OFFICE OF SPECIAL MASTERS

June 25, 1997

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JARED DE FAZIO,	*	
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Petitioner,	*	
	*	
vs.	*	No. 90-3174V
	*	PUBLISHED
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
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Ronald C. Homer, Boston, MA, for petitioner.

Elizabeth Kroop, Washington, DC for respondent.

DECISION

MILLMAN, Special Master

On behalf of her son, Jared DeFazio, Mrs. Leslie Hudson filed a petition(1) for compensation under the National Childhood Vaccine Injury Act of 1986(2) (hereinafter, the "Vaccine Act" or the "Act"). Petitioner has satisfied the prerequisites for a prima facie case provided in § 300aa-11(c) of the Act by showing that no one has previously collected an award of settlement of a civil action for damages arising from the vaccine injury, that the diphtheria-pertussis-tetanus ("DPT") vaccinations were administered in the United States, and that $1,000.00 in unreimbursable medical expenses were incurred prior to filing the petition.

Petitioner alleges that Jared suffered an on-Table residual seizure disorder (RSD) as a result of his three DPT immunizations.

Respondent, in its Rule 4(b) report, conceded that Jared had on-Table RSD. Specifically, respondent's report states "[u]pon review, DVIC medical personnel have concluded that compensation for Jared's residual seizure disorder (now resolved), and educational and behavioral difficulties (sequelae of this

injury), is appropriate in this case." Respondent stated that compensation for Jared's nystagmus and visual problems was not appropriate and petitioner later agreed.

Based on the language in respondent's report, the special master set filing dates for the parties' life care plans. Petitioner filed a life care plan on September 15, 1995[(3)]. On February 16, 1996, respondent filed its life care plan.

A hearing was held on August 16, 1996 and January 31, 1997. Testifying for petitioner were Dr. Marcel Kinsbourne, Ms. Sandra Raboin, Mrs. Leslie Hudson, and Dr. Richard Platt. Testifying for respondent were Dr. Steven Sandler, Dr. Joel Herskowitz, and Ms. Jaqueline Peterson.

At the August 1996 hearing, it became apparent that respondent's view was that none of Jared's current problems were related to his conceded RSD and therefore no compensation should be awarded. Until that time, the court and petitioner were operating under the assumption that respondent had agreed to compensate Jared for at least some of his educational and behavioral difficulties. This assumption was based on the language in respondent's Rule 4(b) report. The court realizes that it is petitioner's burden to prove sequelae of the vaccine injury. However, much confusion (and expense) in this case could have been avoided by respondent more clearly delineating its position in its Rule 4(b) report and in subsequent status conferences prior to trial because, in fact, respondent was unwilling to compensate Jared for any of his current educational and behavioral problems.

JARED'S COMPETENCE

Jared's competence to represent himself was an underlying issue throughout these proceedings. When the petition was filed, Jared was 13 years old and his mother, Leslie Hudson, was the petitioner. On February 11, 1995, Jared reached the age of majority (18). On August 1, 1996, respondent requested that the special master determine who was the proper party to bring this case. On August 15, 1996, petitioner filed a Motion to Amend the Caption to make Jared the petitioner in this case. The motion was granted on August 19, 1996. Counsel also informed the court that proceedings were underway to have Mrs. Hudson appointed guardian of Jared's property.

When the hearing resumed in January 1997, petitioner's counsel informed the court that Mrs. Hudson was not going to be substituted as the named petitioner, and that Jared had not been legally declared incompetent. Respondent then renewed an earlier request to cross-examine or depose Jared DeFazio.

Based on the testimony of Jared's mother and the treating doctors in this case, the court decided that Jared has significant emotional and psychological disabilities and that any usefulness of his testimony was outweighed by the damage that forcing him to testify might cause. Furthermore, the testimony shows that in spite of his problems, Jared sees himself as normal. Therefore, it is doubtful his testimony would truly assist the court. The court does not believe respondent was prejudiced by this decision.

FACTS

Jared was born on February 11, 1977. He received his first DPT vaccination on April 13, 1977 when he was two months old. He received his second DPT vaccination on May 11, 1977 when he was three months old. He received his third DPT vaccination on June 16, 1977 when he was four months old. Med. recs. at Ex. 2, pp. 1-2.

The pediatric record from May 13, 1977 states that the day before Jared had three episodes of stiffness without eye rolling or motor activity. Med. recs. at Ex. 2, p. 1. He became cyanotic and let out a cry. Id. He had experienced the same fits after his previous DPT and had had another similar fit that morning. Id.

A June 20, 1977 letter from Dr. Ellison, a pediatric neurologist, to Dr. Mereu, Jared's treating pediatrician, states that Jared experienced seizures initially after his first DPT consisting of stiffening and becoming purple. He had four episodes following his second DPT. The amount of pertussis in the third DPT was decreased and Jared's mother did not see a seizure. However, a seizure may have occurred as Mrs. Hudson heard a similar noise and found Jared dusky. Med. recs. at Ex. 3, p. 1.

Dr. Ellison wrote that Jared was a very placid, even-tempered child and was by temperament both before and after the seizures so it was difficult to give evidence of any loss of interest in surroundings or mild changes in temperament. He was doing age-appropriate things and had a normal neurological exam. Id. at p. 2.

A September 30, 1977 letter from Dr. Ellison to Dr. Mereu states that at 35 weeks of age, Jared displayed appropriate language and adaptive skills. He was three to four weeks behind in fine and gross motor skills. He was sitting briefly, but not for prolonged periods. However, Mrs. Hudson was not as concerned because Jared's older brother had walked late. Jared was on Phenobarbital. He would awaken every one to two hours at night. He remained a very happy, responsive, and contented baby. Med. recs. at Ex. 2, pp. 22-23.

A July 6, 1978 letter from Dr. Ellison to Drs. Mereu and Pasternack states that the major concern with Jared was not his milestones but his irritability. Id. at p. 25. His Dilantin was cut back. Id.

Dr. Robert Cassidy, a neurologist, wrote to Dr. Mereu on October 31, 1979. The letter states that Mrs. Hudson was concerned about Jared's behavioral characteristics such as getting down on all fours and acting like a dog. She was more legitimately concerned about Jared's prolonged episodes of real bitchiness and irritability that occurred even when he was off medication. Id. at p. 26. Jared would have five to eight days where he was totally miserable and he would scream and physically resist any attempts to change what he was doing. No seizures ever occurred during such periods. Id. at pp. 26-27. On physical examination he was very bright, lively, and precocious with an amazing vocabulary for his age. His behavior showed concentration, planning and sometimes downright manipulation. He was remarkably hypotonic. Id. at p. 27. Dr. Cassidy found it very difficult to believe that Jared's misbehavior was due to seizures. Id. at p. 28. He also did not think it was due to medication because the behavior occurred when he was off all medication. He thought that behavioral difficulties seemed most logical, and, if they continued, child psychology and psychiatry evaluations might be necessary. Id.

In January 1982, Jared was hospitalized for dizziness, ataxia, lethargy, and headaches. Med. recs. at Ex. 23, p. 2. He was diagnosed with Dilantin overdose. Id. at p. 1. The records state that Jared's last seizure had been fourteen months earlier (or November 1979). Id. at p. 2.

The Bethlehem Central Schools performed a Psychoeducational Evaluation in February 1983. P., Ex. 18, Tab 36. The results show Jared to be functioning at the average to high average range of cognitive development. Id. His school performance did not seem hampered by his nystagmus or by acuity. Id. No additional programming seemed warranted. Id.

A similar evaluation was performed in February 1985. P., Ex. 18, Tab 37. His nystagmus was interfering with his visual performance, and he was not at age-level for his grade. Id. Nevertheless, he made substantial progress. Id.

The next Psychoeducational Evaluation was in January 1988. P. Ex. 9, p. 10. Jared continued to function in the average range of cognitive ability. Id. He had average verbal skills, and low-average non-verbal skills, with the discrepancy between them now statistically significant. Id. at p. 12. His nystagmus may

have affected his performance scores. Id. at p. 11. The social history taken was that Mrs. Hudson had experienced health problems over the last two years requiring hospitalization. Id. This and family problems with Jared's stepbrother had affected Jared negatively making him tense. Id.

On February 12, 1990, Jared was evaluated by Dr. Jerome Haller, a pediatric neurologist, for behavioral and attention problems. Med. recs. at Ex. 29, p. 27. Jared had been seizure-free for seven years. Id. For the past two years, Jared had had irritability and problems paying attention at home. Id. The doctor thought his attention problems were probably more behavioral than true attention deficit disorder. Id. at 28.

A Psychoeducational Evaluation was performed in April and May of 1990. Med. recs. at Ex. 5, p. 1. Jared was a slow learner who needed a great deal of reinforcement and individualized instruction. Id. He had an average IQ. He was legally blind due to nystagmus. Id. at p. 2.

Dr. Steven Sandler, a psychiatrist, evaluated Jared on May 25, 1990. Med. recs. at Ex. G. The presenting problem was oppositional behavior at home. Id. The problems had been prominent for about one year. Id. Jared had a normal IQ of 98 but was suffering from depression. Id. Jared had an uneasy relationship with his stepfather and his stepbrother. Id. Jared claimed they were abusive. Id. He had been off seizure medication since age seven. Id. Dr. Sandler diagnosed adjustment disorder with depressed mood. Id.

Jared's 1991 school Psychoeducational Evaluation states that Jared continued demonstrating average range cognitive skills with academic deficits in several areas. P. Ex. 9, p. 2. Psychologically, Jared seemed overly self-critical and somewhat defensive about his visual problem. Id.

On June 10, 1994, Dr. Natalie Nussbaum, a psychologist, wrote to the Hudsons after evaluating Jared. She states that ratings of diagnostic criteria by Mrs. Hudson indicated that Jared had 10 of the 14 characteristics of attention deficit hyperactivity disorder ("ADHD"), and that they were apparent at least since he was six. Med. recs. at Ex. 27. He also showed signs of a depressive disorder. Id. His history included significant family stressors which may have emotionally impacted Jared. Id.

In 1995, Dr. Mereu wrote to petitioner's life care planner that Jared has been seizure-free and off convulsants since July 1983, and the probability of recurrence of seizures is quite low. Med. recs. at Ex. 29, p. 57.

EEGs on March 12, 1981, January 25, 1982, June 2, 1983, and November 25, 1996 were normal. Med. recs. at Ex. 29, p. 5; Ex. 2, p. 55; Ex. 10; Ex. 31.

TESTIMONY

Ms. Sandra Raboin, petitioner's life care planner, testified first. Tr. at 44. She had spent four and one-half hours with Jared, five and one-half hours with Mrs. Hudson, and one-half hour with Mr. Hudson. Tr. at 59, 62. Petitioner requested insurance coverage for Jared because he will not be able to have gainful employment, and therefore insurance coverage, because of his injury. Tr. at 66. Jared had held several jobs where his performance was poor. Tr. at 77. He was successful only at two positions (veterinarian assistant and the town's parks and recreation department) and that was because the jobs were specifically modified to meet his needs. Tr. at 67.

Ms. Raboin recommended Landmark College for Jared. Tr. at 78. Landmark offers an education program designed for students with learning disabilities, specifically ADHD[(4)]. Tr. at 79. The school offers basic study and organizational living skills. Tr. at 82. Jared had enrolled in community college, but then withdrew. Id. Ms. Raboin testified that Jared has a pseudo identity -- he tries to present himself

as normal. Tr. at 81. She thought Jared would go to Landmark College if given the opportunity. Tr. at 84.

Jared is currently taking Elavil daily that is administered by a LPN who is staying with the family. Tr. at 84. Jared's parents renovated a garage apartment so that he would have some privacy and independence. Tr. at 85.

Dr. Kinsbourne testified next for petitioner. Tr. at 103. He has seen thousands of people with ADHD. Tr. at 132. It is his specialty in pediatric neurology. Id. The core of the syndrome of ADHD is an individual who is inattentive, impulsive, and restless. Tr. at 127. The condition affects about five percent of the population. Id. The majority of cases result from genetic familial reasons. Id. However, a minority of cases result from a variety of brain dysfunction and abnormalities. Id.

Jared's IQ is 91 or 94. Tr. at 114-15. Dr. Kinsbourne described Jared as having lack of cognitive flexibility or concrete thinking, decreased psychomotor speed, and lack of insight. Tr. at 128. Dr. Kinsbourne testified those problems are not a part of the usual type of ADHD found in the general population. Id. Rather, they were characteristic of a variety of forms of brain damage. Id. Because pertussis vaccine can cause brain damage, it can cause the kinds of problems Jared has. Tr. at 130. Dr. Kinsbourne would have been uncertain if Jared's Table injury caused his ADHD if ADHD were his only problem. Id. But, Jared also had seizures and displays lack of insight and concreteness, and slowness in movement which cohere to a brain-damaged picture. Tr. at 131.

Depression is a well-recognized consequence of ADHD, usually resulting from the life problems experienced by people who have it. Id.

When asked about the record from when Jared was two that states Jared was bright, precocious, and had an amazing vocabulary, Dr. Kinsbourne stated that bright people can have ADHD and that the description does not seem reflected in Jared's normal IQ scores. Tr. at 132. Also, children who are hyperactive often appear bright, and vocabulary development is unrelated to ADHD. Tr. at 133.

Landmark college would be useful for Jared. Tr. at 134. He then could go on to a junior college. Tr. at 226. Jared needs schooling and medication to be successful. Tr. at 137. With this regimen, he could live by himself. Tr. at 139.

Jared has attention deficit hyperactivity disorder of the combined type, meaning he is both hyperactive and impulsive. Tr. at 141-42.

Dr. Kinsbourne viewed a residential habilitation worker as appropriate for Jared to give him individual assistance with organization. Tr. at 142. Dr. Kinsbourne agreed with Ms. Raboin that Jared requires "non-conventional" or flexible psychotherapy, i.e., outside a normal 50-minute office session. Tr. at 155-56. For the first two years, Jared would need to be seen weekly. Tr. at 156. After that, monthly psychological help should be available. Tr. at 157. He would also need a doctor to manage his medication. Id.

Dr. Kinsbourne does not think an annual EEG is necessary since Jared does not have any seizure activity. Tr. at 159. An EEG should be done now, and if it is normal, another EEG should be performed in five years. Tr. at 159. Petitioners also requested an annual neurological exam, but Dr. Kinsbourne said that whoever was managing Jared's medication regime would be qualified to examine him neurologically. Tr. at 159. Dr. Kinsbourne said it was more likely than not that Jared's seizures would not reoccur. Tr. at 161. Dr. Kinsbourne said it was reasonable that Jared be provided an exercise regime

if it is helpful for him to blow off steam. Tr. at 162.

On cross-examination, Dr. Kinsbourne testified that the same brain damage that caused the seizures, also caused Jared's current problems. Tr. at 182. When pertussis vaccine causes a residual seizure disorder, it does so by causing brain injury which is defined as encephalopathy. Tr. at 182-83. The damage that set up Jared's seizure disorder, also set up his behavioral problems. Tr. at 185.

Depression is not part of ADHD in everyone who has it. Tr. at 207. However, people who have ADHD very often secondarily become depressed. Id. ADHD is a risk factor for depression. Tr. at 209. Jared has a relatively severe case of ADHD. Tr. at 211. Not all ADHD people have disruptive behavior. Id. One never gets cured of ADHD. Tr. at 212. Dr. Kinsbourne does not think Jared's nystagmus would cause depression. Tr. at 216-18. His depression is more likely due to the ADHD than the nystagmus. Tr. at 221.

ADHD cannot be diagnosed at the age of two months. Tr. at 247. It can take years to emerge. Id. It usually emerges when children leave the unstructured atmosphere of kindergarten and enter grade school. Id. But, ADHD is not caught at a certain age like a disease. Id.

Ms. Raboin then resumed her testimony. Tr. at 250. She recommends Jared have an annual physical exam because of the psychotropic medications and because he is unable to assess his own condition. Tr. at 254.

The hearing resumed on January 31, 1997. Dr. Kinsbourne was first recalled for petitioner. Tr. at 313. Alcohol abuse is a known outcome of ADHD in many individuals. Tr. at 314. Dr. Kinsbourne does not connect Jared's marijuana use to the ADHD because it is so widespread among adolescents. Tr. at 318. Dr. Kinsbourne was asked about Dr. Cassidy's record when Jared was two years seven months and he was experiencing prolonged episodes of bitchiness and irritability and would be miserable for periods of five to eight days. Dr. Kinsbourne stated these behaviors were not seizure states and were not caused by anti-convulsants. Tr. at 331-32. They represent a brain-based problem which is connected to ADHD which later emerged in a more classical sense. Tr. at 332. Jared had oppositional defiant disorder. Tr. at 338.

Whatever damaged Jared's brain and caused seizures, also caused his maladaptive behavior and spectrum of manifestations. Tr. at 343-44. These behavioral disorders take different forms depending on age and environmental circumstances. Tr. at 344. People with ADHD typically are in denial and oblivious to their situation. Tr. at 352.

Jared had encephalopathy whose onset was the same time as the seizures. Tr. at 359. Since it is known that Jared had a brain injury at a certain time, it is most likely that the other signs of brain injury that he exhibits occurred at that same time. Tr. at 360.

At this point in the hearing, Mrs. Hudson, Jared's mother, testified that he was taken off anti-convulsants in 1983, and that he was seizure-free for two years prior to that. Tr. at 362-63.

Jared had seizures following each of his three DPT vaccinations. However, Dr. Kinsbourne could not apportion the amount of brain damage among the three events. Tr. at 368. The first event brought out a seizure tendency. Id. The second and third DPTs significantly aggravated the encephalopathy/seizures that occurred after the first DPT. Id. Because Jared's seizures were brief, his disability is mild. Tr. at 369.

When ADHD results from early brain injury, one does not instantly get ADHD behavior. Tr. at 431. This emerges over time. Tr. at 431-32. Most of the causes of ADHD happen before or at birth. Tr. at 432. But, certain forms of brain damage after birth can also cause ADHD. Tr. at 433.

When ADHD is associated with a depressive disorder, it is frequently catalogical depression, which is chronic dissatisfaction, irritability, and blaming others. Tr. at 453-54. This is in contrast to a major depression which comes on like a wave and then the person recovers. Tr. at 454-55.

Dr. Kinsbourne would not have diagnosed Jared as depressed based on his symptoms at two and one-half years old. Tr. at 460-61. Usually ADHD precedes depression. Tr. at 463. Dr. Kinsbourne did not see signs of depression in Jared before his parents divorced in 1983. Tr. at 464. Dr. Kinsbourne would not exaggerate the role family turmoil played in Jared's depression because the turmoil ceased but Jared's depression continued. Tr. at 466. His visual function is not a significant determinant of his ongoing depression. Tr. at 471.

Dr. Steven Sandler testified for respondent. Tr. at 371. He is a psychiatrist for children and adults. Tr. at 372, 374. When Dr. Sandler first saw Jared, he had already been diagnosed with depression. Tr. at 374. Dr. Sandler also diagnosed Jared with depression as well as oppositional disorder. Id. Oppositional behavior is usually diagnosed in toddlers and school-aged children. Tr. at 375. Depression can exist in anyone, even an infant. Id. He has not treated children who have had vaccine injuries and then experience chronic behavioral disturbances. Tr. at 381.

Jared has symptoms consistent with ADHD. Tr. at 383. Dr. Sandler has not seen any medical literature relating ADHD and depression to vaccine-related seizures and brain injury. Tr. at 384. He has not seen it in his practice either. Id. In many cases, there is a familial tendency to inherit depressive disorders and ADHD. Tr. at 386-87. Dr. Sandler did not take a history from Mr. DeFazio, so he does not know if he has ADHD. Tr. at 389. The fact that Jared's father was rough in play and had punched Jared's brother in the jaw does not lead Dr. Sandler to conclude that Jared and his father have a biological disorder. Tr. at 399. The mother's history does not suggest a strong biological tendency to depression. Tr. at 395. Mr. DeFazio opposed Jared's receiving medication on religious grounds. Tr. at 387.

When he first saw Jared, Dr. Sandler's primary goal was treating his depression. Tr. at 391. It was not until two years later in 1992 that he noted Jared's ADHD characteristics. Id. The depression may have come before the ADHD or concomitantly. Tr. at 401. Family stress can cause or exacerbate depression. Tr. at 396. For a good percentage of ADHD cases, the cause is unknown. Tr. at 400. ADHD kids have a higher rate of depression than the average child in most studies. Id. It is unclear if the relationship is biological or the depression comes from struggling with ADHD symptoms. Tr. at 402. ADHD children also are more aggressive. Tr. at 400.

To have a diagnosis of ADHD, one must show symptoms of it before the age of seven. Tr. at 405. Dr. Sandler does not know when Jared's symptoms began. Tr. at 406. Most people agree that one is born with ADHD. Tr. at 407. Something is wrong neurologically. Id. The symptoms emerge at some point before age seven, but the disorder was always there. Id. He has not seen any literature indicating that a vaccine injury or brief seizures would exacerbate ADHD. Tr. at 408.

Regarding oppositional defiant behavior, some children are born with a stubborn temperament and, in other cases, it is due solely to conflict at home. Id. No one knows if one is born with depression. Tr. at 408.

It is Dr. Sandler's opinion that Jared's depression is not a subtype of his ADHD. Tr. at 412. It may have

come about partly because of his struggles with ADHD, but it is more likely that they are two different diagnoses not related causally. Tr. at 412-13. Jared's condition is complicated by his family situation of a divorce and a stepbrother who allegedly abused him. Tr. at 414. His family problems certainly played a role in his depression. Tr. at 416. Dr. Sandler could not apportion the amount of Jared's damage that is related to depression and the amount that is related to ADHD. Tr. at 415.

Jared also had to struggle with being legally blind. Tr. at 417. He could not ascribe a percentage to how this affected Jared's depression. Id.

Dr. Sandler testified he would not make too much from Dr. Ellison's record when Jared was 35 weeks old that he was 3-4 weeks behind in gross and fine motor development. Tr. at 396, 419. He would be concerned by the fact that Jared, at nine months, could not pull himself into a sitting position and had poor head control and generalized hypotonia. Tr. at 423. But, he would defer to a pediatric neurologist. Tr. at 424. Dr. Sandler owns one of the texts authored by Dr. Herskowitz. Tr. at 426.

Dr. Richard Platt, a professional counselor, testified next. Tr. at 494. Jared's parents first contacted him in November 1993. Id. Dr. Sam Press, a psychiatrist who is Dr. Platt's colleague, performed the initial assessment. Id. Mr. and Mrs. Hudson attended but Jared would not participate. Tr. at 495. Dr. Platt saw the parents once in 1993, and eleven times in 1994. Id. The parents were seeking counseling on how to deal with Jared's behavior. Tr. at 496. Jared started participating in August 1994. Tr. at 497. He had just returned to live with his mother after living with his father, and his mother conditioned the move on Jared's participating in counseling. Id. Jared was not receptive to medication. Tr. at 497-98. There were ten sessions in 1995. Tr. at 499. In October 1995, Jared expressed he was not interested in continuing counseling. Id.

Dr. Platt thinks if Jared were offered counseling, he would decline. Tr. at 500. However, Jared's situation requires counseling. Tr. at 501-02. Jared is impulsive, and has difficulty controlling his anger. Tr. at 502. Jared's therapy needs to be in a controlled environment. Tr. at 503. Psychotropic drugs are helpful to Jared. Tr. at 505. He would need a psychiatrist or a neuropsychiatrist to monitor his medication. Tr. at 507. Jared would benefit from a residential habilitation worker or "life coach". Tr. at 508. Dr. Platt believes that ADHD comes before depression. Tr. at 510.

Jared did not want to live with his father because he was too far away from his friends. Tr. at 512. He had also had a disagreement with his father over retaking a math class. Tr. at 513. Dr. Platt dealt only with the relationship between Jared and Mr. and Mrs. Hudson. Tr. at 521. Jared's father changed his mind about opposing medication after seeing a program on ADHD. Tr. at 522-23.

Jared has ADHD and significant symptoms of depression. Tr. at 525. The depression is related to the ADHD. Tr. at 527. If the ADHD and depression were not related, Dr. Platt could not put a percentage on how much of Jared's condition was caused by each. Tr. at 527-28. ADHD has caused a very large percentage of his difficulties. Tr. at 528.

Mrs. Hudson testified next for petitioner. Tr. at 490, 531. Jared's initial seizure after the first DPT occurred while she was bathing him. Tr. at 491. His body arched, his arms and head flew back, his eyes rolled, and his skin became dark in color. Tr. at 491. Over time, Jared's personality progressively disintegrated. Tr. at 531. There was always a question of whether Jared's milestones were developmentally on target. Tr. at 533.

After the second DPT, Jared began having difficulty sleeping. Id. He would sleep for only ten to fifteen minutes at a time. Id. Mr. DeFazio was absent from the home ninety percent of the time. Id.

Jared was taken off anti-convulsants when he was five years old. Tr. at 535. He was sleeping better, but his irritability did not decrease. Tr. at 536. In the summer of 1977, a doctor told her Jared had nystagmus. Tr. at 537. As he went from preschool to kindergarten, the extent of his visual impairment became apparent. Tr. at 539. The nystagmus cleared when Jared entered puberty. Tr. at 541. He remains visually impaired, but is not legally blind. Id. Mrs. Hudson believes that because he was receiving services for his visual impairment, his ADHD was not discovered. Tr. at 544.

Jared's father does not have ADHD or learning disabilities; neither she nor any of her other children have ADHD. Tr. at 546.

Jared enrolled in community college in August 1996, but dropped out after four weeks. Id. He does not have a steady job. Tr. at 549. He stopped his medication in November 1996. Id. He is not undergoing therapy. Id.

Mrs. Hudson said Jared does not feel as if he could succeed at Landmark College and he would not now go. Tr. at 551. If he got the therapy he needs, he would be less frightened of pursuing his education. Id. She also testified that Jared would not go to therapy at this point. Tr. at 552. He does have a small group of friends. Id.

Mrs. Hudson told Dr. Nussbaum in 1994 that Jared displayed ten out of fourteen characteristics of ADHD and they had been apparent since at least age 6. Tr. at 564. She agreed that significant family stress emotionally impacted Jared. Tr. at 565. Jared was threatened when she married Mr. Hudson in 1986. Tr. at 567.

Mr. DeFazio was always gentle and kind with Jared and his sister Kimberly. Tr. at 573. Sometimes he would play rough with Jason. Id. Jared's stepbrother, Ted, has ADHD and sociopathic behaviors. Tr. at 576. Ted would threaten Jared. Tr. at 577. Ted has not been present in their lives since Jared was 12 years old. Tr. at 578. Jared drinks beer frequently and uses marijuana occasionally. Tr. at 585. He has talked about suicide from time to time. Tr. at 588.

Dr. Herskowitz testified for respondent. Tr. at 589. He is a pediatric neurologist. Tr. at 590. He sees 2,500 children per year and more than half his patients have learning and attention problems with many having different kinds of ADD. Tr. at 591.

Oppositional defiant disorder is a cluster of behavioral symptoms that often is an outgrowth of untreated or undertreated ADD. Tr. at 593. It can also exist independently of ADD. Id. Ten to fifteen percent of people with ADD develop elements of depression. Tr. at 593-94. However, they rarely develop a depressive disorder. Tr. at 594. Elements of depression fall far short of a depressive disorder. Id. Dr. Herskowitz has never seen depression in a thirteen- year-old as an outgrowth of ADD. Id. Jared's depression is extensive and severe. Id. At the same time, his ADD symptoms are so lacking in prominence that Dr. Herskowitz could not deduce that the depression is an outgrowth of ADD. Id.

Jared's behavior at two years, eight months as recorded by Dr. Cassidy suggests the possibility of a prelude to a mood or affective disorder. Tr. at 595. It is not a typical ADD situation. Id. Affect refers to a person's emotional state or mood and mood is the prevailing emotional climate. Tr. at 596. It is what one feels over days or weeks, not at a given moment. Id. ADD, according to the DSM-IV,[(5)] consists of three elements; hyperactivity, inattentiveness, and impulsivity. Tr. at 598. ADD is broken down into inattentive subtype and hyperactive/impulsive subtype. Id. The records support a diagnosis of ADD when Jared was a teenager. Tr. at 599. Dr. Herskowitz is unsure if Jared has ADD now. Id.

Jared clearly had seizures after his three DPTs. Tr. at 600. The seizures were brief, thirty seconds to one minute, and no cluster of seizures lasted more than thirty minutes. Id. There was no prolonged or profound postictal somnolence or coma afterwards. Id. He was not on Phenobarbital for prolonged periods of time. Tr. at 601. On June 16, 1977 when Jared was four months old, Dr. Ellison recorded Jared had age-appropriate development and a normal neurological exam. Id.

There was a family pattern of gross motor delay. Tr. at 604. People who are visually impaired also have delayed gross motor functioning. Tr. at 605.

In Dr. Herskowitz's opinion, Jared did not suffer permanent damage from his post-DPT seizures. Tr. at 603. The medical literature does not support a person sustaining this kind of RSD (meaning brief seizures unassociated with prolonged periods of lethargy, stupor or coma lasting two hours, and not followed by postictal paralysis) as having later neurologic injury. Tr. at 606. Jared does not fit the criteria of the NCES[(6)]. Id.

There are no clinical footprints here to connect early brain injury with later manifestations. Tr. at 607. There was no drop in head circumference. Tr. at 607. The six months between the DPT shot and Jared's irritability is too long to link causally. Tr. at 609. Jared did not suffer from an on-Table encephalopathy. Tr. at 614.

Dr. Herskowitz defers to Dr. Sandler on the diagnosis of ADD. Tr. at 610. He agrees that Jared's oppressive affective disorder is a separate diagnosis. Tr. at 609-10. Jared's family situation and visual problems contributed to his condition. Tr. at 615. Dr. Herskowitz testified denial is not characteristic of ADD. Tr. at 617. Jared's major behavioral changes occurred months and months if not years beyond the DPT. Tr. at 619.

On cross-examination, Dr. Herskowitz testified there is no evidence Jared's brain was injured. Tr. at 620. There was some impairment in the functioning of his brain, but Jared grew out of that dysfunction within the first several years of his life. Id. There is nothing specific about poor head control. Tr. at 623. Hundreds of disorders are associated with it and he does not know the disorder Jared had. Id. There is a 10/23/79 record from Bethlehem Central School District that describes Jared as "...aggressive, upset to the point of violence, frustrated, head shaking, intolerant of restrictions..." Tr. at 626.

Dr. Herskowitz said this depicts a very unhappy child, but this record does not describe oppositional behavior or ADD. Tr. at 626-27. It describes an affective disorder either depressive or bipolar. Tr. at 628. Over 99 percent of children with depression and ADD have a normal neurologic exam. Tr. at 629. Jared's depressive disorder is related to an in-built biochemical dysfunction. Tr. at 630. The major depression and significant elements of ADD were anchored in adolescence. Tr. at 643. They pursued their own different tracks. Id. Different stressors bring out one or the other or both. Id.

Jared also has anxiety. Id. Before adolescence, Jared had elements of an ADD disorder, and then it became a disorder. Tr. at 645.

The type of injury Jared incurred after his three DPTs was not of sufficient gravity to have manifested itself in ADHD and depression. Tr. at 647. At one point, Jared was hearing voices. Tr. at 652. One hears voices with psychosis or depression, not ADD. Id.

ADD may contribute to Jared's alcohol and marijuana use, but there is a lot going on in his life. Tr. at 661.

Seizures do not usually stem from brain injury and do not cause brain injury. Tr. at 664. Jared's seizures were brief and self-limited and there is no evidence they injured his brain. Tr. at 666. Jared does not show evidence of a long-term effect of taking anti-convulsants for four years. Tr. at 666-67. If Jared had just had seizures, and not depression or ADHD, Dr. Herskowitz would expect him to be living a normal life. Tr. at 670.

DISCUSSION

Petitioner has the burden of proving that Jared's conceded on-Table RSD resulted in certain sequelae. *Hossack v. Secretary, HHS*, 32 Fed. Cl. 769, 776 (1995); *Song v. Secretary, HHS*, 31 Fed. Cl. 61, *aff'd*, 41 F.3d 1520 (Fed. Cir. 1994). Seizures and seizure disorders do not all result in the same outcome. Petitioner asserts that all Jared's mental and physical disabilities, except his nystagmus, are a result of his RSD; respondent denies that the United States should pay any damages because Jared's current condition is unrelated to his RSD.

The seizures Jared experienced after his first and second DPT (and possibly his third although none was witnessed) were brief episodes. Jared was taken off anti-convulsants in 1983 when he was about six years old. He had been seizure-free for two years prior to that so he has not had a seizure in approximately 16 years. The four EEGs in the record dating from 1981 to 1996 are all normal.

Dr. Kinsbourne testified that Jared had encephalopathy whose onset was the same time as his seizures and damaged his brain. This brain damage is the cause of all his behavioral disorders. According to Dr. Kinsbourne, Jared has ADHD and people with ADHD often become secondarily depressed. Dr. Platt, the psychologist, agreed that Jared's depression is related to his ADHD.

Dr. Steven Sandler, the psychiatrist, first saw Jared in May 1990 and diagnosed adjustment disorder with depressed mood. At that time, Jared had already been diagnosed as depressed by the Center for Stress and Anxiety Disorders. Dr. Sandler testified that his primary objective was treating Jared's depression. By 1992, Dr. Sandler noticed Jared displayed characteristics consistent with ADHD. Unlike Dr. Kinsbourne and Dr. Platt, however, he does not believe that Jared's depression is secondary to his ADHD, but rather is its own disorder. He opined Jared's family problems played a definite role in his depression, and he also was legally blind.

Dr. Herskowitz testified that ten to fifteen percent of people with ADHD develop elements of depression. However, they do not develop major depression as Jared has. Dr. Herskowitz has never seen depression in a thirteen-year-old as an outgrowth of ADHD. He agrees with Dr. Sandler that the two diagnoses are separate.

The court is most impressed with the testimony of Dr. Sandler because he is a treating psychiatrist. Although Dr. Platt also treated Jared, he is a counselor and does not have a medical degree. Dr. Sandler does not believe that Jared's depression is secondary to his ADHD. In his view, Jared's family troubles were the main contributor to his severe depression. The court agrees. The court does not doubt that people with ADHD often get depressed from struggling with their disorder. However, in Jared's case, his depression was quite serious and profound and the diagnosis appears in the record well before any references to ADHD.

The more difficult issue is whether Jared's ADHD relates to his on-Table RSD. The court agrees with respondent's expert that the seizures that Jared experienced following his DPTs were not severe enough to cause the problems Jared later suffered, including his ADHD. The 1977 records from Dr. Ellison show a child who is placid and even-tempered both before and after seizures. The doctor saw no evidence of a loss of interest or change in temperament. At 35 weeks, although 3-4 weeks behind in

motor skills, Jared remained a happy, responsive, and contented baby.

In September 1978, Dr. Ellison was concerned about Jared's irritability. In October 1979, Jared saw Dr. Cassidy, a neurologist, who did not think Jared's behavioral difficulties were a product of his seizures or the medication because they occurred regardless of whether he was on or off medication. And, when Jared was completely taken off medication in 1983, his situation did not improve.

The descriptions of Jared's early behavior do not fit the classical definition of ADHD (hyperactivity, inattentiveness, and impulsivity). The first record to discuss inattentiveness is Dr. Haller's in 1990, which states the problem had been occurring for the past two years or since 1988. In 1988, Jared was 11 years old, well past the age 7 cut-off for displaying symptoms of ADHD. Furthermore, Dr. Haller concluded Jared's problems were not true ADHD. Mrs. Hudson did complete a form for Dr. Nussbaum showing Jared having ten of the fourteen characteristics of ADHD and displaying them since age 6. However, Dr. Haller is a neurologist and Dr. Nussbaum is a psychologist. The court credits a medical opinion more.

Dr. Herskowitz also testified that the behaviors Jared was displaying early in life were not typical of ADHD and were more suggestive of a mood or affective disorder.

None of Jared's school psychoeducational evaluations mentions ADHD, and Mrs. Hudson's view that his nystagmus masked his disorder is speculation. As stated above, Dr. Haller in 1988 did not believe Jared had true ADHD. No medical doctor diagnosed Jared with ADHD until Dr. Sandler noted Jared had ADHD characteristics in 1992.

The court believes that Jared's early problems were primarily behavioral and bore no relation to his RSD. The court is willing to believe that at some point Jared displayed symptoms consistent with a diagnosis of ADHD. However, the seizures Jared experienced after his DPTs were not severe enough to cause it.

The court is also faced with the issue that even if it had found that Jared's ADHD and other problems were related to his RSD, it is quite clear from the record that Jared is refusing therapy, medication, and educational opportunities. Jared does not believe that therapy or medication is beneficial to him. His mother testified that, at this point, Jared is not taking medication and would not avail himself of counseling. Dr. Platt testified that Jared would refuse counseling. Jared has dropped out of college. Jared is a 20-year-old who cannot be forced into treatment absent legal action by his parents. To date, they have not taken such action.

The court believes that even if Jared received an award, it is highly likely that he would continue to reject therapy, medication, and educational opportunities. The court raised this problem at the hearing. There was discussion of the possibility of an award going into a reversionary trust so that if unused, it would revert back to the government at Jared's death. But a reversionary trust is not an acceptable solution if it is probable the funds would not be expended.

This case is not like the court's decision in *Vitale v. Secretary, HHS*, No. 94-0060V, 1997 WL 39498 (Fed. Cl. Spec. Mstr. Jan. 16, 1997). In *Vitale*, respondent also conceded an on-Table RSD but argued the United States should pay only for Nicole Vitale's anti-convulsants, blood testing, and neurological services. The court ruled that respondent was responsible for compensating Nicole for all the damages related to her seizure disorder, including ADHD.[(7)] However, unlike Jared, Nicole's seizures were intractable. In addition, Nicole had been diagnosed with Lennox-Gastaut syndrome which began with her first on-Table seizure and is usually associated with mental retardation.

In sum, the court finds that Jared's depression, ADHD, and other behavioral problems are not sequelae of his on-Table RSD.

LIFE CARE PLAN ITEMS

For the sake of clarity, the court discusses below the items requested by petitioner in his life care plan.[(8)]

1. Insurance Coverage

Petitioner requested insurance coverage for Jared on the basis that his vaccine injury precluded him from obtaining employment that would provide him with insurance. An award for insurance is appropriate only where it covers items for which compensation is otherwise allowable, and where the policy costs less than funding the items individually. *See Huber v. Secretary, HHS*, 22 Cl. Ct. 255, 257 (1991). Since, petitioner is not receiving funds under the Program, whether to award an insurance policy is no longer an issue.

2. Neurological Services

Jared has not had seizures since he was three years old and every EEG he has undergone has been normal. Respondent and petitioner's experts agreed that it is more likely than not that Jared's seizures would not reoccur. In addition, Dr. Kinsbourne testified that he would not recommend that Jared receive a seizure monitor neurologic exam every three years. Tr. at 678-79. Earlier in his testimony, Dr. Kinsbourne opined that whoever was monitoring his medication regimen would be qualified to perform a neurological exam. Tr. at 159. Since the court is not awarding funds for Jared's medication, and since even Dr. Kinsbourne thought a neurologic exam unnecessary in the context of Jared's being at risk for future seizures, the court does not award compensation for neurological services.

3. Physical Exam

The court has ruled that Jared's ADHD, depression, and any other disorders are unrelated to his vaccine injury. Therefore, the court does not award compensation for an annual physical.

4. Psychotropic Medication and Psychotropic Monitoring

The court has ruled Jared's ADHD, depression, and any other disorders are not related to his vaccine injury. The court also notes that since Jared is refusing medication, an award for psychotropic medication and related liver and blood tests would be speculative. Therefore, the court does not award compensation for psychotropic medication and monitoring.

5. Mental Health

The court has ruled Jared's ADHD, depression, and any other disorders are not related to his vaccine injury. The court also notes that since Jared is refusing therapy, an award for counseling would be speculative. Therefore, the court does not award compensation for mental health.

6. Landmark College and Specialized Tutorial for Junior College

The court has ruled that Jared's ADHD, depression, and other disorders are not related to his vaccine injury so the court will not award compensation for Landmark College and a specialized tutorial for junior college. In addition, Mrs. Hudson testified that Jared abandoned junior college in fall 1996 after

four weeks. She also testified that, at this time, Jared would not attend Landmark College. Any award for Landmark College or a specialized tutorial would be speculative.

7. Other Resources

Petitioner also requests compensation for computer costs, residential habilitation services, therapeutic recreation, a financial advisor, and community living. The court will not award funds for these services as the court finds Jared's ADHD, depression, and other disorders are not related to his vaccine injury.

SUMMARY

Petitioner has not carried the burden of showing that his current condition is a sequelae to his conceded on-Table RSD and thus the court does not award compensation. In the absence of motion for review filed pursuant to RCFC Appendix J, the clerk of the court is directed to enter judgment in accordance herewith. The parties can expedite the entry of judgment by jointly filing a notice not to seek review.

IT IS SO ORDERED.

Dated:

Laura D. Millman

Special Master

1. *See* discussion *infra* regarding Jared's competence.

2. The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. § 300aa-1 et seq. (West 1991). The National Vaccine Injury Compensation Program comprises Part 2 of the Vaccine Act. For convenience, further reference will be to the relevant subsection of 42 U.S.C. § 300aa.

3. Petitioner filed post-hearing charts to clarify the requests for compensation following the hearing. P. Ex. 34.

4. Throughout the testimony, most witnesses used "ADHD" and "ADD" interchangeably and the two were treated as synonyms. For the sake of consistency, the court uses "ADHD" exclusively except for the testimony of Dr. Herskowitz who only used "ADD".

5. DSM-IV = Diagnostic and Statistical Manual of Mental Disorders, 4th ed.

6. R. Alderslade, et al., *The National Childhood Encephalopathy Study*, WHOOPING COUGH: REPORT FROM THE COMMITTEE ON SAFETY OF MEDICINES AND THE JOINT COMMITTEE ON VACCINATION AND IMMUNISATION (1981).

7. The court found Nicole's scoliosis, scapular winging, and absent pectoralis muscle were not compensable.

8. See P. Ex. 34.