

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(Filed: September 3, 2009)

No. 06-227V

UNPUBLISHED¹

SAEID B. MOJABI and PARIVASH VAHABI,)	
as legal representatives of their minor son,)	
RYAN B. MOJABI,)	
)	MMR; Alleged Table
Petitioners,)	Encephalopathy that
)	Led to the Development of
v.)	Autism Spectrum Disorder;
)	Weight Accorded to
SECRETARY OF THE DEPARTMENT)	Provided Affidavits
OF HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

ORDER REGARDING WEIGHT ACCORDED TO AFFIDAVITS PROVIDED IN SUPPORT OF PETITIONERS' CLAIM

On March 23, 2006, petitioners, Saeid Mojabi and Parivash Vahabi (petitioners or the Mojabis), as parents of Ryan Mojabi, filed a claim for compensation pursuant to the National Vaccine Injury Compensation Program (Vaccine Program or Program).² 42

¹ Because this order contains a reasoned explanation for the special master's action in this case, the special master intends to post this order on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless an issued decision contains trade secrets or commercial or financial information that is privileged or confidential, or the decision contains medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. When a special master files a decision or substantive order with the Clerk of the Court, each party has 14 days within which to identify and move for the redaction of privileged or confidential information before the document's public disclosure.

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10 *et seq.* (2006) (Vaccine Act or the Act). All citations in this order to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

U.S.C. §§ 300aa-1 to -34 (2006). In their petition, the Mojabis alleged that, as a result of “all the vaccinations administered to him from March 25, 2003 through February 22, 2005, and more specifically, measles-mumps-rubella (‘MMR’) vaccinations administered to him on December 19, 2003 and May 10, 2004,” Ryan has suffered “a severe and debilitating injury to his brain, described as Autism Spectrum Disorder (‘ASD’).” Petition at 1. The Mojabis asserted that Ryan “suffered a Vaccine Table Injury, namely, an encephalopathy” as a result of Ryan’s receipt of the MMR vaccination on December 19, 2003, or in the alternative, that “as a cumulative result of his receipt of each and every vaccination between March 25, 2003 and February 22, 2005, Ryan has suffered . . . neuroimmunologically mediated dysfunctions in the form of asthma and ASD.” Id. at 1-2.

I. Background

Petitioners elected to proceed first on the claim that Ryan had suffered a Table injury, reserving the right to request inclusion in the Omnibus Autism Proceeding at a later date. See Order of May 8, 2006 at 1. After development of the documentary record, the undersigned conducted two fact hearings. Ryan’s parents testified during the first fact hearing held in San Jose, California on August 14, 2007. Based on significant differences between the events described by Ryan’s parents during their testimony and the events described in the medical records, the court asked Richard Armstrong, M.D., Ryan’s treating pediatrician during the time period of interest, to testify as a court witness, and a second fact hearing was held in San Jose on February 11, 2008. After careful review of the entire developed documentary record and careful consideration of the testimony given by the Mojabis and Dr. Armstrong, the undersigned issued a Revised Ruling Regarding Factual Findings (Revised Factual Ruling) on May 29, 2009.

The undersigned made the factual findings reflected in the Revised Factual Ruling based on the undersigned’s examination and analysis of the record as a whole, see 42 U.S.C. § 300aa-13(a)(1), and apprised the parties that “[t]he medical significance” of the fact findings would need to be addressed by the parties’ respective experts. Revised Factual Ruling at 21. By subsequent order, petitioners were directed to file their expert report by August 27, 2009. See Order dated July 8, 2009.

On August 13, 2009, two weeks prior to the filing date for petitioners’ expert report, petitioners filed a combined Motion for Issuance of a Subpoena and Extension of Time to File Additional Evidence in Support of Their Petition. Subsequently, on August 17, 2009, petitioners filed supplemental affidavits from A. Alami, M.D. and M. Goudarzi, M.D. Two days later, on August 19, 2009, the undersigned convened a telephonic status conference with counsel to address petitioners’ combination motion and the supplemental

affidavits. See Order of September 2, 2009 (Status Conference Order). The undersigned addressed the motion for subpoena by Order dated August 25, 2009 (Subpoena Order). And as addressed in the Subpoena Order and the Status Conference Order, the motion for extension of time to file additional evidence is now moot because petitioners have filed supplemental affidavits from Drs. Alami and Goudarzi and petitioners have elected not to submit an expert opinion or any further evidence for consideration in connection with their vaccine claim.³ As further addressed in the Status Conference Order, the undersigned now explicitly addresses the weight previously accorded to three of petitioners' exhibits, particularly, Exhibit 18 (the affidavit of Paravaneh Shah-Mohammadi and Pooran Vahabi), Exhibit 23 (the affidavit of Sohelia Javid) and Exhibit 25 (photographs of Ryan prior to his vaccination on December 19, 2003 and after his vaccination on December 19, 2003). The undersigned also addresses the weight she accords to the recently filed supplemental affidavits from Drs. Alami and Gourdarzi. In addressing the affidavits, the undersigned is mindful of the standard of review she must apply in considering the evidence before her.

II. Standard of Review

In determining whether a petitioner is entitled to compensation under the Vaccine Program, a special master must consider "all . . . relevant medical or scientific evidence contained in the record," including "any diagnosis, conclusion, medical judgment, or autopsy or coroner's report . . . regarding the nature, causation, and aggravation of the petitioner's illness, disability, injury, condition, or death . . ." § 300aa-13(b)(1)(A). The special master must consider "the record as a whole," § 300aa-13(a)(1), and cannot make a finding of entitlement based on the claims of a petitioner that are not substantiated by medical records or by medical opinion, *id.* The special master's decision regarding entitlement must include findings of fact and conclusions of law. § 300aa-12(d)(3)(A)(i).

In Vaccine Act cases, petitioner must prove, by a preponderance of the evidence, the factual circumstances surrounding his claim. § 300aa-13(a)(1)(A). This evidentiary standard requires that the Special Master "believe that the existence of a fact is more probable than its nonexistence before [she] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence." In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965)).

³ Based on the representations made by petitioners' counsel during a status conference conducted on August 19, 2009, the undersigned closed the record in this case by September 2, 2009 Order.

A. The Previously Filed Affidavits and Photographs

A special master has wide discretion in conducting the proceedings in a vaccine case. Burns v. Sec’y of Health and Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993). Consistent with that afforded discretion, the undersigned has conducted two fact hearings in this case and has reviewed carefully the documentary record developed in the case. Informed by the testimony heard during the two fact hearings and by the documentary evidence filed in this case, the undersigned issued on August 25, 2009 a Revised Order Ruling on Petitioners’ Motion for Issuance of a Subpoena and Extension of Time to File Additional Evidence in Support of Their Petition.

Petitioners now question whether the undersigned considered Exhibit 18 (the affidavit of Paravaneh Shah-Mohammadi and Pooran Vahabi), Exhibit 23 (the affidavit of Sohelia Javid) and Exhibit 25 (photographs of Ryan prior to his vaccination on December 19, 2003 and after his vaccination on December 19, 2003) when making her factual findings because the exhibits were not explicitly addressed in the issued Revised Factual Ruling. As the undersigned stated in the Revised Factual Ruling, having “[c]onsider[ed] the record evidence for the relevant time period together with the testimony of the three fact witnesses, the undersigned is not persuaded that following the administration of his first MMR vaccination, Ryan Mojabi exhibited symptoms during the period of time between December 19, 2003, and December 27, 2003, that were as severe as petitioners alleged.” Revised Factual Ruling at 19. That the undersigned did not explicitly address each piece of evidence that she considered is not an indication that the undersigned failed to consider and evaluate the presented evidence. The court in Guillory v. Secretary of Health and Human Services has observed that there is no “requirement that the special master must reference in [an issued ruling or] decision each item of evidence presented during the proceedings before the special master. Guillory v. United States, 59 Fed. Cl. 121, 126 (Fed. Cl. 2003), aff’d, 104 Fed. Appx. 712, 2004 WL 1378624 (Fed. Cir. June 15, 2004) (emphasis added). And contrary to petitioners’ suggestion, the undersigned has considered--consistent with her charge under the Vaccine Act--the full record before her. See § 300aa-13(b)(1).

Nonetheless, the undersigned now makes the following observations about the exhibits, addressing each of the three in turn.

1. Exhibit 18: The Affidavit of Paravaneh Shah-Mohammadi and Pooran Vahabi

In support of their claim, petitioners filed the affidavit of Ryan’s grandmother,

Paravaneh Shah-Mohammadi, and his aunt, Pooran Vahabi. The affidavit appeared to reflect the recollections of the two relatives jointly and was dated October 12, 2006, more than two years after the time period in interest. See Petitioners' Exhibit (Ps' Ex.) 18. The observations of the relatives were divided into two time periods. First, the relatives addressed Ryan's behavior from January 6, 2004, until January 15, 2004. Id. Then the relatives addressed Ryan's appearance from January 15, 2004, until March 1, 2004. Id.

During the first time period addressed, the relatives stated that Ryan was "lethargic," "hardly respon[sive] to noises and people around him," and "unable to hold himself upright." Id. The witnesses further stated that they observed "that he had convulsion/seizures several times" and that they were "present when he was taken to the Children Medical Center on January 6th and 9th." Id.

These statements by the relatives were consistent with the finding reflected in the Revised Factual Ruling that Ryan "had episodes of diminished activity" while on travel. Revised Factual Ruling at 20. These statements by the relatives were also supportive of the finding reflected in the Revised Factual Ruling that "[o]n January 6, 2004, Dr. Goudarzi examined Ryan at Children's Hospital Medical Center, and . . . diagnosed Ryan with a febrile convulsion." Id.

During the second time period addressed, the relatives stated that Ryan's "illness and symptoms were severe," "his overall health continued to be fragile," and "he looked ill all the times." Ps' Ex. 18. The relatives added that "[h]is weakness and symptoms were indicative of immune and neurological dysfunction," and "[h]e was lo[osing] weight with alternating constipation and diarrhea." Id.

These descriptions made by Ryan's relatives of Ryan's health issues from January 15, 2004, through March 1, 2004, were not corroborated by any of the notations contained in the most contemporaneous medical records for Ryan. Moreover, the offered assessment of Ryan's immunological and neurological functioning by lay witnesses—who were not identified as either treating physicians or medical experts—cannot be credited, without more, as either reliable or accurate. The undersigned declined to accord any weight to these statements in her Revised Factual Ruling.

2. Exhibit 23: The Affidavit of Sohelia Javid

In further support of their claim, petitioners filed the affidavit of Sohelia Javid, Mrs. Vahabi's "upstairs neighbor . . . in Tehran, Iran." Ps' Ex. 23. The affidavit was dated January 7, 2007. Id.

As presented, the affidavit purported to address the affiant's observations during the period of time between January 6, 2004, and February 28, 2004.⁴ In pertinent part, the affiant stated that she "was saddened that Ryan was not feeling well and that he was ill most of the times [she] saw him." Id. She further stated that:

Ryan showed signs of lethargy and reduced consciousness as well as poor muscle control and sensory impairment. I witnessed [t]remor, convulsions and occasional vomiting during his stay in Iran. Although Ryan showed some improvement over time, he continued to be weak, pale looking and getting sick often until he left Tehran.

Id.

The affiant's statements concerning Ryan's observed lethargy, tremors, and convulsions were supportive of the findings reflected in the Revised Factual Ruling that Ryan "had episodes of diminished activity, and at times, . . . appeared listless" and that "[o]n January 6, 2004, Dr. Goudarzi examined Ryan at Children's Hospital Medical Center, and . . . diagnosed Ryan with a febrile convulsion." Revised Factual Ruling at 20.

The affiant's statements pertaining to Ryan's "reduced consciousness as well as [his] poor muscle control and sensory impairment" did not reflect the type of vernacular that the undersigned would have expected from an upstairs neighbor who was not presented as having any sort of medical training. Rather, in the view of the undersigned, the statements sounded like clinical notations. The phrasing of the statements made the undersigned doubtful that these statements by the affiant in fact reflected the affiant's own recollections. And because the statements were not consistent with or corroborated by any of the notations contained in the most contemporaneous medical records for Ryan, the undersigned accorded little weight to these statements in the Revised Factual Ruling.

3. Exhibit 25: Photographs of Ryan Prior to His Vaccination on December 19, 2003 and After His Vaccination on December 19, 2003

⁴ Although the affidavit indicated that the period of time addressed began on January 6, 2003, the undersigned is persuaded that the year intended was 2004, when Mrs. Vahabi was in Tehran visiting. See Ps' Ex. 23 (affiant stating she "was delighted to learn that Parivash [(Mrs. Vahabi)] and her son [were] coming to Iran for [a] visit").

As filed, six pre-vaccination pictures of Ryan capture his expression at various stages between two months of age and eleven months of age. See Ps' Ex. 25 at 1-3. The pictures of Ryan at two months and at seven months show Ryan in restive positions looking seriously at either the camera or the person taking his picture. Id. at 1-2. The pictures of Ryan at four months, at seven months, at nine months, and at eleven months show Ryan smiling. Id. at 1-3.

The seven post-vaccination pictures that were filed were dated, respectively, December 29, 2003, December 30, 2003, December 31, 2003, and January 15, 2004, and were taken during the Mojabis travel to Paris and to Tehran. In three of the pictures, Ryan is either crying or appears fretful. See id. at 4-5. In the balance of the pictures, Ryan appears to be awake but he is not looking in the direction of the camera or the photographer. See id. at 4-7.

On review of the pictures, the undersigned found that the post-vaccination pictures in which Ryan was not crying were supportive of the undersigned's fourth enumerated finding that Ryan "had episodes of diminished activity." Revised Factual Ruling at 20. The pictures of Ryan crying were indicative of periods of increased activity, even if agitated activity, and when considered with the balance of the evidence provided, lent support to the further finding that "[p]etitioners . . . did not seek medical attention for Ryan during this period of time because his symptoms did not appear to be of the type or severity to warrant medical treatment." Id.

The undersigned now turns to address the supplemental affidavits filed on August 17, 2009.

B. The Recently Filed Supplemental Affidavits

The undersigned addresses, in turn, two supplemental affidavits prepared by the two physicians who examined Ryan during his stay in Iran.

1. Exhibit 29: Supplemental Affidavit of A. Alami, M.D. Dated August 1, 2009

In his initial affidavit dated December 27, 2006, Dr. Alami stated that he recalled examining Ryan in his clinic on January 7, 2003 in Tehran. It was his diagnostic impression that Ryan's "high fever, skin rash, tremors, [and] lethargy" were "most likely due to [an] adverse reaction[] to multiple vaccines he [had] received earlier." Ps' Ex. 22.

In a recently prepared supplemental affidavit dated August 1, 2009, Dr. Alami

elaborated on his earlier recollection. Ps' Ex. 29 at 1. He stated that on January 7, 2004, the date on which he examined Ryan, Ryan had been carried by his mother and grandmother to his office, which was a short distance from the home of Ryan's grandmother. Id. He noted that Ryan's mother "gave [him] an overview of Ryan's history, his reactions and ever worsening of his conditions since his vaccination in December of 2003." Id. Dr. Alami further noted that Ryan's mother "shared with [him] that she . . . took Ryan to Children Medical Center on January 6th, 2004 due to [Ryan's] sever[e] symptoms and him being in abnormal state of nearly unconsciousness and unresponsiveness." Id. Ryan's mother and grandmother had brought Ryan to Dr. Alami because "his conditions had not improved from the previous day" and Ryan's mother "mentioned that Ryan [had] choked on some food as he fainted in the middle of feeding earlier that day." Id.

Dr. Alami stated that Ryan "had distinctly severe symptoms including temperature of 105 degrees F, febrile convulsions, runny nose, conjunctivitis, persistent lethargy, and incredibly low level of consciousness. He ha[d] skin rashes matching that of classical measles viral infection." Id. Dr. Alami explained that he "ha[s] seen hundreds of measles cases in [his] practice over the years, but none with [the] severity of Ryan's symptoms such as the presence of malaise, and noticeable drastic changes/decline in the level of consciousness or mental functioning." Id. He added that:

Ryan was not alert and [was] hardly responsive to his surroundings. Ryan's levels of consciousness ranged from drowsiness to fainting and even collapse during the time that he was in the clinic exam room. I observed Ryan rolling his eyes up to the back of his head and then closing them which I remember as [a] distinct warning sign about his condition.

Id. at 2. Dr. Alami recommended that Mrs. Vahabi monitor Ryan and return to the Children Medical Center if Ryan's symptoms did not improve within a few days. Id.

As the undersigned indicated to petitioners' counsel during the conducted status conference held on August 19, 2009, the now offered assertions that are recalled even later than those described in the first filed affidavit strain credulity. The representation that Ryan's case was the most severe case of hundreds of observed measles cases because it was marked by such an "incredibly low level of consciousness" is difficult to reconcile with Dr. Alami's recommendation to Mrs. Vahabi to monitor at home the condition of her almost one year old for improvement.⁵ In the absence of information about the applicable

⁵ Ryan turned one year old on January 18, 2004. See Ps' Ex. 3 at 1. He saw Dr. Alami less than two weeks before his first birthday.

standard of care, the undersigned questions whether, in the particular circumstances described, Dr. Alami was more likely to have sent Ryan home in a state of significantly reduced consciousness than he was to have recommended that Ryan promptly receive further medical monitoring. Comparing this later-prepared supplemental affidavit with Dr. Alami's first affidavit and considering his affidavits in the context of the record as a whole—which includes evidence that Ryan received a second MMR immunization, without incident, on May 10, 2004, two months after his return to the United States⁶—the undersigned is persuaded that Dr. Alami counseled Mrs. Vahabi to take Ryan home for further monitoring because although Ryan presented with what appeared to be a serious measles-like rash, Dr. Alami did not view Ryan's medical condition as gravely then as is now suggested in his most recently recorded recollections. The supplemental affidavit provided by Dr. Alami is supportive of the findings set forth in the sixth and seventh numbered paragraphs of the Revised Factual Ruling. See Revised Factual Ruling at 20. For the reasons stated, the undersigned declines to accord any weight to this supplemental affidavit that would disturb the earlier fact ruling.

**2. Exhibit 30: Supplemental Affidavit of M. Goudarzi, M.D.
Dated August 16, 2009**

Filed as Exhibit 6 with the petition was an affidavit dated February 12, 2006 from Dr. Gourdarzi. The summary affidavit indicated that Ryan Mojabi was brought to Children Medical Center on January 6, 2004 with a temperature of greater than 104 degrees Fahrenheit. Ps' Ex. 6. He was brought back to the medical center three days later due to a persistent high fever of greater than 104 degrees Fahrenheit. Id. Dr. Gourdarzi noted that his diagnostic impression was that Ryan has suffered a febrile convulsion probably related to the MMR he received on December 19, 2003. Id. Dr. Gourdarzi further noted that Ryan was covered from head to toe in a measles-like rash. Id.

In a supplemental affidavit filed on February 16, 2007, Dr. Gourdarzi stated that his affidavit dated February 12, 2006 was "based on [his] vivid memory of Ryan Mojabi[']s visits to Children Medical [C]enter, both as a patient from abroad and his severe condition." Ps' Ex. 19. Dr. Goudarzi continued that "[u]nfortunately, there was no records were kept for Ryan Moja[b]i as an outpatient." Id.

The contents of these affidavits were further supplemented by the affidavit prepared by Dr. Goudarzi dated July 15, 2009 and filed as Exhibit 30. In the most

⁶ At the time Ryan received his second MMR vaccination, he also received hemophilus influenzae type b (Hib) and varicella vaccinations.

recently filed affidavit, Dr. Goudarzi states that he “would like to elaborate on [the] specifics of [his] observations, the diagnosis and provide a more complete narrative on [Ryan].” Ps’ Ex. 30 at 1. He explained that because Ryan was “the only child from the US . . . brought in frantically by his mother and grand-mother on that day of January 6th, 2004 with marked symptoms and features[,] . . . [he is] able to recall vividly all [his] personal observations and physical examination of [Ryan].” Id.

Dr. Goudarzi then recounted the following:

The scene of Ryan[’s] mother carrying him in her arms nearly unconscious and motionless was most notice-able at first. Ryan had no eye contact and showed no response to my touch, voice, and any stimulation. His eyes were unable to focus on anyone or anything in the room. Despite all efforts and call for Ryan’s attention, he could not have a steady look upon his mother or me, rather his eyes rolled back and then to the left. Ryan had total lack of attention to people and his surroundings during the whole time I examined him on January 6th 2004 and again on January 9th 2004. He seemed dazed, unaware of and unresponsive to events around him.

Id. at 1-2. He added:

I clinically characterize[d] Ryan’s level of consciousness as significantly impaired and reduced. He had febrile convulsions associated with a viral infection and my diagnosis indicated that was due to measles virus.

His convulsions and significantly impaired consciousness was persistent until January 9th, 2004 three days later that he was brought back to me again. His temperature also had held at 104-105° levels during that period. He showed [a] significant degree of lethargy and drowsiness, a characteristic of [a] severely disturbed level of consciousness.

Id. at 2.

Dr. Goudarzi described the rash covering Ryan’s face, arms, and trunk as “small red flat and raised pink/red dots” that resembled a measles rash. Id. Among the other “remarkable features of the physical examination” were “several enlarged, tender lymph nodes,” “markedly swollen tonsils,” and “small red spots with white centers inside [Ryan’s] mouth known as Koplik’s spots.” Id. at 2-3.

Dr. Goudarzi stated that Ryan “was given available medical treatment” which included “giving him plenty of fluids, encourag[ing] extra rest, and [administering acetaminophen or ibuprofen for fever.” Id. at 3. Dr. Goudarzi also recommended that Ryan receive close monitoring after his return to the United States. Id.

The statements in the supplemental affidavit provided by Dr. Goudarzi regarding the measles-like rash, the high fever, and the febrile convulsions that Ryan experienced are supportive of the findings set forth in the sixth and eighth numbered paragraphs of the Revised Factual Ruling. See Revised Factual Ruling at 20. These statements do not disturb the factual findings contained in the Revised Factual Ruling.

The statements in Dr. Goudarzi’s supplemental affidavit regarding Ryan’s “severely disturbed level of consciousness,” however, are more difficult to credit. The fact that Dr. Gourdarzi discharged Ryan, without a hospital admission, on two separate occasions with instructions that Ryan’s mother should ensure that Ryan got “extra rest” cannot be reconciled easily with a finding that Ryan was in a state of significantly impaired consciousness. Notwithstanding Dr. Goudarzi’s strong representations in his most recent recollections, it is the view of the undersigned that had Ryan remained in a persistent state of a substantially reduced level of consciousness between Dr. Goudarzi’s initial and subsequent examination of Ryan, the recommended medical treatment would have involved more than an administration of fluids and ibuprofen by Mrs. Vahabi at her mother’s home. It is the further view of the undersigned that the recommended medical treatment would not have included directions for a “dazed” and “unresponsive” Ryan to get more rest and to receive further medical monitoring nearly six weeks later, when Ryan returned to the United States. Of additional note, Ryan’s medical records reflect that, with his parents’ consent, he received a second MMR vaccination two months after his return from Iran, and there is no evidence in the records that Ryan had any adverse reaction to this booster shot. On the record of this case, the undersigned is not persuaded that Ryan’s condition during the time period at issue was as dire as Dr. Goudarzi’s most recent affidavit suggests, and the undersigned declines to accord much weight to the statements that Ryan remained in a persistent state of significantly reduced consciousness during the weeks following his first MMR vaccination.

III. Conclusion

Having addressed the weight accorded to the affidavits provided in support of petitioners’ vaccine claim, the undersigned can now address, by separate ruling, petitioners’ motion for judgment on the record.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Special Master