OFFICE OF SPECIAL MASTERS

(No. 91-0732V)

(Filed August 31, 1998)

* *		
JEFFREY D. RALEY, SR. and PEGGY RALEY, on behalf of AARON D. RALEY, deceased,	*	
Petitioners,	*	Publish
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

Curtis R. Webb, Twin Falls, Idaho, for petitioners.

Glenn A. MacLeod, U.S. Department of Justice, Washington, D.C., for respondent.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

WRIGHT, Special Master.

This matter is before me on respondent's motion to dismiss the underlying petition for compensation brought under the National Vaccine Injury Compensation Program (hereinafter "Vaccine Act" or "the Act").[1] Respondent urges me to dismiss the petition because there are no medical records to support petitioners' claim, thereby violating Section 13(a)(1) of the Act. For the reasons stated herein, respondent's motion is denied.

I.

PROCEDURAL BACKGROUND

On January 31, 1991, petitioners filed a claim on behalf of Aaron D. Raley ("Aaron"), Petitioners claimed that as the direct result of a diphtheria-pertussis-tetanus ("DPT") vaccination administered on October 1, 1979, Aaron suffered an encephalopathy as defined by the Vaccine Injury Table, resulting in his death. On July 31, 1996, respondent filed a report in this matter recommending compensation be denied since contemporaneous medical documentation did not support petitioners' claim. However, during a status conference held September 9, 1997, respondent's counsel informed the special master that he would not be presenting any expert testimony at the scheduled evidentiary hearing because of the compelling nature of the facts alleged.[2] Because of respondent's pre-trial representations an evidentiary hearing was held on September 16, 1997, in Washington, D.C. on factual matters only. Petitioners presented the testimony of Jeffrey D. Raley, Sr. and Peggy Raley, Aaron's parents.

On November 13, 1997, I issued findings of fact based upon the hearing testimony. Spec. Mstr. Order dated Nov. 13, 1997. On November 20, 1997, petitioners filed a supplemental expert report of Dr. Schweller. In lieu of filing a supplemental expert report, as directed, respondent filed a motion for summary judgment on December 23, 1997. ("Resp. Motion") Respondent asserts summary judgment should be entered against petitioners in this matter because petitioners have failed to supply medical records or a qualified medical opinion to substantiate their claim, as required by Section 13(a)(1) of the Act. Petitioners filed a brief in opposition to respondent's motion on January 12, 1998. ("Pet. Opp.")

II.

FACTUAL BACKGROUND

In my order dated November 13, 1997, I made the following findings of fact:[3]

Aaron was born on July 13, 1979, following an uncomplicated pregnancy and delivery. P. Ex. 2; P. Ex. 3 at 4. Aaron's birth weight was 7 lbs. 1 ½ oz. Aaron was the Raleys' first child. Tr. at 6. Aaron had a normal development and was healthy except for an upper respiratory infection on September 18, 1979. P. Ex. 9 at 1; Tr. at 37. On October 1, 1979, Aaron received his DPT vaccination from Dr. Leroy Schaffner. P. Ex. 4 at 8; P. Ex. 9 at 1. Aaron was found dead on the morning of October 2, 1979. The pathologist who conducted an autopsy on Aaron on October 3, 1979, concluded he died of sudden infant death syndrome ("SIDS"). P. Ex. 6 at 2.

Mrs. Raley took Aaron to Dr. Schaffner's office on October 1, 1979, for a well-baby visit. Dr. Schaffner examined Aaron and determined that he was healthy and normal. Tr. at 37-38. During the visit, Aaron received his DPT inoculation at approximately 4:30 or 5:00 p.m. Tr. at 38. Immediately following the vaccination, Aaron cried briefly. Tr. at 39. Upon arriving home, Mrs. Raley gave Aaron some Tylenol on advice from her mother who informed her that Aaron might be fussy and run a little fever.(4) Tr. at 39, 45. Mrs. Raley then laid Aaron down while she cooked dinner. Tr. at 39. While Mrs. Raley was cleaning the dishes from dinner, Aaron started crying inconsolably. Tr. at 8, 39. Mrs. Raley described the cry as very loud and shrill. Tr. at 41. Mrs. Raley testified that she tried in vain to calm Aaron, changing his diaper and attempting to give him a bottle, but Aaron could not be consoled. Tr. at 39-40.

Aaron continued to cry throughout the evening despite Mrs. Raley's unsuccessful attempts to calm him. Tr. at 45, 59. Mrs. Raley tried to give Aaron a bath around 1:00 a.m., but Aaron was struggling, kicking his arms and legs, and crying. Tr. at 59-60. She also attempted to give Aaron a bottle, but he would not suck and would spit up any milk squirt into his mouth. Tr. at 61. At approximately 5:30 a.m., Aaron suddenly fell asleep in his swing.(5) Tr. at 40, 42, 46.

Mr. Jeffrey Raley, Sr., Aaron's father, stopped and kissed Aaron lightly on the top of the head before he left for work in the morning. Tr. at 12-13. At that time, Mr. Raley did not notice anything wrong with Aaron, although he did not look closely enough at Aaron to determine whether he was breathing. Tr. at

Later that morning, Mrs. Raley's mother, sister, and grandmother came to the house at around 9:00 a.m. Tr. at 46. Mrs. Raley was still in bed when her mother went over to pick up Aaron and found him dead in his bassinet.(6) Tr. at 46. Although Mr. and Mrs. Raley were both somewhat confused about exactly who arrived at the house after Aaron's death, it would appear that neither an ambulance nor the sheriff's office was contacted but that Aaron's body was taken directly to the funeral home.

Mrs. Raley testified that, because of her fear about Aaron's reaction to his vaccination, her second son, Jeff, did not receive any immunizations until he was one year old. Tr. at 73. According to Mrs. Raley, she scheduled Jeff's vaccinations on a Friday so that Mr. Raley would be able to stay up with her in case Jeff had a severe reaction. Tr. at 73. Jeff's school immunization records confirm that his first vaccinations were given on a Friday when he was a year old. P. Ex. 17.

To be sure, there were some minor inconsistencies in the Raleys' testimony. However, I found their testimony overall to be credible in this matter. Mrs. Raley was Aaron's primary caretaker and a

particularly compelling witness. As might be expected after such a traumatic event, she seems to have the main events of that tragic night firmly etched in her memory.[7]

On October 23, 1996, petitioners filed the expert report of Dr. Thomas A. Schweller.[8] This report was supplemented by filing dated November 20, 1997. P. Ex. 7; P. Ex. 20. It is Dr. Schweller's opinion that Aaron suffered an encephalopathy within 17 hours of his October 1, 1979, DTP vaccination, and that his death was a sequela of that encephalopathy. As noted above, rather than filing a medical expert report in this matter as directed by the undersigned, after the hearing respondent instead filed the instant motion for summary judgment. No testimony was taken on the medical aspects of the case.

III.

THE PARTIES' ARGUMENTS

The crux of respondent's argument is that Section 13(a)(1) requires independent corroborating evidence of a Table injury that a medical opinion cannot provide if it is based solely on petitioners' claims.

Section 13(a)(1) of the Vaccine Act delineates the standard by which the special master may award compensation to petitioners. It states, in part:

(a) General rule.

(1) Compensation shall be awarded under the Program to a petitioner if the special master or court finds on the record as a whole --

(A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section 300aa-11(c)(1) of this title, and

(B) that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition.

The special master or court may not make such a finding based on the claims of a petitioner alone, *unsubstantiated by medical records or by medical opinion.*

Id. (emphasis added).

Citing *Hellebrand v. Secretary of HHS*, 999 F.2d 1565 (Fed. Cir. 1993) and *Hodges v. Secretary of HHS*, 9 F.3d 958 (Fed. Cir. 1993), respondent asserts that death alone cannot independently establish a Table injury. Resp. Motion at 5-6. I fully agree. In order to prevail, a petitioner must prove that a Table injury occurred, that the first symptom or manifestation of onset began within 72 hours of the vaccination, and that the death was the acute complication or sequela of the Table injury. Further, however, respondent argues that the substantiation requirement in Section 13(a)(1) dictates that "either medical records or medical opinion must authenticate petitioners' claim that a vaccine-related injury occurred." Resp. Motion at p. 7. In other words, respondent's position is that if there are no medical records to substantiate a claim, a medical opinion will satisfy Section 13(a)(1) only if it can substantiate the *facts* of a claim, not just offer an opinion on facts as presented by petitioner. Respondent asserts that although Federal Rule of Evidence 703 allows a medical expert opinion based solely on the unsubstantiated lay witness testimony, the Vaccine Act imposes a higher standard for expert medical opinions. *Id.*

Respondent relies chiefly upon *Lett v. Secretary of HHS*, 39 Fed. Cl. 259, (1997) to support her position. In that case, petitioners claimed that their daughter suffered her first seizure the morning after receiving a DPT vaccination. The child's parents testified they took her to the emergency room and she was treated at the office of the hospital's doctor on duty, who diagnosed Diane's episode as a bronchial attack. However, neither the emergency room records nor the doctor's records were ever found. At the hearing, petitioners presented the testimony of Dr. Mark Geier, an obstetrical geneticist who has testified for petitioners in many Program cases, who concluded that the child suffered from a Table residual seizure disorder. Petitioners also submitted an opinion from Dr. Marcel Kinsbourne, a highly qualified pediatric neurologist, who found, based on the affidavits of petitioners and the available records, that there were no "events within Table Time that could be interpreted as indicating . . . seizures, either by Table definition or based on my own medical knowledge." *Id.* at 262.

Judge Turner upheld the special master's dismissal of the claim based on the absence of corroboration of the factual claims by medical records or by medical opinion. Judge Turner agreed with the special master that Dr. Geier's opinion was insufficient to corroborate petitioners' claim because the factual basis of his opinion was based solely on the allegations of the petitioners themselves. *Id.* at 262. Judge Turner stated, "We conclude that when there is no mention of a seizure in any health record and when the only evidence of a seizure rests on the statements of the petitioners, the requirements of § 300aa-13 (a)(1) of the Vaccine Act are not met." *Id.*

Respondent also cites *Buxkemper v. Secretary of HHS*, 32 Fed. Cl. 213 (1994), a case in which the court reversed the special master's decision to award pain and suffering to petitioners who proved their child suffered a Table residual seizure disorder although he later died of an unrelated injury. In reaching her conclusion, Judge Horn also reversed the special master's factual determination that the child suffered a Table injury, because no medical records supported petitioners' claims.

Finally, respondent relies on *Bradley v. Secretary of HHS*, 991 F.2d 1570 (Fed. Cir. 1993), to buttress her argument. In *Bradley*, the Federal Circuit affirmed a special master's dismissal of petitioners' claim where the special master specifically found that petitioners' testimony was not credible. In affirming the special master's action, Judge Michel stated:

Here, there were no medical records that showed that the symptoms occurred within 72 hours of the

DPT vaccine. In addition, although medical opinions were offered in support of Mrs. Bradley's testimony, those medical opinions were based largely on that testimony itself and, *therefore, the special master could reasonably conclude that the medical opinions did not qualify "to substantiate" that testimony*.

Bradley at 1574 (emphasis added). In the instant case, because petitioners' expert, Dr. Schweller, concluded that Aaron suffered a Table encephalopathy which caused his death, based solely on petitioners' testimony, and could not independently corroborate the facts, respondent asserts petitioners' claim must fail.[(9)] Resp. Motion at 9-10.

Respondent further argues that the substantiation exception found in Section 13(b)(2) of the Act only applies when there is independent evidence that an alleged injury in fact occurred. Resp. Motion at 10-11. Section 13(b)(2) states:

The special master or court may find the first symptom or manifestation of onset or significant aggravation of an injury, disability, illness, condition, or death described in a petition occurred within the time period described in the Vaccine Injury Table even though the occurrence of such symptom or manifestation was not recorded or was incorrectly recorded as having occurred outside such period. Such a finding may be made only upon demonstration by a preponderance of the evidence that the onset or significant aggravation of the injury, disability, illness, condition, or death described in the petition did in fact occur within the time period described in the Vaccine Injury Table.

Respondent asserts that this section "relates to timing and nothing more." It "cannot be read as authorizing the special master to find the *occurrence* of a compensable, vaccine-related injury based upon the claims of petitioner alone without the independent evidence required by [Section] 13(a)(1)." Resp. Motion at 10-11 (emphasis in original.)

Petitioners counter that Section 13(a)(1) does not restrict the special master's discretion to rely on lay testimony. Pet. Opp. at 2-5. Specifically, petitioners claim that respondent distorts the meaning of the last sentence of Section 13(a)(1), which states that the special master or court may not find a Table injury "based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." Petitioners argue that respondent has confused the term "substantiate," with "corroborate." *Id.* at 2-3. The former term, petitioners claim, means that "the injured person's condition must be identified as vaccine related . . ." while the latter term implies an independent source provides evidence which corresponds to facts represented by some other witness. *Id.* at 3-4. According to petitioners, medical opinion rarely, if ever, corroborates lay testimony. *Id.* at 4. Congress did not require corroborative evidence from medical opinion testimony, it merely required "'other' evidence from medical records or opinion." *Id.* In this case, this "other" evidence, petitioners argue, is the expert opinion of Dr. Schweller. To the extent that the *Lett* decision holds otherwise, petitioners argue, it is wrong.

Finally, petitioners find support in the substantiation exception provision found in Section 13(b)(2). Petitioners cite to the following legislative history of Section 13(b) to bolster their argument: "The court is specifically authorized to find that the record demonstrates that the time restrictions of the Table have been met even if some pieces of evidence omit references to time or incorrectly record them." H.R. Rep.

No. 908, 99th Cong., 2d Sess. Pt. 1 at 18 (1986), *reprinted in* 1989 U.S.C.C.A.N. 6359.

IV.

DISCUSSION

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); Vaccine Rule 8(d); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *Jay v. Secretary of HHS*, 998 F.2d 979 (Fed. Cir. 1993). The moving party bears the burden of showing there is no genuine issue of material fact. *SRI Int'l v. Matsushita Elec. Corp. of Am*., 775 F.2d 1107, 1116 (Fed. Cir. 1985); *Jay v. Secretary of HHS*, 998 F.2d at 982. When ruling on summary judgment, all inferences are drawn in favor of the non-moving party. *Id*. Indeed, in her motion, respondent "assumes the credibility and good faith of petitioner." Resp. Motion at 5. Respondent believes that the evidence in this case would not permit me to find for petitioners as a matter of law. Respondent's theory is grounded on the notion that a medical expert opinion based solely on "unsubstantiated" testimony of petitioners does not qualify as a medical opinion under Section 13(a)(1). Resp. Motion at p. 7.

Section 13(a)(1) is inapplicable because there is a medical record which substantiates petitioners' claim.

The parties in this matter have seemingly overlooked the fact that there in fact is indeed a crucial medical record substantiating the possibility that a vaccine-related injury occurred -- the autopsy report. Although the pathologist who prepared the report concluded that Aaron died of Sudden Infant Death Syndrome (SIDS), that fact does not disqualify the report as a bona fide medical record of an adverse event following vaccination, albeit not one that reaches the conclusion that a vaccine-related death occurred. It should be noted, however, that in almost every contested case in this Program, there is no contemporaneous medical record which directly substantiates petitioner's claim. If such a record exists, and respondent's expert does not find that petitioner's injury or death is due to a factor unrelated to the administration of the vaccination in question, then respondent invariably determines at the outset that the case is compensable, or otherwise decides not to defend the case.

As noted, respondent correctly asserted that death alone, or the agonal process, does not qualify petitioner for compensation. It must be shown that the injured person suffered a vaccine-related injury which led to his or her death. *Hellebrand v. Secretary of HHS*, 999 F.2d 1565 (Fed. Cir. 1993); *Hodges v. Secretary of HHS*, 9 F.3d 958 (Fed. Cir. 1993). However, according to well-established precedent, death may be *considered* when determining whether a vaccine-related injury occurred. *Jay v. Secretary of HHS*, 998 F.2d 979 (Fed. Cir. 1993).[(10)] Indeed, in most death cases which have been compensated under the Vaccine Act, a pathologist concluded that a deceased vaccinee died of SIDS, while petitioner's medical experts disagreed, based on facts elicited during the course of the proceedings -- facts which, oftentimes, are not available to the pathologist. As noted above, it appears that no ambulance or sheriff's report was prepared in this matter because Aaron was taken directly to the funeral home after being

pronounced dead.

It is within the province of the special master to find facts upon which an expert may base his or her testimony. Once the facts have been established, usually by testimony during an evidentiary hearing, an expert is free to opine as to whether a vaccine-related injury occurred, based on the facts as the special master has found them. That is and has been the nature of proceedings under the Vaccine Act since the inception of the Program. This case is no different. A pathologist determined, apparently based on scanty factual underpinnings, that Aaron died of SIDS. Now that the facts have been more fully developed, petitioners' expert has a different opinion. Although no medical expert hearing has been held as yet (because of respondent's earlier position that if I found the facts as averred by petitioners, respondent would likely either concede the case or determine no longer to defend it) petitioners' expert should now be free to offer his opinion based on the record herein.

Even if there were no medical record in this case indicating that Aaron suffered a terminal event within the Table time frame following his DPT inoculation, the principles of statutory construction dictate that Section 13(a)(1) does not require independent medical record corroboration of a vaccine-related injury.

Statutory construction begins with the plain language of the statute, with the assumption that the ordinary meaning of the provision accurately reflects congressional intent. "Where a statute's language is unambiguous, its plain meaning is conclusive, and judicial inquiry halts at this point . . . ." *Amendola v. Secretary of HHS,* No. 90-766V, 1991 WL 43027 (Cl. Ct. Spec. Mstr. Mar. 14, 1991), *sustained*, 23 Cl. Ct. 621 (1991), *aff'd*, 989 F.2d 1180 (Fed. Cir. 1993).

The plain meaning of the words are followed if they sufficiently indicate the purpose of the statute. However, where the plain meaning leads to absurd, futile or unreasonable results, "plainly at variance with the policy of the legislation as a whole," the Supreme Court has followed the purpose rather than the literal words.

Rooks v. Secretary of HHS, 35 Fed. Cl. 1, 5 (1996) *citing United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940). A statute must be interpreted as a whole, and every effort should be made to give meaning and effect to the entire enactment. *Beecham v. United States,* 511 U.S. 368 (1994).

The plain language of Section 13(a)(1) does not require independent medical record corroboration of the facts supporting a vaccine-related injury. It states that the special master may not find a Table injury "based on the claims of a petitioner alone, unsubstantiated by medical records *or by medical opinion."* (Emphasis added.) There is no requirement in the Vaccine Act that the medical opinion independently corroborate the *facts* of an injury. As petitioners have pointed out, medical experts in Vaccine cases invariably have no independent knowledge of the facts of the case. Further, percipient medical witnesses (also a rarity in vaccine cases) almost never serve as expert witnesses who render opinions on the ultimate issue in the case. Almost every case is decided by an expert with no firsthand knowledge of the facts who relies on the entire record, including the facts as they have been presented by petitioners. It is then within the province of the special master to determine whether the underlying facts are credible as presented by petitioners. If a special master concludes that the facts as presented are

incredible, then any expert testimony based on those facts carries no weight. The conclusions of an expert are only as sound as their factual predicate. *See Davis v. Secretary of HHS*, 20 Cl. Ct. 168, 173 (1990); *Loesch v. United States*, 645 F.2d 905, 915 (Ct. Cl. 1981)(*citing State of Washington v. United States*, 214 F.2d 33, 43 (9th Cir.), *cert. denied*, 348 U.W. 862 (1954); *Fehrs v. United States*, 620 F.2d 255, 265 (Ct. Cl. 1980).

Any requirement that a medical expert have independent knowledge of the facts would impose an extraordinary burden on petitioners and is nonsensical in the scheme of the Vaccine Act, the purpose of which is to provide a compensation procedure that administers awards "quickly, easily, and with certainty and generosity." H.R. Rep. No. 908, 99th Cong., 2d Sess. 1 (1986), *reprinted in* 1989 U.S.C.C.A.N. 6344, 6348. To impose a greater burden on petitioners in the Vaccine Program, as opposed to traditional tort litigation where, as respondent has pointed out, the Federal Rules of Evidence permit medical experts to testify based solely on the unsubstantiated lay witness testimony, would lead to an absurd result and contravene the express purpose of the Act. It is unfathomable to think that although Congress intended the Federal Rules of Evidence not to apply to Vaccine cases, it would intentionally set a higher standard for medical opinions than is required under the Federal Rules. This goes against the very purpose Congress intended in structuring proceedings meant to be less formal and stringent than in the typical tort litigation setting.

The plain language of the Act states that petitioners' claims can be substantiated by medical records *or* by medical opinion. By placing the word "or" in the sentence, Congress intended that petitioners may *either* rely upon the medical records to prove their claim, *or*, in cases where the medical records contain no information regarding whether petitioner suffered a Table injury, petitioners may rely upon an expert medical opinion to substantiate their claim. In *Bernard v. Secretary of HHS*, No.91-1301V, 1992 WL 101097 (Cl. Ct. Spec. Mstr. Apr. 24, 1992), the special master noted the significance of expert medical testimony. He stated:

The medical significance of the facts testified to by the lay witnesses must be interpreted by a medical doctor, who, in turn, expresses the opinion either that a compensable Table injury has occurred or that the vaccine in question actually caused the injury complained of. If such an opinion appears in the medical records, then it is unnecessary to call a retained expert witness in order to establish a prima facie case; if, on the other hand, the medical records do not provide such substantiation, then a petitioner must retain a medical doctor who, upon review of the entire record, concludes that it is more likely than not that a compensable injury has occurred.

Id at *1.[(11)]

A full and fair reading of the Vaccine Act dictates that parties are entitled to rely on expert opinion in the absence of corroborating medical record evidence to prove their cases.

The issue of substantiation has been specifically addressed by at least two special masters. In *Eng v. Secretary of HHS*, No. 90-1754V, 1994 WL 67704 (Fed. Cl. Spec. Mstr. Feb. 18, 1994), Special Master French specifically rejected the same argument respondent asserts here. Special Master French noted,

The court does not violate the § 13(a)(1) prohibition by making findings of fact based on oral testimony where, as here, there is no documented evidence of the course of injury or if the recorded information is found to be erroneous. If [a] medical expert submits thereafter a creditable opinion that the facts as found constitute a Table injury, the requirements of the statute have been satisfied.

Id. at *3. The special master further stated:

The authority to find facts based on credible testimony is critical in vaccine cases to overcome the inherent problems created by inaccurate or incomplete records. Had congress not included the provisions discussed herein, the court would be held hostage by human errors contained in medical records. Moreover, a court proceeding would be unnecessary if the record of proceedings were confined to medical records only. The testimony of the fact witnesses is critical evidence upon which medical experts may formulate their opinions or evaluate the accuracy of a given diagnosis.

Id. (citations omitted).

Likewise, in *Valenzuela v. Secretary of HHS*, No. 90-1002V, 1991 WL 182241 (Cl. Ct. Spec. Mstr. Aug. 30, 1991), Special Master Baird rejected respondent's argument by holding the following:

Section 13(a) sets out the general rule concerning the finding of eligibility for compensation under the Program. It provides that a special master may not make such a finding based on the claims of a petitioner alone. Those claims must be substantiated by medical records or medical opinion. It allows the special master to make such a finding if the petitioner's claims are substantiated either by medical records or by medical opinion. Section 13(b)(2) does not further limit the authority of the special master. It merely states that the special master is not bound by medical record entries in determining either when the onset of a Table injury occurred or whether such an injury occurred. Numerous decisions have been issued finding that a Table encephalopathy occurred where the autopsy report and/or death certificate reported the cause of death as being SIDS and there was no medical record showing that an encephalopathy occurred.

Id. at *3 (footnotes omitted).

I agree with the analyses of special masters French and Baird. It is within the special master's discretion to determine whether petitioners' testimony is credible. After a special master has made a determination that the testimony presented is credible, he or she may rely on medical expert opinion based upon that testimony. Respondent's position would penalize petitioners who are unable to produce medical records supporting their claim, for whatever reason. Particularly impacted would be those petitioners who had their children vaccinated during service in the military, as, in my experience, an alarming percentage of military medical records do not follow their owners from post to post. Would respondent expect that petitioners' claims be automatically dismissed if their medical records were destroyed in a fire, flood or other disaster? Indeed, in many situations, the testimony of petitioners is given greater weight than the medical records which may contain inconsistent or incorrect information. *See, e.g., Stevens v. Secretary of HHS*, No. 90-221V, 1990 WL 608693 (Fed. Cl. Spec. Mstr. Dec. 21, 1990).

The requirement that petitioners' claims must be supported either by medical records or medical expert opinion simply addresses the fact that the special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone. The substantiation requirement in Section 13(a)(1) refers to the ultimate finding of a Table injury under 11(c)(1). That substantiation may be found within the record as a whole. Section 13(c) defines the record as that established by the special master in a proceeding on the vaccine petition. Section 13(b) delineates the matters the special master is to consider:

(1) In determining whether to award compensation to a petitioner under the Program, *the special master or court shall consider*, in addition to all other relevant medical and scientific evidence contained in the record --

(A) any diagnosis, conclusion, medical judgment, or autopsy or coroner's report which is contained in the record regarding the nature, causation, and aggravation of the petitioner's illness, disability, injury, condition, or death, and

(B) the results of any diagnostic or evaluative test which are contained in the record and the summaries and conclusions.

Any such diagnosis, conclusion, judgment, test result, report, or summary shall not be binding on the special master or court. *In evaluating the weight to be afforded to any such diagnosis, conclusion, judgment, test result, report, or summary, the special master or court shall consider the entire record and the course of the injury, disability, illness, or condition until the date of the judgment of the special master or court.*

Section 13(b) (emphasis added). The special master is not limited by the above section, but is given deference to weigh the credibility and reliability of all the evidence.

Respondent is correct in her assertion Section 13(b)(2) applies only to the finding that the onset of the injury occurred within the Table time frame even if medical records are silent on the point or actually contradict the alleged date of onset. In cases where medical records are devoid of any mention of onset or contain a date or dates of onset that are inconsistent with petitioners' allegations, however, it has been held that the fact finder must closely scrutinize such testimony and, to meet their burden, petitioners must present thoroughly credible and persuasive testimony and/or documentary evidence to explain omissions or errors in the medical records. As the Federal Circuit noted in *Cucuras v. Secretary of HHS*, "oral testimony in conflict with contemporaneous documentary evidence deserves little weight." 993 F.2d 1525, 1528 (Fed. Cir.1993), *citing United States v. United States Gypsum Co.*, 333 U.S. 364 (1947). However, as Special Master Golkiewicz noted in *Stevens v. Secretary of HHS*, No. 90-221V, 1990 WL 608693 (Fed. Cl. Spec. Mstr. Dec. 21, 1990), "discrepancies between the testimony and records or gaps in the medical records are not in and of themselves decisive; clear, cogent and consistent testimony can overcome such missing or contradictory medical records."[(12)] *Id.* at *3.

In this case, however, there are no medical records which contradict petitioners' testimony, and indeed, an autopsy report verifies that something devastating (death) occurred to Aaron within the Table time period following his DPT immunization. I have found petitioners' testimony to be credible and have made findings of fact based upon their testimony and the entire record herein. Petitioners' expert, Dr. Schweller, has formed an opinion based upon petitioners' testimony and the

records in this matter. I find that this meets the substantiation requirement of Section 13(a)(1).[(13)]

V.

CONCLUSION

Based on the foregoing, the undersigned finds, after considering the entire record in this case, that respondent's motion for summary judgment is hereby DENIED.

In light of the above, the following is hereby ORDERED:

(1) No later than September 30, 1998, respondent shall file an expert report in this matter.

(2) Upon receipt of respondent's expert report, petitioners shall contact respondent and the undersigned's office to determine a mutually-convenient date and time for the next status conference in this matter.

IT IS SO ORDERED.

_____

Elizabeth E. Wright

Special Master

1. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C.A. §§ 300aa-1 through -34 (West 1991 & Supp. 1998)). References shall be to the relevant subsection of 42 U.S.C.A. § 300aa.

2. Respondent's counsel represented that if I found the factual testimony to be credible, respondent would likely either concede the case or determine not to further defend it.

3. The evidence in the record consists primarily of exhibits submitted as part of the petition filed in this case ("P. Ex. ____"), respondent's exhibits filed in this matter ("R. Ex. ____"), plus evidence taken at the evidentiary hearing in this matter ("Tr. at ____").

4. In her affidavit, Mrs. Raley stated that she gave Aaron another dose of Tylenol around 12:30 a.m. P. Ex. 1 at 4-5. However, during her testimony, Mrs. Raley could not recall the second dose of Tylenol. Tr. at 57-58.

5. Mrs. Raley testified that she did not call a doctor that evening since she had spoken to her mother-in-law, who is an LVN, about Aaron's behavior. Tr. at 42.

6. In an affidavit, Mrs. Nancy Gee, Aaron's maternal grandmother, averred that she found Aaron dead in his crib on October 2, 1979. P. Ex. 14 at 2. Mrs. Gee stated, "Aaron's fingernails and lips were purple and his face had ugly spots on it. When I touched him he was as cold as ice." P. Ex. 14 at 3. According to Mrs. Gee, she sent her mother and daughter across the street to a store to call for someone. P. Ex. 14 at 3. Mrs. Gee recalled that someone from the funeral home arrived at the house as well as the justice of the peace who pronounced Aaron dead. P. Ex. 14 at 3-4. Mrs. Gee did not recall an ambulance or sheriff at the house. According to Mrs. Gee, Aaron was taken directly to the funeral home. P. Ex. 14 at 4.

7. Mr. Raley testified he first learned of the Vaccine Program 24 hours before the deadline for filing his claim. Tr. at 4. When he filed the petition, Mr Raley, acting *pro se*, attached to the petition an affidavit signed by Mrs. Raley. Mr. Raley testified he had prepared the affidavit and had his wife sign it. Tr. at 5-6, 22. Mrs. Raley testified she never read the affidavit before signing it as the memory of Aaron's death was too painful for her. Tr. at 49-50, 54-55.

8. Dr. Schweller is board certified in pediatrics, neurology and electroencephalography. P. Ex. 8. He has maintained a private practice in neurology since 1979 and is on the faculty of the University of California Medical School at San Diego. *Id*. Dr. Schweller is also a medical consultant for the Department of Social Security Disability Services. *Id*.

9. Respondent also seems to challenge Dr. Schweller's conclusion that Aaron's death was a sequela of his encephalopathy because, according to respondent, Aaron had apparently returned to a normal condition when his father stopped to kiss him on the way to work in the morning. Resp. Motion at 8-9. As an initial matter, because of respondent's pre-hearing assertions, there was no medical testimony in this case. Dr. Schweller was never given the opportunity to elaborate on his opinion regarding the medical issues. Moreover, to suggest that Aaron's condition had returned to normal simply because his father did not notice anything was wrong when he went to work that morning is purely speculative.

10. Respondent asserts that the Federal Circuit's decision in *Jay* was incorrect. Respondent avers that the Court's decisions in *Hellebrand v. Secretary of HHS*, 999 F.2d 1565 (1993) and *Hodges v. Secretary of HHS*, 9 F.3d 958 (1993) contradict the Court's ruling in *Jay*. I disagree. *Hellebrand* and *Hodges* stand for the proposition that petitioners must establish a Table injury separate and distinct from the agonal

process in order to receive compensation under the Program. The Court in *Jay* stated that there is "nothing in the Vaccine Act which precludes death from being used as *evidence* of a table injury . . . ." *Jay* at 983 (emphasis added). Thus, while death *alone* cannot establish a Table injury, it can be taken into consideration in determining whether a Table injury occurred. In the cases of *Hellebrand* and *Hodges*, petitioners were found not to be entitled to compensation because they were unable to prove that a Table injury occurred that was separate and apart from the child's death. The issue of whether death was a sequela of a Vaccine related injury was not addressed.

11. In *Bernard*, the special master found petitioners were not entitled to compensation because their expert's opinion was too equivocal to provide adequate substantiation. *Bernard v. Secretary of HHS*, 1992 WL 101097 at *2-3.

12. Respondent also asserts that petitioners have failed to meet their burden of proving that Aaron suffered an on-Table encephalopathy and that his death was a sequela, asserting that petitioners have merely proven a temporal relationship between the DTP vaccination and Aaron's death. Resp. Motion at p. 9. It should be noted yet again that, because of respondent's pre-trial assertions, no medical expert testimony has been elicited in this case. That is the next step in this proceeding. After hearing the testimony of both experts in this matter, I will decide whether petitioners have met their burden of proving a presumptively vaccine-related injury.

13. Respondent has cited several cases to support her position. Rather than uniformly supporting respondent's position, however, at least one case upon which respondent relies arguably supports the notion that credible fact testimony can be relied upon by an expert witness in the absence of medical documentation to support a claim. In *Bradley, supra*, while upholding the dismissal of a claim in which there was no corroborative medical documentation, the court also noted that the special master has broad discretion in determining the credibility of fact witnesses. *Id.* at 1575. The special master in *Bradley* found the fact testimony to be incredible. Rather than buttressing respondent's position, to the contrary, in my view, *Bradley* supports the notion that if the special master had found the fact witness testimony to be credible, an expert opinion relying on that testimony could support a Table injury. To the extent that the *Lett* and *Buxkemper* decisions require independent medical corroboration of a vaccine-related injury, the undersigned respectfully disagrees. It should be reiterated here, however, that *Lett* and *Buxkemper* are inapplicable in this case because the autopsy report lends credence to petitioners' assertion that something devastating happened to Aaron within 72 hours of his DPT vaccination. It is within the province of the experts to render an opinion, based on the facts as I have found them, agreeing or disagreeing with the conclusions of the coroner.