

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DONNA E. SHALALA, SECRETARY OF HEALTH &
HUMAN SERVICES, Petitioner v. MARGARET
WHITECOTTON, ET AL.

CASE NO: No. 94-372

PLACE: Washington, D.C.

DATE: Tuesday, February 28, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DONNA E. SHALALA, SECRETARY :

4 OF HEALTH & HUMAN SERVICES, :

5 Petitioner :

6 v. : No. 94-372

7 MARGARET WHITECOTTON, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, February 28, 1995

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:05 a.m.

14 APPEARANCES:

15 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor

16 General, Department of Justice, Washington, D.C.; on
17 behalf of the Petitioner.

18 ROBERT THOMAS MOXLEY, ESQ., Cheyenne, Wyoming; on behalf
19 of the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-372, Donna E. Shalala v. Margaret
5 Whitecotton.

6 Mr. Gornstein.

7 ORAL ARGUMENT OF IRVING L. GORNSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GORNSTEIN: Mr. Chief Justice, and may it
10 please the Court:

11 This case arises under the vaccine injury act
12 and involves an interpretation of two related provisions.
13 The first creates a presumption that a vaccine has caused
14 a child's condition when the first symptom or
15 manifestation of the onset of that condition occurs within
16 a specified period after the administration of a vaccine.
17 The second permits the Secretary to rebut the presumption
18 of causation by showing that the child's condition is due
19 to factors unrelated to the vaccine.

20 Our position is that the court of appeals erred
21 in its interpretation of each of these provisions. Let me
22 start with the statutory presumption in section 300aa-11,
23 which appears in page 2 of our brief.

24 The court of appeals interpreted the requirement
25 that the first symptom or manifestation of onset must

1 occur in the statutory period to mean that a presumption
2 of causation will arise whenever any manifestation of a
3 covered condition occurs after the administration of the
4 vaccine, even if that condition has already manifested
5 itself beforehand.

6 So under the court of appeals decision, if a
7 child has very clear manifestations of a serious brain
8 injury, and then has the vaccine, and then another
9 manifestation of the same condition, under the court of
10 appeals decision, there will be a presumption that the
11 vaccine caused the onset of the child's condition, and we
12 think that interpretation is incorrect for two reasons.

13 First, it is inconsistent with the use of the
14 statutory terms, first, and onset. When a condition has
15 already manifested itself prior to the administration of a
16 vaccine, any manifestation of that same condition that
17 occurs after the administration of the vaccine cannot be
18 first, and it cannot be a manifestation of onset. The
19 very first symptom or manifestation of onset necessarily
20 implied the absence of any preexisting symptom or
21 manifestation of that same condition.

22 The second reason that we think the court of
23 appeals erred in its interpretation is that its
24 interpretation fails to take into account the fact that
25 Congress specifically addressed cases where conditions had

1 already manifested themselves prior to the administration
2 of a vaccine through the significant aggravation
3 presumption. QUESTION: Mr. Gornstein, if we had only the
4 language Under section 300aa-11, there is a separate
5 presumption of causation when the first symptom or
6 manifestation of a significant aggravation of a
7 preexisting condition occurs within the statutory period.
8 We think the clear import of that separate presumption is
9 that when a condition has already manifested itself prior
10 to the administration of the vaccine, a presumption that
11 the vaccine has something to do with the child's condition
12 can only arise when that preexisting condition has gotten
13 worse after the administration of the vaccine. OK, because

14 the words So under a simple and straightforward reading of
15 the statutory language, the simple existence of a symptom
16 or manifestation of a covered condition in the statutory
17 period is never enough by itself to trigger the
18 presumption that the vaccine has caused the child's
19 condition. In addition, it must either be the case that
20 there's no preexisting symptom or manifestation of that
21 condition, or the child's condition has gotten markedly
22 worse afterwards. have decided to use the word "first" at

23 all. By holding the court of appeals holding that the
24 existence of a symptom or manifestation of a condition in
25 the statutory period was sufficient by itself to trigger

1 the statutory presumption, we think the court of appeals
2 clearly erred.

3 QUESTION: Mr. Gornstein, if we had only the
4 language that was in that table and not the statutory
5 language, wouldn't there be more of a case for the
6 opposite interpretation?

7 MR. GORNSTEIN: Justice Ginsburg, I think even
8 if we were just looking at that table language, and that
9 appears, by the way, at page 4 of our brief, and says,
10 "Time period for first symptom or manifestation of onset
11 or of significant aggravation after vaccine
12 administration," there would be more of a case, but I
13 still think you would come to the same conclusion, because
14 the words "first" are still used in relation to the term
15 "onset" and I think when a condition has manifested itself
16 prior to vaccine administration, anything that comes after
17 that cannot be the first manifestation of onset.

18 Even trying to give some meaning to the word
19 "first" in the table period is difficult, given the way
20 the court of appeals interpreted that phrase, because if
21 Congress had set out to do what the court of appeals had
22 done, it wouldn't have needed to use the word "first" at
23 all. It could have just said, any symptom after vaccine
24 administration, because any symptom is always first in
25 relation to what came -- comes after the statutory period.

1 The only real reason to use the word "first" is
2 to make clear that you're talking about first in relation
3 to what came before the statutory period.

4 But whatever ambiguity you have when you just
5 look at this language, I think the bigger problem with
6 what the court of appeals did is that it looked here at
7 all, because the purpose of the Vaccine Injury Table is
8 not to set out what the claimant is required to show in
9 order to trigger the statutory presumption. It's set out
10 to show the time period in which the claimant has to make
11 that showing.

12 QUESTION: Isn't the term "first" somewhat
13 superfluous with the term "onset"?

14 MR. GORNSTEIN: Well, I think you have the first
15 symptom or manifestation of onset, or significant
16 aggravation.

17 QUESTION: So first doesn't modify onset, in
18 your view?

19 MR. GORNSTEIN: I think it -- it does modify
20 onset, yes, but I think it's just first symptom or
21 manifest -- it's somewhat superfluous, I would agree, but
22 I think it makes it more clear. It describes a
23 relationship between "first" and "onset."

24 So I think that that is the basic mistake, is in
25 looking to the Vaccine Injury Table, because what -- under

1 section 300aa-13, it tells you that compensation is
2 appropriate when the petitioner has demonstrated the
3 matters in 300aa-11, and 300aa-11 is the part of the
4 statute we're relying on, which is very clear, and I
5 believe even the court of appeals acknowledged that when
6 you look at 300aa-11, it's very clear that the claimant
7 has to show, in effect, the first of all manifestations.

8 QUESTION: Mr. Gornstein, if we were to agree
9 with you on the interpretation of the statute as to
10 question 1 in the cert petition, do we need to reach the
11 question of the standards under question 2, as posed in
12 the cert position?

13 MR. GORNSTEIN: You do not. We have presented
14 both questions because we think that in this case one or
15 the other has to be suffic -- there are two independent
16 grounds, and either one will do.

17 QUESTION: The respondent spends a good deal of
18 time discussing how the district court might have reached
19 the wrong conclusion on the facts here. I assume all of
20 those matters are open on remand.

21 MR. GORNSTEIN: We would agree that those
22 matters are open on remand.

23 If there are no further questions on the
24 first --

25 QUESTION: I have one. What was the first

1 symptom?

2 MR. GORNSTEIN: The first symptom or
3 manifestation was the abnormally small head size at birth,
4 which was -- the special master found was a positive
5 indication that this child was -- already had a very
6 serious brain injury.

7 The second clear manifestation occurred at
8 between 3 and 4 months, and that was the fact that she
9 fell further behind on the growth chart in head size, and
10 so that was also, the special master said, a manifestation
11 that she had a preexisting brain injury, serious brain
12 injury.

13 QUESTION: Is there any question in the record,
14 just as an evidentiary matter, that the head size can be
15 treated as a cause of the brain injury?

16 MR. GORNSTEIN: I would say it's not the head
17 size that's the cause, it is the abnormally small brain
18 that is the cause of the injury, and it is the abnormally
19 small head size that tells you you have an abnormally
20 small brain, and sometimes the term microcephaly is used
21 to refer to both of those things, but what you have is an
22 abnormally small head size that tells you you have an
23 abnormally small brain, and that's what the special master
24 found.

25 QUESTION: So there's no question about the

1 evidentiary basis for that relationship.

2 MR. GORNSTEIN: No.

3 QUESTION: If we therefore reverse, there's not
4 going to be a fight over what the evidence shows.

5 MR. GORNSTEIN: Well, the other side may have a
6 different view on whether the kind of -- the head size
7 here was sufficiently indicative of an abnormally small
8 brain, the kind of abnormally small brain that would
9 result in the conditions, and that was the dispute that
10 was had at trial.

11 The special master resolved that by finding that
12 there was sufficient evidence that it was so abnormally
13 small as to indicate abnormally small brain that would
14 give rise to these conditions.

15 QUESTION: You say there's no question about the
16 evidentiary basis for that finding.

17 MR. GORNSTEIN: I think that's clearly
18 supportable in the evidence. The court of appeals did not
19 disturb the special master's findings on that, and in
20 answer to Justice O'Connor's question, I was simply saying
21 that that is open on remand for them to argue that there's
22 something wrong with that finding. We don't think there
23 is.

24 QUESTION: Is the difference in the two
25 briefs -- you refer to a scientific term, and the

1 plaintiffs refer to small head, not conceding that that
2 was any kind of symptom of any malady. Is that what the
3 dispute --

4 MR. GORNSTEIN: I think that's the factual
5 dispute, that the head -- they would agree, I believe,
6 that at some point the head size is so small as to let you
7 know that there is a real problem and that brain injury
8 has already occurred, but they'll have to speak for
9 themselves on that issue, but I think what they would say
10 is, it wasn't small enough, and that the special master
11 heard conflicting evidence about that and concluded that
12 it was.

13 He also concluded -- really, the main dispute
14 was at birth, but there was really no -- what was even
15 clearer evidence is the further fall-off below the second
16 percentile that occurred between the third and fourth
17 month. Even their expert agreed that that was an
18 indication that some serious brain injury had occurred at
19 3 months, no later than 3 months. It could have occurred
20 at birth.

21 QUESTION: Well, let me ask you, and perhaps
22 this will bring you to your second point, was it the
23 hearing examiner's theory -- is it the Government's theory
24 that the ultimate condition, the encephalopathy, was
25 related to the microcephaly?

1 MR. GORNSTEIN: Yes, that's right, that the
2 abnormally small brain led to the difficulties that this
3 child later experienced in life, including mental
4 retardation, and cerebral palsy, that these are, in fact,
5 children with microcephaly, over 90 percent turn out to
6 have -- are mentally retarded. There's only a small
7 percentage that are not.

8 QUESTION: And is that the reason -- or perhaps
9 there are other reasons. Is that the reason that the
10 ultimate condition is not idiopathic?

11 MR. GORNSTEIN: The reason that the ultimate
12 condition is nonidiopathic is that we take a different
13 view of what that term means than did the court of
14 appeals. We think that what not idiopathic rules out is
15 the Secretary saying something like, we know, we have
16 evidence that the vaccine did not cause the child's
17 condition, but we have no idea what did.

18 The court of appeals took that one step further
19 back and said, even if we can identify a factor that
20 caused the child's condition, we then have to go back and
21 show what caused that factor, effectively requiring a dual
22 layer of causation.

23 So it wasn't enough for the Government to show
24 that the small brain, abnormally small brain led to the
25 child's condition unless the Government can then go back

1 and show what caused the child to have a small, abnormally
2 small brain size in the first place.

3 QUESTION: So are you saying that you can
4 concede that the microcephaly is idiopathic, in the sense
5 that we don't know what caused it, but that you still
6 prevail in this case?

7 MR. GORNSTEIN: That's right, because I think
8 idiopathic within the meaning of this statute simply -- it
9 describes a situation where the Secretary says, I have
10 no -- the vaccine couldn't have caused it. I have no idea
11 what did.

12 That's not this case. The Secretary is saying,
13 we know what caused the child's condition. It is the
14 preexisting microcephaly, or abnormally small brain. We
15 just don't know what caused that.

16 QUESTION: So idiopathic depends on the question
17 we're asking, I take it.

18 MR. GORNSTEIN: That's exactly right, and I
19 think that to resolve that ambiguity I think you should go
20 back to the core language in section 300aa-13, which says
21 that the Secretary -- (b), that shows that the Secretary
22 can rebut the presumption of causation by showing that the
23 child's condition is due to factors unrelated to the
24 administration of that vaccine.

25 When you just read that language, you definitely

1 get the sense that the Secretary can rebut the presumption
2 of causation by showing an alternative cause, but nothing
3 in that would require the Secretary to establish the cause
4 of the cause, and I think when you move down to the later
5 references to idiopathic, you should -- and unknown, you
6 should read them in light of that basic distinction.

7 What must be known is the cause, not the cause
8 of the cause, and the purpose of this idiopathic provision
9 was to clear up an ambiguity that would otherwise have
10 existed if they had just said, factors unrelated to the
11 administration of the vaccine, because at that point it
12 might have been the case that the Secretary could have
13 said, I know the vaccine didn't cause it. I have evidence
14 to prove it. I don't know what did, but a factor
15 unrelated did.

16 QUESTION: Does the medical profession use the
17 word, idiopathic, in the same sense that we're using it
18 here, relative depending on which question we're asking?

19 MR. GORNSTEIN: I think that's right. I can't
20 say that's 100 percent true, but I think they would
21 describe -- they could easily describe it either way,
22 depending on the question you're trying to answer.

23 QUESTION: Does your under -- does sense of
24 idiopathic, as you are saying the statute uses it, broad
25 enough to cover this situation: is a condition idiopathic

1 when that condition is part of a recognized disease, in
2 and of itself, although we don't know what causes the
3 disease?

4 For example, if you had a vaccine, one of the
5 symptoms of which is people get -- sometimes get forgetful
6 after a couple of days, and someone with Alzheimer's
7 disease had the vaccine and was indeed forgetful. We
8 wouldn't say, in effect, I suppose, that Alzheimer's
9 disease causes forgetfulness. That's what we mean by
10 Alzheimer's disease, so in that case, if the Secretary
11 came in with evidence there was preexisting Alzheimer's
12 disease, would that be sufficient for rebuttal under your
13 understanding of idiopathic?

14 MR. GORNSTEIN: As long as you could show that
15 the Alzheimer's preexisted the --

16 QUESTION: Yes.

17 MR. GORNSTEIN: -- the administration of the
18 vaccine, yes, because --

19 QUESTION: So nothing is idiopathic, then, I
20 guess, if it is a condition which is sort of a recognized
21 set of symptoms or conditions within normal diagnostic
22 practice.

23 MR. GORNSTEIN: That's right, and cancer would
24 be a good example. If you had a preexisting cancer, and
25 you knew that led to certain brain problems, mental

1 retardation or whatever, even if the cancer was idiopathic
2 in the sense that we don't know what caused the cancer,
3 it's not idiopathic within the meaning of the statute,
4 because it is a specific factor that the Secretary is
5 relying on to explain the child's condition. The
6 Secretary would not be saying in that case, I have no idea
7 what caused this child's condition.

8 The one other reason that I would give in
9 support of our interpretation, other than the statutory
10 language that I relied on, is that the court of appeals'
11 interpretation is really inconsistent with the purposes of
12 the compensation program, because by adding a second layer
13 of causation, they are really requiring compensation in
14 cases in which everyone would agree that the vaccine could
15 not have caused the child's condition because something
16 else did. That is not consistent with Congress' intent to
17 limit compensation to vaccine-related injuries.

18 If the Court has nothing else, I'll reserve the
19 balance of my time for rebuttal.

20 QUESTION: Very well, Mr. Gornstein.

21 Mr. Moxley, we'll hear from you.

22 ORAL ARGUMENT OF RICHARD THOMAS MOXLEY

23 ON BEHALF OF THE RESPONDENTS

24 MR. MOXLEY: Mr. Chief Justice, and may it
25 please the Court:

1 On behalf of Maggie Whitecotton, we are not
2 contending for a departure from the court of appeals
3 decision, nor are we contending for a rule based on a
4 generous interpretation of the statute, nor are we
5 contending for an interpretation of the statute.

6 We are contending for an enforcement of the
7 express language of section 300aa-13(a)(2)(A), found at
8 page 3 of the petitioner's brief, which states that the
9 term "factors unrelated to the administration of the
10 vaccine" does not include any idiopathic, unknown,
11 hypothetical, or undocumentable cause, factor, injury,
12 illness, or condition.

13 On the subject of microcephaly, we do not
14 believe that microcephaly qualifies as a first symptom of
15 encephalopathy. Microcephaly is the measure of the
16 outside of the head at its largest point. It's not a
17 measure of the function of the brain inside. Any error in
18 measurement is always in measuring it too small, because
19 the largest part of the head is what the doctor looks for.

20 Microcephaly is not a diagnosis. It is not a
21 disease any more than short stature is a symptom of
22 disease.

23 QUESTION: Isn't that a matter, counsel, for
24 medical judgment, and weren't there expert witnesses who
25 testified that that was a manifestation, or symptom, of

1 the ultimate disability?

2 MR. MOXLEY: Correctly stated, no medical
3 authority would consider it to be a symptom. Correctly
4 stated, a medical authority would consider it to be a
5 finding, and to call it a symptom is to be sloppy in the
6 use of the language.

7 QUESTION: Well, what did the experts who
8 testified in this case call it?

9 MR. MOXLEY: I cannot recall, Your Honor, that
10 experts ever called it a symptom, as such.

11 In the context of the statute, the statute
12 prescribes what symptoms of encephalopathy are. The
13 symptoms of encephalopathy are set forth extensively in
14 section 14(b)(3)(A), the age and qualifications to the
15 interpretation of the Vaccine Injury Table, and proof of
16 an encephalopathy, in table time at least, or even outside
17 of table time, under that statute is very narrow, and it
18 focuses on specific medical findings such as EEG, such as
19 bulging fontanel, it even says that the classical signs of
20 a DPT reaction are compatible with but not proof of an
21 encephalopathy, so --

22 QUESTION: Are they exclusive? Are they recited
23 to be exclusive?

24 MR. MOXLEY: They are not exclusive, but I don't
25 believe --

1 QUESTION: So what difference does it here
2 whether it's called a symptom or anything else? As I
3 understand it, the finding below was that there was a
4 pathological condition of the brain which was evidenced by
5 the small head size, if you like, but --

6 MR. MOXLEY: That is correct --

7 QUESTION: -- but that there was that
8 pathological condition before the vaccine was
9 administered, and that's what needs to be proven, isn't
10 it?

11 MR. MOXLEY: Well, what we believe this Court
12 should do is articulate a rule which will guide us in our
13 practice, and we believe the enforcement of the plain
14 language of the statute sets forth a sequence of analysis
15 that must be performed. We believe that what the special
16 master did was skipped a step in the sequence. The
17 sequence in the statute is first, 13(a)(1)(A), and then
18 13(a)(1)(B).

19 13(a)(1)(A) first calls for the inquiry as to
20 whether or not the petitioner has proven a table case. In
21 this case, the proof of this case, in the Government's
22 proof of this case, the Government used the table reaction
23 as part and parcel of the proof of the preexisting
24 condition, and the special master skipped over the table
25 reaction to get into the causation inquiry before the

1 special master made the findings that give us the benefit
2 of the presumption.

3 QUESTION: But that wasn't the basis for the
4 court of appeals ruling, was it?

5 MR. MOXLEY: In a very strong sense, Your Honor,
6 I believe it is.

7 QUESTION: Well, the court of appeals -- I
8 understood the court of appeals to leave the findings of
9 the special master undisturbed.

10 MR. MOXLEY: I agree that that happened,
11 although the special master did violence to the statute,
12 and the court of appeals was able to determine the case in
13 that -- because of that legal error.

14 We believe the court of appeals said what they
15 can't do, but we believe that this Court should set forth
16 a rule telling us what they can do, and we believe that
17 the proof --

18 QUESTION: Are you defending the reasoning of
19 the court of appeals here?

20 MR. MOXLEY: Oh, very much so, Your Honor.

21 QUESTION: Well, but since the court of appeals
22 dealt virtually not at all with the findings of the
23 special master, I don't see why you should concentrate on
24 the findings of the special master, then.

25 MR. MOXLEY: Oh, I don't so much focus on the

1 findings, Your Honor, as the process which the special
2 master went through, and the special master skipped over
3 the finding of the table injury.

4 The special master found, parenthetically, as it
5 were, that technically the petitioners had put on a table
6 case. Our strongest argument is that the statute requires
7 a focus on the table time injury. As implied by our
8 statement of the questions presented, we believe that the
9 Secretary must prove through a logical sequence of cause
10 and effect that the so-called factor unrelated can be
11 shown as the cause of the table injury.

12 In this case, the special master's analysis was
13 whether or not the so-called factor unrelated was
14 consistent with the ultimate outcome.

15 We believe it would be legally and logically
16 inconsistent to allow the Government to use the same facts
17 which give rise to the presumption to also defeat the
18 presumption, and the Government syllogism of causation in
19 this case was that this child had to have an organic brain
20 syndrome because this child had a small head, and this
21 child had seizures, and this child had cerebral palsy, et
22 cetera.

23 QUESTION: Well, let's look at (a) (1) (A).
24 That's what you say was not adequately done. It requires
25 a showing of the matters required by section

1 300aa(11)(c)(1). Where is that?

2 MR. MOXLEY: 11(c)(1) is the statute found at
3 page 4 of the petitioner's brief. 11(c)(1) merely sets
4 forth the requirements of the petition that --

5 QUESTION: The bottom of page 4, Vaccine Injury
6 Table, is that what you're talking about?

7 MR. MOXLEY: No, it -- the requirements of the
8 petition. The -- 11(c)(1)(C)(i) says a petition shall
9 contain documentation.

10 QUESTION: Where are you reading from,
11 Mr. Moxley?

12 MR. MOXLEY: I -- the statute is on page 3, I'm
13 sorry.

14 QUESTION: Page 3 --

15 MR. MOXLEY: Of the petitioner's brief.

16 QUESTION: -- of the petitioner's brief, thank
17 you.

18 MR. MOXLEY: Page 2. Page 2 is section 11. It
19 says, the petition shall contain documentation that the
20 person who suffered such injury sustained or had
21 significantly aggravated any illness set forth in the
22 Vaccine Injury Table, and the first symptom or
23 manifestation of the onset or significant aggravation
24 occurred within the time set forth in the table.

25 Now, it's --

1 QUESTION: And it goes on, and the first symptom
2 or manifestation of the onset or of the significant
3 aggravation of any such illness, disability, blah, blah,
4 blah, blah, blah.

5 MR. MOXLEY: Yes. Now --

6 QUESTION: Don't leave that out. That's central
7 to the case, isn't it?

8 MR. MOXLEY: Well, the thing that -- I agree,
9 yes, Your Honor.

10 The matter that is central to the case is that
11 what happened to Maggie Whitecotton in table time is the
12 onset of a table condition, a residual seizure disorder.

13 QUESTION: Well, but that's the debate. I
14 mean --

15 MR. MOXLEY: Well, the special master --

16 QUESTION: -- you simply just can't say that the
17 special master ignored that provision.

18 MR. MOXLEY: The special master found, Your
19 Honor, that the child technically, "technically" satisfied
20 the provisions of the table with regard to a residual
21 seizure disorder. That is, the child's first seizure
22 occurred in table time.

23 QUESTION: But --

24 MR. MOXLEY: That has to be the onset of a
25 significant aggravation. As a matter of law, a table

1 injury, ab initio, in table time, has to be something that
2 satisfies the table.

3 QUESTION: But the illness is not the seizure.
4 Surely the seizure is a manifestation of an illness, isn't
5 it? Is the seizure the illness? You ask what his illness
6 is, he has --

7 MR. MOXLEY: The encephalopathy, the acute
8 encephalopathy --

9 QUESTION: All right.

10 MR. MOXLEY: -- was the injury, Your Honor, yes.

11 QUESTION: All right, and what this requires is
12 that the first symptom or manifestation of the onset or of
13 the significant aggravation of the illness have occurred
14 within the period after the vaccine --

15 MR. MOXLEY: Yes, Your Honor, but --

16 QUESTION: -- was administered.

17 MR. MOXLEY: A residual seizure disorder --

18 QUESTION: And that's what the debate is about.

19 MR. MOXLEY: A residual seizure disorder is a
20 table injury and it is a specific table injury, and it is
21 a specific species of table injury, and it's also the most
22 specific well-known species of vaccine injury.

23 QUESTION: But counsel, the special master found
24 that the child had not, in fact, suffered a residual
25 seizure disorder, and you didn't petition for cert on

1 that. I didn't think that was before us here.

2 The CA Fed has not addressed that, has it? I
3 just didn't think that argument was even here.

4 MR. MOXLEY: Your Honor, I believe the CA Fed
5 recognized that the seizure, under the statute, was
6 clearly the onset, the first onset of symptomatic
7 encephalopathy, and I believe that's a correct holding.

8 QUESTION: Yes, but you were just arguing this
9 residual seizure disorder point, and I understood that
10 that issue was not here. It was decided against you by
11 the special master, and it isn't here.

12 MR. MOXLEY: The special master did say that the
13 child suffered a residual seizure disorder. The special
14 master said that the child doesn't now suffer from a
15 residual seizure disorder. What that doesn't take account
16 of, Your Honor, is the fact that a residual seizure
17 disorder and an encephalopathy are overlapping
18 definitions, and the residual seizure disorder is in the
19 table to satisfy by itself the requirements of the table
20 to show a table time encephalopathy.

21 The CA Fed showed that the child -- held that
22 the child had suffered a table time encephalopathy, and I
23 don't think anybody factually disputes that.

24 QUESTION: Did the special master hear medical
25 evidence?

1 MR. MOXLEY: The special master did, Your Honor.
2 The special master synthesized his findings from the
3 literature, and we submit that they are not the type of
4 finding to be given deference by an appellate court
5 because they are logically absurd on their face.

6 If 90 percent of the children with this head
7 size had seizure disorders --

8 QUESTION: But to repeat Justice O'Connor's
9 point, my impression was the findings simply are not here.

10 MR. MOXLEY: I agree that we're not arguing --

11 QUESTION: But you keep criticizing them.

12 MR. MOXLEY: I understand that, Your Honor.

13 Our --

14 QUESTION: You agree, I take it, that there can
15 be different kinds of symptoms evidencing the same cause,
16 right, evidencing the same disease. A disease can have
17 more than one symptom, right?

18 MR. MOXLEY: Many manifestations, yes, Your
19 Honor.

20 QUESTION: Now, suppose that a symptom of
21 encephalopathy occurred before the administration of the
22 vaccine.

23 MR. MOXLEY: Yes, Your Honor.

24 QUESTION: The presumption would not be
25 satisfied then, would it?

1 MR. MOXLEY: I -- no, I don't agree with that,
2 Your Honor, because --

3 QUESTION: All right. I think that's what we're
4 here to argue about.

5 MR. MOXLEY: Yes. The issue -- the issue --

6 QUESTION: And I think it would assist the Court
7 if you would argue that point, because that's where you're
8 in disagreement with the Government, and that's why the
9 case is here.

10 MR. MOXLEY: Yes, Your Honor. The issue is
11 whether or not an acute encephalopathy occurs within table
12 time. If the child has a preexisting condition, the focus
13 is whether or not that acute encephalopathy radically
14 changes that child's future prognosis. If the
15 encephalopathy does radically change that child's future
16 prognosis, that child has had a significant aggravation.

17 There is no way to trigger the significant
18 aggravation presumption other than to have an acute
19 encephalopathy in table time, and the sudden onset of
20 seizures in table time, and the diagnosis in the record by
21 the treating physicians of a DPT encephalopathy, satisfies
22 that burden whether or not the child had a preexisting
23 condition.

24 QUESTION: Well, it's necessary to satisfy the
25 burden, but it's not sufficient to satisfy the burden,

1 because you've also got to show that it was -- that these
2 symptoms were the manifestations, the first manifestations
3 of the onset of the disease, and that in and of itself
4 doesn't follow merely from introducing evidence that after
5 the vaccination the symptoms occurred. You've got to
6 introduce something else, haven't you?

7 MR. MOXLEY: I don't exactly agree with that,
8 Your Honor. The issue is -- is whether or not the
9 disease, the alleged disease necessarily includes the
10 symptoms.

11 All are in agreement that the alleged organic
12 brain syndrome which allegedly preexisted the table time
13 reaction, all are in agreement that the table time
14 reaction is not typical of organic brain syndrome. All
15 are in agreement that seizures are not typical of organic
16 brain syndrome. All are in agreement that cerebral palsy
17 is not necessarily a manifestation of organic brain
18 syndrome.

19 QUESTION: Well, they may not be typical, but if
20 in fact the evidence is that they were caused, and you
21 don't also introduce some evidence to the effect that
22 there was no other manifestation of the disease prior to
23 vaccination, you haven't touched all the bases required in
24 the statute, have you?

25 MR. MOXLEY: I believe that -- I believe it gets

1 back to 13(a)(2)(A).

2 QUESTION: Well, what's the answer to my
3 question first?

4 MR. MOXLEY: The answer is that there was --
5 that microcephaly is not a disease. Microcephaly might be
6 a symptom of a disease. Chronic organic brain syndrome is
7 not a disease, either. It is an idiopathic disorder. It
8 is totally speculative.

9 QUESTION: Well, no one is claiming in this case
10 that microcephaly is itself the disease. I mean, I --
11 maybe I'm missing your point --

12 MR. MOXLEY: I believe the Government has.

13 QUESTION: -- but I don't think that responds
14 either to the Government's position or to my question.

15 MR. MOXLEY: I believe, Your Honor --

16 QUESTION: I thought the disease was
17 encephalopathy, and the Government is simply saying
18 that -- well, I -- strike what the Government is saying.

19 It seems to me that in order to make the case
20 that you have to make in the first instance, you would
21 have to show not merely that there was some manifestation,
22 some symptoms of that following the vaccination, but that
23 in fact it was the first symptom, that it was the symptom
24 of an onset, and if you don't show that, you haven't, in
25 fact, made out your prima facie case, isn't that so?

1 MR. MOXLEY: I don't believe that it has to be
2 the first symptom in a significant aggravation case. The
3 legislative intent has a specific -- fact-specific example
4 in it of the aggravation of a seizure disorder, and all it
5 requires is that the seizures become more frequent, so the
6 first --

7 QUESTION: Let's say it's not a -- let's leave
8 aside the aggravation point. If you're just talking about
9 the first symptom of the illness, then you would agree
10 that you must show not only that there was a symptom
11 within the table time after the vaccination, but that it
12 was the first symptom.

13 MR. MOXLEY: That is correct for what we call an
14 onset case, Your Honor, yes. I don't dispute that at all.

15 QUESTION: Your position is that this is an
16 aggravation case, is that correct?

17 MR. MOXLEY: Our position is that this case
18 satisfies the table presumption for significant
19 aggravation.

20 QUESTION: So that if I understand you correctly
21 that even though there might have been a symptom of the
22 disease before the vaccination, therefore it's not --
23 therefore what happened after the vaccination is not the
24 first symptom of the onset, nevertheless, I understand
25 your position, there could be a serious aggravation caused

1 by the vaccine, and the first symptom of that was the
2 seizure within 3 days.

3 MR. MOXLEY: That is correct, Your Honor.
4 The --

5 QUESTION: So that if there -- but that's not
6 the theory of the court of appeals, or am I right on that?

7 MR. MOXLEY: Well, it's both. Our theory is
8 that we had actually the first symptom of an
9 encephalopathy as defined by the act in table time after
10 the shot.

11 QUESTION: You make two arguments. 1) you say
12 the small head size is not a symptom.

13 MR. MOXLEY: Yes.

14 QUESTION: That's one of your arguments. And
15 alternatively you argue, under the table, that the seizure
16 within 3 days, or whatever the period was, was the first
17 symptom of a serious aggravation.

18 MR. MOXLEY: That is correct, Your Honor.

19 QUESTION: So you have two alternative
20 arguments.

21 MR. MOXLEY: That is correct.

22 QUESTION: What did the finder of fact conclude
23 as to that?

24 MR. MOXLEY: The finder --

25 QUESTION: I mean, surely that's a factual

1 question.

2 MR. MOXLEY: The finder of fact found that we
3 technically fit the table, but that maybe Congress did not
4 intend for the table to be literally applied.

5 QUESTION: Can you point to the words in the
6 finder of fact's findings that say what you've just
7 summarized?

8 MR. MOXLEY: There is a footnote. One would
9 have to look in the petition for writ, and have to look
10 for the special master's decision. Page 27a of the
11 petition for writ of certiorari.

12 The special master found that the child's
13 condition satisfied the injury table but that he did not
14 have to find a table injury, and footnote 4, he said his
15 conclusion was based on a literal reading. However,
16 Congress may have intended something else.

17 We believe that we need a rule that will govern
18 us in our practice. We believe that we need a rule which
19 puts the burden on the Government after we satisfy our
20 burden, and does not put a burden on us to disprove the
21 Government's case in the satisfaction of our burden.

22 QUESTION: If you need a rule, I mean, I thought
23 this case came here on a slightly different theory.

24 Imagine a baby is born. On the 3rd February it
25 has a seizure. On the 3rd March, it has another seizure.

1 On the 1st April it gets some DPT vaccine, and on the 3rd,
2 it has a third seizure.

3 In that circumstance, I thought the statute
4 makes clear that you have not -- will not be able to
5 recover.

6 MR. MOXLEY: It doesn't --

7 QUESTION: You were not able, in that situation,
8 to show what, I guess, the statute here in 11(c) requires,
9 that you have to show that -- what are the exact words,
10 that the first symptom or manifestation of the injury or
11 the aggravation occurred within 3 days after the DPT
12 vaccine.

13 MR. MOXLEY: I agree, Your Honor.

14 QUESTION: And yet the Fed Circuit seemed not to
15 do that simple thing. Rather, they seemed to say that
16 even if it were just the case I was describing, that that
17 words wouldn't apply.

18 That's what I thought the issue was initially,
19 and then that seems to be mixed up with a different issue,
20 is, is this small head size like the prevaccine seizures
21 or not like the prevaccine seizures? You're saying not,
22 it wasn't a symptom or manifestation, and I guess
23 initially the other side said it was. Am I right?

24 MR. MOXLEY: You are.

25 QUESTION: If not, explain why I'm not. Am I --

1 I am right?

2 MR. MOXLEY: The thing that would have to be --

3 QUESTION: I'd like to be right.

4 MR. MOXLEY: Yes, Your Honor. The thing that
5 would have to be added to your significant aggravation
6 scenario --

7 QUESTION: Yes.

8 MR. MOXLEY: -- in order for us to satisfy our
9 case to show -- our burden to show a table case would be
10 for that seizure after the shot to be the first of weekly
11 seizures.

12 QUESTION: There'd have to be some change. In
13 the pure case that I imagine, everybody's in agreement.
14 Is that right?

15 MR. MOXLEY: I believe so, yes.

16 QUESTION: And so then the question is, was it
17 somehow an aggravation, a symptom of a significant
18 aggravation, the first symptom of a significant
19 aggravation --

20 MR. MOXLEY: Yes, Your Honor.

21 QUESTION: -- and if so, the statute seems to
22 say, if it's the first symptom of the significant
23 aggravation -- that's what -- the words it uses, then, if
24 you show that, you prevail, but then what's the legal
25 argument?

1 They're saying, and as it comes up here, it
2 seems as if there is a finding that it isn't the first
3 symptom of a significant aggravation. There was a disease
4 here that preexisted, and there was no significant change.
5 Those are fact-findings.

6 MR. MOXLEY: Your Honor, in the -- there's a
7 legal standard there that's implicit. The Office of
8 Special Masters has articulated a presumption of normalcy
9 for the child at the time of the shot if the child has had
10 no overt symptoms of encephalopathy, and if you'll look at
11 the Government's reply brief, they would put the burden on
12 us of proving that the child was normal at the time of the
13 shot, and we believe that we need an articulation of what
14 this statute means in terms of what it means to our
15 practice, and we believe that the Court should find that
16 this child has the right to be presumed to be normal if
17 she had no symptoms of encephalopathy that fit the
18 statute --

19 QUESTION: Well, what the statute says, the
20 statute says that you, the petitioner, have to demonstrate
21 by a preponderance of evidence matters in the petition, in
22 300aa(11)(c)(1). One of those matters is that the first
23 symptom or manifestation of the significant aggravation
24 occurred within 3 days after the DPT vaccine, so it would
25 seem to say that you have to show that. So why wouldn't

1 it?

2 MR. MOXLEY: Well, the first symptom does not
3 require a showing that the child was normal. The first
4 symptom is the first symptom. The seizure in this case
5 was, indeed, the first symptom. There were no symptoms.
6 Microcephaly is not a symptom.

7 QUESTION: Mr. Moxley, may I come back to
8 Justice Ginsburg's question about what the finder of fact
9 had to say about aggravation?

10 You referred us to page 27a, and footnote 4. I
11 have read it now three times, and I find not a word about
12 aggravation. It says nothing about aggravation.

13 MR. MOXLEY: The special master went into the
14 question of comparing the ultimate condition, consistency
15 of ultimate conditions.

16 QUESTION: This is the closest you can find to a
17 finding by the special master that this was a significant
18 aggravation --

19 MR. MOXLEY: No, Your Honor.

20 QUESTION: Page 27a.

21 MR. MOXLEY: No, Your Honor.

22 QUESTION: Well, give me another page.

23 MR. MOXLEY: That is the --

24 QUESTION: I don't find a mention of aggravation
25 on page 27.

1 MR. MOXLEY: I agree. I --

2 QUESTION: Well then, why did you cite that page
3 in response to Justice Ginsburg's question?

4 MR. MOXLEY: I believe that she was asking me if
5 I was -- if I could point out whether or not the Court had
6 addressed the issue of a table injury, Your Honor.

7 QUESTION: I thought it was aggravation.

8 MR. MOXLEY: I believe that --

9 QUESTION: Well, I'll ask you. Aggravation.
10 What did the --

11 (Laughter.)

12 QUESTION: What did the finder of fact have
13 to -- you're contending this was an aggravation. Where
14 did the finder of fact find an aggravation?

15 MR. MOXLEY: The finder of fact used the Massoci
16 test as articulated -- as ostensibly argued in my brief,
17 which was to compare the ultimate condition of the
18 speculative -- compare the ultimate condition to the
19 outcome from the speculative organic brain syndrome.

20 Because the special master focused on the final
21 outcome rather than on the table injury, the special
22 master was able to find that the causation of the ultimate
23 outcome was from the speculative hypothetical preexisting
24 condition.

25 QUESTION: I think what you're saying is, not at

1 all. aggravation. The issue to us is whether or not the table

2 MR. MOXLEY: Not at all, properly. That is

3 correct, your Honor. whether or not the ultimate condition

4 QUESTION: Not at all, that the finder of fact the

5 did not find any aggravation. possibility --

6 MR. MOXLEY: No. He addressed aggravation at tion

7 page 36a -- asked. I think that there was something the fact-

8 QUESTION: Ah. this is on page 43a ; - "no

9 MR. MOXLEY: -- of that same -- in that same
10 opinion.

11 QUESTION: All right. line, " so he made a finding

12 MR. MOXLEY: A comparison of the condition prior

13 to the administration of the vaccine and an exercise of

14 deciding whether or not that condition was consistent with

15 the current condition. If you believe that the child is

16 brain-injured prior to the shot, there's a way of saying

17 that the ultimate condition is always consistent --

18 QUESTION: Where on 36a does the special master
19 talk factually about aggravation? you stand up there at the

20 MR. MOXLEY: I don't believe the special master
21 did. I don't believe the special -- our Honor. I don't

22 QUESTION: Did the special master anywhere make
23 any factual finding that there was an aggravation? Yes or

24 no. MR. MOXLEY: I don't mean to confuse the Court.

25 MR. MOXLEY: No. He found that there was no

1 aggravation. The issue to us is whether or not the table
2 condition itself is an aggravation, and the special
3 master's analysis is whether or not the ultimate condition
4 is an aggravation, and we believe that it strips us of the
5 statutory presumption of compensability --

6 QUESTION: Mr. Moxley, in answer to the question
7 that was asked, I think that there was something the fact-
8 finder said. He said -- this is on page 43a -- "no
9 significant aggravation of Maggie's underlying brain
10 disorder was manifested within 3 days following the
11 administration of the DPT vaccine," so he made a finding
12 that there was no significant aggravation.

13 MR. MOXLEY: I agree, Your Honor. I believe
14 that the onset of a residual seizure disorder in the --

15 QUESTION: Mr. Moxley, we've been questioning
16 you several times about findings of aggravation. You
17 answered me just a moment ago that the special master made
18 no finding. Now Justice Ginsburg points out that he made
19 a very express finding. How can you stand up there at the
20 rostrum and give these totally inconsistent answers?

21 MR. MOXLEY: I'm sorry, Your Honor. I don't
22 mean --

23 QUESTION: Well, you should be.

24 MR. MOXLEY: I don't mean to confuse the Court.

25 QUESTION: Well, you -- perhaps you haven't

1 confused us so much as just made us gravely wonder, you
2 know, how well-prepared you are for this argument.

3 MR. MOXLEY: Your Honor, it is our assertion
4 that the onset of a residual seizure disorder in table
5 time is a significant --

6 QUESTION: Your time has expired.

7 MR. MOXLEY: -- aggravation as a matter of law.

8 Thank you, Your Honor.

9 QUESTION: Mr. Gornstein, you have 11 minutes
10 remaining.

11 REBUTTAL ARGUMENT OF IRVING L. GORNSTEIN

12 ON BEHALF OF THE PETITIONER

13 MR. GORNSTEIN: Just two quick points. One is
14 that the court of appeals did not reach the question of
15 significant aggravation. It decided this case as an onset
16 case, and that's clear from page 5a of our -- to the
17 petition for a writ of certiorari, where they quote the
18 language from the table that refers to onset.

19 QUESTION: It is correct, is it not, that your
20 opponent does rely in part on it being an aggravation
21 case?

22 MR. GORNSTEIN: Yes, and I was going to say that
23 the special master found that there was no significant
24 aggravation. There is a discussion of the evidence in
25 support of that.

1 QUESTION: The theory of the special master was,
2 you compare the condition at the time of the vaccination
3 with the condition in the long run, as I understand it.

4 MR. GORNSTEIN: I would say that that was part
5 of the analysis.

6 QUESTION: And your opponent's argument is that
7 the seizure itself was an aggravation, isn't that right?

8 MR. GORNSTEIN: That's their theory, and I --

9 QUESTION: And that's what the table -- that's
10 the theory of the table under his view of the statute.

11 MR. GORNSTEIN: His theory was that the seizure
12 was the manifestation of a significant aggravation, and
13 the special master addressed that and said that it wasn't
14 because the seizures were very brief and transient, that
15 after the seizures in the table period, that the child
16 returned to her prevaccine neurological status, that she
17 continued to progress at the basically kind of slow but
18 sure pace, and that she ultimately --

19 QUESTION: Is it correct that the seizure -- as
20 to the first seizure the child had?

21 MR. GORNSTEIN: That is the first seizure the
22 child had, yes.

23 QUESTION: So at least there's an argument that
24 hasn't been resolved by the courts below as to whether
25 that might itself satisfy the requirements of the table.

1 MR. GORNSTEIN: Well, two of the three courts
2 below resolved it, but the court of appeals did not.

3 QUESTION: Right.

4 MR. GORNSTEIN: I would say the special master
5 in the Court of Federal Claims, and that issue is open on
6 remand --

7 QUESTION: Yes.

8 QUESTION: But Mr. Gornstein I think has raised
9 a point which he'd like guidance on in this, because
10 suppose that this child has the seizure within 3 days
11 after the DPT vaccine is administered, and suppose that
12 really is the first seizure, and the purpose of this
13 statute is so you don't have to go into a long thing about
14 causation, you don't have to go into a long thing about
15 whether there was some other, mysterious thing that caused
16 it.

17 Well, you could, on your interpretation, have to
18 go into that long thing, because if mysterious disease X
19 that nobody knows about in fact had caused something,
20 arguably, prior to the administration of the vaccine, like
21 a head-twisting, or something, then it would be open to
22 the Government to say, oh, you see, that was really the
23 first symptom, in which case by the back door you'd bring
24 in all these other mysterious, idiopathic or whatever,
25 causes.

1 I think -- I'm not positive, but I think that's
2 the kind of thing that was bothering him, and I think that
3 that's the sort of thing he'd like an interpretation
4 about, so what would we say about that?

5 MR. GORNSTEIN: I'm not sure I follow the
6 hypothetical.

7 QUESTION: Well, I mean, there's a mysterious
8 idiopathic cause, some weird thing, and the Government
9 wants to say, this weird thing is the cause.

10 MR. GORNSTEIN: Okay. I --

11 QUESTION: Now, they're forbidden by the statute
12 to bring that up, but they might say, wait a minute, there
13 was a first symptom. The first symptom was a neck-
14 twisting or something --

15 MR. GORNSTEIN: Well, I think --

16 QUESTION: -- even before.

17 MR. GORNSTEIN: Well, I think there has to be
18 medical evidence that --

19 QUESTION: Yes, there is. There's a doctor who
20 comes in and --

21 MR. GORNSTEIN: -- to say that that is a
22 manifestation of encephalopathy, and if that's true, then
23 the child has not demonstrated the prima facie case, and
24 then you turn to the question of significant aggravation,
25 and you look to see whether the seizure is a manifestation

1 of something that, a marked change in the condition *for
2 the worse.

3 QUESTION: You could bring that in even with the
4 weird, mysterious, idiopathic mystery disease? You see,
5 that's what's worrying him, the weird, idiopathic mystery
6 disease which had its first symptom, according to Dr. X,
7 before the vaccine was administered.

8 MR. GORNSTEIN: You could, but I'm not sure I
9 see what the problem with that is, when the statute, the
10 terms of the statute say that the claimant has to show
11 that the first symptom or manifestation of encephalopathy
12 occurred after a vaccine administration.

13 And if there is a preexisting manifestation of
14 encephalopathy, and there is medical evidence to that
15 effect, it's just that we don't know what caused the
16 encephalopathy, then there's no presumption, because the
17 natural -- the natural implication of the evidence is that
18 the child already had something, and then the statute says
19 you look to whether there's significant aggravation.

20 QUESTION: May I --

21 QUESTION: Mr. Gornstein, assume -- I'm sorry.

22 QUESTION: Just-- I want to follow up one point
23 on the aggravation. Supposing that it is true that if
24 3 days after -- within 3 days after an aggravation, the
25 child has the first seizure the child has ever had, and at

1 that point in time, that would be one symptom of a serious
2 aggravation.

3 Now, it may turn out, over -- if you look at it
4 a year later that there never was a serious aggravation.
5 This would have happened anyway. But is it not true that
6 looking at it as of the period 48 hours after the
7 vaccination, the table condition is satisfied if it is a
8 symptom of something that she may, in fact, not have?

9 MR. GORNSTEIN: I think that what the statute
10 says is it has to be a manifestation of a significant
11 aggravation, which means --

12 QUESTION: No, it has to be a symptom.

13 MR. GORNSTEIN: A manifestation of a significant
14 aggravation.

15 QUESTION: Right.

16 MR. GORNSTEIN: And the -- but the significant
17 aggravation is defined --

18 QUESTION: It's a symptom or a -- a first
19 symptom or manifestation, or of the significant
20 aggravation. It seems to me that -- it seems to me, in
21 other words, the statute could be satisfied by someone
22 who's perfectly healthy, if they had the wrong symptom.

23 MR. GORNSTEIN: If it was a -- if someone could
24 say, testify, based on that manifestation, that that was a
25 manifestation of a marked deterioration in the child's

1 condition, because significant aggravation is defined on
2 page 6 of our brief, 300aa(33)(4), the term significant
3 aggravation means any change for the worse in a
4 preexisting condition which results in markedly greater
5 disability, pain, or illness, accompanied by substantial
6 deterioration of health.

7 So you have to be able to say that that seizure
8 was a manifestation of that. That is, that it was a
9 manifestation of a change for the worse in a preexisting
10 condition which results in markedly greater disability,
11 pain, or illness, and the special master carefully
12 examined that and found that it was not.

13 Seizures can be entirely benign. They can be
14 something that is a manifestation of significant
15 aggravation. They can be a manifestation of something in
16 between benign and significant aggravation.

17 QUESTION: It seems to me if they're a symptom,
18 that's all the statute requires, and that's what you're
19 opponent argues here in his alternative theory.

20 MR. GORNSTEIN: On significant aggravation?

21 QUESTION: Yes.

22 MR. GORNSTEIN: Well, I think it has to -- I
23 would repeat my argument that it's not enough for it to be
24 a symptom. It has to be a manifestation or a symptom of a
25 significant aggravation.

1 QUESTION: But manifestation is in the
2 dysjunctive, compared to symptom, symptom or
3 manifestation.

4 MR. GORNSTEIN: That's right, and it was -- the
5 special master found it was neither in this case.

6 QUESTION: My I try out two alternatives --

7 MR. GORNSTEIN: Sure.

8 QUESTION: -- to see if I understand your
9 position.

10 Assume Justice Breyer's hypothetical. The first
11 seizure occurs whatever it was, a day after the
12 vaccination. Prior to the vaccination there has been
13 head-twisting, neck-twisting of some sort.

14 The medical evidence, the Government presents
15 medical evidence in the first case, the first
16 hypothetical, by a doctor who says, in my judgment there
17 probably was a relationship between the seizure and the
18 preexisting neck-twisting. That is not a standard
19 syndrome, but I think that's what we're ultimately going
20 to find, so for that reason I posit a cause of the seizure
21 which is not the vaccination. That's hypothetical number
22 1.

23 Hypothetical number 2, the doctor says, there is
24 in fact a recognized syndrome or condition in which
25 seizures and neck-twisting go together. You get neck-

1 twisting, you know you're going to get a seizure or
2 there's going to be a high probability of a seizure later
3 on. This conjunction of symptoms is readily observed and
4 understood as kind of a standard diagnostic category, and
5 we call that category disease X. Disease X has nothing to
6 do with vaccinations. You would have gotten the seizure
7 anyway because you had the neck-twisting.

8 As I understand your position, in the first
9 case, the claimant would have made out at least a case for
10 the presumption. It would not have been affected by this
11 hypothesis of an idiopathic cause which nobody but the
12 doctor testifying knows about.

13 In the second case, the presumption would not
14 apply, because, in fact, no reasonable finder of fact
15 would conclude, if they accepted the doctor as telling the
16 truth and as a competent medical expert, no reasonable
17 finder of fact would -- in fact would conclude that
18 this -- that the seizure was, in fact, a first
19 manifestation of an aggravation.

20 Is that your position?

21 MR. GORNSTEIN: Justice Souter, I'm not sure I
22 agree with that description.

23 QUESTION: Okay. Well then, correct me then.

24 MR. GORNSTEIN: I think that as long -- in the
25 first case, even if you don't know what caused it, if you

1 can say, this is a manifestation of encephalopathy, and
2 that is the table condition that the claimant is seeking
3 compensation for, and the person doesn't know exactly --

4 QUESTION: Well, you mean, even if you don't
5 know what causes encephalopathy --

6 MR. GORNSTEIN: That's right.

7 QUESTION: -- but there is always seizures that
8 go with encephalopathy --

9 MR. GORNSTEIN: But that --

10 QUESTION: -- and you have evidence of
11 preexisting encephalopathy. Okay.

12 MR. GORNSTEIN: But that's the key, is
13 encephalopathy, because that's what the table says you can
14 recover for, either the onset of encephalopathy, or a
15 significant aggravation of encephalopathy.

16 That's the key condition, and so when you go
17 back and say, what happened before table time, the
18 question you're asking under the first part of our
19 analysis is, was there a symptom or manifestation of
20 encephalopathy, not of head-jerking, or anything else. It
21 could be -- you get nowhere with head-jerking.

22 On the second part of our analysis, if you could
23 show that head-jerking is some sort of defined condition
24 that causes, ultimately, encephalopathy, then you would
25 win as a -- on a factor unrelated, even if the first

1 symptom or manifestation of that condition occurred after
2 the administration of the vaccine, and that's the
3 difference between our two theories.

4 QUESTION: What about the residual seizure
5 disorder point? I thought it was decided by the master
6 that that was not established.

7 MR. GORNSTEIN: That's right. The special
8 master found that there was not a residual seizure
9 disorder because the -- one of the requirements is that
10 the effects last for a period of more than 6 months, and
11 the special master found that that was not so with respect
12 to residual seizure disorder.

13 CHIEF JUSTICE REHNQUIST: Thank you,
14 Mr. Gornstein. The case is submitted.

15 (Whereupon, at 11:05 a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

DONNA E. SHALALA, SECRETARY OF HEALTH & HUMAN SERVICES, Petitioner
v. MARGARET WHITECOTTON, ET AL.

CASE NO.: 94-372

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)