

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: May 11, 2007)

DO NOT PUBLISH

THOMAS ODOM,)
as father of his son,)
WILLIAM AUSTIN ODOM,)
)
Petitioner,)
)
v.)
)
SECRETARY OF)
HEALTH AND HUMAN SERVICES,)
)
Respondent.)

No. 03-1924V
Entitlement; Credibility Ruling;
Finding of Fact

DECISION¹

Petitioner, Thomas Odom (Mr. Odom), as father of his son, William Austin Odom (William), seeks compensation under the National Vaccine Injury Compensation Program (Program).² Mr. Odom filed a Program petition on August 18, 2003. *See generally* Petition (Pet.). According to Mr. Odom, William developed a persistent fever within two days after he received several vaccinations on February 11, 2002. *See* Petitioner’s exhibit (Pet. ex.) 43, ¶¶ 5, 8-22.³ Mr. Odom maintains that

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

³ William received a diphtheria-tetanus-acellular pertussis (DTaP) vaccination, an
(continued...)

during the early morning on February 15, 2002, William’s fever caused William to suffer “a prolonged seizure” leading to “widespread hypoxic brain injury.” Pet. ex. 26 at 4-5.

William’s medical records from February 2002 provide a measure of support for a conclusion that William exhibited some symptoms of illness following his February 11, 2002 vaccinations. For instance, Mr. Odom reported on February 15, 2002, that William’s “new babysitter,” Pet. ex. 9 at 9; *see also* Pet. ex. 9 at 151, had given William “cold baths” during the previous week. Pet. ex. 9 at 151. Bettie Hathcock (Ms. Hathcock)—William’s maternal step-grandmother in February 2002, *see* Transcript (Tr.) at 81, and William’s babysitter in February 2002, *see* Tr. at 80—related that she bathed William “two or three times” with “cool water” between February 11, 2002, and February 14, 2002, because “he seemed to be hot.” Tr. at 88. Likewise, Mr. Odom reported on February 15, 2002, that William’s “caregiver” had informed him that William “had vomited once” on February 14, 2002. Pet. ex. 9 at 6. Further, William’s mother, Lorra Hayes (Ms. Hayes), reported on February 15, 2002, that William displayed “sl[ight] cold symptoms” at some point preceding his February 15, 2002 seizure. Pet. ex. 9 at 14. Finally, the paramedic who responded to the emergency call that Mr. Odom placed on February 15, 2002, Tim Lowery (Mr. Lowery), noted that William was “warm to touch” when he arrived at the Humboldt General Hospital Emergency Room by ambulance. Pet. ex. 47 at 1.

Nevertheless, William’s medical records from February 2002 refute predominantly a proposition that William experienced a persistent fever between February 13, 2002, and the early morning on February 15, 2002. On February 15, 2002, Ms. Hayes told medical personnel at the Humboldt General Hospital Emergency Room that William “was in his normal state of health,” without “fever,” on February 14, 2002. Pet. ex. 8 at 1. Ms. Hayes offered similar information to medical personnel at Jackson-Madison County General Hospital later on February 15, 2002. *See* Pet. ex. 9 at 14 (“No fever noted” on February 14, 2002). Also on February 15, 2002, Mr. Odom told medical personnel at Jackson-Madison County General Hospital that William “was doing fine” on February 14, 2002. Pet. ex. 9 at 4. Indeed, medical personnel at Jackson-Madison County General Hospital reflected specifically “no history of fever.” *Id.* And, Michael Brueggeman, M.D. (Dr. Brueggeman), a neurologist who evaluated William on February 16, 2002, understood that William had “not been febrile” before his hospital admission on February 15, 2002. Pet. ex. 9 at 6.

The United States Court of Appeals for the Federal Circuit (Federal Circuit) counsels that “[m]edical records, in general, warrant consideration as trustworthy evidence.” *Cucuras v. Secretary of HHS*, 993 F.2d 1525, 1528 (1993). The Federal Circuit explains that “generally contemporaneous” medical records “contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions.” *Id.* Thus, the Federal Circuit recognizes that “[w]ith proper treatment hanging in the balance, accuracy has an extra premium.” *Id.* Moreover, the Federal Circuit counsels that “oral testimony in conflict with contemporaneous

³(...continued)

hemophilus influenza type-b/Hepatitis B (Hib/HB) vaccination, a “Strep Pneumococcal” vaccination and inactive polio vaccine (IPV). Pet. ex. 5 at 1.

documentary evidence deserves little weight.” *Id.*, citing *United States Gypsum Co.*, 333 U.S. 364, 396 (1947). However, the contemporaneous medical record rule “should not be applied blindly.” *Murphy v. Secretary of HHS*, No. 90-0882V, 1991 WL 74931, at *4 (Cl. Ct. Spec. Mstr. Apr. 25, 1991); *aff’d*, 23 Cl. Ct. 726 (1991); *aff’d per curiam* 968 F.2d 1226 (Fed. Cir. 1992); *cert. denied* 113 S.Ct. 463 (1992). The special master in *Murphy* reasoned:

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. 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.

Id. (citation omitted).

The special master convened a hearing. Mr. Odom, Ms. Hayes and Ms. Hathcock testified. The special master observed carefully each witness during direct examination and cross-examination. The special master interrogated intently each witness. The special master assessed critically each witness’s demeanor and credibility. The special master has evaluated thoroughly his impressions of the testimony.

Each witness appeared genuinely devoted to William and to his welfare. Nevertheless, in the special master’s view, the witnesses’ current recollections about events in February 2002 are not sufficiently reliable for the special master to reject overwhelmingly clear statements in William’s medical records from February 2002 regarding the absence of fever preceding William’s February 15, 2002 seizure. The special master cites especially his significant concerns about inconsistencies among the witnesses’ accounts that Mr. Odom sought medical attention for William from William’s treating pediatrician, Bernhard E. Dietz, M.D. (Dr. Dietz), between the administration of William’s vaccinations on February 11, 2002, and the early morning on February 15, 2002.

Ms. Hathcock stated that she suggested to Ms. Hayes on February 12, 2002, that Ms. Hayes “needed to take [William] to the doctor,” Tr. at 82; *see also* Tr. at 86, because William was vomiting “quite a bit.” Tr. at 89; *see also* Tr. at 82. Although Ms. Hathcock maintained that Mr. Odom followed her advice, Ms. Hathcock could not recall the date on which Mr. Odom took William to Dr. Dietz’s office. Tr. at 83. Mr. Odom asserted that he “took [William] to Dr. Dietz’s office” during the afternoon on February 14, 2002. Tr. at 12; *see also* Tr. at 14-15, 32-33, 44. Mr. Odom was adamant that he “called” Ms. Hayes before departing their house for Dr. Dietz’s office. Tr. at 15; *see also* Tr. at 33, 44. According to Mr. Odom, he and Dr. Dietz spoke in “the waiting room” of Dr. Dietz’s office about William’s persistent fever. Tr. at 14. Mr. Odom claimed that Dr. Dietz

assured him that William's condition was "normal." *Id.*; *see also* Tr. at 32. Mr. Odom said that Dr. Dietz recommended simply "baby Tylenol" for William's fever. Tr. at 14; *see also* Tr. at 32. Ms. Hayes did not remember receiving a telephone call on February 14, 2002, from Mr. Odom about Mr. Odom's plan to take William to Dr. Dietz's office. *See* Tr. at 74. Rather, Ms. Hayes declared that she did not know that Mr. Odom had taken William to Dr. Dietz's office during the afternoon on February 14, 2002, until William's admission into the hospital on February 15, 2002. *See* Tr. at 72, 74.

Moreover, Mr. Odom and Ms. Hayes insisted that Mr. Odom informed medical personnel on February 15, 2002, that he had "taken [William] to his family doctor" on February 14, 2002, because William was "running a fever." Tr. at 37; *see also* Tr. at 72. Yet, none of William's medical records from February 2002 corroborate the testimony. Rather, William's medical records indicate that Mr. Odom and Ms. Hayes recounted just the opposite: William exhibited no fever on the day before his hospital admission on February 15, 2002. *See, e.g.*, Pet. ex. 8 at 1; Pet. ex. 9 at 4, 6, 14.

Other aspects of the record detract from the witnesses' testimony that William experienced a persistent fever beginning on February 13, 2002. In particular, Robert A. Sanford, M.D. (Dr. Sanford), a pediatric neurosurgeon, evaluated William on April 15, 2002. Dr. Sanford obtained a history that William "had some fever" following his February 11, 2002 vaccinations. Pet. ex. 15 at 2. Then, "[a]bout a week after the fever[,] he had marked vomiting" before "his parents" discovered him one morning "lifeless and not breathing." *Id.* A fair, rational reading of Dr. Sanford's record supports a conclusion that any fever that William might have suffered following his February 11, 2002 vaccinations had dissipated before the events prompting his hospitalization on February 15, 2002.

Further, Dr. Dietz executed an affidavit countering essentially the substantive portion of Mr. Odom's recitation. *See* Pet. ex. 46. Dr. Dietz concedes that he does not remember conversing with Mr. Odom, or observing William, on February 14, 2002. *See* Pet. ex. 46, ¶¶ 5-6. But, Dr. Dietz advances that had Mr. Odom consulted him about William and persistent fever on February 14, 2002, he "would have been concerned" enough to "require followup for the development of further problems." Pet. ex. 46, ¶ 8. And, Dr. Dietz notes that he did not evaluate William until March 27, 2002, nearly four weeks after William's discharge from the hospitalization for seizures commencing on February 15, 2002. *See* Pet. ex. 46, ¶¶ 3, 11. Neither party contests Dr. Dietz's representations. *See, e.g.*, Tr. at 90-91. Finally, Mr. Lowery executed a statement asserting that his impression regarding William's "[s]kin warmth" contained in the February 15, 2002 ambulance record "cannot be used to conclude that [William] had a fever." Respondent's exhibit (R. ex.) B at 1.

In sum, the special master determines that the testimony that William displayed a persistent fever between February 13, 2002, and the early morning on February 15, 2002, is not persuasive. As a consequence, the special master finds that there is not a preponderance of the evidence that William displayed a persistent fever between February 13, 2002, and the early morning on February 15, 2002. Mr. Odom's entire case rests upon the allegation that William displayed a persistent fever

between February 13, 2002, and the early morning on February 15, 2002. *See, e.g.*, Pet. ex. 26 at 4-5. Therefore, the special master's ruling on the factual issue is dispositive.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Mr. Odom's copy of this decision to Mr. Odom by overnight express delivery.

John F. Edwards
Special Master