ability to walk would be rather advanced for a 10 month old. Yet, the two records from appointments in October, do not say anything confirming or undermining the assertion that Jacob was already walking. See exhibit 7 at 286 and 282. Moreover, when Jacob was evaluated in November 2007 after a television fell on his leg, Mr. Ferguson told Dr. Powell that Jacob was "crawling and standing almost completely normally." Exhibit 7 at 278. If Jacob were already walking in November 2007, then it is likely that both Mr. Ferguson and Dr. Powell would have evaluated a leg injury by assessing his ability to walk. Thus, it is likely that Ms. Ferguson did not accurately remember when Jacob started to walk.

A later record from May 7, 2008, said that Jacob "[w]alks well" at that time, which was when Jacob was 17 months old. Exhibit 7 at 275. This May 7, 2008 report regarding Jacob's gait is not consistent with Ms. Ferguson's testimony that Jacob is "still having gait problems at that [May 7, 2008] time." Tr. 144.

Another example of inconsistency of evidence about Jacob's development concerns his fine motor skills. Ms. Ferguson testified that Jacob was

approximately twelve months old when the Fergusons noted that he experienced difficulty in grasping objects. Jacob's fine motor skills continued to deteriorate after this time. Tr. 119. However, when Dr. Powell evaluated Jacob on May 7, 2008 for developmental progress, Dr. Powell noted that he has a "neat pincer grasp." Exhibit 7 at 275. Consequently, the record, considered as a whole, does not support a finding that Jacob experienced developmental problems in either his gross motor or fine motor abilities, starting in December 2007.[18]

In December, Ms. Ferguson's employment ended. In her resignation letter, she stated, among other things, that she did not have "adequate guidance to perform my job as requested." Exhibit 18 at 878. In this litigation, she stated that she left her job because she needed to take care of Jacob. Tr. 95-96. It appears that Ms. Ferguson continued her education.

In February 2008, Jacob began to develop an intermittent rash, which was described as "small red bumps in diaper area and on arms, legs, and chest. Bumps will self resolve in two to [three] days and they occur once every one to two weeks." Exhibit 7 at 264.

In connection with her pursuit of a master's degree in social work, Ms. Ferguson learned about developmental milestones. A particular vignette from a class informed the Fergusons that Jacob had significant developmental issues. Tr. 120. Mr. Ferguson particularly noted that this vignette caused him to stop "denying" the trouble with Jacob. Tr. 179. After the Fergusons had this realization, Ms. Ferguson contacted the North Los Angeles County Regional Center to assess Jacob. Tr. 121-22. The Fergusons also scheduled another appointment with Edwards.

Jacob went to Edwards on May 7, 2008 for a check-up regarding his development. Dr. Powell saw him. At the appointment, Mr. and Ms. Ferguson provided a history about Jacob's development. Exhibit 7 at 271. (Most of this history has been incorporated into the findings set forth above.) According to Mr. Ferguson's testimony, Dr. Powell "kind of gave me [Mr. Ferguson] a butt chewing

[18] Jacob may have had problems in areas other than gross motor and fine motor. For example, by his first birthday, the Fergusons were concerned about Jacob's focus on things rather than people. Tr. 196-97. Their testimony, however, did not explain very well when the Fergusons's first noticed the lack of eye contact because the Fergusons were focused on Jacob's gastrointestinal problems and because a lack of focus is difficult to detect. See tr. 43-44; tr. 73; tr. 175-76.

about not coming in sooner, about bringing up these developmental problems sooner." Tr. 180.

At the appointment the Fergusons reported that Jacob was making poor eye contact, not playing social games, walking on his toes, flapping his hands, and playing with toys in an incorrect manner. Exhibit 7 at 271. Dr. Powell noted that, regarding Jacob's growth and development, he "has a neat pincer grasp, walks well, stoops and climbs stairs." Exhibit 7 at 275. Dr. Powell noted that Jacob's closed fontanelle was abnormally large. Exhibit 7 at 275.

At the May 7, 2008 appointment, Dr. Powell noted that Mr. and Ms. Ferguson "state[d] that shortly after he received his MMR vaccine he became very withdrawn for the next few weeks." Exhibit 7 at 271. This reference to an MMR vaccine is not correct because Jacob did not receive the MMR vaccine. Tr. 75.

Dr. Powell diagnosed Jacob with delayed milestones in language and possible pervasive developmental disorder not otherwise specific (PDD-NOS). Dr. Powell ordered blood tests and also recommended a hearing test. Exhibit 7 at 277. Jacob's blood tests indicated that he had a high white blood cell count, low MCV, low MCH, low neutrophil percentage, and high lymphocyte percentage. Exhibit 6 at 166 (results of tests for blood drawn on May 12, 2008).

On May 20, 2008, Dr. Powell spent approximately 45 minutes counseling Mr. Ferguson in regard to Jacob's pervasive developmental disorder. Dr. Powell spoke about the need for speech therapy and "the proven utility of ABA or other behavioral therapies." Dr. Powell did not want to order other tests such as "immune deficiency tests, and testing for yeasts" because they were "not proven." Dr. Powell and Mr. Ferguson talked about the "utility of specific testing for gluten and casein peptides and that TRICARE will not pay for this test. [Mr. Ferguson] underst[ood] and state[d] that they plan on paying for that test out of pocket." Exhibit 7 at 265.

On May 23, 2008, Jacob's test results for urinary peptides came back with an abnormal result for casomorphin, or milk, and a normal result for gliadorphin, or wheat. Based on information provided with the test, the results suggested starting the tested individual on a gluten- and casein-free diet. Exhibit 7 at 360. Other test results appear at pages 583-84 of exhibit 9 and page 261 of exhibit 7.

On May 28, 2008, Ms. Ferguson called Edwards and expressed concerns that Jacob might be having subclinical seizures manifesting as nighttime

awakenings. Ms. Ferguson noted that Jacob did not have any seizure-like activities during the day. Dr. Powell discussed the possibility of a gluten- and casein-free diet as well as visiting a Defeat Autism Now physician. Exhibit 7 at 263. Dr. Powell also referred Jacob to a pediatric neurologist. Exhibit 7 at 263.

On this same day, Jacob underwent auditory testing from HeaRx. The testing indicated that he did not respond to warble tones at all, although he did turn his head toward speech sounds and animal sounds. The results also showed that he could hear speech at normal levels. Exhibit 7 at 401.

On May 30, 2008, Jacob underwent speech evaluation by Dahut Speech Services. Although Jacob had an oral peripheral mechanism appropriate for producing speech, he was seven months below his chronological age in expressive language. The evaluator also noted delays in receptive language, articulation and phonology, and pragmatic language. Exhibit 7 at 416-17.

Jacob underwent an occupational therapy evaluation at Life Steps Foundation on June 7, 2008. Ms. Ferguson provided a lengthy history, which has been addressed in the findings above. At the June 7, 2008 appointment, the evaluator noted that Jacob was independent in walking and playing in his room. Jacob could work one-on-one with the therapist without walking away and also did not tantrum or become upset when he did not get what he wanted. Exhibit 7 at 410-411, 413. The evaluator noted that Jacob experienced limited hand awareness and deficits in bilateral motor coordination, necessary for complex object manipulation and learning. Exhibit 7 at 413.

On June 10, 2008, Jacob went to the pediatric clinic at Edwards for a follow-up visit regarding his continued digestive issues, as well as his autism. Ms. Ferguson indicated that Jacob continued to have intermittent, alternating diarrhea and constipation without blood, as well as several episodes of non-bloody, non-bilious emesis each week. Ms. Ferguson also indicated that Jacob frequently woke up during the night and seemed to be in abdominal pain. Jacob was diagnosed with vomiting and pervasive developmental disorders. Exhibit 7 at 254.

On June 14, 2008, Ms. Ferguson started a blog to document Jacob's struggles and progress regarding his health. Exhibit 17. In this blog, Ms. Ferguson writes that she plans to make a vaccine injury claim, as she believes most of Jacob's symptoms started "after his round of about 9-11 vaccines in one day." Entry dated July 31, 2008. Ms. Ferguson's last entry is dated July 9, 2009. In this entry, she writes that Jacob is autistic, but is on his way to recovery.

Today, Ms. Ferguson states that while her son suffers from "common variable immune deficiency" and has a "gastrointestinal disease," he is responding well to treatment. Jacob is receiving intravenous immunoglobulin treatment once a month and that this treatment has changed their lives. Tr. 28-29. Jacob now loves to play sports outside, and his eating has improved. Tr. 129; see also tr. 150; tr. 201.

The parties appear to agree that the medical records created after June 10, 2008, set forth contemporaneous events in Jacob's life accurately. In absence of any dispute, specific findings of fact are not made.

The parties are ordered to provide these findings of fact to any expert whom they retain to testify. A status conference will be held on **Thursday, September 6, 2012 at 10:00 Eastern Time.** The Fergusons should be prepared to propose the next step in this case.

IT IS SO ORDERED.

s/ Christian J. Moran
Christian J. Moran
Special Master