

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

PETER NUTTALL and CHERIE NUTTALL,*
as legal representatives of their minor son *
NATHANIEL NUTTALL, *

Petitioners, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

No. 07-810V
Special Master Christian J. Moran

Filed: March 6, 2009

Findings of fact, autism spectrum
disorder, childhood disintegrative
disorder.

Curtis R. Webb, Webb, Webb & Guerry, Twin Falls, Idaho, for petitioners;
Voris E. Johnson, United States Dep't of Justice, Washington, D.C., for respondent.

UNPUBLISHED FINDINGS OF FACT*

Peter and Cherie Nuttall filed a petition pursuant to the National Childhood Vaccine Injury Program, 42 U.S.C. § 300aa-10 et seq. (2006)(the "Vaccine Act"). The Nuttalls claim that the second dose of the mumps-measles-rubella vaccine, which was given to their son Nathaniel ("Nathan") Nuttall on November 22, 20004, caused him to develop Childhood Disintegrative Disorder. Childhood Disintegrative Disorder is a disorder along the spectrum of disorders called autism. Pet. ¶ 4.

* Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

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

Respondent observed that the medical records are sometimes inconsistent with each other in describing Nathan's history. Some medical records are also inconsistent with assertions made by the Nuttalls in affidavits submitted during this litigation. See Resp't Rep't, filed Feb. 22, 2008, at 11-12.

To resolve any possible disputes about the facts, a hearing was held. See Campbell v. Sec'y of Health & Human Servs., 69 Fed. Cl. 775, 779-80 (2006); Skinner v. Sec'y of Health & Human Servs., 30 Fed. Cl. 402, 410 (1994). Five witnesses testified. These were: Cherie Nuttall (Nathan's mother), Peter Nuttall (Nathan's father), Sharon Cloward (Nathan's maternal grandmother), Ellis Nuttall (Nathan's paternal grandfather), and Shaina Payton (a babysitter for Nathan). All witnesses appeared credible in the sense that they intended to testify as honestly as possible. However, the completeness and accuracy of their testimony were limited by the witnesses' observations about Nathan's health approximately four years earlier and their ability to recall those observations when testifying.

After the hearing concluded, the parties were instructed to submit a joint set of questions that required resolution. Order, dated July 30, 2008. The parties proposed seven questions, five of which contain subparts. These questions are resolved below.

Standards for Adjudication

The Vaccine Act permits a finding of when a first symptom appeared, despite the lack of a notation in a contemporaneous medical record. See 42 U.S.C. § 300aa-13(b)(2) (2006). The preponderance of the evidence standard requires that the Special Master "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 [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 250-51 (1965)).

In weighing divergent pieces of evidence, contemporaneous written medical records are usually more significant than oral testimony. Cucuras v. Sec'y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993). However, compelling oral testimony may be more persuasive than written records. Campbell, 69 Fed. Cl. at 779 ("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) (table). Whether contemporaneous medical records or later-given oral testimony is more persuasive is a determination that "is uniquely within the purview of the special master." Burns v. Sec'y of Health & Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993).

Generally, the reliability of medical records depends upon at least two different sets of individuals: the persons providing the information and the persons recording the information.¹

First, medical records are only as accurate as the person providing the information. The ability to recount symptoms and problems to a doctor is comparable to a person's ability to testify in a court. Witnesses in court are competent to present their testimony when they possess four traits: (1) the ability to observe or to perceive events with their senses, (2) the ability to remember their observations or perceptions, (3) the ability to communicate these observations or perceptions, and (4) an appreciation for the obligation to tell the truth. See Michael H. Graham, 2 Handbook of Federal Evidence § 601.1 (6th ed. 2006).

In translating these abilities from the courtroom to a doctor's examination room, the fourth factor – honesty – will almost always be present. Because people are seeking assistance for an illness or injury, they are likely to be as forthcoming as possible. See Cucuras, 993 F.2d at 1528 (“With proper treatment hanging in the balance, accuracy has an extra premium.”). However, due to anxiety, stress, or the nature of the illness or injury itself, the first three attributes (observation, memory, and communication) may be impaired when patients talk to doctors.

Second, the accuracy of medical records depends upon the person recording the information presented by the patient. Normally, health care providers document the patient's subjective history as well as the objective observations. This data is recorded to facilitate medical treatment and to substantiate requests for payment. Therefore, the information is usually accurate. “Usually,” of course, does not mean “always.” Sometimes, a “symptom may have been relayed, but misreported or not recorded by the medical professional.” Campbell, 69 Fed. Cl. at 779.

These criteria provide a basis for evaluating the evidence presented. The evidence includes not only the testimony presented by the five witnesses but also all the exhibits filed by the parties. The testimony of these witnesses and the material found in the medical records are the basis of the findings of fact that follow.

Discussion of General Issue

The repeating theme is how to determine the facts of Nathan's case when the witnesses present one story and the documents being created contemporaneously with the events described

¹ Occasionally, one person performs both tasks. For example, a patient may fill out a questionnaire that includes a check box of symptoms. However, this document is usually the starting point for further investigation by the health care provider.

Theoretically, the records must be maintained and retrieved accurately as well. However, questions that could be answered by a document custodian are rarely raised.

in the witnesses' story do not contain the same information. Mostly, the documents describe one problem but omit any discussion of another problem.

One specific medical record demonstrates this problem. On January 11, 2005, Nathan's parents brought him to see his pediatrician. The chief complaint was "congestion, cough." Dr. Winkler diagnosed Nathan with an upper respiratory infection and prescribed amoxicillin. Exhibit 5 at 4. This visit seems to be typical for a four-year-old child.²

However, Mr. and Mrs. Nuttall testified that by January 11, 2005, Nathan was not acting like his ordinary self. According to their testimony, Nathan's eating habits had changed, he was not speaking very much, and he started experiencing extreme anxiety if he was separated from his mother. None of these concerns are listed in the doctor's notes from the January 11, 2005 visit.

The omission of these concerns opens the way for an argument that Nathan was, in fact, still eating as usual, still talking, and not experiencing separation anxiety. This argument is based upon two propositions, which may or may not be true. The first is that the doctor recorded everything Nathan's parents told her. The second is that Nathan's parents told the doctor everything that was wrong with Nathan.

In general, Mr. and Mrs. Nuttall do not claim that they communicated information to Nathan's pediatrician that the doctor failed to record. Thus, the first proposition is accepted as valid, at least for Nathan's pediatrician.³

The question, then, becomes whether the Nuttalls did not tell the pediatrician about all the problems that Nathan was having. The Nuttalls certainly demonstrated their love, concern, and care for Nathan when they testified. Thus, the reasonable expectation is that if Nathan were experiencing a problem, the Nuttalls would have sought assistance from Nathan's doctors. Tr. 72, 135.

Although this expectation is reasonable, in practice, parents do not always present every concern to their child's doctors. Sometimes, an event, like getting poked in the eye, prompts the parents to seek medical attention for that particular problem. In focusing on that event, the parents may not be mindful of other potential problems.

The ability to inform doctors about potential problems is more complicated when the change in behavior is subtle. For example, the Nuttalls testified that Nathan stopped speaking

² Other examples include a visit on January 17, 2005, because Nathan's left eye was "poked with a straw," and a visit on January 19, 2005, as a follow up. Exhibit 5 at 3, 5.

³ For other providers of medical services, the Nuttalls challenge the accuracy of the reports. See, e.g., exhibit 5 at 1.

sometime in December 2004. This testimony is not literally true in the sense that Nathan was not saying any words. However, as explained in response to question 5, Nathan spoke much less in December than he did in November. This decrease is more difficult to observe than a physical action such as a poke in the eye. Thus, the Nuttalls may not have had a basis for telling Dr. Winkler, in January 2005, that Nathan was not talking as much as he had previously.

Furthermore, the story presented by Nathan's parents conflicts with Nathan's contemporaneously created medical records only in the sense that Nathan's medical records omit any description of the problem. For example, the January 11, 2005 medical record does not say affirmatively that Nathan's speech is normal. While Dr. Winkler's form includes boxes to check for review of systems, the checklist seems to be a review of physical problems. It is not focused on behavior or developmental progress. Exhibit 3 at 4. If there were an affirmative indication that a doctor examined Nathan and determined that his speech was normal (creating a direct contradiction with the parents' story), crediting the parents' testimony would be more difficult. See Murphy, 23 Cl. Ct. at 733 (stating "the 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.")

These points explain why the medical records may not be accurate or complete. They must be considered when weighing the information contained in the medical records against the testimony.

The testimony of the witnesses was credible in the sense that each person appeared to be testifying as honestly as his or her recollection of events would permit. Of course, because the events took place nearly four years earlier, their recollections may not be perfect. The credibility of the testimony was enhanced because the witnesses anchored their testimony around certain events, such as a family wedding that have a fixed and knowable date. Their credibility was also strengthened because, in some ways, there were some inconsistencies from one witness to another. These slight differences suggest that each witness was testifying according to his or her own (imperfect) memory and the witnesses had not rehearsed their testimony together.

For these reasons, the testimony of the witnesses is generally credited over the information presented in medical records that were created contemporaneously with events being described in the witnesses' testimony. Although this analysis is the foundation for the answers to the specific questions posed by the parties, it is not separately repeated below.

Resolution of Specific Questions

1. Nathaniel Nuttall's Speech Development

Nathan's ability to express himself using language was not delayed compared to his peer group before November 22, 2004.

Nathan, however, spoke with a lisp before November 22, 2004. Tr. 21. Some evidence indicates that a lisp is not a permanent condition because exercises and drills can correct the lisp. Tr. 20, 51.

A delay in the ability to use language differs from a problem with the ability to create correct sounds. For example, when Nathan turned four, that is before November 22, 2004, he knew to say “cheese” when his picture was being taken, although he said a word closer in sound to “these.”

Records that say that Nathan suffered from a speech delay before November 2004 are not accurate. See exhibit 5 at 2. These records were created in June 2005 and attempt to describe Nathan’s condition when he was two years old (September 2002 to September 2003). Because the records were not created contemporaneously with the events in 2002-03, this report is not entitled to presumption of correctness. See Cucuras, 993 F.2d at 1528.

The persuasive value of the June 2005 report is also lessened because of the presence of typos, errors with dates and other mistakes. Tr. 53-55. These errors suggest that process of obtaining a history from Mrs. Nuttall was not as good as it could have been.

Furthermore, Nathan’s two brothers (one older, one younger) both had problems with speech. Nathan’s younger brother, Dylan, was born several months prematurely and has some speech issues such as mispronouncing words or could not make certain sounds. Dylan has since been released from speech therapy. See tr. 21, 30, 77, 138. These characteristics in Nathan’s family may explain why some histories may be confused.

In comparison with the stray references in the collection of medical records, the testimony of Mr. and Mrs. Nuttall was compelling and persuasive. Consequently, their testimony is credited — Nathan did not have a speech delay before November 22, 2004.

2. Immediate Reaction to MMR Vaccine.

The evidence indicates that Nathan did not experience a fever or a rash or uncontrollable crying within 5 - 15 days after receiving his MMR vaccine on November 22, 2004. Tr. 64, 91.

3. Developmental Regression

The parties’ third question asks about developmental regression generally. Questions 4 through 7 ask for findings of fact regarding specific behavior. Findings of facts for these questions are incorporated into this response.

A. Timing of Onset

Nathan's regression began at different times depending upon the skill involved. The earliest regression was a change in his speech, which occurred at the end of November 2004.

B. Gradual or Abrupt

In subpart B for questions 3 through 7, the parties ask whether Nathan's developmental "regression was gradual or abrupt." The definitions of these words are important. Abrupt means "1. Unexpectedly sudden." The American Heritage Dictionary 68 (2d College Ed. 1985). Sudden, in turn, is defined as "1. Happening without warning; unforeseen . . . 3. Characterized by rapidity; quick; swift." Id. at 1215. In contrast, gradual means "Advancing or progressing by regular or continuous degrees." Id. at 570.

When these terms are used to describe a change in Nathan's abilities, it is useful to create a metaphorical graph. In this graph, Nathan's ability can be plotted along the y axis and time along the x axis. If the change in ability resembles a cliff, then the change is abrupt. If the change in ability more resembles a hill, then the change is gradual.

The overall pattern of Nathan's regression was gradual. His regression worsened by degrees. For example, his ability to use language started to decrease in November 2004. However, he did not begin to injure himself until March 2005.

Mr. Nuttall's testimony supports a finding that Nathan's overall developmental regression worsened gradually. Tr. 126. Mrs. Nuttall also testified that from February 2005, Nathan "deteriorate[d]" over the next three months. Tr. 45-46.

Mrs. Nuttall's testimony, in contrast, was that Nathan's change was like a light switch turning off. Tr. 70. This testimony is not credited because if Nathan's skills and abilities changed so dramatically, in even a few days, it is very likely that his parents would have been much more aggressive about seeking medical attention for him. The medical records would contain notations like "Nathan no longer talks." The absence of any entries like these from November 2004 through January 2005 strongly suggests that Nathan was declining gradually, not abruptly.

However, the regression in certain abilities appeared abruptly. See discussion below.

C. Nature of Regression

Answers to questions 4 through 7 capture most, if not all, of the changes in Nathan.

4. Extreme Irritability.

Nathan developed extreme irritability and anxiety, especially when separated from his mother, after receiving the MMR vaccine on November 22, 2004.

A. Timing of Onset

Nathan began experiencing this separation anxiety by December 18, 2004. This was the date of the wedding of Nathan's paternal aunt, Julia. Mrs. Nuttall could not leave Nathan with a babysitter because Nathan was so upset at being separated from his mother. Tr. 39-40, 59, 118, 162.

Nathan experienced an episode of separation anxiety on November 30, 2004. On this date, Mrs. Nuttall left Nathan at her church's nursery in care of older children who had previously taken care of Nathan. Nathan cried inconsolably for the time he was away from his mother, which seems to be two to three hours. This was the first time Nathan had this type of episode. Tr. 33-38.

B. Gradual or Abrupt

Nathan's change in mood developed gradually. Although the two episodes described above happened within a span of 18 days, Nathan's change was not consistent. For example, Nathan's parents left him with a babysitter, Ms. Shaina Payton, in early December. When his mom and dad departed for the evening, Nathan did not exhibit separation anxiety. Tr. 170, 174.

In addition, when the Nuttalls brought Nathan to his pediatrician in early January 2005, the Nuttalls attempted to describe all of Nathan's problems to Dr. Winkler. Tr. 72, 135 see also exhibit 3 at 8. However, this record does not mention Nathan's clinginess. Exhibit 3 at 8; tr. 73, 135.

C. Nature of Regression

Nathan's separation anxiety was marked by prolonged crying. He also screamed at times.

5. Speech Skills

Nathan lost his skills in speaking after receiving the MMR vaccination on November 22, 2004. To some extent, the findings in this section overlap with the findings in section 1, above.

A. Timing of Onset

Nathan began to lose his speech skills in November 2004. Tr. 32, 150.

B. Gradual or Abrupt

Nathan's loss of speech skills was abrupt.

Mrs. Nuttall described that Nathan stopped saying "Mom, I want juice" and began saying "Ju Na-Na." Tr. 32. This change happened during the week of Nathan's vaccination in November 2004. Tr. 64.

Mr. Nuttall also explained that he noticed that Nathan had stopped speaking during a car trip to San Diego for the wedding, which was on December 18, 2004. Before this trip, Mr. Nuttall did not have much opportunity to observe Nathan because of Mr. Nuttall's job and school obligations. Tr. 118, 121, 131.

Nathan's regression in ability to speak was confirmed by the testimony of his paternal grandfather. Mr. Ellis Nuttall poignantly described how Nathan rejected him when Mr. Nuttall saw Nathan at the wedding. Tr. 162.

Nathan lost his speech abruptly. After the abrupt decline, Nathan's speech did not improve. In the winter 2005, Nathan was not speaking much, if at all. Tr. 45, 49; see also exhibit 3 at 8 (saying that Nathan "used to go weeks without saying much.").

C. Nature of Regression

Nathan's first change was a change in his vocabulary and sentence structure. This change was evident at the end of November 2004 when Nathan stopped saying "Mom, I want juice" and began saying "Ju Na-Na." Tr. 32.

Nathan also changed because the quantity of his speech declined. Before November 2004, Nathan was talkative. Tr. 20, 22-23, 104, 112, 162. After November 2004, Nathan spoke much less, almost not at all. Tr. 44, 49, 123, 135, 170.

Finally, Nathan also changed in that he does not use words as they are used in the English language. Tr. 12, 128. For example, Nathan would use phrases he learned from television shows and cartoons as a frame of reference instead of asking specifically for what he wanted. No evidence indicates when this change began.

6. Appetite and other Issues Related to Food

Nathan experienced a decline in his appetite after November 22, 2004. Furthermore, although the parties' question specifies "a dramatic change in [Nathan's] appetite," Nathan also experienced other problems related to food.

A. Timing of Onset

Nathan's appetite has been a problem since the end of November 2004. Tr. 16, 65. Mrs. Nuttall informed Nathan's doctor that he was "not eating well" on January 19, 2005. Exhibit 3 at 5.

During the week of Nathan's vaccination in November 2004, Nathan was having diarrhea. This change in his bowel movements also led his parents to put Nathan into diapers again. Previously, Nathan had been trained to use the toilet. Tr. 32, 44, 66 (describing changing diapers and washing clothes around Christmas), 118-19.

B. Gradual or Abrupt

The decline in Nathan's appetite was gradual. If Nathan had stopped eating solid foods entirely in December 2004, then Mrs. Nuttall would have told the doctor of this change. However, in January 2005, Mrs. Nuttall said that Nathan was "not eating well," which implies that Nathan was eating some food.

Nathan's recurrent diarrhea was abrupt. Although the medical records do not mention diarrhea until March 1, 2005 (exhibit 3 at 6), diarrhea is a condition common enough that parents may not have sought medical attention immediately.

C. Nature of Change

Before November 2004, Nathan ate a variety of foods. After November 2004, Nathan preferred to drink juice. Tr. 16 (current).

Before November 2004, Nathan was trained to use the toilet. After November 2004, he returned to diapers.

7. Self-Injurious Behaviors

After November 22, 2004, Nathan began to injure himself.

A. Timing

The self-injurious behavior began at the end of February 2005. By March 2005, Mrs. Nuttall purchased a helmet for Nathan to wear to protect his head. Exhibit 3 at 7; tr. 68.

B. Gradual or Abrupt

It appears that the self-injurious behavior began abruptly. No evidence indicates that before February 2005, Nathan routinely hurt himself.

C. Nature

Nathan banged his head. Nathan also bit himself. Exhibit 3 at 7; tr. 68. No information was provided about how frequently Nathan injures himself, such as number of occurrences per week. Also, no information was provided about whether Nathan still hurts himself.

Conclusion

This document resolves the parties' disputes over Nathan's development. A status conference will be held on **Thursday, March 19, 2008 at 3:00, eastern time**. The Nuttalls should be prepared to address how they want to proceed in light of the decisions in the first three test cases from the Omnibus Autism Proceeding. Respondent should be prepared to address whether the petition was filed within the time provided by the statute of limitations.

IT IS SO ORDERED.

Christian J. Moran
Special Master