

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 09-717V
Filed: February 11, 2011
Unpublished

ALBERTO WANCEL,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

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Denial of compensation; Influenza vaccine; Guillain-Barré Syndrome, GBS

DECISION¹

This action commenced with the filing of the Petition (“Pet.”) on October 22, 2009. Petitioner alleges he suffered from Guillain-Barré Syndrome (“GBS”) as the result of an influenza vaccine he received “in October 2008.” Pet. at 3. Subsequent to filing the Petition, medical records were filed and petitioner filed a Statement of Completion on January 8, 2010. On March 9, 2010, respondent filed her Rule 4(c) Report, denying petitioner is entitled to compensation. R Rule 4(c) Report, filed March 9, 2010. Petitioner’s vaccine record, which was previously missing from the record, was filed on May 5, 2010. P Ex 7. At this point, onset of petitioner’s alleged injury was in contention between the parties.

A fact Hearing was conducted in this case on November 30, 2010, wherein petitioner testified to determine the timing of onset of petitioner’s GBS. Fact Ruling & Order (“Fact Ruling”), filed December 3, 2010. Ultimately, the undersigned was unable to credit Mr. Wancel’s testimony. While the undersigned credited petitioner’s sincerity and effort to remember the timing of events from two years prior, “his memory in ‘hindsight’ was not reliable.” Fact Ruling at 1. “This is evident not only from errors in his affidavit, but is clear when comparing the contemporaneous medical records to Mr. Wancel’s affidavit and testimony.” Id. The undersigned held that the medical records would be relied upon for the facts

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, the undersigned agrees that the identified material fits within the requirements of that provision, such material will be deleted from public access.

in this case. Id. The Fact Ruling and Order explicates the discrepancies between petitioner's testimony and the medical records further.

Notably, no treating physician mentions the October immunization as the cause of petitioner's GBS, Fact Ruling at 2, and petitioner has not filed a medical opinion supportive of his case. In the Fact Ruling, the undersigned noted significant hurdles petitioner must address to prove causation in this case. Fact Ruling at 2 (discussing the considerable lapse of time between vaccination and injury, the lack of treating physicians linking the injury to the vaccine, and petitioner's preexisting conditions, diabetes and an upper respiratory infection). Petitioner was offered the opportunity to file a supportive medical opinion; however, the undersigned cautioned petitioner that such efforts may be deemed unreasonable if petitioner's expert did not address the significant problems discussed in the Fact Ruling. On February 7, 2011, petitioner filed a Motion for a Ruling on the Record. P Motion for a Ruling on the Record, filed February 7, 2011.

The Court of Appeals for the Federal Circuit teaches us "medical records, in general, warrant consideration as trustworthy evidence." Cucuras v. Sec'y of the Dept. of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993). Citing the U.S. Supreme Court, the Federal Circuit continued, "oral testimony in conflict with contemporaneous documentary evidence deserves little weight." Id. (citing United States v. United States Gypsum Co., 333 U.S. 364, 396 (1947)). "With proper treatment hanging in the balance, [the] accuracy [of medical records] has an extra premium." Id. "[D]iscrepancies between the testimony and records . . . are not in and of themselves decisive; clear, cogent, and consistent testimony can overcome such missing or contradictory medical records. See 300aa-13(b)(1); Morris v. Sec'y of the Dept. of Health & Human Servs., No. 89-94V, slip op. at 8 (Fed. Cl. Spec. Mstr. Nov. 5, 1990). As discussed in the Fact Ruling, such testimony was not offered here and there simply is no basis for altering or augmenting the factual information contained in the contemporaneous medical records with petitioner's hindsight recollection.

A review of the record shows petitioner fails to provide preponderant evidence that he suffered the alleged injury as a result of his October 2008 influenza vaccine. The Act at 42 U.S.C. § 300aa-13(a) provides that the special master "may not make a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." Thus, this Petition remains unsupported by either medical records or medical opinion. In accordance with section 13(a) the undersigned has no option but to **deny** petitioner's claim for want of proof.

The Clerk of the Court is directed to enter judgment accordingly.²

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Special Master

² This document constitutes a final "decision" in this case pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision. Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.