

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

CARLIE CROWELL,	*	
	*	No. 10-190V
	*	Special Master Christian J. Moran
Petitioner,	*	
	*	
v.	*	Filed: March 7, 2011
	*	
SECRETARY OF HEALTH	*	Unpublished, findings of fact
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

Mark T. Sadaka, Englewood, NJ, for petitioner;
Voris E. Johnson, Jr., United States Dep't of Justice, Washington, DC, for
respondent.

FINDINGS OF FACT*

Carlie Crowell alleges that the human papillomavirus vaccine, which she received in 2006 and 2007, caused her to develop a seizure disorder. Ms. Crowell

* Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

seeks compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa—10 et seq. (2006).

To support her claim for compensation, Ms. Crowell has filed medical records and affidavits. The recitation of events in the affidavits does not match entirely with the events set forth in the medical records in the sense that the affidavits assert that Ms. Crowell experienced some health problems that are not documented in a contemporaneously created medical record. When special masters are confronted with discrepancies between medical records and affidavits, special masters are encouraged to hold hearings to evaluate the testimony of the affiants. See Campbell v. Sec'y of Health & Human Servs., 69 Fed. Cl. 775, 779-80 (2006).

A hearing was held on October 7, 2010, during which Ms. Crowell and her parents testified. All three witnesses appeared by videoconferencing as permitted by Vaccine Rule 8(b)(2). Following the hearing, Ms. Crowell filed a brief, proposing findings of fact. Respondent filed a response. Ms. Crowell filed a reply and with that reply, findings of fact may be made.

Standard for Finding Facts

Petitioners are required to establish their cases by a preponderance of the evidence. 42 U.S.C. § 300aa–13(1)(a). The preponderance of the evidence standard requires a “trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the judge of the fact’s existence.” Moberly v. Sec’y of Health & Human Servs., 592 F.3d 1315, 1322 n.2 (Fed. Cir. 2010) (citations omitted).

The process for finding facts in the Vaccine Program begins with analyzing the medical records, which are required to be filed with the petition. 42 U.S.C. § 300aa–11(c)(2). Medical records that are created contemporaneously with the events that they describe are presumed to be accurate. Cucuras v. Sec’y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993).

Not only are medical records presumed to be accurate, they are also presumed to be complete, in the sense that the medical records present all the problems of the patient. Completeness is presumed due to a series of propositions. First, when people are ill, they see a medical professional. Second, when ill people

see a doctor, they report all of their problems to the doctor. Third, having heard about the symptoms, the doctor records what he (or she) was told.

Appellate authorities have accepted the reasoning supporting a presumption that medical records created contemporaneously with the events being described are accurate and complete. A notable example is Cucuras in which petitioners asserted that their daughter, Nicole, began to have seizures within one day of receiving a vaccination, although medical records created around that time suggested that the seizures began at least one week after the vaccination. Cucuras, 993 F.3d at 1527. A judge reviewing the special master's decision stated that "In light of [the parents'] concern for Nicole's treatment . . . it strains reason to conclude that petitioners would fail to accurately report the onset of their daughter's symptoms. It is equally unlikely that pediatric neurologists, who are trained in taking medical histories concerning the onset of neurologically significant symptoms, would consistently but erroneously report the onset of seizures a week after they in fact occurred." Cucuras v. Sec'y of Health & Human Servs., 26 Cl. Ct. 537, 543 (1992), aff'd, 993 F.2d 1525 (Fed. Cir. 1993). Decisions by judges of the Court of Federal Claims have followed Cucuras in affirming findings by special masters that the lack of contemporaneously created medical records can contradict a testimonial assertion that symptoms appeared on a certain date. E.g. Doe v. Sec'y of Health & Human Servs., 95 Fed. Cl. 598, 607-08 (2010); Doe/17 v. Sec'y of Health & Human Servs., 84 Fed. Cl. 691, 711 (2008); Ryman v. Sec'y of Health & Human Servs., 65 Fed. Cl. 35, 41-42 (2005); Snyder v. Sec'y of Health & Human Servs., 36 Fed. Cl. 461, 465 (1996) (stating "The special master apparently reasoned that, if Frank suffered such [developmental] losses immediately following the vaccination, it was more likely than not that this traumatic event, or his parents' mention of it, would have been noted by at least one of the medical record professionals who evaluated Frank during his life to date. Finding Frank's medical history silent on his loss of developmental milestones, the special master questioned petitioner's memory of the events, not her sincerity."), aff'd, 117 F.3d 545, 547-48 (Fed. Cir. 1997).

The presumption that contemporaneously created medical records are accurate and complete, however, is rebuttable. For cases alleging a condition found in the Vaccine Injury Table, special masters may find when a first symptom appeared, despite the lack of a notation in a contemporaneous medical record. 42 U.S.C. § 300aa-13(b)(2). By extension, special masters may engage in similar fact-finding for cases alleging an off-Table injury. In such cases, special masters are expected to consider whether medical records are accurate and complete.

In weighing divergent pieces of evidence, contemporaneous written medical records are usually more significant than oral testimony. Cucuras, 993 F.2d at 1528. However, compelling oral testimony may be more persuasive than written records. Campbell, 69 Fed. Cl. at 779 (Fed. Cl. 2006) (“like any norm based upon common sense and experience, this rule should not be treated as an absolute and must yield where the factual predicates for its application are weak or lacking”); Camery v. Sec’y of Health & Human Servs., 42 Fed. Cl. 381, 391 (1998) (this rule “should not be applied inflexibly, because medical records may be incomplete or inaccurate”); Murphy v. Sec’y of Health & Human Servs., 23 Cl. Ct. 726, 733 (1991), aff’d, 968 F.2d 1226 (Fed. Cir. 1992).

The relative strength or weakness of the testimony of a fact witness affects whether this testimony is more probative than medical records. An assessment of a fact witness’s credibility usually involves consideration of the person’s demeanor while testifying. Andreu v. Sec’y of Health & Human Servs., 569 F.3d 1367, 1379 (Fed. Cir. 2009); Bradley v. Sec’y of Health & Human Servs., 991 F.2d 1570, 1575 (Fed. Cir. 1993).

The parties present different views regarding the weight to be given to medical records vis-à-vis oral testimony. Citing Cucuras, respondent argues that “the medical records provide the most credible source of information regarding the time of onset of [Ms. Crowell’s] symptoms.” Resp’t Br. at 1. Respondent argues that the oral testimony should not be credited because the testimony was internally inconsistent.

Ms. Crowell maintains that some medical records themselves are not consistent. For example, a record created when Ms. Crowell was hospitalized for a suspected seizure states, in one place, that she “was doing fine until 2 days prior to admission” and yet states, in another place, that she was “incontinent to bladder” two weeks earlier. Pet’r Reply at 5, quoting exhibit 5 at 4 & 8. Ms. Crowell also observes that even when a medical record contains a history, that history is based upon a recollection of events provided by Ms. Crowell orally. Thus, Ms. Crowell, suggests relying upon her testimony and the testimony of her parents.

Ms. Crowell’s argument is not consistent with precedents. Medical records are usually credited because they are created close in time to the events being described. As such, the memory of the person providing the history has not been diminished by the passage of time. See Lowrie v. Sec’y of Health & Human Servs., No. 03-1585V, 2005 WL 6117475, at *24 (Fed. Cl. Spec. Mstr. Dec. 12, 2005). Additionally, information given to medical providers for seeking treatment

is afforded a presumption of accuracy because the person is motivated by concerns of health to be as accurate and as forthright as possible. This reasoning is presented in Cucuras, 993 F.2d at 1528.

A final point is that special masters consider the record as a whole. 42 U.S.C. § 300aa—13(a). The record in cases in the Vaccine Program always contains medical records created from more than one provider of medical care. Special masters' consideration of multiple sources promotes fact-finding that is in accord with the weight of all the records.

These criteria are used to find the following facts:

Findings of Fact

1. Ms. Crowell was born in 1991.
2. As a child, she experienced headaches like other people get headaches. Exhibit 4 at 2; tr. 38; tr. 60.
3. In January 2006, Ms. Crowell had an episode in physical education class. She started hyperventilating and was taken to an emergency room by her father. Exhibit 2 at 8; exhibit 3 at 72; tr. 39; tr. 54-57.¹ Although more recently created medical records describe this event as part of Ms. Crowell's past medical history, the reports from the emergency room have not been filed into the record. Ms. Crowell is ordered to obtain these records.
4. On November 9, 2006, Ms. Crowell received the first dose of Gardasil. Exhibit 2 at 1; tr. 47.
5. After this dose of Gardasil, Ms. Crowell had some soreness at the injection site. Although this soreness is not recorded in a medical record

¹ In February 2008, Dr. Apperson described this episode as "seizure activity." Exhibit 3 at 72. It appears that Ms. Crowell disputes this characterization. See Pet'r Reply at 6. If either party retains experts to testify, the experts may present their own understanding of the January 2006 event. See Snyder v. Sec'y of Health & Human Servs., 88 Fed. Cl. 706, 746 n.67 (2009) (indicating that the views of treating doctors are not sacrosanct and may be rebutted).

created contemporaneously, Ms. Crowell's testimony is credited. Reports of transient soreness after the administration of any vaccine are not unusual. Additionally, the temporary nature of any minor pain would not necessarily prompt a 15 year old woman to seek medical attention. Thus, the lack of a written record is not dispositive.

6. On January 9, 2007, Ms. Crowell received the second dose of Gardasil. Exhibit 2 at 1; tr. 47.
7. Beginning at the end of March, Ms. Crowell experienced some episodes of shortness of breath. At first, these episodes were infrequent and of short duration. Tr. 71-72.
8. From January to June, Ms. Crowell played softball for a traveling team. This team played highly competitive softball. Tr. 21-23; tr. 65, tr. 67.
9. In May, Ms. Crowell began working at a grocery store. She worked approximately 25 hours per week. Tr. 16; tr. 75.
10. On May 16, 2007, Ms. Crowell received the third dose of Gardasil. Exhibit 2 at 1.
11. Following the third dose of Gardasil, Ms. Crowell continued to have episodes of shortness of breath. Tr. 48-49.
12. By the end of May 2007, the episodes of shortness of breath were worse. Ms. Crowell had reported at least some problems to her parents. Tr. 10; tr. 37-38.
13. In June 2007, Ms. Crowell stopped playing travel softball. The reason she stopped playing was because she was tired of softball and wanted to try something different. Tr. 23.
14. Ms. Crowell worked at the grocery store in the summer 2007. Tr. 24; tr. 75.
15. In summer 2007, Ms. Crowell had episodes of shortness of breath and she experienced dizziness. Tr. 46. Any episodes were mild enough that

- they did not prevent Ms. Crowell from doing her planned activities. Tr. 25; tr. 44.³
16. In summer 2007, Ms. Crowell did not experience any episodes in which her vision went black and she saw white dots. Although there was testimony to this point, tr. 50-53, this testimony is not credited. If Ms. Crowell had actually experienced any episodes in which she saw white dots on a black background, Ms. Crowell would have sought medical care. Problems of vision, especially repeated problems, are more severe than transient shortness of breath.
 17. In the summer 2007, Ms. Crowell joined the volleyball team at her new high school. She participated in volleyball practices during this time. Tr. 52.
 18. On September 22, 2007, Ms. Crowell had “an altered level of consciousness.” Exhibit 2 at 3. She saw some dots and felt dizzy. Exhibit 2 at 9. Additional details are reflected in a history obtained by a child neurologist, Dr. Friedrich, two months later. Exhibit 2 at 8-9.
 19. On October 20, 2007, Ms. Crowell received a dose of the flu vaccine. Exhibit 2 at 1.
 20. On October 25, 2007, Ms. Crowell had an electroencephalogram, which was normal. Exhibit 2 at 5.
 21. On November 21, 2007, Ms. Crowell visited Dr. Friedrich, the pediatric neurologist, to whom she provided additional details about the September 22, 2007 episode. Exhibit 2 at 8-9.
 22. On December 21, 2007, Ms. Crowell received the meningococcal, Tdap & hepatitis A vaccines. Exhibit 2 at 1.
 23. On February 14, 2008, Ms. Crowell had a seizure. Exhibit 3 at 47; exhibit 3 at 72; tr. 56-57.⁵

³ The one exception appears to be that Ms. Crowell could not celebrate the Fourth of July with her friends as planned. Tr. 25; tr. 51.

The parties appear to agree that the medical records created after February 14, 2008, set forth contemporaneous events in Ms. Crowell's life accurately. In absence of any dispute, specific findings of fact are not made.

The parties are ordered to provide these findings of fact to any expert whom they retain to testify. A status conference will be held on **Thursday, March 24, 2011 at 2:30 P.M., Eastern Time**. Ms. Crowell should be prepared to propose the next step in this case.

IT IS SO ORDERED.

s/ Christian J. Moran
Christian J. Moran
Special Master

⁵ Ms. Crowell links the February 14, 2008 event to the September 22, 2007 event. Pet'r Reply at 2. Whether the two events are related will depend upon the views of experts.