

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

LAUREN SHORTNACY,

Petitioner,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

* No. 10-827V
* Special Master Christian J. Moran

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* Filed: March 30, 2012

* Findings of Fact

FINDINGS OF FACT

Lauren Shortnacy received doses of the human papillomavirus vaccine on July 23, 2007, September 26, 2007, and January 28, 2008. In February 2008, Ms. Shortnacy was diagnosed with nodular sclerosing Hodgkin’s disease. Ms. Shortnacy claims that the HPV vaccine caused her Hodgkin’s disease and she presented a claim to the National Childhood Vaccine Injury Compensation Program.

It appears that the symptoms and signs of Hodgkin’s disease include swollen lymph glands, itching, and fatigue. When Ms. Shortnacy experienced these conditions is important to her case for two reasons. First, the statute of limitations requires Ms. Shortnacy to file her petition within 36 months “after the date of the occurrence of the first symptom or manifestation of onset” of the injury for which a petitioner seeks compensation. 42 U.S.C. § 300aa—16(a). Second, Ms. Shortnacy is also required to establish that the onset of her Hodgkin’s disease “occurred within a timeframe for which . . . it is medically acceptable to infer causation-in-fact.” Bazan v. Sec’y of Health & Human Servs., 539 F.3d 1347, 1352 (Fed. Cir. 2008).

The evidence relating to when Ms. Shortnacy had swollen lymph glands, itching and/or fatigue is not consistent. Different medical records indicate that

these problems began at different times. Additionally, Ms. Shortnacy and her mother presented affidavits, adding more information to the mix.

To resolve the conflict in evidence, a hearing was held. The most knowledgeable witnesses were Ms. Shortnacy's mother (Tammy Shortnacy), her pediatrician (Dr. Paris), and Ms. Shortnacy. Additional witnesses included Ms. Shortnacy's father and a family friend. After the hearing, Ms. Shortnacy filed additional documents, including a printout from her Facebook postings during the relevant time. Then, both parties filed briefs and the matter is ready for adjudication.

Criteria 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).

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 v. Sec’y of Health & Human Servs., 69 Fed. Cl. 775, 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 in the analysis below.

Findings of Fact

The critical period is between Thanksgiving and Christmas 2007. Before November 2007, Ms. Shortnacy appeared healthy. By January 2008, Ms. Shortnacy was in frequent contact with health care providers who recorded her contemporaneous health. The parties accept the accuracy of these contemporaneously created medical records.¹

Health Before November 2007

Ms. Shortnacy was born in October 1990. Exhibit 1. Her primary care doctor was Ray Paris. Tr. 24; tr. 67; tr. 127-28. Dr. Paris saw her periodically but not frequently. Tr. 35-36 (Ms. Shortnacy’s testimony that she did not see any doctors for more than five years); tr. 155-56. In January and February 2007, Dr. Paris administered doses of the hepatitis B vaccine. Pet’r Second Amended Ex. 2 at 76-78. On June 11, 2007, Dr. Paris checked her for three moles. Id. at 73-75.

Ms. Shortnacy completed the tenth grade in June 2007. See tr. 16. That summer, she did not have routine employment, but she did earn money by babysitting. Tr. 14. At the hearing, Ms. Shortnacy testified that she stayed up relatively late (sometimes to 1:00 or 2:00 in the morning) and slept late the next morning. Tr. 55. Records from Facebook, which Ms. Shortnacy produced after the hearing, confirm her nocturnal activities as she made many posts late in the evening / early in the morning. See exhibit 23 at 37-56.

¹ As discussed below, some doctors memorialized a history relating to events months earlier. The parties do not always accept the accuracy of descriptions of more distant events.

Dr. Paris's office drew a blood sample from Ms. Shortnacy on July 9, 2007. The exact reason for the blood draw is not absolutely clear because Dr. Paris's records do not associate the blood draw with an office visit. Tr. 130-31. Ms. Shortnacy and her mother testified that her mother was concerned about Ms. Shortnacy being tired. Tammy Shortnacy also testified that she had been recently diagnosed with anemia and was concerned that her daughter had the same problem. Tr. 15; tr. 38; tr. 67-68.

In any event, the complete blood count was more or less normal. Her white blood cells were slightly elevated (11.5 versus a normal range of 3-11). Her neutrophils were also slightly elevated and lymphocytes were slightly low. Pet'r Second Amended Ex. 2 at 76-78. Dr. Paris was not concerned about these results. Tr. 131.

Ms. Shortnacy received the first dose of the HPV vaccine and the third dose of the hepatitis B vaccine from Dr. Paris's office on July 23, 2007. Pet'r Second Amended Ex. 2 at 67-70. There are no notes reflecting an examination by Dr. Paris on this date.

Besides babysitting, Ms. Shortnacy spent much time in the summer with her friends. She went on a vacation to the beach and she went camping several times. Tr. 14; tr. 56-58.

Following summer vacation, Ms. Shortnacy started her junior year of high school. Her attendance records show that she missed only one day of school in the first semester. Exhibit 19 at 4; see also tr. 16-20. She earned A's and B's, while maintaining a full load of courses. She assisted in a fourth grade classroom by serving as a teaching cadet. Ms. Shortnacy's mentor, Amanda Hoskins, testified that Ms. Shortnacy was full of energy. Exhibit 18 (affidavit) ¶ 3.

In the fall, Ms. Shortnacy began working at a local restaurant, Willie T's. She usually worked 15-20 hours per week. Exhibit 20 (affidavit of Ms. Shortnacy's supervisor). Tr. 21-23; tr. 101. She was permitted to wear shorts to work and she did so without experiencing any itching. Tr. 57.

Health Starting November 2007 – Early December 2007

In 2007, Thanksgiving was on November 22, 2007. Her immediate family was hosting dinner for her extended family (approximately 20-30 people). Tr. 59-60; tr. 69; tr. 96. On Wednesday, November 21, 2007, Ms. Shortnacy was not feeling well and she went to a clinic for treatment. She went to a clinic, rather than to Dr. Paris's office, because her family wanted to avoid getting other people sick. Resp't Exhibit A (Tammy Shortnacy's narrative);² tr. 69.

At the Midtown Acute Care Clinic, Ms. Shortnacy reported that she had cough, congestion, sore throat, and swollen nodes for one week. The doctor examined her and assessed her as having purulent nasal discharge, mucosal edema, and "cervical adenopathy." Pet'r Second Amended Ex. 2 at 9. Dr. Paris explained that this finding confirms Ms. Shortnacy's report that she had swollen nodes. Tr. 207-09.

At the hearing, Dr. Paris associated swollen lymph nodes with different conditions including an infectious process, an autoimmune disease, and a neoplastic process (cancer). Tr. 202. In November 2007, a doctor at Midtown Acute Care diagnosed her as having an upper respiratory infection and prescribed Zithromax ("Z-Pack"). She took it for five to seven days. Tr. 41; tr. 70; tr. 137; tr. 171; Pet'r Second Amended Ex. 2 at 9-10.³

On December 3, 2007, Ms. Shortnacy saw Dr. Paris. Her "chief complaint" was "swollen lymph nodes within her neck area and dry, itchy skin." In this record, Dr. Paris wrote "itching" and "Trunk Arms Legs." Pet'r Second Amended Ex. 2 at 62.⁴ The significance of this record is a point of contention between the parties.

² The Secretary located this narrative on the internet and submitted it. Subsequently, Ms. Shortnacy confirmed her mother wrote it. See Pet'r Status Rep't, filed Dec. 22, 2011, ¶ 6.

³ This information can also be found in exhibit 14 at 4-5, which contains duplicative pages of those contained in petitioner's second amended exhibit 2 at 9-10.

⁴ Dr. Paris described the process by which his office generates a record. Tr. 158-62. Dr. Paris stated that for the December 3, 2007 visit, he did not follow his

Ms. Shortnacy and her mother each testified that Ms. Shortnacy was not experiencing itching on December 3, 2007.⁵ Both place the beginning of her itchiness as after Christmas 2007. Tr. 26-27; tr. 47-48; tr. 70-71; tr. 97-100. Dr. Paris, too, downplayed his record. See tr. 138-39; tr. 146-47.

A preponderance of the evidence supports a finding that Ms. Shortnacy was experiencing an unusual amount of itching on her trunk, arms, and legs on December 3, 2007. The December 3, 2007 record seems plain on its face. One of Ms. Shortnacy's two "chief complaints" was "dry, itchy skin." Dr. Paris elaborated on this complaint by noting the specific locations (trunk, arms and legs) where she was itchy. Pet'r Second Amended Ex. 2 at 62. Dr. Paris prescribed hydrocortisone. Tr. 190.

Ms. Shortnacy's attempt to explain away her report to Dr. Paris is not persuasive. Ms. Shortnacy testified that she was reporting that she was having "normal" dry skin consistent with early fall. It would be highly unusual for a patient to inform her doctor about a "chief complaint" that is really only a typical seasonal experience. Similarly, it would be unusual for a doctor to solicit more information about skin that was dry just due to the weather.

Furthermore, Dr. Paris's explanation that Ms. Shortnacy was experiencing only "ordinary" itchiness on December 3, 2007 (tr. 217), did not ring true. He testified that he had previously prescribed topical steroids for atopic dermatitis.⁶ Tr. 139. However, there is no record that Dr. Paris treated Ms. Shortnacy for atopic dermatitis. On the two occasions in which Dr. Paris saw Ms. Shortnacy before December 3, 2007, Dr. Paris did not diagnose her with atopic dermatitis and did not prescribe steroids. See Pet'r Second Amended Ex. 2 at 80 (school physical

usual practice in that he did not record the results of his physical examination. Tr. 167; tr. 218.

⁵ Ms. Shortnacy provided her recollections, although she stated that she could not remember the December 3, 2007 visit with Dr. Paris. Tr. 42.

⁶ "Atopic dermatitis" is a common, chronic type of skin inflammation. Dorland's Illustrated Medical Dictionary (32nd ed. 2012) at 494.

at age 10) and at 74 (check of three moles).⁷ Furthermore, Ms. Shortnacy did not recall ever seeing a doctor for dry skin. Tr. 48. Thus, her December 3, 2007 complaint about “dry, itchy skin” is not consistent with Ms. Shortnacy’s experience with medical doctors.

In addition, some minor support is found in two retrospective medical records. On February 20, 2008, Ms. Shortnacy’s parents completed a new patient medical history questionnaire for a doctor treating Ms. Shortnacy’s Hodgkin’s disease. In this history, they described Lauren’s present condition as “Very tired, July 2007; swollen neck, November 2007; severe itching, November 2007.” Exhibit 4 at 9; tr. 107-09. On March 11, 2008, Dr. Bergsagel wrote a letter describing Ms. Shortnacy’s history. He wrote: “At Thanksgiving 2007, she noticed swelling in her left neck area. She also developed pruritus.” Pet’r Second Amended Ex. 2 at 17; tr. 84-85; tr. 150-51.

Finally, a finding that Ms. Shortnacy had out-of-the-ordinary itching on December 3, 2007 is consistent with Ms. Shortnacy’s initial petition. There she alleged that she was “experiencing extreme itching in her feet and legs” on December 3, 2007. Petition, filed Dec. 2, 2010, ¶ 2.⁸ Because Ms. Shortnacy is bound by the statements of her attorney, see Azarkhish v. Office of Personnel Management, 915 F2d 675, 678 (Fed. Cir. 1990), the petition constitutes some additional evidence that Ms. Shortnacy thought that her more severe itching was present on December 2, 2007. The December 2, 2010 petition simply confirms what Dr. Paris’s December 3, 2007 medical record clearly states: Ms. Shortnacy had itching on December 3, 2007.⁹

⁷ The Secretary argued this point. Resp’t Br. at 11 n.6. In Ms. Shortnacy’s reply, she did not point out any record where Dr. Paris (or any other doctor) diagnosed her as having atopic dermatitis or prescribed steroids for her.

⁸ After Ms. Shortnacy filed her petition, an initial status conference was held on January 31, 2011. The Secretary raised the possibility that Ms. Shortnacy may have filed the petition outside the period set forth in the statute of limitations. Thereafter, Ms. Shortnacy filed an amended petition alleging that on December 3, 2007, she had “mild itching” that resolved shortly after the doctor’s visit. Second Amended Petition, filed Aug. 19, 2011, ¶ 3.

⁹ Because the basis for finding that Ms. Shortnacy had itching on December 3, 2007, is Dr. Paris’s record, the same finding would have been made even if the original petition did not allege that Ms. Shortnacy was experiencing extreme

Consequently, Ms. Shortnacy is found to have experienced unusual itching before December 3, 2007.¹⁰ Dr. Paris's December 3, 2007 medical record describes both itchiness and swollen lymph glands.

There is no doubt that Ms. Shortnacy had swollen lymph glands on December 3, 2007. Dr. Paris's office staff coded the reason for Ms. Shortnacy's visit as 785.6. See exhibit 24 at 6 (box 21). Diagnosis code 785.6 means a "lymphadenopathy unknown etiology." Pet'r Second Amended Exhibit 2 at 51; tr. 179. This diagnosis code was repeated when Dr. Paris ordered additional testing from the acute care clinic on December 7, 2007.¹¹ Pet'r Second Am. Ex. 2 at 58; see also tr. 197-99.

On December 7, 2007, Ms. Tammy Shortnacy telephoned Dr. Paris's office. Ms. Tammy Shortnacy reported her daughter's condition as "still tired and lymph nodes still very much swollen. She states she feels fine though and she is even at school." Pet'r Second Amended Ex. 2 at 59.

Mid-December 2007

Ms. Shortnacy recalled that in mid-December 2007, she was feeling better. She testified that she does not recall feeling fatigued or experiencing any unusual itching. She returned to school, and maintained a regular work schedule. Tr. 26-27; tr. 72; exhibit 20 at 17.

The parties' arguments suggest that the condition of Ms. Shortnacy's lymph nodes from mid-December until the end of 2007 is a critical fact. Ms. Shortnacy

itching on this date. The finding regarding itching is not based on a strict enforcement of pleading standards.

¹⁰ Ms. Shortnacy argues against this finding by pointing out that she did not report itchiness when she sought treatment at the clinic on November 21, 2007. Pet'r Reply at 3, citing Pet'r Second Amended Ex. 2 at 9. I do not find that Ms. Shortnacy had itchiness on November 21, 2007. But, a lack of itchiness is not inconsistent with a finding of itchiness approximately two and a half weeks later.

¹¹ Dr. Paris had ordered an initial set of laboratory studies that were created on December 4, 2007. Tr. 140; tr. 174-76. The results appear at Pet'r. Second Amended Ex. 2 at 89-90.

contends that the swelling she admittedly experienced at the end of November and in early December resolved. See Pet'r Br. at 6. In contrast, the Secretary argues that Ms. Shortnacy's lymph nodes remained swollen. See Resp't Br. at 1. Each party cites evidence to support their position.

Only two people, Ms. Shortnacy and her mother, have any information on this topic. Although Dr. Paris's office created some written records, Dr. Paris does not directly contribute to determining whether Ms. Shortnacy's glands were swollen in mid-December because he did not examine her at this time. If Dr. Paris had examined Ms. Shortnacy, then his opinion about the condition of her glands would be presumptively correct. In the absence of an observation by a medical doctor, the available evidence consists of testimony of two people who appear to have no specialized medical training. This lack of experience appears not to be an impediment to reaching a factual finding about the condition of Ms. Shortnacy's lymph nodes because Dr. Paris believed that Ms. Shortnacy's mother, at least, could report the condition of her daughter's lymph nodes accurately. Tr. 143-44; tr. 183-84; tr. 186-87; tr. 213-15.

The evidentiary record is further muddled by the inconsistencies in the statements of Ms. Shortnacy and her mother. Some of these inconsistencies are probably attributable to a lack of precision in a layperson's estimate about the swollenness of glands. It may be the case that Ms. Shortnacy's mother did not use the same (subjective) scale in judging the size of her daughter's glands. For example, on January 4, 2008, Ms. Shortnacy's mother called the Columbus Clinic. She was concerned about her daughter's swollen glands. The message provides, in relevant part, that "Mom states that [patient's] lymph nodes went down to normal size about 12-11-07 and [patient] was doing ok. However, for the past 3 days now [patient] has had her lymph nodes in her neck swell up again and now she also has a lymph node under her left armpit." Pet'r. Second Amended Ex. 2 at 53; tr. 143.

Yet, between December 7, 2007 and December 12, 2007, Ms. Shortnacy's mother communicated with medical personnel by telephone several times. None of these records indicate that the swelling in Ms. Shortnacy's lymph nodes went down. See Pet'r. Second Amended Ex. 2 at 57-59; tr. 142; tr. 187.

The January 4, 2008 statement that the lymph nodes went down to normal size on December 11, 2007 is in conflict with another statement that Ms. Tammy Shortnacy made. In her narrative, Ms. Shortnacy states that the lymph nodes were swollen around Thanksgiving and "The nodes never really shrank." Resp't Exhibit A. Ms. Shortnacy put this recollection together around December 11, 2009.

Additionally, a history from Ms. Shortnacy's surgeon, Dr. Borkat, dated January 23, 2008, supports finding that Ms. Shortnacy's lymph nodes did not return to a normal size. Dr. Borkat noted that swelling had been present in Ms. Shortnacy's neck "since Thanksgiving." Exhibit 3 at 4.

Due to the importance of this issue, I have considered carefully all the relevant evidence, including the oral testimony at the hearing. I find that in December 2007, Ms. Shortnacy's lymph nodes fluctuated in size. As discussed previously, on December 3, 2007, her lymph nodes were indisputably swollen. Then, in mid-December, the swelling in her lymph nodes decreased. Tr. 78-79.¹² Although smaller, the lymph nodes did not shrink to a normal size. Resp't Exhibit A at 2; exhibit 3 at 4. By the end of the month, the lymph nodes were again increasing in size.

End of December 2007 – Present

After Christmas 2007, Ms. Shortnacy started to have even more severe itching. This itching was worse than the itching that she had on December 3, 2007. The itching was especially bad below her knees. Tr. 28-29; tr. 61; tr. 73-75; tr. 97-98; tr. 105-07; tr. 145-47; Pet'r Second Amended Ex. 2 at 53.

In January 2008, Ms. Shortnacy again complained of swollen lymph nodes. Tr. 78-79. When she visited Dr. Paris on January 7, 2008, she specifically mentioned swollen glands under her left armpit. She also complained about headaches, fatigue, and itching all over her body. Pet'r Second Amended Ex. 2 at 50. Dr. Paris agreed that Ms. Shortnacy's lymph nodes were swollen. Pet'r Second Amended Ex. 2 at 50; see also exhibit 12 (affidavit of Dr. Paris) at 2, ¶ 6.

From this point forward, there appears to be no dispute about Ms. Shortnacy's health. She saw various doctors and eventually had a biopsy of a lymph node on February 1, 2008. The results were consistent with classical

¹² Ms. Shortnacy proposes that her lymph node decreased in the size because she was recovering from an upper respiratory illness. See Pet'r Br. at 6; see also Pet'r Reply at 3-4. I do not make any finding about the cause of the decrease. This ruling merely finds, as a matter established by preponderant evidence, that Ms. Shortnacy's lymph nodes were less swollen in mid-December compared with early December. Why that change occurred may require the testimony of experts.

Hodgkin's lymphoma, nodular sclerosis type. Exhibit 3 at 5, 14 and 17. Ms. Shortnacy was treated by an oncologist, Dr. Pippas. Exhibit 4. She also was treated at the AFLAC Cancer Center and Blood Disorder's Service at Children's Health Care of Atlanta. Exhibit 5. In November 2011, Ms. Shortnacy was studying nursing at Columbia State University to pursue a career in pediatric oncology. Tr. 12-13.

Conclusion

The parties are instructed to provide these findings of fact to any expert whom they consult. A status conference is scheduled for **Thursday, April 19, 2012 at 11:00 A.M. Eastern Time**. The parties should be prepared to propose the next step for this case.

IT IS SO ORDERED.

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