

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 09-407V
Filed: August 18, 2010

JULIANNE SCHERZINGER,

Petitioner,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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Fact Hearing, Juvenile
Myoclonic Epilepsy;
Human Papillomavirus
Vaccine; Witness
Credibility; Medical
Records, Corroboration

Sean F. Greenwood, Esq., and Katherine M. Gonyea, Esq., Houston, TX, for petitioner.

Debra A. Filteau Begley, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

RULING ON FACTS PERTAINING TO ONSET

Vowell, Special Master:

On June 22, 2009, Julie Gloria Scherzinger ["Mrs. Scherzinger"] filed a petition ["Pet."] for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*¹ [the "Vaccine Act" or "Program"], on behalf of Julianne Scherzinger ["Julianne," "Ms. Scherzinger," or "petitioner"], her daughter. The petition alleged that human papillomavirus ["HPV"] vaccines Julianne received on December 13, 2007, and February 22 and June 20, 2008 caused her to develop juvenile myoclonic epilepsy. Pet., ¶¶ 3, 4, 7. On February 22, 2010, the special master then presiding

¹ National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

over this case² granted a motion to amend the caption of the case as Ms. Scherzinger had reached the age of majority.

Discussions between the parties indicated the need to determine facts regarding the onset of Julianne's epilepsy prior to obtaining the reports of medical experts. Although Julianne was not diagnosed with epilepsy until August 14, 2008, she contends that the onset of her seizures began in December 2007, approximately three days after receiving her first HPV vaccination on December 13, 2007. Pet., ¶ 4, 6.

A hearing to determine the facts surrounding the onset of Julianne's condition was held in Austin, TX, on June 24, 2010. Julianne and her mother, Mrs. Scherzinger, appeared as witnesses. Based on the evidence before me,³ including their testimony, I find the following facts.

A. Facts Not Reasonably Subject to Dispute.

1. Julianne was born on November 21, 1991. Pet. Ex. 1.

2. She received HPV vaccinations on December 13, 2007; February 13, 2008;⁴ and on June 20, 2008. See Pet. Exs. 7-10.

3. Her medical history prior to the HPV vaccinations was unremarkable, with visits for normal childhood illnesses, including upper respiratory infections, headaches, and eye irritations. See *generally* Pet. Ex. 6, pp. 24-31, 36-49.

4. Julianne's most recent doctor's visit prior to the initial HPV vaccination occurred on July 25, 2007, for a cough, congestion, and sore throat. Pet. Ex. 6, pp. 24-

² The case was reassigned to me on March 25, 2010.

³ It became evident during the hearing that some medical records were missing. Petitioners were to file the records of the second visit to Dr. Gay; updated records from Dr. Szabo, Julianne's current treating neurologist; and updated records from the therapist treating her for depression. See Transcript ["Tr."] at 94. The therapist's records were filed (see Petitioner's Exhibit ["Pet. Ex."] 19), but, to date, the other records have not been filed. The information provided in the therapist's records does not pertain to symptom onset. The information in the outstanding medical records might change some of the factual determinations set forth below. If, upon my review after their filing, I determine that they alter my factual findings, I will issue modified or additional factual rulings.

⁴ Although the petition indicated that Ms. Scherzinger received the vaccination on February 22, 2008 and some subsequent histories reflect that date, two records of the physician who ordered the vaccination and the vaccination consent form all indicate that petitioner's second HPV vaccine was administered on February 13, 2008. Based on these documents, I find that the second vaccination was administered on February 13, 2008.

25. Other than a history of seasonal mold allergies, no medical problems were described. *Id.*, p. 24.

5. The first report of medical problems, other than the childhood illnesses noted above, was made to Doctor David Sandercock, D.O., on June 5, 2008, during what was described as a “well child check.” Pet. Ex. 6, p. 17. Julianne reported fatigue over the prior nine months and shortness of breath. Pet. Ex. 6, pp. 17-18. Whether additional symptoms were reported at this visit remains in dispute. Julianne’s physical examination was normal. Doctor Sandercock ordered several laboratory studies, which were also normal, with the exception of a slightly low carbon dioxide level. *Id.*, pp. 19, 50-51.

6. On June 20, 2008, the date of her third HPV vaccination, Julianne reported shortness of breath when outside, some slight improvement in her fatigue level, and no problems with her previous two HPV vaccinations. Pet. Ex. 6, p. 15.

7. Doctor Sandercock’s medical records do not reflect what prompted him to refer petitioner to Dr. Charles Gay, a pediatric neurologist, nor do they reflect when he made the referral. However, Dr. Gay’s records reflect that Dr. Sandercock was the referring provider. Pet. Ex. 4, p. 1.

8. At her first visit with Dr. Gay on August 14, 2008, Julianne reported “a 7 or 8 month history of morning myoclonic jerks,”⁵ beginning about three days after her initial HPV vaccination. Pet. Ex. 4, p. 1. She described the jerks as occurring after awakening or when very tired. *Id.* An EEG performed that day was abnormal, with “generalized, potentially epileptogenic activity.” *Id.*, p. 2. Doctor Gay’s assessment was that the history and EEG were compatible with juvenile myoclonic epilepsy [“JME”]. He described JME as “genetically determined primary generalized epilepsy,” adding that it was not related to her HPV vaccination. *Id.*, p. 3. He prescribed Topomax. *Id.*

9. A handwritten note on Dr. Gay’s record of Julianne’s treatment indicates that on September 2, 2008, he received a telephone call from Mrs. Scherzinger (identified as “mom” in the note) indicating that Julianne had been “a bit short-tempered [and] moody.” He recommended decreasing her dose of Topomax and a follow-up appointment in two weeks. Pet. Ex. 4, p. 1. There was no medical record from this appointment filed, although Julianne and her mother both testified that they believed a second visit occurred. Tr. at 15, 43, 46-47, 71, 88.

⁵ Myoclonic jerks are involuntary muscular contractions restricted to one area of the body. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1213 (30th ed. 2003).

10. Julianne saw Dr. Sandercock on September 10, 2008. The encounter note reflects her mother's concern about Ms. Scherzinger's recent diagnosis of JME, and its possible relationship to the HPV vaccine. Doctor Sandercock referred petitioner to another neurologist. Pet. Ex. 6, pp. 13-14.

11. On September 25, 2008, Ms. Scherzinger saw a counselor at the Family Service Association of San Antonio, Inc., as an emergency case. She was described as crying, angry, and distraught, and reported not eating, being unable to sleep, and feeling isolated and overwhelmed. Pet. Ex. 13, p. 1. She was not attending school. *Id.*, p. 3. Ms. Scherzinger stated that she had begun having problems in 7th grade, but had been able to hide them from others. *Id.*, pp. 1-2. Records of additional therapy sessions from October through December, 2008 were filed (Pet. Ex. 13), but testimony indicated that additional sessions occurred (Tr. at 87). After the hearing, petitioner filed more complete records as Pet. Ex. 19. Ms. Scherzinger reported her recent epilepsy diagnosis at the intake session, indicating that her epilepsy medication was interfering with her ability to mask her depression. Pet. Ex. 19, p. 42.

12. Julianne saw Dr. Charles Szabo on October 30, 2008. His record indicated that Julianne had been switched from Topmax to Kepra for seizure control, but did not indicate when that switch occurred. Pet. Ex. 5, p. 3.

B. Evidence of the Matters in Dispute.

The factual matters in dispute primarily concern: (1) precisely when Ms. Scherzinger's myoclonic jerks began; (2) how often they occurred; and (3) the relationship between her epilepsy and subsequent treatment for depression. Making factual determinations is complicated by some inconsistencies between the testimony of the two witnesses, their inability to recall details, the lack of contemporaneous records, and conflicts between the various medical histories and the testimony. Neither Ms. Scherzinger nor her mother was a particularly good historian; both were often vague on dates and uncertain about when events occurred.

1. Onset of Myoclonic Jerks.

Mrs. Scherzinger testified that Julianne reported to her in January or February 2008 that she was having a "jerking sensation" in the mornings. Tr. at 6. Although she could not remember the date her daughter reported the problem, she remembered it being at the "beginning of the year." Tr. at 7. However, she also testified that it was about the time of Julianne's second HPV vaccination. Tr. at 8. When she asked Julianne when the problem began, Julianne indicated that the jerking began around Christmastime. Tr. at 7. Mrs. Scherzinger never witnessed the jerking herself because she was usually at work when Julianne got up. Tr. at 7.

Julianne's account differed in some respects. She remembered the jerking beginning "a few weeks" after her first HPV vaccination. Tr. at 65. When prompted to be more specific, she indicated that they began in early January or late December. Tr. at 66. She also testified that the jerks began "shortly after the first vaccination" but that she could not say whether this was a matter of days or weeks after the initial HPV vaccination. Tr. at 75. In yet other testimony, she indicated that they began "like a week after I had got my first vaccination--about. I don't remember exactly." Tr. at 77. The jerking and feeling tired began around the same time. Tr. at 67. She reported the jerking to her mother "a little while before" her second HPV vaccination. Tr. at 67.

Julianne indicated that she and her mother did not mention the jerking movements to Dr. Sandercock at the time of the second HPV vaccination because "we didn't think it had anything to do with the shot." Tr. at 68. There is no record of jerking symptoms in either visit to Dr. Sandercock in June 2008. See Pet. Ex. 6, pp. 15-19.

Mrs. Scherzinger initially thought that the jerking might be caused by thyroid problems, anemia, or diabetes, and that these concerns, plus the tiredness that Julianne also reported, prompted the June 5, 2008 visit to Dr. Sandercock and the medical testing that he ordered. Tr. at 9-10. She testified that she told Dr. Sandercock about the jerking at the June 5, 2008 visit (Tr. at 10), but also testified that she was not certain that it was at the June 5th visit (Tr. at 34). When the laboratory reports were normal, Mrs. Scherzinger asked Dr. Sandercock again about the jerking, and at that point, he referred Julianne to a neurologist. Tr. at 11-12, 37.

Julianne reported to Dr. Gay on August 14, 2008, that she began experiencing jerking within three days of her initial HPV vaccine. Pet. Ex. 4, p. 1. At this point, however, Mrs. Scherzinger had associated the onset of Julianne's jerking episodes with the initial HPV vaccination, and had conducted internet research into reports of side effects from the HPV vaccine. Tr. at 13, 43-45. I also note that the timing of three days after the initial vaccination differs from what Julianne reported to her mother some six to seven months earlier, and from Julianne's own testimony at the hearing.

2. Frequency and Severity of Symptoms.

Julianne testified unequivocally that the myoclonic jerks occurred daily every morning from the time of their onset. Tr. at 77, 86. She also testified that the jerking became stronger sometime after her second HPV vaccination, but was unable to pinpoint precisely when this occurred. Tr. at 78-79. She explained that the worsening of the jerking prompted the June 5, 2008 visit to Dr. Sandercock. Tr. at 80-82.

Julianne acknowledged that her testimony conflicted with the medical records. She testified that she first told Dr. Sandercock about the jerking or shaking before her third HPV vaccination, and that she told him she was having symptoms, including

dropping things, every day. Tr. at 81-82. She also testified that she recalled telling Dr. Sandercock in September 2008 that she had symptoms “several times a month” and that this remark referred to her symptoms before she began taking anti-epileptic medications. She could not explain why she provided this history to Dr. Sandercock, but insisted that the jerks occurred every day. Tr. at 85-86. She testified that she told her mother about “the most, I guess, prominent” symptoms after her third HPV vaccination, but did not tell her every time she had jerks or shakes. Tr. at 90-91. Mrs. Scherzinger’s journal⁶ reflects only sporadic entries of shaking episodes during the period between the third HPV vaccination and the initial appointment with Dr. Gay.

3. Relationship between Epilepsy Diagnosis and Depression.

Julianne testified that her epilepsy diagnosis affected her emotionally and that she became depressed after she received the diagnosis. Tr. at 73. She testified that she never had feelings of depression or anxiety before her diagnosis and that she handled the stress of school, sports, and work well. Tr. at 73-75. She indicated that the depression led her to drop out of school. Tr. at 73-74.

In contrast, Mrs. Scherzinger testified that Julianne liked to do well in school and, prior to her diagnosis, she would get anxious or stressed before tests and before sports competitions. Tr. at 53-54. Mrs. Scherzinger also testified that Julianne reported to Dr. Gay, either at her first visit with him or at the follow-up visit, that she was experiencing anxiety and stress. Tr. at 45-46. This report is not reflected in the one record from Dr. Gay that was filed as an exhibit.⁷ See Pet. Ex. 4.

Julianne’s testimony also conflicted with the detailed notes from her initial visit to a therapist on September 25, 2008, during which she reported having been “seriously

⁶ The journal was filed as Pet. Ex. 11. It consists of four pages of lined paper with wide top margins. It begins with an entry in the upper margin of the page that is dated “6\20,” with no year, and the notation “HPV shot.” It therefore likely refers to 2008. The entries are spaced out, with several blank lines between some entries and only one line between others. The dates are not always in chronological order, with Pet. Ex. 11 at 2 covering both “7\31” and two separate entries dated “8\3,” with one of the “8\3” entries labeled “Sunday” and the other labeled “Monday.” This page is followed by an entry dated “7\22-leave for camp,” followed by the date “7\14” with no entry and an entry “7\29 – shook a little in morning.” Pet. Ex. 11 at 3. The next page (*id.*, p. 4), has dates ranging from “8\7” to “8\13,” with an entry made only for the first date.

⁷ Handwritten notes on the only record of a visit to Dr. Gay reflect a report of short temper and moodiness in Julianne a little less than three weeks after her initial visit. However, both witnesses testified that there were two visits to Dr. Gay because he changed the anti-seizure medication after the initial diagnostic visit, based on Julianne’s reaction to it. Tr. at 15, 43, 46-47, 71, 88.

overwhelmed for quite some time” and that her problems began when she was in the 7th grade. Pet. Ex. 13, p. 1.

During an office visit five days later, Dr. Sandercock recorded that Julianne’s depression had “been present for some time, but she [was] unable to estimate the actual duration.” Pet. Ex. 6, p. 11. She listed as stressors school and friends. Doctor Sandercock also recorded a family medical history of depression. *Id.*

When school started in August 2008, Mrs. Scherzinger described Julianne as having difficulty attending school. It was hard for her to focus, and she called her mother frequently to report that she couldn’t get up or had missed the bus. Mrs. Scherzinger described one particular day when Julianne called her at work to say that she had missed the bus and just couldn’t cope with attending school. Mrs. Scherzinger left work and returned home to find Julianne collapsed on the floor of her room and crying uncontrollably. Tr. at 15-17. At that point, Julianne stopped attending school and her mother sought counseling for her. After Mrs. Scherzinger obtained an appointment for Julianne with a counselor, she had to plead with Julianne to keep it. At this point, Julianne was belligerent and hard to deal with, but she eventually agreed to see the counselor. Tr. at 18.

After trying several alternative schooling arrangements, Julianne dropped out of high school in November 2008, during her junior year. Tr. at 19-20. Julianne enrolled in a Gateway program in January 2009, which allowed her to attend San Antonio College, with mixed academic results. Tr. at 21, 64, 73-74.

C. Standards Applied in Resolving Evidentiary Conflicts.

Conflicts between contemporaneous medical records and subsequent statements, testimony, and medical histories are common in Vaccine Act cases. Two general legal principles guide the resolution of conflicts between contemporaneous records and later-adduced evidence. The first is that the absence of a reference to specific symptoms in a medical record does not conclusively establish the absence of symptoms during that timeframe. *See, e.g., Murphy v. Sec’y, HHS*, 23 Cl. Ct. 726, 733 (1991), *aff’d*, 968 F.2d 1226 (Fed. Cir. 1992) (“[T]he 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.” (citation omitted)).

The second principle addresses the degree of reliance commonly accorded to contemporaneous records. Special masters frequently accord more weight to contemporaneously recorded medical symptoms than those recounted in later medical histories, affidavits, or trial testimony. “It has generally been held that oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight.” *Murphy*, 23 Cl. Ct. at 733 (1991) (citation omitted); *see also Cucuras v. Sec’y*,

HHS, 993 F.2d 1525, 1528 (Fed. Cir. 1993). Memories are generally better the closer in time to the occurrence reported and when the motivation for accurate explication of symptoms is more immediate. *Reusser v. Sec’y, HHS*, 28 Fed. Cl. 516, 523 (1993). Inconsistencies between testimony and contemporaneous records may be overcome by “clear, cogent, and consistent testimony” explaining the discrepancies. *Stevens v. Sec’y, HHS*, No. 90-221V, 1990 WL 608693, at *3 (Fed. Cl. Spec. Mstr. Dec. 21, 1990); see also *Burns v. Sec’y, HHS*, 3 F.3d 415, 417 (Fed. Cir. 1993) (decision to credit contemporaneous medical records over oral testimony “uniquely within the purview of the special master”). The following factual conclusions are presented with these legal principles in mind.

D. Resolution of Factual Conflicts.

1. Onset of Myoclonic Jerks.

I conclude that Julianne first experienced what were later identified as myoclonic jerks within one to three weeks after her initial HPV vaccination on December 13, 2007. I base this conclusion on Julianne’s report to her mother in January or February 2008 that she had begun experiencing shaking episodes when she woke up in the morning. I cannot date the onset more precisely because Julianne’s initial report to her mother was not precise. Using the Christmas holiday as a landmark, Julianne could only state that the shaking began around Christmastime, and that she remembered Christmas decorations. During their testimony, both witnesses appeared to be honest in their efforts to date the onset, but simply could not remember with greater specificity.

I did not credit the report of onset three days after vaccination that was reflected in Dr. Gay’s medical records. If Julianne could not date onset more precisely when she talked with her mother back in January or early February 2008, I cannot accept that she was able to date the onset precisely some six months later. I emphasize that I do not think Julianne or her mother deliberately falsified information in Julianne’s initial meeting with Dr. Gay. Rather, at that point, Mrs. Scherzinger believed that the HPV vaccination was a possible cause for Julianne’s symptoms, and her internet research into HPV side effects found that seizures had been reported, information that she had shared with Julianne. This resulted in a compression of the interval between vaccination and onset when reporting to Dr. Gay how long the symptoms had persisted.

At some point between Julianne’s second HPV vaccination and her visit to Dr. Sandercock on June 5, 2008, Julianne’s myoclonic jerks became more severe. I conclude that it is more likely that this happened closer in time to the June 5, 2008 visit than in the weeks immediately after her second vaccination on February 13, 2008. I base this conclusion on the testimony that Julianne’s jerking, tiredness, and shortness of breath prompted the doctor’s visit, and thus it is more likely that worsening symptoms

in April or May would have prompted a doctor's visit in early June than symptoms that became more severe immediately after the second vaccination in mid-February. I am aware that Dr. Sandercock's records do not reflect any complaint of jerking movements at either the June 5 or the June 20 visit, but the referral to Dr. Gay had to be prompted by some neurological complaint, and seizures are the most likely explanation. Doctor Gay's records reflect that the referral came from Dr. Sandercock. Pet. Ex. 4, p. 1.

2. Frequency of Seizures.

Identifying how frequently Julianne's seizures occurred is more difficult, but I accept Julianne's clear and unequivocal testimony that they occurred on a daily basis, notwithstanding her report to Dr. Sandercock. At that point, Julianne had been taking anti-seizure medication for over a month and the possibility of confusion regarding breakthrough seizures and the frequency of the seizures before medication may account for the discrepancy. Doctor Szabo's records indicate that Julianne did have breakthrough seizures while on Topomax. Pet. Ex. 5, p. 3.

3. Relationship between Seizure Disorder and Depression.

Notwithstanding the testimony of Julianne and her mother, I find that Julianne's depression and anxiety existed, albeit undisclosed, prior to her diagnosis of epilepsy. I base this finding on (i) Julianne's statements to her therapist that the problems began in the 7th grade; (ii) her statements to Dr. Sandercock that her depression had existed for some time and was centered on problems with school and friends; and (iii) Mrs. Scherzinger's testimony that Julianne became stressed at times as the result of school tests and sports competitions.

That is not to say that the morning jerking did not contribute to Julianne's deterioration in mental health, and her symptoms of tiredness and shortness of breath as reported to Dr. Sandercock in June 2008. Losing even a minor degree of control over one's body could reasonably be expected to increase stress and anxiety.

Furthermore, the timing of the exacerbation of the stress, anxiety, and depression in late August and early September 2008 with her diagnosis with a chronic medical condition seem to me to be linked more than simply temporally. That is, based on my knowledge of human nature, the ways of the world, and years of hearing testimony about responses to persistent medical conditions, it is reasonable to attribute Julianne's breakdown at least partially to a reaction to either her disease or her diagnosis. Julianne, then 16 years of age, was diagnosed with a condition that, in Dr. Gay's words, "responds very well to appropriate anticonvulsants, but typically does not remit in most patients." Pet. Ex. 4, p. 3. Depression, anxiety, and stress would likely increase in anyone in this situation, particularly when told that the "majority of people

with [her condition] also have convulsive seizures, and she is still at high risk for convulsive seizures.” *Id.*

Notwithstanding my conclusion that the diagnosis or the disease aggravated Julianne’s underlying stress, anxiety, and depression, I cannot conclude—at this time—that it significantly aggravated her condition. Her own statements to her physician and therapist emphasized other significant stressors, not her diagnosis.

E. Orders to the Parties.

The next step in the process of determining whether petitioner is entitled to compensation is obtaining the report of a medical expert linking her diagnosis of juvenile myoclonic epilepsy to her HPV vaccinations. **Petitioner is ordered to file the report of a medical expert by Tuesday, November 16, 2010. Respondent is ordered to file the report of a medical expert by Tuesday, January 18, 2011.**

The parties are directed to provide a copy of these factual findings to their respective experts, and the expert reports shall reflect their receipt of these factual findings. Should an expert disagree with any factual finding herein, that expert shall clearly state in his or her report: (1) the finding involved; (2) the reasons for the expert’s disagreement; and (3) the impact, if any, of my contrary finding on the expert’s conclusions regarding causation or significant aggravation.

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master