

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-176V

Filed: August 31, 2012

ANDREA CORTEZ,)	
spouse and representative of the estate of)	TO BE PUBLISHED
RENALDO CORTEZ, deceased,)	
)	
Petitioner,)	Fact Ruling; Sufficiency of
)	Evidence; Receipt of
)	Vaccination
v.)	
)	
SECRETARY OF HEALTH)	
AND HUMAN SERVICES,)	
)	
Respondent.)	

*Sean Franks Greenwood, Gauthier, Houghtaling & Williams, Houston, TX, for Petitioner
Melonie J. McCall, United States Department of Justice, Washington, DC, for Respondent*

RULING REGARDING FINDING OF FACT¹

Zane, Special Master.

The issue before the undersigned is whether Petitioner, Andrea Cortez (“Mrs. Cortez”), has shown by preponderant evidence that her deceased husband, Renaldo Cortez,² received an

¹ Because this ruling contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this decision on the website of the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. *Id.*

² Also at issue is whether Mrs. Cortez has satisfied the requirements for showing that she is the legal representative of Mr. Renaldo Cortez. Mrs. Cortez has submitted her marriage certificate to indicate that she was married to Mr. Cortez at the time of his death. But, as yet, she has not satisfied the state requirements for demonstrating she is the legal representative of Mr. Cortez’s estate, which apparently would involve the expenditure of funds to obtain the appropriate materials from the state. With the acquiescence of the parties, that issue has been deferred pending the outcome of the issue currently before undersigned.

influenza vaccination. 42 U.S.C. § 300aa–11(b) and (c). Mrs. Cortez, as the spouse of decedent, Renaldo Cortez,³ filed her petition for compensation under the National Childhood Vaccine Injury Act⁴ (“Vaccine Act”), as amended, 42 U.S.C. § 300aa-10, *et seq.*, alleging that a trivalent influenza (“flu”) vaccination that her deceased husband allegedly received on January 26, 2006, at the office of Dr. Manuel Pena, caused him to suffer from Guillain-Barré syndrome (“GBS”), which eventually led to his death. *See* Petition; *see also* Respondent’s Rule 4 Report at 2, fn 2.

The issue arose because no vaccination record was filed, and there was a void in the evidence submitted to support the claim that Mr. Cortez had received the flu vaccination as alleged. The evidence Mrs. Cortez submitted on the issue was her own affidavit, Petitioner’s Exhibit 1, an affidavit from her son, Narcisco Garcia, Petitioner’s Exhibit 2, and a billing record from Dr. Pena that indicated that Mr. Cortez had received some injection on January 26, 2006. Petitioner’s Exhibit 4 at 6. Although this evidence can be considered as satisfying Petitioner’s obligation to provide evidence substantiating her statements at the initial pleading stage, *see generally* 42 U.S.C. § 300aa-13(a)(1), other medical records containing the contemporaneous notes of Mr. Cortez’s treating physician, Dr. Manuel Pena, from that same visit cast some doubt as to whether Mr. Cortez had actually received an influenza vaccination. *See* Petitioner’s Exhibit 4 at 4. Additionally, none of the medical records relating to Mr. Cortez’s health care, beginning with his initial hospitalization in April 2006,⁵ referenced his receipt of a flu vaccination in January 2006. *See generally* Petitioner’s Exhibits 3-13. Subsequently, necessary additional evidence, i.e., sworn answers of Mr. Cortez’s treating physician, to written deposition questions were added to the record and a fact hearing was conducted. As explained below, upon consideration of the record as a whole, the undersigned finds that there is *insufficient* evidence that Mr. Cortez received an influenza vaccination on or around January 26, 2006, and finds that Mr. Cortez *did not receive an influenza vaccination in January 2006*.

I. BACKGROUND

A. Factual Background

Mr. Renaldo Cortez, a resident of Texas, was born in 1932. Petitioner’s Exhibit 3 at 2; Tr. at 26.⁶ He was married for more than 20 years to Mrs. Cortez. Petitioner’s Exhibit 1, ¶ 1. He had a county government job, Tr. at 8, from which he retired when he was sixty-three or sixty-four. Tr. at 8.

³ Mr. Cortez’s name is spelled two different ways in various places, *i.e.*, Reynaldo and Renaldo. This opinion will use the spelling in the caption of this case.

⁴ 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).

⁵ Although Mr. Cortez was alleged to have received the flu vaccination in January 2006, he was not hospitalized until April 2006. Following the January 2006 doctor’s visit, Mr. Cortez went to Mexico for some period, at a minimum of a few days. Tr. at 16, 49. According to the medical records, Mr. Cortez developed chest pain and weakness of his extremities beginning the day before he went to the hospital in April 2006. Petitioner’s Exhibit 10 at 23-24.

⁶ “Tr.” refers to the Transcript of the fact hearing held on November 29, 2011.

Leading up to the year in question, 2006, Mr. Cortez had a medical history that included hypertension, hypercholesterolemia, arthritis, coronary artery disease with previous myocardial infarction. See Petitioner's Exhibit 5 at 19-21. He had had a quadruple bypass surgery in 1995, open heart surgery in 1997, and carotid artery surgery in 1999. Petitioner's Exhibit 3 at 1, Petitioner's Exhibit 5 at 1338.

On January 26, 2006, Mr. Cortez visited Dr. Manuel Pena. According to Dr. Pena's contemporaneous notes, the reason for the visit was that Mr. Cortez had begun feeling dizzy and was not sleeping and sought treatment for his high blood pressure. Court Exhibit 1001 at 22, transcribing Petitioner's Exhibit 4 at 4; Court Exhibit 1001, Response No. 35. At that time, Mr. Cortez received a shot. Petitioner's Exhibit 4 at 4; Court Exhibit 1001 at 21-22, transcribing Petitioner's Exhibit 4 at 4; Court Exhibit 1001, Response Nos. 32-36. This was the shot that Mrs. Cortez claimed was an influenza vaccine. Petitioner's Exhibit 1, ¶ 2.

Three months after his receipt of this shot, on or about April 24, 2006, Mr. Cortez went to the hospital with chest pain and weakness of the upper and lower extremities. Petitioner's Exhibit 10 at 23-24. He reported that beginning the day before, he had developed left upper extremity and bilateral lower extremity weakness. Petitioner's Exhibit 10 at 23-24. Neurology was consulted, and a lumbar puncture was performed, the findings of which were consistent with Guillain-Barré syndrome. Petitioner's Exhibit 10 at 27-28. Mr. Cortez was treated with IVIG beginning on April 26, 2006, as his clinical picture was consistent with GBS. *Id.*

On May 4, 2006, at Mrs. Cortez's request, Mr. Cortez was transferred to Methodist Hospital. Petitioner's Exhibit 5 at 22-23; Petitioner's Exhibit 10 at 27-28. The neurology notes recorded on May 5, 2006, indicate that Mr. Cortez had been in Mexico for four weeks from March 18 through April 16, 2006. Mr. Cortez had a dental procedure while there, and also experienced diarrhea April 16-18 prior to going to the hospital on April 23. Petitioner's Exhibit 5 at 32. His diagnosis was "ischemic heart disease" and "acute Guillain Barré syndrome." Petitioner's Exhibit 5 at 23.

Mr. Cortez was discharged from Methodist Hospital to a rehabilitation hospital on May 24, 2006. Petitioner's Exhibit 6 at 99. From then until March of 2007, Mr. Cortez was either in a hospital or receiving home health care assistance, with brief periods of improvement. See Petitioner's Exhibit 6 at 98; Petitioner's Exhibit 7 at 6-7; Petitioner's Exhibit 8 at 2-3; Petitioner's Exhibit 11. On March 12, 2007, Mr. Cortez was admitted to the University of Texas Medical Branch Galveston ("UTMB"). Petitioner's Exhibit 9 at 72-73. While at UTMB, Mr. Cortez was found unresponsive, and a subsequent neurological examination concluded that he had suffered "cerebral death." Petitioner's Exhibit 9 at 373. He was pronounced dead on March 19, 2007. Petitioner's Exhibit 9 at 51-52. His death certificate stated that the cause of death was Guillain-Barre syndrome due to uncertain etiology. Petitioner's Exhibit 12.

B. Procedural Background

Mrs. Cortez filed her petition on March 20, 2009, more than 36 months after the date Mr. Cortez allegedly received the influenza vaccination, but within 24 months of the date of his death. Over the next two years, Mrs. Cortez gathered and filed medical records. In March 2011, this matter was transferred to the undersigned.

In May 2011, Respondent, the Secretary of Health & Human Services (“HHS”) filed her report pursuant to Vaccine Rule 4. In that report, HHS raised, *inter alia*, the issue of whether Mrs. Cortez had provided sufficient proof of vaccination. Respondent’s Rule 4 report at 2, fn. 2.

In June 2011, a status conference was held. Discussed at that conference was the issue of having Mrs. Cortez obtain records and information from Mr. Cortez’s treating physician, Dr. Manuel Pena, who allegedly administered the flu vaccination in January 2006, to substantiate the record relating to Mr. Cortez’s receipt of the flu vaccination. Petitioner’s counsel indicated they had had difficulty in obtaining the necessary medical records from Dr. Pena. Also discussed was the possibility of taking Dr. Pena’s deposition, if necessary, to obtain the pertinent records. Order of July 19, 2011.

Following discussions at a subsequent status conference on August 31, 2011, Petitioner’s counsel contacted Dr. Pena. Due to his apparent limited mobility, Petitioner’s counsel served written deposition questions upon Dr. Pena.⁷ Through his legal representative, Dr. Pena provided sworn answers to Petitioner’s questions, and these were filed in the record. *See* Petitioner’s Exhibit 15.

Significantly, in his answers to Petitioner’s counsel’s deposition questions, Dr. Pena indicated that he was not administering flu vaccinations in 2006. Petitioner’s Exhibit 15, Response No. 10. This statement conflicted with the statements made by Mrs. Cortez and her son in their affidavits. *Compare* Petitioner’s Exhibits 1 and 2 with Petitioner’s Exhibit 15; *see also* October 12, 2011 Order. Thus, Dr. Pena’s responses transformed what appeared originally to be a gap in the records to a material factual dispute regarding Mr. Cortez’s receipt of the flu vaccination.

To resolve this factual dispute, the undersigned, in her discretion pursuant to 42 U.S.C. § 300aa-12(d)(3)(B), directed that further written deposition questions be propounded to Dr. Pena to clarify the information provided to date. *See generally* Vaccine Rule 7(b); *King v. Sec’y of Health & Human Servs.*, No. 03-584, 2008 WL 1994968 at 2 (Fed. Cl. Sp. Mstr. Feb. 7, 2008)(ordering discovery where necessary to make a decision on the record); *see also* Vaccine Rule 8(the special master will determine the format for taking evidence and hearing argument based on the specific circumstances of each case and after consultation with the parties). Thereafter, the parties and undersigned drafted and served upon Dr. Pena, through his legal counsel, additional written deposition questions. Court Exhibit 1001, attaching Petitioner’s Exhibit 15 (first set of responses from Dr. Pena, Exhibit A) and Petitioner’s Exhibit 4 (medical records from Dr. Pena, Exhibit B); *see also* November 1, 2011 Order. In addition, a fact hearing

⁷ The undersigned and parties were informed that Dr. Pena was very elderly and not very mobile although there was no indication that he was not alert and competent to provide information. Indeed, he had counsel representing him. As a result, it was determined that the preferred manner to obtain information from Dr. Pena was to pose written questions to him, to which he would respond under oath with the assistance of counsel. This would ensure that the record included all information reasonable and necessary to make a decision, *see* 42 U.S.C. § 300aa—12(d)(3)(B), while at the same time ensuring that there would be a minimal burden to Dr. Pena. *See Simanski v. Sec’y of Health & Human Servs.*, 671 F.3d 1368, 1380 (Fed. Cir. 2008).

was conducted where Mrs. Cortez and her son, Narcisco Garcia, testified. Minute Entry, November 30, 2011; *see also* Transcript of Proceedings, November 29, 2011.

At a status conference following receipt of the transcript of the hearing and the filing of Dr. Pena's sworn answers, the parties advised that they had not ordered the transcript and did not intend to submit any post-hearing briefs on this issue.⁸ As such, this matter is now ready for decision on the limited fact question of whether Mr. Cortez received an influenza vaccination on January 26, 2006.

II. EVIDENCE PRESENTED

The evidence in the record consisted of medical records of the treating physician who was alleged to have administered the vaccination, Dr. Manuel Pena, medical records of various health care providers which included statements regarding Mr. Pena's medical history and the affidavit and live testimony of Mrs. Cortez and her son, Narcisco Garcia. This evidence relating principally to the issue of receipt of vaccination is summarized here.

A. Contemporaneous Medical Records & Treating Physician's Sworn Statements

The contemporaneous medical records of Dr. Pena, the physician who was alleged to have administered the vaccination at issue here, indicate that Dr. Pena did not administer a vaccination to Mr. Cortez. *See* Court Exhibit 1001 at 22; *see also* Response Nos. 14-17, 36-40.⁹ Dr. Pena's notes and his explanations, presented under oath, provide a detailed, precise description of the nature of his medical treatment of Mr. Cortez, and, in particular, his treatment of Mr. Cortez on the date in question, January 26, 2006. As Dr. Pena explained, after reviewing the notes he had made contemporaneously with Mr. Cortez's January 26, 2006 visit, he noted that he had treated Mr. Cortez for high blood pressure. Court Exhibit 1001, Response Nos. 33, 35, 39-40, 51-53. Dr. Pena acknowledged that on the date at issue, he had given Mr. Cortez an injection. That he did so is reflected in his billing ledger, the document upon which Mrs. Cortez relied to support her claim. Petitioner's Exhibit 4 at 7. But that injection was not a flu vaccination according to the medical records and Dr. Pena's sworn responses. Court Exhibit 1001 at 21-22; Court Exhibit 1001, Response Nos. 29, 31 and 40. Rather, as noted in Dr. Pena's contemporaneous medical notes as transcribed and explained by him, it was an injection of Lasix

⁸ Although the undersigned is mindful of not requiring the parties to expend unnecessary additional resources, post-hearing briefing is, in most instances, beneficial to the fact-finder to ensure that all issues and arguments and applicable legal precedent the parties believe are pivotal are addressed. Due to the absence of such briefing, undersigned made all reasonable efforts and took additional time to address anticipated arguments.

⁹ Dr. Pena provided responses under oath to two separate sets of written deposition questions. Court Exhibit 1001 and Petitioner's Exhibit 15. Dr. Pena responded to the first set of deposition questions, propounded by Petitioner's counsel, based on his memory alone without review of the medical records relating to Mr. Cortez's January 26, 2006, visit. The second set of deposition questions propounded to Dr. Pena was a set of questions composed by the parties and undersigned along with copies of Dr. Pena's answers to the first set of deposition questions, Petitioner's Exhibit 15 (Exhibit A to Court Exhibit 1001), and the medical records relating to Mr. Cortez his office had provided, Petitioner's Exhibit 4 (Exhibit B to Court Exhibit 1001) attached.

to treat Mr. Cortez's high blood pressure.¹⁰ Court Exhibit 1001 at 22, transcribing Petitioner's Exhibit 4 at 4; Response No. 33.

Additionally, in each set of questions to which Dr. Pena responded, he stated that he was not administering vaccines and, in particular, flu vaccines in January 2006. Petitioner's Exhibit 15, Response Nos. 10 and 11; Court Exhibit 1001, Response Nos. 12, 14, 17, 18 and 33. Significantly, in responding to the second set, at which time he had the benefit of reviewing his contemporaneous notes from Mr. Cortez's January 26, 2006, visit, Dr. Pena stated unequivocally that he had not given Mr. Cortez a vaccination. Court Exhibit 1001, Response Nos. 29, 31 and 40. There has been no challenge to the accuracy of these records.

None of the medical records of the various health care providers that Mr. Cortez saw beginning in April 2006 when Mr. Cortez first was hospitalized, noted in his medical history that he had an influenza vaccination in January 2006. *See i.e.*, Petitioner's Exhibit 5 at 19-23, Exhibit 10 at 23-24, 27-28, and Petitioner's Exhibit 6 at 15-16. Indeed, from the time Mr. Cortez first went to the emergency room on April 23, 2006, the records consistently note his prior history of coronary disease, to include references to high blood pressure, and that his chief complaint was chest pain. Petitioner's Exhibit 10 at 23-24 (noting severe substernal chest discomfort, which had been intermittent but increasing in frequency and intensity over the preceding 12-18 hours); Petitioner's Exhibit 5 at 22-23. There is no reference in any of these records to Mr. Cortez having received a flu vaccination in January 2006. *Id.*

B. Affidavits and Testimony of Andrea Cortez and Mrs. Cortez's Son, Narcisco Garcia

Mrs. Cortez's evidence to support her claim that Mr. Cortez received a vaccination in January 2006 consisted primarily of her affidavit, her hearing testimony and that of her son, Narcisco Garcia. In their affidavits, executed about three years after the pertinent events, each of them stated that Mr. Cortez had received a flu shot in January 2006, and that approximately three days after the shot, Mr. Cortez experienced fatigue, muscle weakness, chest pain and blurred vision. Petitioner's Exhibits 1 ¶ 2 and 2 ¶ 3. Mrs. Cortez also stated that prior to Mr. Cortez's April 2006 hospitalization, Mr. Cortez had no other medical problems. Petitioner's Exhibit 1, ¶ 3.

At the hearing, each of them testified regarding the pertinent events. Mrs. Cortez testified that she was with Mr. Cortez when he received the shot in January 2006. Tr. at 43. But, with regard to the onset of Mr. Cortez's symptoms, rather than three days as stated in her affidavit, Mrs. Cortez testified that it was two weeks after going to see Dr. Pena that she noticed Mr. Cortez feeling tired, walking funny and not eating right. Tr. at 47.¹¹

¹⁰ Lasix is a trademark for preparation of furosemide, a loop diuretic used in the treatment of edema associated with congestive heart failure or hepatic or renal disease, as an adjunct in the treatment of acute pulmonary edema, and in the treatment of hypertension, usually in combination with other drugs; administered orally, intramuscularly, or intravenously. *Dorland's Medical Dictionary*, www.dorlands.com.

¹¹ When asked what she had told the doctors regarding Mr. Cortez's prior medical history at the time Mr. Cortez was admitted to one hospital, the medical records indicating that Mrs. Cortez had told staff that Mr. Cortez had been in Mexico for a month, he had had a dental procedure there and that he had gotten sick and had diarrhea April 16-18, Petitioner's Exhibit 5 at 32, Mrs.

Mrs. Cortez's son and Mr. Cortez's stepson, Narcisco Garcia, also testified. Although in his affidavit, Mr. Garcia stated that Mr. Cortez received a flu shot in January 2006, Petitioner's Exhibit 2, ¶ 2, at the hearing, however, Mr. Garcia clarified that he was not with Mr. Cortez when he visited Dr. Pena's office in January 2006. Tr. at 100. Indeed, at the time, Mr. Garcia was living in Austin, Texas, and only returned to Mr. and Mrs. Cortez's home approximately every few weeks for one to two days at a time. Tr. at 69, 85-87. Thus, any information he had relating to Mr. Cortez's receipt of a vaccination and much of his information regarding Mr. Cortez's medical condition during the pertinent period of 2006, was not first-hand, but instead was based on hearsay in the form of secondhand reports from either his mother or Mr. Cortez.

Moreover, although in his affidavit Mr. Garcia stated that Mr. Cortez became ill three to seven days after the flu vaccination, Petitioner's Exhibit 2, ¶ 3, at the hearing, he testified that Mr. Cortez did not mention feeling sick other than the pains and aches of life in the two weeks following the shot. Tr. at 107. In fact, Mr. Garcia testified that it was approximately one and a half months later that Mr. Cortez mentioned some weakness in legs, blurry vision and pains. Tr. at 107.

Furthermore, in his affidavit Mr. Garcia stated that he was surprised Mr. Cortez got the flu vaccination because they had had discussions regarding vaccinations, specifically the flu vaccination, and the reasons one should not receive it. Petitioner's Exhibit 2, ¶ 2. But, during his testimony, Mr. Garcia said that Mr. Cortez had actually received a vaccination every year generally between December and February at either the community center or his former employer's location. Tr. at 75, 122, 119-120. When asked for an explanation as to why Mr. Cortez would not have received the flu vaccination in the 2005-2006 consistent with the years past, Mr. Garcia said he was unsure. Tr. at 121.

III. APPLICABLE LEGAL STANDARDS

A petitioner must prove, by a preponderance of the evidence, the factual circumstances surrounding her claim. 42 U.S.C. § 300aa-13(a)(1)(A). The special master must "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)). Mere conjecture or speculation is insufficient to satisfy the preponderance standard. *Snowbank Enterprises v. United States*, 6 Cl.Ct. 476, 486 (1984).

Cortez initially testified that she didn't recall talking to the doctors in the hospital. Tr. At 48. On cross examination when asked about statements made, she admitted that she and Mr. Cortez had gone to Mexico but only for two-three days in March or April 2006 and that he had only been sick there one day and that they did not return because he was sick. Tr. at 16. But, later during her testimony, she stated that she and Mr. Cortez had gone to Mexico for a week but that he did not have a dental treatment there because he had stomach problems. Tr. at 48. Later still during her testimony, Mrs. Cortez seemed to indicate that Mr. Cortez had not been sick at all in Mexico but merely had had difficulty walking while there. Tr. at 53.

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). The special master may not make a finding based on the claims of a petitioner that are not substantiated by medical records or medical opinion. *Id.* The process for finding facts pursuant to the Vaccine Act begins with analyzing the medical records, which are required to be filed with the petition. 42 U.S.C. § 300aa-11(c)(2). As set forth in 42 U.S.C. § 300aa-13(b)(1)(A), 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 . . . regarding the nature, causation, and aggravation of the petitioner’s illness, disability, injury, condition, or death”

In resolving factual issues, the special master must weigh the evidence presented, which may include contemporaneous medical records and testimony. *See Burns v. Sec’y of Health & Human Servs.*, 3 F.3d 415, 417 (Fed. Cir. 1993)(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). 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, in general, warrant consideration as trustworthy evidence.” *Cucuras v. Sec’y of Health & Human Servs.*, 993 F.2d 1525, 1528 (Fed. Cir. 1993). Indeed, records created contemporaneously with the events that they describe are presumed to be accurate. *Id.* 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. Sp. Mstr. Feb. 24, 1992). And, when considering the weight to be accorded oral testimony versus contemporaneous records, “[i]t has generally been held that oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight.” *Murphy v. Sec’y of Health & Human Servs.*, 23 Cl.Ct. 726, 733 (1991), *aff’d*, 968 F.2d 1226 (Fed. Cir. 1992), *cert. denied sub nom. Murphy v. Sullivan*, 113 S.Ct. 263 (1992) (citations omitted), citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1947); *see Cucuras*, 993 F.2d at 1528.

IV. DISCUSSION

The evidence of the record as a whole is simply insufficient to find that Mr. Cortez received a flu vaccination in January 2006. The contemporaneous medical records of Dr. Pena, as transcribed and clarified by him, indicate that he did not administer a vaccination to Mr. Cortez on January 26, 2006. Court Exhibit 1001 at 22, transcribing Petitioner’s Exhibit 4 at 4; Court Exhibit 1001, Response Nos. 29, 31 and 40. The medical records detail the treatment Dr. Pena provided Mr. Cortez on January 26, 2006, which was treatment for high blood pressure. Petitioner’s Exhibit 4 at 4; Court Exhibit 1001 at 22; Court Exhibit 1001, Response Nos. 32 and 33. That treatment included a shot of Lasix. *Id.*

Moreover, Dr. Pena, through his sworn responses, unequivocally stated that he did not administer an influenza vaccination to Mr. Cortez. Court Exhibit 1001, Response Nos. 29, 31 and 40. Significantly, he was not administering any vaccines to any patients in January 2006. Court Exhibit 1001, Response Nos. 14-18, 36, 40; Petitioner’s Exhibit 15, Response Nos. 10 and 11. Dr. Pena’s contemporaneous medical records as well as his sworn statements clarifying the

notes in those records are precisely the type of records which have been recognized as trustworthy and to which particular attention should be paid. *See Capizzano*, 440 F.3d at 1326; *Cucuras*, 993 F.2d at 1528. Additionally, it has been observed that the absence of a reference in a medical record is less significant than a reference that actually negates the existence of a circumstance. *Murphy v. Sec’y of Health & Human Servs.*, 23 Cl.Ct. 726, 733 (1991), *aff’d*, 968 F.2d 1226 (Fed. Cir. 1992).

Here, the contemporaneous medical records specifically negate the claim that a flu vaccination was administered to Mr. Cortez on January 26, 2006. No one has challenged the authenticity and accuracy of these records. Because these records are contemporaneous medical records and records from the treating physician, significant weight is accorded those records.

On the other hand, Mrs. Cortez presented evidence, primarily through her own affidavit and testimony and those of her son, Narcisco Garcia, Petitioner’s Exhibits 1 and 2 and Transcript of Nov. 29, 2011 hearing, which suggested Mr. Cortez did receive an influenza vaccination in January 2006. But that testimony alone without substantiation is insufficient to establish that Mr. Cortez received the vaccination. 42 U.S.C. § 300aa-13(a)(1); *see Centmehaiey v. Sec’y of Health & Human Servs.*, 32 Fed. Cl. 612 623-624 (1995)(holding that the evidence did not support a finding that infant received vaccination based primarily on statements of Petitioner and interested individuals).

Understandably, due to the lapse of time, Mrs. Cortez’s and Mr. Garcia’s statements reflect their lack of recollection or understanding of the pertinent events and are inconsistent with contemporary medical records. Significantly, although Mrs. Cortez and Mr. Garcia stated that Mr. Cortez had received the flu shot at the visit to Dr. Pena on January 25, 2006, they appeared to lack knowledge or recollection regarding other aspects of that visit. In particular, when asked about the reason for the visit, Mrs. Cortez appeared uncertain, stating that the reason for the visit was that Mr. Cortez had “achy bones.” Tr. at 43. Specifically, Mrs. Cortez stated that at the time of the January 2006 visit she was unaware of Mr. Cortez’s high blood pressure. Tr. at 43. She further testified that Dr. Pena never referred her husband to a specialist, and did not tell Mr. Cortez to return. Tr. at 46. At the same time, when asked if she had heard Dr. Pena talk to her husband about returning, she admitted she had not heard that. Tr. at 46. She also said that although she went with her husband when he went to Dr. Pena, she stayed in the waiting room and did not go into the examination room. Tr. at 41.

Mr. Garcia’s information regarding Mr. Cortez’s January 2006 doctor’s visit was less reliable in that he was not at the doctor’s office and, thus, had no first-hand knowledge of the visit. Because he was not present, his testimony appears to have been based on his recollection of conversations that he had with Mr. Cortez following the doctor’s visit. As to the reason for the visit, at one point, Mr. Garcia said that he believed Mr. Cortez went to Dr. Pena in January as a follow up to the fall he had the previous autumn. Tr. at 99-101. But, at another time, Mr. Garcia testified that Mr. Cortez went to the doctor in January because Mr. Cortez felt like he had a cold and was under the weather and his arthritis was acting up. Tr. at 74.¹²

¹² Mr. Garcia did not have a clear, consistent recollection of the date in question or the general time frame. Although he testified that at the time he was living in Austin, Texas and that on the day Mr. Cortez went to see Dr. Pena in January 2006, he had traveled from Austin to visit his mother and Mr. Cortez, *see* Tr. at 85-87, he was inconsistent regarding the details of that

And, when Mr. Garcia explained the basis for his statement that Mr. Cortez had received a flu vaccination, he described a conversation with Mr. Cortez regarding his receipt of a shot. Tr. at 88. Mr. Garcia explained that apparently when Mr. Cortez purportedly told Mr. Garcia he had gotten a flu shot, Mr. Garcia responded that he hoped Mr. Cortez had not received a tetanus shot. *Id.* Mr. Garcia's response that he hoped Mr. Cortez had not gotten a tetanus shot raises a question and suggests that Mr. Cortez had told Mr. Garcia merely that he had received a shot, without specifically identifying it as a flu shot.

In contrast to Mrs. Cortez's and Mr. Garcia's recollections, the contemporaneous medical records from the January 2006 visit clearly state that the reason for the visit related to Mr. Cortez's high blood pressure. Court Exhibit 1001, Response 33. Indeed, the records indicate Dr. Pena treated Mr. Cortez's high blood pressure with an injection of Lasix, had wanted to refer Mr. Cortez to a specialist, and had wanted Mr. Cortez to return in February. Court Exhibit 1001 at 20-21. In fact, the contemporaneous notes and Dr. Pena's responses make clear that Mr. Cortez's high blood pressure was the very reason for his visit in January 2006. Petitioner's Exhibit 4 at 3-4; Court Exhibit 1001 at 21-22 transcribing Petitioner's Exhibit 4 at 3-4 and Response Nos. 32-33.

Mrs. Cortez's and Mr. Garcia's recollections regarding other important details also were lacking and inconsistent with medical records. For instance, as to Mr. Cortez's medical condition, Mrs. Cortez testified that prior to his admission to the hospital in April 2006 and regarding medical conditions when he saw Dr. Pena, she was not aware of any of Mr. Cortez's medical conditions and unaware that he had high blood pressure. Tr. at 28, 43. In contrast, numerous medical records note that Mr. Cortez had a history of hypertension, coronary illness, and he previously had a quadruple bypass. *See e.g.*, Petitioner's (Methodist Hospital) Exhibit 5, V.1, at 19-20, Petitioner's Exhibit 10 at 23, Court Exhibit 1001 at 21-22. With regard to his January 2006 visit to Dr. Pena, the medical records that Dr. Pena wrote contemporaneously specifically state that Mr. Cortez came to him and was treated for hypertension. Court Exhibit 1001 at 21-22; Petitioner's Exhibit 4 at 4.

As to the timing of the onset of Mr. Cortez's symptoms, in both their affidavits, Mr. Garcia and Mrs. Cortez stated that the onset of symptoms occurred in approximately three days following the shot in January 2006. Petitioner's Exhibit 1, ¶ 2 and Petitioner's Exhibit 2, ¶ 3. At the hearing, however, Mrs. Cortez testified that Mr. Cortez did not begin to experience symptoms for two weeks after seeing Dr. Pena. Tr. at 47. In his testimony, Mr. Garcia stated that it was approximately one and half (1-1/2) months after the shot that Mr. Cortez began to experience blurry vision, weakness in legs and pains in his arms, thereby, setting the date of the onset of the symptoms as occurring much later than stated by Mrs. Cortez. Tr. at 108-109. Although he did mention that his father started driving erratically approximately three weeks after the January visit, Mr. Garcia explains that it was not until April when Mr. Cortez complained that his motor skills were off, his legs were not responding, and he got confused.

visit. At one point, Mr. Garcia testified that on the day in question he had driven back from Austin and by the time he arrived at Mr. Cortez's home, Mr. Cortez had already left the house to go to the doctor. Tr. at 73. But, later, Mr. Garcia testified that he had come home in January and on the morning Mr. Cortez went to the doctor, he had slept late so that he did not go with Mr. Cortez to the doctor. Tr. at 93.

Mr. Cortez believed something was wrong and went to the hospital. Tr. at 76-78.¹³

The foregoing demonstrates that Mrs. Cortez and Mr. Garcia, despite their sincerity, do not accurately recall the events of January 2006 clearly, including Mr. Cortez's visit to Dr. Pena on January 26, 2006 and the state of Mr. Cortez's health during the pertinent period. As such, the undersigned accords little weight to their statements and testimony. The evidence is insufficient to find that Mr. Cortez received a vaccination on January 26, 2006.

The only record upon which Mrs. Cortez relies to substantiate her claims is the billing record from Dr. Pena's office that indicates an injection was given to Mr. Cortez on January 26, 2006. Petitioner's Exhibit 4 at 7. But, Dr. Pena's contemporaneous records and sworn answers demonstrate that the injection given to Mr. Cortez and noted on the billing record was not a vaccination. Rather, the contemporaneous records and his clarifying explanations indicate the injection given was an injection of Lasix, a drug to treat his high blood pressure. Court Exhibit 1001 at 22, Response Nos. 33, 36, 37, 39. Thus, in viewing this record in light of the other medical records and the sworn statements of Dr. Pena, the billing record actually substantiates that Mr. Cortez did not receive an influenza vaccination.

It is well established that where present-day testimony conflicts with contemporaneous documentary evidence, the former deserves minimal weight. *Montgomery Coca-Cola Bottling Co., Inc. v. United States*, 222 Ct. Cl. 356, 615 F.2d 1318, 1328 (1980)(discussing *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1947)). Contemporaneous medical records "warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium." *Cucuras*, 993 F.2d at 1528. Moreover, statements by treating physicians are entitled to significant weight in Vaccine Act cases. *Campbell v. Sec'y of Health & Human Servs.*, 90 Fed. Cl. 369, 386 (2009). The contemporaneous medical records and the statements of Dr. Pena, the treating physician, are accorded substantial weight. That evidence outweighs the present-day testimony of Mrs. Cortez and Mr. Garcia, which conflicts with the contemporaneous medical records and physician's statements and demonstrates some inaccuracies due, no doubt to the lengthy lapse of time since the events. The undersigned finds that the medical records as clarified by Dr. Pena are simply more trustworthy. *Capizzano*, 440 F.3d at 1326; *Coffelt*, 1992 WL 158714 at *6 (contemporaneous medical records, created before the notion of litigation, are generally viewed as trustworthy evidence and are accorded greater weight than testimony, formed after litigation has begun).

¹³ One explanation for the difference between Mrs. Cortez's and Mr. Garcia's recollection regarding the onset of symptoms is that Mr. Garcia only visited Mr. Cortez once every few weeks for a few days at a time, Tr. at 85-87, 107, so that he did not really observe any changes in Mr. Cortez. At the same time, that being the case, it would be difficult to understand how Mr. Garcia would be able to state in his affidavit that the symptoms began three to seven days following the vaccination, Petitioner's Ex. 2, ¶ 3, especially when at one time he stated he had left Mr. Cortez's home on the date following the January 2006 doctor's visit. Tr. at 107. The logical explanation is that due to the lapse of time, his memory has faded. But, it is also due to that lapse of time and fading of memory that little weight can be accorded his statements.

V. FINDING OF FACT

Based on review of the record as a whole and for the foregoing reasons, the undersigned finds that Mrs. Cortez has failed to carry her burden and prove by preponderant evidence that Mr. Cortez received an influenza vaccination on or about January 26, 2006. Accordingly, the undersigned finds that Mr. Cortez did not receive an influenza vaccination on January 26, 2006.

VI. CONCLUSION

The significance of the foregoing factual finding and the schedule for future proceedings remains to be addressed by the parties. The parties shall confer and contact my judicial assistant, Lori Lewis, at (202) 357-6339 within **on or before Friday, September 14, 2012**, to schedule a status conference to address further proceedings in this matter.

IT IS SO ORDERED.

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