

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-819V

Filed: September 6, 2011

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|---------------------|---|---------------------------------|
| JESSICA MURA, | * | NOT TO BE PUBLISHED |
| | * | |
| Petitioner, | * | |
| | * | Fact Ruling; trivalent (flu) |
| v. | * | vaccine; prior viral infection; |
| | * | acute disseminated |
| SECRETARY OF HEALTH | * | encephalomyelitis (“ADEM”) |
| AND HUMAN SERVICES, | * | |
| | * | |
| Respondent. | * | |
| | * | |

Corey J. Hogan, Hogan, Willing, Esquire, Amherst, New York, for Petitioner.
Linda S. Renzi, United States Dep’t of Justice, Washington, D.C., for Respondent.

RULING REGARDING FINDING OF FACT¹

Zane, Special Master.

This matter is before the undersigned Special Master on Respondent’s Motion for a Limited Fact Ruling on the Record (hereinafter “Resp’s Mtn for Ruling”). Petitioner, Jessica Mura (hereinafter “Ms. Mura”), originally filed her petition on November 18, 2008, for compensation under the National Childhood Vaccine Injury Act² (“Vaccine Act” or “Act”), as amended, 42 U.S.C. § 300aa-1, *et seq.* Ms. Mura alleges that a trivalent influenza (“flu”) vaccine that she received in November 2006, caused her to suffer from acute disseminated encephalomyelitis (“ADEM”). Petition, ¶ 8.³

¹ When this decision was originally issued, the parties were notified that the decision would be posted in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). The parties were also notified that they may seek redaction pursuant to 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b). No request for redaction was filed; therefore, this decision is being posted in its entirety without modification.

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended, 42 U.S.C. § 300aa-10 through § 300aa-34 (2006) (Vaccine Act or the Act.)

³ This matter was assigned to the undersigned Special Master on March 15, 2011.

There is a material factual dispute as to whether Ms. Mura had a “viral type syndrome” in the ten days to two weeks prior to her admission to the hospital on November 26, 2006. See Resp’s Mtn for Ruling. The parties have briefed the issue, and this limited, albeit material, issue is now ready for adjudication.

I. BACKGROUND

A. Factual Background

Ms. Mura received a flu vaccine on November 22, 2006. Order of July 20, 2010 [ECF No. 46]. At the time she received the vaccine, Ms. Mura was 21 years old and working for an ambulance service. Petitioner’s Ex. 1, ¶ 6(Ms. Mura’s Affidavit); Petitioner’s Ex. 48, ¶ 2(Marlene Mura’s Affidavit). Although Ms. Mura’s prior medical history noted certain medical conditions, Petitioner’s Ex. 6 at 10-13; Petitioner’s Ex. 5 at 10, 17; Petitioner’s Ex. 7 at 1, according to Ms. Mura herself and her primary treating physician, she did not appear to have any current or chronic medical conditions and was generally in good health. Petitioner’s Ex. 47, ¶ 4(Ms. Mura’s Second Supplemental Affidavit); Petitioner’s Ex. 6 at 29; Petitioner’s Ex.13, ¶ 12. Days after receiving the flu vaccine, on November 26, 2006, Ms. Mura experienced parasthesia in both her legs and was taken to the hospital. Petitioner’s Ex. 6 at 34. Ms. Mura was conscious when she arrived. Petitioner’s Ex. 6 at 27. Within 24 hours, Ms. Mura progressed to no motor function in her upper or lower extremities. *Id.* By November 28, 2006, she was transferred to the Neurological Intensive Care Unit (Neurological ICU) and was emergently intubated because of her inability to protect her airway. *Id.* Ms. Mura eventually lapsed into a coma. Petitioner’s Ex. 47, ¶ 8(Ms. Mura’s Second Supplemental Affidavit). She was on a ventilator until January, 2007. Petitioner’s Ex. 6 at 29. Ms. Mura was eventually discharged from the hospital in late January 2007, with a diagnosis, *inter alia*, of ADEM. Petitioner’s Ex. 6 at 25.⁴

B. Procedural Background

Following the filing of Ms. Mura’s petition, Respondent, the Secretary of Health & Human Servs. (hereinafter “HHS”), identified a material fact dispute regarding the date Ms. Mura received the flu vaccine. The dispute arose because Ms. Mura’s petition was filed without a vaccination record and materials in the record, i.e., Ms. Mura’s two affidavits, Petitioner’s Ex. 1, ¶ 4 and Petitioner’s Ex. 2, ¶ 1, and the affidavit of a former co-worker, Jody Scalisi, Petitioner’s Ex. 3, ¶ 5, identified different dates as the date Ms. Mura received the flu vaccine.⁵ In the Rule 4 report, HHS stated that if Ms. Mura could

⁴ ADEM is an autoimmune disorder in which the body’s immune system, in response to some triggering event, attacks and destroys the myelin sheathing around the neurons of the central nervous system. *DeBazan v. Sec’y of Health & Human Servs.*, 539 F.3d 1347, 1350, n. 1 (Fed. Cir. 2008).

⁵ In particular, Ms. Mura originally stated that she believed she received the vaccine on November 19, 2006, Petitioner’s Ex. 1, ¶ 4(Ms. Mura’s Affidavit), whereas her former

establish that she received the flu vaccine on either November 19 or 20, 2006, HHS would not expend any further resources to contest entitlement and would focus on determining the amount of compensation to be provided to Ms. Mura. Respondent's Rule 4 Report at 4.

A fact hearing was held on July 16, 2010, to determine the date of the administration of the flu vaccine to Ms. Mura. Following the hearing, the special master then assigned to the case determined that Ms. Mura had received the flu vaccine on Wednesday, November 22, 2006, four days prior to her admission to the hospital. July 20, 2010 Order [ECF No. 46].

Subsequently, the parties submitted medical expert reports to support their positions on the issue of causation-in-fact. See generally *Althen v. Sec'y of Health & Human Servs.*, 418 F.3d 1273, 1278 (Fed. Cir. 2005). Ms. Mura filed an expert report from Dr. Marcel Kinsbourne. Petitioner's Ex. 46. Dr. Kinsbourne opined that the ADEM with which Ms. Mura was diagnosed and of which she first experienced symptoms on November 26, 2006, see Petitioner's Ex. 46 at 45, 175, 369, was caused by the flu vaccine Ms. Mura received on November 22, 2006. Petitioner's Ex. 46 at 15. Significantly, in his opinion, Dr. Kinsbourne noted that Dr. Updegraff, Ms. Mura's treating physician prior to her hospital stay and one of her attending physicians during her hospital stay, stated that prior to her November 2006 hospitalization, Ms. Mura had no neurological problems and was generally healthy. Petitioner's Ex. 13, ¶¶ 12 and 16.

HHS filed the expert report of Dr. Thomas Ward. Respondent's Ex. A. Dr. Ward concluded that it was more likely than not that Ms. Mura's symptoms were triggered by a viral illness occurring 10 to 14 days before the onset of her symptoms. Respondent's Ex. A at 3. Critical to Dr. Ward's opinion and the basis for his opinion was a single notation in Ms. Mura's medical records dictated on December 7, 2006, by Dr. Suh, a neurosurgeon who had examined Ms. Mura while she was in the Neurological ICU. See Resp's Mtn for Ruling at 3. At the time of his examination, Dr. Suh recorded that Ms. Mura was unresponsive to verbal commands and had her eyes closed. Petitioner's Ex. 6 at 45-46. Nonetheless, with regard to her medical history, Dr. Suh noted that Ms. Mura "apparently had a remote history of a viral type syndrome approximately 10 days to 2 weeks prior to her admission." Petitioner's Ex. 6 at 45-46.

Dr. Suh's records reflect a medical history different from the other doctors' medical histories recorded for Ms. Mura, thereby creating a factual dispute regarding her medical history. And because Ms. Mura's medical history is critical to the findings of the experts, in particular HHS's expert, that history is material to this case. The parties have requested that the Court resolve this factual dispute and make a factual finding as to Ms. Mura's pre-vaccine medical condition. See Resp's Mtn for Ruling. As explained

colleague, Jody Scalisi, stated she believed that Ms. Mura received the flu vaccine on November 24, 2006. Petitioner's Ex. 3, ¶ 5(Scalisi Affidavit). In her second affidavit, Ms. Mura indicated that the date of the vaccine may have been November 24, 2006. Petitioner's Ex. 2, ¶ 6 (Ms. Mura's Supplemental Affidavit).

below, based on a review of the submissions of the parties and the overall records in this case, the undersigned Special Master concludes that Ms. Mura was generally in good health prior to receiving the flu vaccine and that she had not suffered a viral illness, gastroenteritis or upper respiratory infection in the 10 to 14 days prior to her receipt of the flu vaccine.

II. DISCUSSION

A. *Petitioner's Evidence*

In her submission, Ms. Mura cites to numerous statements in the medical records, each of which indicates that Ms. Mura had not been ill, had not suffered from a viral type syndrome in the days and weeks leading up to her November 26, 2006, hospitalization, and that she was generally in good health.⁶ First, Ms. Mura refers to the notes of Dr. Bradley Post, the doctor who examined and interviewed Ms. Mura and subsequently dictated the emergency department report on November 26, 2006 when Ms. Mura arrived at the hospital. Petitioner's Ex. 6 at 33. Dr. Post reported that Ms. Mura "had no recent upper respiratory infections or gastroenteritis." Petitioner's Ex. 6 at 34. Significantly, Dr. Post recorded his contemporaneous observations of Ms. Mura, noting that she "is in no acute distress, is alert, awake and oriented to person, place and time and situation." Petitioner's Ex. 6 at 35.

Second, Ms. Mura cites to the records of Dr. Jason Speir, the neurologist who also interviewed and examined Ms. Mura on the date she was admitted to the hospital. Petitioner's Ex. 6 at 48. As part of her history of illness, Dr. Speir recorded that Ms. Mura advised him that she had not had any recent illnesses and did not "recall having any upper respiratory infection or diarrhea." Petitioner's Ex. 6 at 49. Dr. Speir recorded that at the time of his examination, Ms. Mura's speech was clear, her language was intact, and she was "[a]lert and oriented times four." *Id.*

Third, Ms. Mura refers to the records and affidavit of Dr. Kristen Updegraff, who had been Ms. Mura's primary care physician during the period immediately preceding her hospitalization and who treated Ms. Mura up to the time of her discharge from the hospital in January 2007. Petitioner's Ex. 13, Affidavit of Dr. Updegraff, ¶ 9. In her affidavit, Dr. Updegraff stated that prior to Ms. Mura's hospitalization in November 2006, she "appeared healthy and free of any neurological or other life threatening conditions." *Id.* at, ¶ 12. The day after Ms. Mura's admission to the hospital, on November 27, 2006, Dr. Updegraff interviewed and examined Ms. Mura. Petitioner's Ex. 6 at 29. Dr. Updegraff noted that Ms. Mura was able to move her head, was conversant and, although depressed, made some jokes. Petitioner's Ex. 6 at 31. Dr. Updegraff recorded a detailed summary of Ms. Mura's history of her present illness as provided by Ms. Mura. Included in this summary was a statement that Ms. Mura did not have any recent upper respiratory infections, had not had any recent viral infections or viral gastroenteritis, and had had no fevers. Petitioner's Ex. 6 at 30.

⁶ A summary of the records cited by the parties is attached as Appendix A.

Ms. Mura also notes that records of other physicians who participated in Ms. Mura's treatment during her hospitalization, albeit later, recorded Ms. Mura's medical history consistent with the records of Dr. Post, Dr. Speir and Dr. Updegraff, either indicating an absence of any recent viral illness or making no mention of such a viral illness. Petitioner's Ex. 6 at 39, 42, 51 and 53.⁷ But, more important, those notes in general reflect Ms. Mura's condition at the time of the examinations as being unresponsive or in an "altered mental status." *Id.*; see also e.g., notes of Dr. Carlton Kemp, Petitioner's Ex. 6 at 39. Indeed, the medical records indicate that two days after her admission, on November 28, 2006, Ms. Mura was emergently intubated and transferred to the Neurological ICU due to respiratory distress. Petitioner's Ex. 6 at 27, 39.

B. Respondent's Evidence

Unlike Ms. Mura, who cites to several physicians' notes, the only physician whose notes HHS cites and upon which HHS's expert places great weight is Dr. Suh. Respondent's Ex. A at 2; see also Petitioner's Ex. 6 at 45. Dr. Suh provided a consultation of Ms. Mura on December 7, 2006, while she was in the Neurological ICU. *Id.* The purpose of the consultation was to evaluate Ms. Mura for a brain biopsy. *Id.* Although his notes regarding her medical history state that she "**apparently**. . . had a remote history of a viral type syndrome approximately 10 days to 2 weeks prior to her admission," Petitioner's Ex. 6 at 45 (*emphasis added*), his notes also indicate that she was unresponsive to verbal commands and her eyes were closed at the time of his examination. *Id.*

C. Legal Standard

A petitioner must prove, by a preponderance of the evidence, the factual circumstances surrounding her claim. 42 U.S.C. § 300-13(a)(1)(A). This evidentiary standard requires that the special master "believe that the existence of a fact is more probable than its nonexistence before [she] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence. *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring, *quoting* F. James, *Civil Procedure* at 250-51 (1965)).

In determining whether a petitioner is entitled to compensation under the Vaccine Act, a special master must consider the record as a whole," 42 U.S.C. § 300aa-13(a)(1), and may not make a finding based on the claims of a petitioner that are not substantiated by medical records or medical opinion. *Id.* Indeed, a special master shall consider "all . . . relevant medical or scientific evidence contained in the record," including "any diagnosis, conclusion, medical judgment, or autopsy or coroner's report .

⁷ The records are of the following physicians who examined Ms. Mura on the dates indicated: Dr. Kemp, November 28, 2006; Dr. Kumjian, November 29, 2006, Dr. Avramovski, November 28, 2006, and Dr. Paletta, December 3, 2006.

. . . regarding the nature, causation, and aggravation of the petitioner's illness, disability, injury, condition, or death . . .” 42 U.S.C. § 300aa-13(b)(1)(A).

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). To resolve factual issues, the special master must determine what weight to assign the various documentary records, which include the contemporaneous medical records created, and what weight to assign other factual evidence including certain factual details that are absent from the record. A special master must decide whether to accord greater evidentiary weight to contemporaneous medical records or other evidence, e.g., later-given oral testimony, and such a decision must evince a rational determination. See *Burns v. Sec’y of Health & Human Servs.*, 3 F.3d 415, 417 (Fed. Cir. 1993).

The usefulness of the record evidence in the court's analysis of a case, however, turns on what is contained in the records. See *Murphy v. Sec’y of Health & Human Servs.*, 23 Cl. Ct. 726, 733 (1991), *aff’d*, 968 F.2d 1226 (Fed. Cir.), *cert. denied*, 506 U.S. 974 (1992) (citations omitted) (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). Particular attention should be paid to contemporaneous medical records and opinions of treating physicians. *Capizzano v. Sec’y of Health & Human Servs.*, 440 F.3d 1317, 1326 (Fed. Cir. 2006). 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). In looking at medical histories it has been recognized that “careful attention is paid to those contemporaneous histories, which are given prior to any thought of litigation. . . .” *Coffelt v. Sec’y of Health & Human Servs.*, 1992 WL 158714 at *6 (Fed. Cl. Spec. Mstr. Feb. 24, 1992). At the same time, for individual records to be found reliable, those records must themselves be corroborated by medical records from other doctors or institutions or by witness testimony.

D. Analysis

The record evidence here reflects that all but one of the many doctors who interviewed, examined, treated, and provided consultations of Ms. Mura during her hospitalization from November 2006 through January 2007, stated that she had not had any recent history of a viral-type infection or syndrome, a viral gastroenteritis, a viral infection or an upper respiratory infection. The records of the doctors that examined, interviewed and treated Ms. Mura on the day of her hospital admission, Dr. Post and Dr. Speir, as well as her primary care physician, Dr. Updegraff, who examined Ms. Mura the following day, all indicated that she had not suffered from any recent illnesses. Significantly, the notes of these physicians who initially examined Ms. Mura at the hospital indicate that each spoke directly with Ms. Mura. Petitioner's Ex. 6 at 27, 30-31, 34-35, 48-49. And, each doctor also notes that Ms. Mura was awake and alert when they interviewed her. *Id.*

No doubt at the time of these initial interviews, the doctors understood the need for particular information about Ms. Mura's prior medical history to enable them to properly diagnose and treat her medical condition. And, no doubt at the time of these interviews, Ms. Mura understood the need to convey accurate information to her doctors to enable them to make a proper diagnosis and provide her proper treatment. In each instance, these physicians' notes reflect that they asked Ms. Mura about recent viral-type syndromes, gastroenteritis and upper respiratory infections. In each instance, the notes reflect that Ms. Mura stated that she had not had any of these conditions recently.

Because these statements in the medical records reflect consultations and examinations contemporaneous with Ms. Mura's admission to the hospital for the purpose of a diagnosis and treatment at a time she was alert, they are entitled to and are, hereby, accorded substantial weight. See *Cucuras*, 993 F.2d at 1528; *Capizzano*, 413 F.3d at 1326; *Murphy*, 23 Cl. Ct. at 733. Indeed, such statements made for the purpose of medical diagnosis are well-recognized as reliable as evidenced by the fact they are a hearsay exception pursuant to the Federal Rules of Evidence. See FRE 803; see generally *Sheppard v. Sec'y of Health & Human Servs.*, 2007 WL 5160383, at *10 (Fed. Cl. Spec. Mstr. Aug. 7, 2007) (referencing reliability of statements made for purposes of medical diagnoses).

On the other hand, the notations regarding Ms. Mura's prior medical history contained in the records of Dr. Suh, who provided a consultation of Ms. Mura more than a week after her hospital admission, on December 7, 2006, while Ms. Mura was in the Neurological ICU, are not as reliable in light of the circumstances surrounding his examination. First, Dr. Suh's notes reflect that, unlike the doctors who initially examined Ms. Mura and who obtained their information directly from an alert Ms. Mura, when Dr. Suh examined Ms. Mura in the Neurological ICU, she was intubated and obtunded, her eyes were closed, there was "no response to voice" and she did "not follow commands." Petitioner's Ex. 6 at 46. In fact, his notes indicate that he discussed the risks of the proposed procedure, i.e., a brain biopsy, with Ms. Mura's family rather than Ms. Mura herself.⁸ The source of Dr. Suh's information, apparently secondhand given Ms. Mura's unresponsive state,⁹ is not as trustworthy as the information of the initial treating physicians who obtained their information firsthand from an alert Ms. Mura.

Similarly, the medical records of the other doctors who examined Ms. Mura at or about the time of Dr. Suh's examination reflect their inability to obtain a medical history from Ms. Mura at that time. Dr. Kumjian who examined Ms. Mura on November 29, 2006, after she was placed in the Neurological ICU, noted that Ms. Mura was unresponsive and that her medical history was provided by Ms. Mura's mother.

⁸ While Dr. Suh's notes indicate that he spoke with Ms. Mura's family regarding the brain biopsy and that he "answered all their questions", Ms. Mura's mother, Marlene Mura, states in her affidavit that she "does not recall ever speaking to a Dr. Daniel Suh." Petitioner's Ex. 6 at 46; Petitioner's Ex. 48, ¶ 9.

⁹ In her Second Supplemental Affidavit, Ms. Mura states that she lapsed into a coma and did not recall speaking with Dr. Suh. Petitioner's Ex. 47, ¶¶ 8-9.

Petitioner's Ex. 6 at 42. Dr. Avramovski, an infectious disease specialist, noted that on November 28, 2006, he could not obtain a history from Ms. Mura. Petitioner's Ex. 6 at 53. Finally, Dr. Paletta, on December 3, noted that Ms. Mura was on a ventilator and unable to provide a history. Petitioner's Ex. 6 at 51. The records themselves indicate that Ms. Mura was on a ventilator until January 2009. Petitioner's Ex. 6 at 27.

Second, unlike the initial treating physicians who obtained their information contemporaneously with Ms. Mura's admission, Dr. Suh's examination took place more than ten days after Ms. Mura was first admitted to the hospital. At the time, Ms. Mura had been in the Neurological ICU unit for nine days, having been transferred there after she suffered respiratory failure. This record made after such a lapse of time is not as dependable as the records made initially upon Ms. Mura's admission.

Third, Dr. Suh used the word "apparently" to qualify his statements regarding Ms. Mura's medical history. This language of Dr. Suh's notes itself suggests uncertainty.

Dr. Suh's record notes are simply not as reliable as information provided contemporaneously with Ms. Mura's admission provided by Ms. Mura herself to aid in her diagnosis and treatment. *See generally Cucuras*, 993 F.2d at 1528 ("With proper treatment hanging in the balance, accuracy has an extra premium."). In weighing Dr. Suh's notes against the statements of all the other doctors, especially those who spoke with Ms. Mura directly contemporaneous with her hospital admission, the undersigned finds that the reasonable and logical conclusion is that those other records are more accurate. Those records indicate that Ms. Mura did not suffer from a viral-type syndrome, a viral gastroenteritis or an upper respiratory infection in the recent period, e.g., 10 to 14 days, prior to her November 26, 2006 hospitalization.

E. Findings of Fact

Based on a review of the record as a whole and for the reasons explained above, the undersigned finds that a preponderance of the evidence demonstrates that in the days and weeks, i.e., ten days to two weeks prior to her admission to the hospital on November 26, 2006, Ms. Mura did not suffer a respiratory infection, viral gastroenteritis, or other viral type syndrome.

F. Conclusion

The significance of the foregoing factual finding remains to be addressed by the parties and their respective experts. The parties shall confer and contact Mary Jamison, my judicial assistant, at (202)357-6354, by **September 15, 2011**, to schedule a status conference to address further proceedings in this case.

IT IS SO ORDERED.

/s/ Daria J. Zane
Daria J. Zane
Special Master