

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SAMUEL CONTI

VETERANS FOR COMMON SENSE, et al,)	COPY
)	
Plaintiffs,)	
)	
VS.)	
)	
JAMES B. PEAKE, M.D., et al,)	
)	
Defendants.)	
)	

NO. C 07-3758 SC
San Francisco, California
Tuesday
June 10, 2008
10:00 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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18 BY: **SUZANNE C. WILL, ESQ.**

19 **Also Present:**

20 Dr. Frank Schoenfeld
21 - Associate Director Mental Health
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23
24
25

P R O C E E D I N G S

1
2 June 10, 2008

10:03 a.m.

3
4 **THE CLERK:** Calling Civil 07-3758, Veterans for
5 Common Sense, et al, versus James B. Peake, M.D., et al.

6 Counsel, please state your appearance for the record.

7 **MS. MOSER:** Good morning, your Honor. Heather Moser
8 of Morrison and Foerster for the plaintiffs.

9 **MR. ERSPAMER:** Good morning, your Honor. Gordon
10 Erspamer from Morrison and Foerster for the plaintiffs.

11 **MR. WOLINSKY:** Sid Wolinsky, Disability Rights
12 Advocates, for plaintiffs.

13 **MR. BENSING:** Your Honor, Daniel Bensing with the
14 Civil Division of the Justice Department for defendants.

15 With me at counsel table is Miss Suzanne Will, the
16 regional counsel for this region of the VA, and Dr. Frank
17 Schoenfeld, the Associate Director of Mental Health at the San
18 Francisco Medical Center.

19 **THE COURT:** All right. I have called this unusual
20 meeting, hearing, with reference to a request by the
21 plaintiffs, an email that they alleged was something that
22 should be brought to the Court's attention. So that's the
23 purpose of this hearing.

24 I have received yesterday a copy of the Senate
25 hearing with reference to this same email.

1 So I might suggest, subject to your approval, that we
2 include the Senate hearing in the evidence in the case. The
3 senators asked a number of questions relative to the email and
4 I don't see any reason why we should repeat the same thing over
5 and over again.

6 If you have something to add, I would be very happy
7 to hear it. I have reviewed the email, reviewed the Senate
8 hearing, and we are ready to proceed with anything you might
9 like to ask.

10 Do you want to have the Senate hearing a part of the
11 evidence?

12 **MR. BENSING:** Yes. From the defendant's standpoint
13 we do, your Honor. If the email itself is to come into
14 evidence, we would like that the explanation offered by Dr.
15 Norma Perez in her Senate testimony be included.

16 **MS. MOSER:** Yes, your Honor. Plaintiffs would also
17 like to include the Senate hearing in the evidence in the case,
18 along with the email.

19 **THE COURT:** Then it will be received into evidence.
20 (Senate hearing transcript and email from Dr. Norma
21 Perez received in evidence.)

22 **THE COURT:** Anything would you like to add that you
23 think I should know?

24 **MS. MOSER:** Yes, your Honor. I believe I would just
25 like to make a few brief remarks this morning to underscore the

1 importance of the email and how it fits into the evidence in
2 the case.

3 I think, first and foremost, it's really important to
4 view the email in terms of how -- what import does it have for
5 the system, and taking a look at what does the system mean. I
6 think this email forced us to evaluate that and the definitions
7 that were imposed upon us many times by the defendants through
8 the course of the trial.

9 The system in the VA, as you know from the trial, is
10 a decentralized system with health care facilities and benefits
11 administration regional offices throughout the country. There
12 is also oversight in Central Office.

13 So what we think, your Honor, is that there is
14 important continuum in terms of a system, of being one single
15 veterans case, to facilities, to every single facility
16 adjudging every single benefits determination and every single
17 health decision in the system.

18 What we have shown at trial is, A, that there is no
19 oversight of that system and, more importantly, that these
20 examples, that the seriatim OIG reports, examples like this
21 email, how could this happen if you had proper oversight? How
22 could this happen if the policies that they are telling you at
23 trial, the mental health screens and the follow-up
24 appointments, were actually happening in practice? They
25 wouldn't.

1 And, your Honor, I believe with that view of the
2 system, then if you read the email it has several important
3 factual distinctions that fit perfectly into this case.

4 One, the distinction between PTSD and adjustment
5 disorder. Maybe it wouldn't seem like a big deal, but it is a
6 critical distinction for the receipt of benefits. If a veteran
7 is diagnosed with adjustment disorder, which she instructs them
8 to refrain from giving a diagnosis of PTSD straight out in
9 favor of adjustment disorder, the impact on the veteran, the
10 practical effect is that they won't get benefits compensation.
11 They would if they had PTSD.

12 There is also the issue on the benefits side of
13 conflicting diagnoses, and this is something we talked about at
14 the trial. I believe Chad Peterson, Dr. Peterson, who worked
15 at the VA, talked about this, where you have the VHA treating
16 physician who says, the person has PTSD. They go in for the
17 benefits compensation pension evaluation by a different
18 physician and that person says, no, the veteran doesn't have
19 PTSD. And they are saying, well, in a tie -- in the Senate
20 hearing the explanation is, well, in event of a tie, it goes to
21 the veteran. You have one diagnosis here, one diagnosis here,
22 the veteran wins.

23 But that's not necessarily the case. And this email
24 proves that, because she is saying that she knows of cases --
25 and, in fact, we at trial proved that there are cases where the

1 veterans are losing. They wouldn't have to appeal if they won
2 in the tie and they said, Oh, there are the two different
3 benefits decisions. Well, let's go with the benefit of the
4 doubt here and award the veteran with PTSD benefits.

5 They are appealing their case on the disparate
6 diagnoses because they are losing in the event of a tie. And
7 that's critical here.

8 There is also the time resources issue, which is
9 raised by the email, something we raised repeatedly at trial
10 and many VA witnesses said, Oh, we have the resources. We have
11 the people. We have the staffing. We can handle this.

12 Well, this woman, Dr. Perez -- this is not an
13 individual veteran's case. She works at a giant facility.
14 It's a multi-VISN. VISNs are the geographical area.
15 Multi-VISN referral facility for mental illness, and she
16 specifically worked as a PTSD coordinator in that facility.
17 This is her job to work on PTSD cases. And she said, "We don't
18 have time to do the extensive testing that should be done to
19 determine PTSD."

20 And at the Senate hearing she testified how it would
21 take up to three hours to properly diagnose somebody with PTSD.
22 They only have a half an hour to an hour for intake.

23 I think it shows that there is not the proper
24 staffing. They are not allocating the resources that they have
25 properly, and they are certainly not allocating them to the

1 PTSD programs if that's the case.

2 And really important point here, your Honor, and I
3 think it's not raised in the letters, but something that
4 occurred to me in reading this is: Where was the 24-hour
5 mental health screening in all of this? I don't think they
6 really talked about it at the Senate hearing. It wasn't part
7 of Dr. Perez's defense. Nobody said, if these veterans came
8 in, even if they had adjustment disorder, that's a mental
9 health issue, why weren't they immediately screened?

10 At the trial we heard if veterans were coming in and
11 they are presenting with a mental health issue, including PTSD,
12 and presumably including adjustment disorder, why aren't they
13 getting a screen within 24 hours?

14 And if the intake is serving as the screen, they are
15 saying, well, that's not enough time. Dr. Perez in the Senate
16 hearing said, Well, that's really not enough time to diagnose
17 somebody with PTSD.

18 I think that's a really important issue that is also
19 raised. We submitted that interrogatory response that it was
20 related to a different case involving a veteran in
21 Massachusetts, in which the VA responded, Well, we don't have a
22 policy for the intake for veterans with PTSD.

23 Once again, your Honor, it comes back down to the
24 system and the things we are talking about. The system can't
25 be just what Washington says. And at some point even if -- if

1 you could give them the benefit of the doubt in the beginning,
2 at some point you have too many OIG reports saying the system
3 isn't doing what it's supposed to. You have too many examples
4 like this. You have policies, the lack of policies at medical
5 centers. How can that happen if there is proper oversight?

6 If there is proper oversight, Dr. Kussman would be
7 able to go in front of the Senate Committee and say, "Let me
8 tell you. I'm the Under Secretary for Health and I have people
9 who monitor this. I have people who know what is going on, and
10 they have this objective proof that this is an aberration."

11 But they don't have that here because at the end of
12 the day it's just a hope that the system is good enough, that
13 it's functioning as they think it should. But those policies
14 are absolutely meaningless when you have incidents like this.

15 And I think one of the most troubling things here is
16 that this was discovered by accident. They didn't know that
17 this happened. It just happened through a FOIA request. We
18 didn't get it through discovery in this case, even though it
19 was relevant. A nonprofit group in Washington, the Center for
20 Responsibility and Ethics in Washington asked for some
21 documents and they produced it.

22 And the explanations that were given, your Honor, I
23 would just like to briefly step through those, how they don't
24 really explain away the email.

25 In some ways Dr. Perez went in front of the Senate

1 and she defended the policies saying, "Well, you are not really
2 understanding what I'm saying." But I think it's pretty clear
3 what she is saying and I think that the explanations really
4 don't hold any water here.

5 She is saying that there is a rule out, oh, make sure
6 it's not PTSD later, but she is -- the critical phrase at the
7 beginning of the email is:

8 "Given that we are having more and more
9 compensation seeking veterans."

10 That's the opening phrase of the advice. And I think
11 the implication is clear, that the adjustment disorder is a way
12 around paying the benefits for the veterans. It's irrelevant
13 if they are going to rule it out later when they are saying
14 they don't have time to make a proper diagnosis. At some point
15 they have got to be accountable for that.

16 Also, they are saying that adjustment disorder would
17 lead to the same treatment as PTSD. Well, adjustment disorder,
18 we looked it up. We are not clinicians, but we tried to figure
19 out what it meant. It happens when you get a divorce or you
20 have a significant life event. You retire. I believe it said,
21 you know, car accident. Something significant happens in your
22 life that impacts you, you feel depressed for about six months.

23 And that's why they were saying, as we noted in the
24 letter, Dr. Katz disagreed with Dr. Perez here. Once again,
25 Central Office not knowing what's going on in the field. They

1 have different views because it's not an appropriate diagnosis.

2 PTSD is severe. It's when people have gone to Iraq.
3 Soldiers have gone to Iraq and they have seen their comrades
4 die. They have seen the enemy die. They have seen civilians
5 die. That has a severe impact on them. That's not the same as
6 getting a divorce. It's not the same treatment. If they are
7 saying that it is, then maybe there is a problem with the
8 treatment for PTSD as well.

9 And also Dr. Kussman, whom you saw testify at the
10 trial, he denied it. He said, "You know, this can't be
11 happening in the system." But there is a huge difference
12 between "can't be happening" and "isn't happening." He didn't
13 point to a single thing that showed that it isn't. They don't
14 know whether or not it's happening.

15 They cannot sit up here and tell you whether or not
16 every single PTSD coordinator in this country wrote a similar
17 email. They don't know. And at the end of the day if you
18 don't know, what we are asking the Court to do -- this is why
19 it's so important for the Court to issue the injunction. What
20 we are asking the Court to do is to have them implement,
21 monitor and enforce the Mental Health Strategic Plan and the
22 Feeley memo, which includes that 24-hour screen and 14-day
23 follow-up. We want to make sure that they take these plans and
24 that they know that they are happening so that these types of
25 things cannot happen.

1 Your Honor, that leads me to my second point, which I
2 just want to address briefly. In the letter they said, well,
3 you know, you can't shift the burden of proof to us. You
4 can't -- you can't tell us, you know, to show that this is
5 happening.

6 But I think you can't have it both ways, your Honor.
7 You can't stand up there and say the policies are what they
8 are. And we say, well, we have testimony from the lead people
9 who are supposed to be monitoring and enforcing those policies
10 and they said they don't know what's going on with respect to
11 mental health screening. They don't know what's going on with
12 respect to suicide prevention. They don't know for sure, but,
13 also, at the same time tell us that we can't get documents with
14 respect -- this is a perfect example of why we should have been
15 entitled to those types of documents, because if we had the
16 documentation, we could look and see for ourselves what's
17 happening.

18 But you can't withhold the documents and also say,
19 well, we don't really know what's going on in the system, but
20 you are going to have to take our word for it. The issue is
21 too important. Veterans are dying. They are committing
22 suicide and they are coming back with PTSD in droves. It's too
23 important to take a chance that they are wrong.

24 Your Honor, I won't belabor the history of the
25 discovery disputes, but we have submitted a proposed solution

1 to the Court here that we think we could wrap everything up
2 within 30 days. We, of all people, do not have any interest in
3 delaying the proceedings, but we think it's very important
4 here, and what we would ask for is something very limited from
5 the Court.

6 **THE COURT:** I will tell you something to save you a
7 lot of the time. I'm going to deny that. This is a special
8 hearing, an unusual hearing for one item alone.

9 The case has been concluded. There are substantial
10 issues that the Court has to decide and anything from this
11 point on is going to be up to three people someplace else.

12 **MS. MOSER:** Yes, your Honor. Understood.

13 Your Honor, I will just conclude by saying I think I
14 have hit the high points of what I wanted to say today, but I
15 do want to emphasize the fact that this email is from someone
16 who is charged with the care of veterans with PTSD at a huge
17 facility. There are 730,000 outpatient visits in a year. This
18 isn't about veteran Bob Jones or veteran Jane Doe.

19 These types of things -- when she sends an email like
20 this and she changes the rules of the game, even if the rules
21 of the game in Washington are right, when she changes them
22 without them knowing -- and we don't know how many other times
23 the rules have been changed -- it's critical because the people
24 who suffer at the end of the day are the veterans, because they
25 are the ones who are harmed in practice. And in a bureaucratic

1 struggle like this, they have got to find their footing in
2 making sure this is happening. And that to my mind, your
3 Honor, is why what we are asking the Court to do here is so
4 critically important.

5 Your Honor, I will allow my opposing counsel to have
6 a word here and maybe I will have something to say after he is
7 done. Thank you for your time.

8 **THE COURT:** Thank you.

9 **MR. BENSING:** Thank you, your Honor. I will be brief
10 because these issues have been fleshed out by the Senate
11 Committee.

12 I should also note that the chairman of the Senate
13 Committee, Senator Akaka, requested that the VA's Office of
14 Inspector General look into this matter. They are doing so and
15 they will have a report out at some point in the future as
16 well.

17 What happened here is that a junior psychologist, Dr.
18 Norma Perez, started with the VA in 2007. She worked on the
19 PTSD screening team -- or patient care team in Temple, Texas,
20 had an idea, and so she sent an email to a number of her
21 professional colleagues on this team. And the email is labeled
22 "Suggestion," and it concludes with the statement that, "This
23 is just a suggestion."

24 And she offers the thought that perhaps sometimes
25 there is going to be -- the same symptoms could justify a

1 diagnosis of adjustment disorder or PTSD, and she suggests that
2 they consider that.

3 The email was worded in such a way that it could be
4 construed to suggest, as plaintiffs and many others have, that
5 the VA is trying to find excuses not to diagnose PTSD.

6 That is unfortunate that she wrote it that way and
7 the VA categorically repudiated that interpretation, both in a
8 statement by Secretary Pierce after this matter came to
9 Secretary Peake, after this matter came to his attention, and
10 in testimony before Congress last week.

11 It is -- the VA's policy is to diagnose cases
12 properly. If that requires a diagnosis of PTSD, depression,
13 anything else, that's the diagnosis. There is no authority,
14 justification or intent that anything to the contrary occur.
15 And for that reason Dr. Perez was counseled and the statement
16 was clarified.

17 There is also a statement in here that:

18 "We really do not have the time to do the
19 extensive testing that should be done to determine
20 PTSD."

21 Again, in her testimony Dr. Perez explained that in
22 the initial intake, when someone comes in and is seen at a
23 facility, there is some questions asked. It's maybe a 30 to
24 60-minute assessment. The trust that needs to develop between
25 the patient and the therapist is just beginning at that point.

1 And so, no, it might not be possible in that first session to
2 definitively diagnose. That's not to say that we don't have
3 the resources at subsequent sessions to do whatever is
4 necessary to provide appropriate care.

5 That's what went on here. It's unfortunate. It has
6 been clarified and, more to the point, it is a single email by
7 a single junior staff member who used some unfortunate language
8 that was misconstrued and has now been corrected.

9 Plaintiffs ask, how could this possibly happen? The
10 answer is, the Veterans Health Administration administers a
11 health care program that provides care to 6 million veterans
12 every year. They have a staff of over 200,000 people, numerous
13 hospitals, facilities. You remember the entire record. Yes,
14 people are going to make mistakes like this. They are going to
15 be corrected and we are going to move on.

16 There is nothing to suggest that this is some massive
17 conspiracy being operated out of central Texas to deliberately,
18 systematically misdiagnose PTSD.

19 Also, adjustment disorder. And I don't want to get
20 into debates on how properly to diagnose. That's not what this
21 case has ever been about, but adjustment disorder could result
22 in the payment of compensation, just as PTSD can.

23 Finally, plaintiffs filed yesterday a lengthy letter
24 with the request for all sorts of new discovery. Your Honor
25 has quite properly denied that.

1 I can stand up here and try to respond to all of
2 their allegations. They have done this over and over again.
3 They file these documents the day before a hearing. I guess
4 they think that's a clever litigation tactic. They hash over
5 the discovery history in this case --

6 **THE COURT:** You don't have to waste your time on that
7 because I have already made a ruling.

8 **MR. BENSING:** I just don't want the Court to suggest
9 or take seriously any of the allegations in that letter. If
10 you are not going to do that, then I will drop it because it
11 should never have been filed.

12 Your Honor, that sums it up. It was an honest
13 mistake by a junior staff member. It's been clarified and
14 corrected. There really is nothing more to this matter, and we
15 submit it should not have any effect on the ruling in this
16 case. Okay.

17 **THE COURT:** Thank you.

18 **MR. BENSING:** Thank you.

19 **MS. MOSER:** Your Honor, I just have a couple of
20 follow-up comments.

21 First of all, your Honor, it's my understanding that
22 the regulations in the C.F.R. were revised in 1997 to exclude
23 most forms of compensation for adjustment disorder other than
24 one type of chronic adjustment disorder. And, clearly, Dr.
25 Perez understood that in writing the email, as she is rightly

1 telling them to diagnose adjustment disorder, not chronic
2 adjustment disorder in order to avoid compensation seeking
3 veterans. It's not that all adjustment disorder is
4 compensable.

5 Also, your Honor, in terms of the initial intake, you
6 know, there is so -- Mr. Bensing is saying, well, there is a 30
7 to 60-minute assessment. It's not long enough.

8 Again, I bring it back to the policies and procedures
9 that were touted throughout the two weeks of proceeding in
10 front of this Court in which they said, if there is a mental
11 health issue -- all the top officials, the Office of Mental
12 Health Services, the Under Secretary, the Principal Deputy
13 Under Secretary, they all said there is a problem. Somebody
14 has a mental health issue, they get an immediate 24-hour screen
15 and that's going to take care of their PTSD and we are going to
16 get them into a treatment program and they get a follow-up
17 appointment 14 days later.

18 Where is that in all of this? I just don't see it.
19 I know it's mentioned. And to me it seems like just proof that
20 what we are saying is true; that these types of policies are
21 facades, that they don't actually happen on the ground floor.

22 And the fact that -- you know, they may want to say,
23 well, she is a junior psychologist. She doesn't matter. But
24 the fact of the matter is, that the system is comprised of
25 many, many Dr. Perez's. Those are the people who interact with

1 the veterans. Those are the people who are making the
2 decisions about their treatment.

3 Dr. Katz in Washington isn't on the ground floor in
4 Texas seeing veterans. He may hope they are doing the right
5 thing, but as Senator Tester said in the hearing, they have got
6 to make sure they are doing the right thing.

7 And that's why a junior psychologist matters, because
8 if she is doing something like this and she is in charge of the
9 PTSD program, she is the PTSD program coordinator, she has got
10 to have supervisors. However, the supervisors, acknowledge
11 that Dr. Perez wrote this email. The supervisor from the VA
12 came in and said, "Oh, that's terrible. You know that's
13 against policy. You can't do that."

14 What happened is the email was produced in response
15 to a FOIA request and then it was a big hullabaloo in light of
16 the Congressional investigation, in light of the obvious
17 implications for this case.

18 So I think saying that she is a junior psychologist
19 and she doesn't matter, that's not the truth. The Dr. Perez's
20 of the world all matter. They matter to the veterans that are
21 coming in, and they are the only people who are interacting
22 with them. That's what the system is.

23 And we don't know how many Dr. Perez's -- how many of
24 them are out there, because they are not doing the monitoring
25 enforcement that they need to.

1 Your Honor, I would also like to offer -- I believe
2 we submitted it with the letter -- the interrogatory response
3 from the Lucey case in which the government admitted that there
4 is no current policy in place, at least with respect to the
5 North Hampton VA Medical Center in terms of intake for PTSD.
6 It was in reference to a case with a young veteran who
7 committed suicide. He had PTSD, was turned away from the VA
8 Medical Center. We submitted an interrogatory that was signed
9 on behalf of the U.S. Attorney out there in Massachusetts --

10 **MR. BENSING:** Your Honor, if I may. We object to
11 that simply because I do not know the context of that case. I
12 don't know what goes on at the North Hampton Medical Center or
13 what's at issue in that litigation. Absent that, I think it's
14 -- it can only be misleading.

15 **THE COURT:** That case is outside the parameters of
16 our hearing anyway.

17 **MS. MOSER:** Understood, your Honor.

18 I believe that's all I have. Thank you for your
19 time.

20 **THE COURT:** All right. Well, just to reiterate for a
21 moment.

22 This hearing is a rather unique hearing, so far as
23 having an opening after the case has been closed. However, I
24 appreciate your comments with references you made on both
25 sides.

1 I will receive in evidence the Senate hearing,
2 receive in evidence the email.

3 I am denying the request for any further discovery
4 and I'm also denying the request for sanctions.

5 You should be hearing from me shortly. Thank you.

6 **THE CLERK:** All rise. This Court stands in recess.

7 (Whereupon, further proceedings in the
8 above matter were adjourned.)

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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 07-3758 SC, VETERANS FOR COMMON SENSE vs JAMES B. PEAKE, M.D. were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.



Debra L. Pas, CSR 11916, CRR, RMR, RPR
Monday, June 10, 2008