

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 June 15, 2011, during which Chari and Matthew Lehan, and Chari's mother, Heather Justin, testified. All three witnesses appeared in-person. During the hearing, the Lehans appeared to testify honestly and were forthcoming. At the conclusion of the hearing, the Special Master noted the persuasiveness of the Lehans' testimony in recalling what happened to Mason, due to missing information and several inconsistencies with Dr. Jercinovic's records. Tr. at 162-63.

Following the hearing, a status conference was held, and the parties agreed to submit a proposed final statement of facts. This statement was filed on November 3, 2011 and a status conference to discuss these factual findings was held on November 9, 2011. During this conference, the parties alerted the undersigned to unresolved disputes. With this proposed submission and pursuant to these discussions, findings of facts are ready to 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), 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).

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. Mason Lehan was born a twin via cesarean section on March 14, 2006, at Edwards Hospital in Naperville, Illinois to Chari and Matthew Lehan. Tr. at 12, 109.
2. After Mason’s birth, Ms. Lehan was the primary caretaker with Mr. Lehan helping after work hours and on weekends. Tr. at 15-16. Mason’s grandmother, Heather Justin, also periodically assisted Ms. Lehan in taking care of the twins and would typically stay with the family every other weekend through their infancy and early childhood. Tr. at 16.
3. After Mason’s birth, Ms. Lehan described his development and other important events in a detailed journal. Tr. at 17; exhibit 36. This journal reflects Ms. Lehan’s contemporaneous observations concerning Mason throughout his development. Tr. at 17-19.
4. At Mason’s first well baby check on March 20, 2006 Dr. Jercinovic noted “mild generalized jaundice.” Exhibit 10 at 5.

5. During his first year, Mason had several upper respiratory and ear infections. Despite these illnesses, Mason's parents considered him to be a happy, healthy baby. Tr. at 14, 20.

6. Ms. Lehan and Mr. Lehan were thrilled with Mason's social and verbal development. Mason played with balls, showed a bright curiosity about his surroundings, interacted and played with his twin sister Mairi, and socialized with others. Mason spoke "quite a few words" during his first year. Those words were "momma, dadda... ball...hi...bye... [and] clock." Tr. at 15, 112; see exhibit 37 at 39, 42.

7. Mason's primary pediatrician during his first year was Dr. Jercinovic. Tr. at 13, 123.

8. At Mason's well baby check on March 16, 2007, he received his one-year vaccinations, which included Prevnar and ProQuad (MMR plus Varicella). Tr. at 23; exhibit 10 at 54.

9. At the appointment Ms. Lehan and Mr. Lehan questioned whether Mason should receive his vaccinations because he was just recovering from a serious upper respiratory infection. Dr. Jercinovic assured them that Mason would be fine. Tr. at 23.

10. After returning home from the March 16, 2007 appointment, Mason seemed fussy and he had developed a rash on his right leg, particularly around the injection site. Tr. at 24; exhibit 36 at 8.

11. Later that night, the rash on Mason's leg had worsened. The injection site was oozing, and the skin around the site was starting to flake off. Mason was crying uncharacteristically and seemed to be in pain. Tr. at 24; exhibit 36 at 8.

12. About two hours after putting Mason in bed, he began to scream in a high-pitched tone Ms. Lehan had never heard before. Mason had a fever of 102.5 degrees and continued to scream throughout the night. Tr. at 24; exhibit 36 at 8.

13. Ms. Lehan called Dr. Jercinovic at about 3:00 a.m. and expressed concern about the rash, fever, and crying. Dr. Jercinovic assured them that the symptoms Mason was experiencing were too early to be a reaction to the vaccine, and that the fever was not high enough to cause concern. He recommended Tylenol, which the Lehans gave to Mason. Tr. at 25; exhibit 36 at 10.

14. On March 17 and March 18, 2007, Mason's fever remained at 102 degrees and he continued to cry until he was exhausted. Tr. at 27-28; exhibit 36 at 10. Mason's injection site still appeared inflamed and irritated. At this point Ms. Lehan noted that Mason was not "Mason" anymore. Tr. at 28. He had a vacant look in his eyes, and did not respond to his name. Id.; exhibit 36 at 11.

15. Over the next couple of days, Mason's fever continued and he became lethargic and passive. He no longer showed an interest in seeking interaction with others or his surroundings. Tr. at 28. Mason had not spoken a word since March 16, 2007. Ms. Lehan felt that Mason could no longer understand her, and noted in her journal that Mason seemed to look through her rather than at her. Tr. at 31; exhibit 36.

16. On March 22, 2007, Ms. Lehan called Dr. Jercinovic again because Mason's symptoms had not improved and because Mason developed a rash on his head and neck in addition to the rash around the injection site. Tr. at 31; exhibit 36 at 11-12.

17. By March 24, 2007, Mason had not returned to his bubbly, social, happy self. Mason would not or could not eat anything, would not communicate, and would not play. Exhibit 36 at 12-13; tr. at 33.¹

18. On March 24, 2007, Dr. Jercinovic diagnosed Mason with "rash, nonspecific < 782.1 >." Exhibit 10 at 55-56.

19. Over the next two weeks, Mason still did not speak and had extreme difficulty with feeding. Food seemed to get stuck in his throat. Mason was still not interactive and he no longer seemed able to understand when others would speak to him. Tr. at 37. Ms. Lehan believed that Mason had regressed to the level of development he had shown as a six-month old. Tr. at 39; exhibit 36 at 15.

20. The Lehans brought Mason back to Dr. Jercinovic on April 11, 2007, to discuss their concerns about Mason still not speaking, developing eating problems, and remaining passive and unsociable. Tr. at 39-40; exhibit 10 at 58. Dr. Jercinovic, after being informed of these complaints, nonetheless noted that on examination Mason's ability to communicate was "appropriate for age" and that he was a "social baby, no smile, but obviously has good eye contact and friendly and cooperative with exam." Exhibit 10 at 59. During this visit, Dr. Jercinovic

¹ Dr. Jercinovic's record from this visit is inconsistent in part because the chief complaint says "not himself" and the narrative says "active and playful." Given the internal inconsistency, Ms. Lehan's journal is credited.

also noted that Mason might be showing some post-vaccination symptoms, but that it would be unusual for the symptoms to occur so soon after vaccination. Tr. at 40; exhibit 10 at 58, 60. The only diagnosis made was “feeding problems < 783.3 >.” Exhibit 10 at 59.

21. The Lehans began to seek a specialist to determine how to help Mason. Tr. at 43. On April 24, 2007, they took Mason to see a pediatric neurologist, Dr. Singh, for a neurological evaluation because of their ongoing concerns about Mason’s regression in speech and behavior. Tr. at 43; exhibit 9 at 4.

22. During the neurological exam, Dr. Singh made a note that Mason made good eye contact and responded to his name when she called him. Exhibit 9 at 5. According to Ms. Lehan, Dr. Singh assured her that Mason might still regain his skills. Tr. at 43. Dr. Singh ordered an EEG for Mason during this visit. Mason’s EEG showed normal brain function. Tr. at 44-45; exhibit 9 at 1.

23. On May 24, 2007, Mason visited Dr. Singh again. Tr. at 46. Dr. Singh wrote a letter to Dr. Jercinovic date May 24, 2007 stating, “I saw Mason, age 15 months, back in the pediatric neurology clinic for a follow-up. As you know the patient had a brief phase of personality behavior changes with some regression of speech which Mom said he is pretty much back to his normal self, making more sounds, responds to name, follows commands.” Dr. Singh noted that Mason was still not talking and suggested to Ms. Lehan that Mason should get a speech evaluation and be put into therapy.² Ex. 9 at 7.

24. During the following months, the Lehans sought diagnoses and treatments for Mason with several doctors who specialized in children with developmental regression and delays. Tr. at 49-52.

25. Mason had EEG brain mapping performed by Dr. Bonesteel, a clinical neuropsychologist. Mason continued to see Dr. Bonesteel several months for neuro-feedback treatment. Tr. at 50 exhibit 13 at 3-4.

² According to Ms. Lehan, she did not tell Dr. Singh that Mason was “pretty much back to his normal self.” Tr. at 46-48. Because Dr. Singh’s record was created close in time to the event being recorded, his record is credited. Although Ms. Lehan’s testimony seemed honest and forthright, her recollection in 2011 about an event that took place in 2007 will inevitably be affected by the passage of time.

26. Mason had blood, urine, fecal, and hair analysis performed by Dr. Georgia Davis, which revealed that Mason was immune deficient and had gastrointestinal problems. Tr. at 50-51; exhibit 8 at 5-21.

27. The Lehans then took Mason to Dr. Usman where he received additional blood, urine, and fecal testing. Tr. at 52; exhibit 3 at 3-39. Dr. Usman diagnosed Mason as having a mitochondrial disorder and referred the Lehans to Dr. Kovacevic for IVIG treatment to deal with Mason's immune problems. Tr. at 52, exhibit 2 at 8-11.

28. Mason visited Dr. Kovacevich where he received IVIG and hyperbaric treatment. Tr. at 52-53. The Lehans noticed some improvement in Mason's condition following the IVIG treatments. Tr. at 126; exhibit 14 at 5.

29. After meeting Dr. Usman and Dr. Kovacevic, the Lehans decided to leave Dr. Jercinovic's pediatric practice. Ms. Lehan contacted the pediatrician's office to obtain a full copy of Mason's records. She was told they did not provide records to parents. After several telephone calls and visits to the office, Ms. Lehan was able to obtain the records. The Lehans reviewed the records and found that numerous things they remembered discussing with Dr. Jercinovic were not documented. They noticed also several items in Mason's records that Dr. Jercinovic had not discussed with them. Tr. at 56-58. Specifically, Mr. Lehan pointed out a notation at Mason's one-month well baby check about developmental delays. Tr. at 58, 123. Despite this notation, both Ms. Lehan and Mr. Lehan testified that Dr. Jercinovic had not expressed any concerns during the first year regarding Mason's development.

30. The Lehans did not give Mason milk or peanut butter before March 24, 2007. Tr. at 34-35, 58, 117-118.³

31. Mason is currently five years old and being treated with several medications and supplements. Tr. at 58-59. His diagnoses for treatment are immune deficiency, mitochondrial dysfunction, speech apraxia, auditory processing impairment, and persistent leucopenia. Exhibit 14 at 3-4, 6. Mason can

³ The parties have requested a finding of fact regarding Mason's drinking milk and eating peanut butter. The Lehans testimony is credited because they were warned about these foods, exhibit 38 at 10, and Ms. Lehan has a family history of lactose intolerance. However, it appears that whether Mason consumed milk or peanut butter is not a material fact in that neither Dr. Lopez nor Dr. McDonald discuss a possible allergy.

currently say one to two words, but cannot carry on a conversation, and often seems confused. He receives speech therapy, occupational therapy, and developmental therapy. Tr. at 59. Mason also continues to receive IVIG and hyperbaric treatments. Tr. at 52-53.

Conclusion

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 **Tuesday, December 20, 2011 at 11:30 A.M. Eastern Time**. The Lehans should be prepared to propose the next step in this case.

IT IS SO ORDERED.

S/Christian J. Moran
Christian J. Moran
Special Master