

upon petitions that are substantiated by medical records and/or by medical opinion. §§ 12(d)(3)(A)(i) and 13(a)(1).

Medical records are afforded substantial weight, as has been elucidated by this Court and by the Federal Circuit:

Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events.

Cucuras v. Secretary of HHS, 993 F.2d 1525, 1528 (Fed. Cir.1993).

Medical records are more useful to the Court's analysis when considered in reference to what they include, rather than what they omit:

[I]t must be recognized that the absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance. Since medical records typically record only a fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant.

Murphy v. Secretary of HHS, 23 Cl. Ct. 726, 733 (1991), *aff'd*, 968 F.2d 1226 (Fed. Cir. 1992), *cert. denied sub nom. Murphy v. Sullivan*, 113 S. Ct. 263 (1992) (citations omitted), citing *Clark v. Secretary of HHS*, No. 90-45V, slip op. at 3 (Cl. Ct. Spec. Mstr. March 28, 1991).

As is often the case, the Court must decide what weight to afford parol testimony as compared to the contemporaneous medical records. In such instances, the following standard is routinely applied:

It has generally been held that oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight. That rule has been followed in Program cases. The rule should not be applied blindly, however. Written records which are, themselves, inconsistent, should be accorded less deference than those which are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance.

Murphy v. Secretary of HHS, 23 Cl. Ct. 726, 733 (1991), *aff'd*, 968 F.2d 1226 (Fed. Cir. 1992), *cert. denied sub nom. Murphy v. Sullivan*, 113 S. Ct. 263 (1992) (citations omitted).

The reason medical records are accorded greater weight than oral testimony has been elucidated by this Court and by the Federal Circuit:

Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events.

Cucuras v. Secretary of HHS, 993 F.2d 1525, 1528 (Fed. Cir.1993). This Court recognizes that contemporaneous written documentation from a disinterested party may well be more reliable than a petitioner's recollection some years after the fact.

However, that is not the end of the matter. When inconsistencies arise between the parol testimony and contemporaneous records, such discrepancies may be overcome by “clear, cogent and consistent testimony” offered by the fact witnesses in explanation of the discrepancy. *Stevens v. Secretary of HHS*, No. 90-221V, 1990 WL 608693, at *3. (Cl. Ct. Spec. Mstr. Dec. 21, 1990). However, parol testimony that is inconsistent or unclear, particularly where it is at odds with contemporaneous medical records, may not be relied upon in reaching a decision.

II. EVIDENCE PRESENTED

Petitioner presented the affidavit testimony of four different individuals, two of them outside of Petitioner’s family. Both parties had opportunity to question the doctor and nurse who authorized and administered the vaccination at issue in depositions convened for that purpose, and transcripts of that deposition testimony have been filed in this case as well. Lastly, the Court heard live testimony from Petitioner himself at a hearing convened on 12 June 2007.

Petitioner moved his young family from suburban living in Plano to a ranch property in a rural clime outside of the Dallas/Fort Worth area in the great State of Texas. Tr. at 27. They first moved to 44 acres on Marlow Rd. (the Marlow property), where their house sat close to the roadway, immediately facing a neighboring property across the street, which belonged to the Cones, a well-known family in the area, due to their enterprise in the field of automotive racing. Tr. at 24, 27-28.

The Demkos and the Cones were not comfortable as neighbors, and Petitioner, as a father, grew increasingly concerned about the late-night gatherings and all-hours gunfire occurring across the street. Tr. at 30. Therefore, Mr. Demko assumed, when he observed a suspicious white van parked in his driveway for over an hour, that the vehicle was somehow associated with the Cones’ property. Tr. at 28. Petitioner called the police, but, by the time the police arrived, the van had been moved and parked on the Cones’ property, and its driver, who Petitioner was later able to identify as Greg Moran, had entered the front door of the Cone residence. Tr. at 28-29. Petitioner continued to complain to the police regarding the disturbing behavior across the street before moving his family and livestock to a new property on Sears Road in the same school district (the Sears property) in the early months of 2002. Tr. at 35-36. Later the same year (November) is when Petitioner visited his

primary care physician, a Dr. Haney, complaining of a cold and some arm pain, only to receive the tetanus vaccination at issue (among other regular observation and/or treatment). Tr. at 40.

Dr. Haney's office nurse at that time was a Janet Lynn Moran (née Janet Lynn Hendrick, hereinafter referred to as Nurse Moran), then wife (now since divorced) of Greg Moran, the individual driving the van on and around Petitioner's property at Marlow Road. Transcript of Deposition of Janet Lynn Hendrick (Moran Depo.) at 8, 10, 21-22; 41. In that capacity, it "was part of [her] duties to administer [vaccinations]." *Id.* at 23. She was the subject of deferred adjudication to which she pled guilty on charges of fraudulently receiving unemployment compensation while employed and receiving compensation therefrom. *Id.* at 38-40. Greg Moran has been "convicted of passing counterfeit and fraudulent checks" and "charged with controlled substances violations." *Id.* at 42.

When Petitioner visited his primary care physician, Dr. Jasyne Haney, in August of 2002, no health problems were noted. Tr. at 40. Three months later, Petitioner went to Dr. Haney with complaints of a bad cold and cough upon appointment on 14 November 2002. Tr. at 40-41. The circumstances of what happened at that visit comprise the factual dispute which the Court is here charged to adjudicate.

Petitioner claims that, when he heard his name called while in the waiting room, he was greeted by Nurse Moran, who quickly asked, "Can I interest you in a tetanus shot today?", before escorting him to the inner office. Tr. at 41. He claims that at first he refused the proposed vaccination, explaining that he did not need it, as he was only there for a cold and cough and did not have any puncture wounds or even open cuts. *Id.* After, *inter alia*, weighing Petitioner, Petitioner claims Nurse Moran brought him to the examining room and once again pressured him to receive the vaccination, to which he responded that he was up-to-date on his tetanus vaccination schedule. *Id.* He says she pressured him further, saying basically that it was better to receive the shot to be safe rather than sorry, and he eventually agreed. *Id.* He says she then left him in the examining room to prepare the vaccination for injection, which seemed to him to be for quite a long time. Tr. at 41-42.

From Petitioner's vantage point, Nurse Moran told him the wait was due to finding a large enough needle for injection. Tr. at 42. When she did return with the vaccine syringe, Petitioner says he rolled up his sleeve to receive the vaccine intramuscularly in his deltoid (shoulder), but says she told him it would need to be injected into his buttocks. *Id.* After some more hesitation, he says he slightly lowered his pants halfway down from his waist, and that she injected him with the vaccination "in the upper left quadrant of [his] right buttocks," inasmuch as his "pants weren't down all the way." Tr. at 42, 44. By his recollection, she did not swab the location of injection with alcohol before the injection, and did not place a bandage over the injection site when she was finished. Tr. at 42-43. According to Petitioner, as soon as the injection was given, while he was still repositioning his pants, she left abruptly, and he did not see her again during that visit, or anywhere else for two years. Tr. at 43. Petitioner claims that he then began to feel strong pain from his shoulder to his upper arm, almost immediately after that vaccination; on cross-examination, he stated

it began 10-15 minutes before Dr. Haney entered the examining room for the scheduled visitation. Tr. at 44; 91.

This pain is said by Petitioner to have persisted for some years, but has since resolved. Tr. at 83. The pain remained only in the right arm and shoulder that was intermittent during that period. Tr. at 45. It led to a habitual pattern of rubbing his hands together, or rubbing his left hand over his right arm, to offset the discomfort. Tr. at 46. The pain was sometimes but not always as severe as its first manifestation, sometimes considered by Petitioner to be a muscle spasm or stiffness. Tr. at 91. However, by the summer of 2003, the pain had increased to a sufficiently unbearable level that it prompted Petitioner to seek medical attention. *Id.*

After receiving the tetanus vaccination at issue, Petitioner began unexplainedly losing significant amounts of weight, such that metastatic cancer was eventually suspected. Tr. at 44, 51; 74. He began then to experience diarrhea and bloody stool. Tr. at 45. He developed one primary lesion (as well as some satellite lesions) on his buttocks, of unknown etiology. Tr. at 89. He also began at some point to experience pain in the lower groin and inner thigh region, which he differentiates from the locus of pain attendant to a previous traumatic injury. Tr. at 90.

Petitioner claims that he did not visit the doctor for some time regarding these complaints because he failed to maintain a “proactive” approach, trying to ignore the problems and “to cowboy up.” Tr. at 55. He did not think of attributing the referenced health problems to the vaccine injection at that time. Tr. at 45. However, Petitioner did return to the same doctor’s office on 31 March 2003 for groin pain lingering from an earlier event, lower right quadrant pain, and blood in the stool, but did not mention the intermittent pain in his arm and shoulder because, he says, it was during a period when it was not affecting him as much. Tr. at 58. Medical records from that visit examined the “lytic lesions in [his] right ischium,” which only began to resolve much later, in January of 2005. Tr. at 59. When the lesion problem did begin to resolve, the radiological medical records apparently contained a reference to traumatic causes, which prompted Petitioner to believe that his medical conditions were really the result of malevolent actions perpetrated by a froward enemy. Tr. at 60.

This growing suspicion led Petitioner to reexamine the vaccination record relating to the injection by Nurse Moran. Tr. at 60. He was piqued that many seemingly mandatory fields were left blank, but actually became convinced of wrongdoing when he recognized that the record purported that the injection had been given in the deltoid (shoulder muscle), contrary to his distinct recollection of injection in the buttocks. Tr. at 61. That led him to begin investigating Nurse Moran, which led him to attend her erstwhile husband’s criminal arraignment; it was at that time that he recognized Mr. Moran as the individual who had piloted the mysterious van a few months before the vaccination at issue. Tr. a 62. Taking all of the events together, Petitioner concluded that the injection of the tetanus vaccine into his buttocks by Nurse Moran was “some kind of retaliation for calling the police on her husband.” Tr. at 63.

By 5 April 2005, Petitioner was convinced of wrongdoing on the part of Nurse Moran, and spoke with officers at the Sherman Police Department in a recorded meeting to complain, only to receive correspondence soon thereafter stating that they believed his claims were unfounded, and that

they would not be investigating his complaint. Tr. at 65-66. That videotaped interview, which the Court had the opportunity to review in part, included comments by the interviewing officers which indicated knowledge of a friendly relationship between Greg Moran and the Cones, Petitioner's former antagonistic neighbors.

Dr. Haney, when deposed, agreed that, previously, Petitioner's complaints and/or presenting symptoms were based on real physiological phenomena, verifiable by medical observation, Transcript of Deposition of Dr. Jasyn Haney (Haney Depo.) at 16-17, and that Petitioner only visited the doctor for typical, reasonable causes, which included diagnostic testing for ailments for which he shared a family history, *Id.* at 22. However, the impression that Dr. Haney held of Petitioner after the vaccination at issue was that he was "a little odd," an impression for which Dr. Haney cannot localize to a specific experience, but noted "just a *gestalt*" based mostly upon a tendency "to hone in on some complaints and [not] let them go" that he noticed in Petitioner. *Id.* at 36-38.

According to Dr. Haney, it was the standard operating procedure in the office for Nurse Moran to "call[] the patient from the waiting room, either put them in a room or a work-up area, g[e]t the vital signs, chief complaint, and then put them in a room." *Id.* at 30. Dr. Haney's recollection seems to be that he had to grant approval before Nurse Moran would administer vaccinations to patients. Haney Depo. at 32. Upon questioning, Dr. Haney did not know whether the hip or the shoulder would be "the appropriate place for a tetanus vaccine in a normal adult," noting that such placement was "a nursing decision." *Id.* at 34. He was similarly unaware of "any contraindications as to whether or not vaccinations of tetanus in adults should be given in the deltoid versus the right hip." *Id.* at 35.

Dr. Haney did not recall at his deposition whether he saw Petitioner before or after the tetanus shot was administered. *Id.* at 33. Moreover, the extent of Dr. Haney's recollection was that there was no set protocol as to whether vaccinations were administered before or after observation and visitation with the doctor. *Id.*

Nurse Moran did not recall or believe that any internal record-keeping of immunizations was followed in the office. Moran Depo. at 23. Regarding who made the decision whether to administer a vaccination to a person, Nurse Moran related that it was the doctor who advised patients about any lapse in their vaccination regimen and offered vaccinations to them. *Id.* at 24. She did not recall "a situation in which [she was] told by the office" to inquire whether a patient was up-to-date with their immunizations. *Id.* She negated that there might be "a situation in which [she] would say 'Can I offer you a tetanus shot today?'" and likewise negated that she would ever administer a vaccination before the patient had seen the doctor. *Id.* at 24-25. She averred that she would need authorization from the doctor to administer a vaccination. *Id.* at 25. She stated that she did not remember Petitioner and that, even when investigated regarding the injection at issue, she denied recollecting any knowledge of that circumstance. *Id.* at 25-26.

Nevertheless, as Nurse Moran admitted, there is nothing in the medical record of that critical doctor's visit to "support[] that Dr. Haney ordered the tetanus shot." Moran Depo. at 28. However, she claims that such lack of regularized protocol and inconsistency regarding substantiating

documentation was typical of that office's administration. *Id.* at 28-29. Nurse Moran stated that the official protocol, which she claimed to have followed, was to obtain consent by signature by the patient, and to complete the information on the same form detailing information concerning the vaccination to be administered. *Id.* at 30-31. When asked whether the patient would sign the form before or after she had filled in that information, Nurse Moran did not remember. *Id.* at 31.

Nurse Moran stated at her deposition that it was impossible that she administered the vaccination at issue into his right buttock "[b]ecause tetanus is always in the arm and I wrote it left deltoid." Moran Depo. at 32; *see also Id.* at 50. However, Nurse Moran was not as familiar regarding other facts surrounding the tetanus vaccine. She was not aware of the time period for which tetanus shots are thought to remain effective, although she surmised at deposition that the period was seven years. *Id.* at 29. She denied pressuring Petitioner to receive the vaccination at issue, "because [she does not] like to give shots, so [would not] try to get him to get one." *Id.* Nurse Moran did not identify "any indication that the patient came in with a puncture wound of any kind," such as might make administration of the tetanus vaccine medically appropriate or indicated. *Id.* at 46-47. Moreover, Dr. Haney agreed that it is not normal for a patient presenting solely with a cough and/or pain in the right hand to warrant the administration of a tetanus vaccination. Haney Depo. at 33.

By Petitioner's recollection, he signed the consent portion of the vaccine record before Nurse Moran had filled in any of the fields detailing the vaccine's specific information, and only objected to the information contained on further review much later, when he began to suspect foul play by Nurse Moran. Tr. at 87-88.

III. THE COURT'S FINDINGS OF FACT

The Court finds that the vaccine at issue, administered on 14 November 2002, was injected into Petitioner's buttocks as he described.

The Court, as a caveat, does not see every suspicious occurrence that raised Petitioner's hackles as part of an overarching criminal conspiracy specifically targeting him for ill. However, the Court accepts as a factual matter some relationship between the Cones and the Morans, notwithstanding Nurse Moran's deposition testimony to the contrary. The Court also recognizes the disparity in putative tendencies toward veracity between Petitioner and Nurse Moran, given her previous *crimen falsi* of defrauding the state government of monies based on false representations. The Court does not derive a specific, identifiable criminal enterprise from the testimony adduced, nor does it need to. It is sufficient that the situation described by Petitioner, taken in this context, sounds the tintinnabulation of veracity by the Court's measure.

Moreover, it may not be necessary for the Court to conclude that foul play was at work in this case. The conflicting and confused account of medical care and exercise of standards of care in the medical office at the time of Petitioner's vaccination does not impress the Court with assurance of complete or accurate compliance with medical procedures or record notation. Dr. Haney's *laissez faire* oversight of vaccination, Nurse Moran's variant protocols in completing vaccination records,

and their inconsistent accounts of the protocols followed all undercut the reliability of the vaccination record at issue. In the face of this incredulity, Petitioner has proffered clearly and cogently his own account, supported by the affidavits of four creditable individuals. Even assuming his wife had the bias or motive for mendacity on his behalf, which the Court does not believe to be the case, the other affiants certainly appear upstanding, reputable individuals. As such, the Court concludes that the vaccination record is rebutted by clear, cogent, and consistent fact witness testimony in this case.

The Court takes note of Petitioner's claims regarding the location, nature, duration, severity and cause of his injuries, but, as those matters are not issues here presented to the Court, defers ruling thereupon at this time.

The Court thanks the parties for their time spent in litigating this issue, and looks forward to future progress in this case. Petitioner is **ordered** to contact the Court to schedule a status conference. For that, or any other purposes, contact may be made via my law clerk, Isaiah Kalinowski, Esq., at 202-357-6351.

IT IS SO ORDERED.

Richard B. Abell
Special Master