UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARQUIES DAVID WINSTON, a Minor,
by his Guardian & Parent, Adriane B. Winston PLAINTIFF

v. CIVIL ACTION NO. 3:95CV-785-S

UNITED STATES OF AMERICA, et al. DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is before the court on motion of the plaintiff, Marquies David Winston, by his guardian (hereinafter "Winston"), to preclude evidence of 1) Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS") benefits, 2) Education of All Handicapped Children Act ("EAHCA") benefits, and 3) Medicaid benefits, all of which were allegedly received by him, and for which he may be eligible in the future (DN 172).

Winston filed suit against the United States under the Federal Tort Claims Act ("FTCA") for injuries allegedly caused by employees of Ireland Army Hospital. He also named Dr. Helen How, an independent contractor obstetrician working at Ireland Army Hospital, claiming medical malpractice.

The United States contends that CHAMPUS payments and EAHCA benefits are not collateral sources with respect to the United States and should therefore be admissible. Dr. How has not filed a response to the motion.

The United States has made no request for an offset with respect to Medicaid benefits. (Response of the United States, pg. 6) Therefore, no evidence need be presented on that issue.

Winston contends that Kentucky's collateral source rule bars the admission of evidence relating to CHAMPUS and EAHCA benefits as to both defendants. The court must look to the law

of Kentucky in addressing the application of the collateral source rule, as it is a substantive rule of law. *Jackson v. City of Cookeville*, 31 F.3d 1354, 1359 (6th Cir. 1994).

CHAMPUS benefits are collateral source payments as to Dr. How. She is precluded by Kentucky's collateral source rule from introducing evidence of such payments to reduce her obligation, if any is found, under an award of medical costs.

> It is well settled that a tortfeasor is not entitled to any credit against what he owes for payments of medical expenses or disability benefits paid by a collateral source to the tort victim pursuant to a contractual obligation owed to the victim from the collateral source, whether it be first party insurance coverage, employment benefits, or otherwise.

Burke Enterprises, Inc. v. Mitchell, 700 S.W.2d 789, 796 (Ky. 1985).

There is no authority from the Kentucky courts or from the Sixth Circuit applying Kentucky law which addresses whether CHAMPUS payments are collateral to the United States.

Since the filing of the memoranda on this issue, the parties have reached a stipulation that evidence of past CHAMPUS payments is admissible, as the United States would be entitled to an offset of these amounts. We conclude that the stipulation reaches the correct result on this issue.

The weight of authority from other jurisdictions favors the conclusion that CHAMPUS payments for past medical expenses are not collateral payments as to the United States. These payments may be proven by the United States in an FTCA case to offset a claim for costs which were not borne by the plaintiff. *See, Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949)(the court noted in *dictum* that it would seem incongruous if the United States should have to pay twice for hospital expenses); *Mays v. United States*, 806 F.2d 976 (10th Cir. 1986)(CHAMPUS benefits not collateral, as payments come exclusively from the general revenues of the United States); *Kornegay v. United States*, 929 F.Supp. 219 (E.D.Va. 1996); *McDonald v. United States*, 900 F.Supp. 483 (M.D.Ga. 1995); *Lozada v. United States*, 140 F.R.D. 404 (D.Neb.), *affm'd*, 974 F.2d 886 (8th Cir. 1992); *Kennedy v. United States*, 750 F.Supp. 206 (W.D.La. 1990);

Anderson v. United States, 731 F.Supp. 391 (D.NH. 1990); *But see*, *Murphy v. United States*, 836 F.Supp. 350 (E.D.Va. 1993); *Mooney v. United States*, 619 F.Supp 1525 (D.NH. 1985).[1]

This court finds the analysis in *Mays v. United States, supra.* and others to be sound. CHAMPUS payments which have already been made for Winston's benefit are not collateral payments as to the United States. The purpose of Kentucky's collateral source rule is not contravened by our ruling because no windfall will result for any party. Winston has accepted CHAMPUS benefits and, therefore, may not recover for those medical expenses he did not incur.

The United States will therefore be permitted to present evidence outside the presence of the jury regarding CHAMPUS benefits for past medical expenses.

There is some authority that the collateral source rule does not preclude recovery of future damages. In *Molzof v. United States*, 6 F.3d 461, 468 (7th Cir. 1993), the United States Court of Appeals for the Seventh Circuit determined that "we share the reluctance of other courts addressing this issue to deny the plaintiff the freedom to choose his medical provider and, in effect, to compel him to undergo treatment from his tortfeasor." The court in *Molzof* quotes from *Feeley v. United States*, 337 F.2d 924 (3d Cir. 1964): "To force a plaintiff to choose between accepting public aid or bearing the expense of rehabilitation is an unreasonable choice." *See also*, *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078 (2d Cir. 1988); *Powers v. United States*, 589 F.Supp. 1084 (D.C.Conn. 1984); *Christopher v. United States*, 237 F.Supp. 787 (E.D.Pa. 1965). These cases involved entitlement to Veterans Administration benefits. The United States Court of Appeals for the Tenth Circuit in *Mays v. United States*, 806 F.2d 976 (10th Cir. 1986) analogized CHAMPUS

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[1]This court ruled previously, under different facts, that the collateral source rule would preclude evidence that the plaintiff had received CHAMPUS benefits for his medical costs. *See McGinnis v. Taitano*, Civ. Action No. 3:96CV-216-S, 1998 WL 230943. McGinnis, a serviceman stationed in Germany at the time of the injury, received CHAMPUS benefits after being injured in an automobile accident. Taitano, also a serviceman and the driver of the vehicle, was sued individually, as their travel was unconnected with his military employment. The CHAMPUS payments were thus a collateral source payment as to the tortfeasor Taitano and were therefore inadmissible under the Kentucky rule. *See, Guyote v. Mississippi Valley Gas Co.*, 715 F.Supp. 778 (S.D.Miss.1989).

benefits to veterans benefits in concluding that the recipient's service could not be considered a contribution toward the benefit.

A number of courts have held as a general proposition that damages for medical expenses may be offset by CHAMPUS benefits. These courts did not draw a distinction between past and future CHAMPUS benefits or expenses.

In *Dempsey v. United States*, 32 F.3d 1490 (11th Cir. 1994), the availability of the offset was presumed, as it was not contested by the parties. The issue before the court was whether the United States had adduced sufficient evidence to establish entitlement to the offset. The United States Court of Appeals for the Eleventh Circuit stated in a footnote, citing *Mays*, that the question of the availability of an offset of future damages was one of first impression in the circuit, the resolution of which would be left for another day. The court deciding *Lazoda v. United States*, 140 F.R.D. 404 (D.Neb.), *affm'd*, 974 F.2d 886 (8th Cir. 1992) also relied upon *Mays* in its decision.

In the *Mays* case itself, the United States Court of Appeals for the Tenth Circuit did not draw a distinction between past and future CHAMPUS benefits, and did not address the issue of restriction on choice of future medical services, a significant question in this court's view.

In *United States v. Feeley*, *supra.,* the court concluded that past medical expenses incurred by the plaintiff and paid by CHAMPUS could not be recovered from the government defendant. The court reasoned that CHAMPUS was not a collateral source, the funds for CHAMPUS benefits being drawn from the general treasury of the United States. The court reached a different result with respect to the recovery of damages for future medical expenses. We quote here at some length from the reasoning of the Third Circuit:

> The district court awarded the plaintiff Twelve Thousand Dollars ($12,000) for future psychiatric medical expenses. 220 F.Supp. at 720. The government argues that this was error because the plaintiff's past practice of employing the free government hospital and medical facilities indicate that he will do so in the future. Therefore the government will be forced to pay twice for this future care, which it is not required to do under the principles which precluded recovery for the past free hospital care. However, acceptance of the government's position would result in forcing the plaintiff, financially speaking, to seek only the available public

> assistance. Private medical care would be obtained at the plaintiff's own expense. We think that this is an unconscionable burden to place on the plaintiff. A victim of another's tort is entitled, we think, to choose within reasonable limits, his own doctor and place of confinement, if such care is necessary...The plaintiff's past use of the government facilities does not ensure his future use of them. He will now have the funds available to him to enable him to seek private care. He should not be denied this opportunity. It is true that if the plaintiff should decide to seek care from the Veterans' Administration, the defendant may well be paying twice for the same element of damages. However, this is dependant on whether the government can refuse to render free care. This factor, however, should not be a consideration in awarding damages under the Federal Tort Claims Act, but rather is a policy judgment to be made in the administration of veterans' benefits.

Feeley, 337 F.2d at 934.

We will apply the same rule with respect to past and future medical expenses. The United States will be permitted to adduce evidence outside the presence of the jury with respect to future CHAMPUS benefits to which Winston may be entitled.

We find that the concerns of the *Feeley* and *Molzof* courts can be adequately addressed through testimony which may be offered by the plaintiff on the issue. The briefs do not make clear whether and to what extent Winston may be entitled to CHAMPUS benefits in the future, nor whether his guardian wishes to avail herself of such benefits. The United States may establish that these benefits would continue to be available to the child. The plaintiff may, in turn, establish unavailability, inadequacy, or disinclination to utilize the facilities and benefits available for future care. All of these considerations would play a role in making an award of future damages, if such an award should be appropriate.

There is little guidance from the courts regarding educational assistance provided through the Education of All Handicapped Children Act, 20 U.S.C.§1400 et seq. Again, there is no authority from the Kentucky courts.

Two cases are cited by the United States in support of its position that evidence of benefits obtained through the EAHCA should be admissible to offset any award for future educational expenses. The first, *Scott v. United States*, 884 F.2d 1280 (9th Cir. 1989), involved a review of the trial court's denial of the offset. The admissibility of evidence of EAHCA benefits to establish

entitlement to an offset was not specifically addressed. The court held that the United States had not presented *sufficient evidence as to the value* of the EAHCA benefits which the plaintiff had received. Thus the case is of little value to this court with respect to the admissibility question.

In the case of *Anderson v. United States,* 731 F.Supp. 391 (D.N.D. 1990), the court made the determination that the United States would be permitted to offset that portion of the damage award for which it could be established that the federal government had contributed funds to South Dakota's funding agency. The court did not discuss the matter of admissibility. Further, the court made no evaluation as to the appropriateness of affording the injured party a choice of educational benefits.

We have not been advised of the source of federal funds which are allocated under the EAHCA. Thus we are unable to reach a determination with respect to the collateral source question.

Additionally, the court has not been provided with any specifics regarding the EAHCA benefits available to or received by Winston in this case. We conclude that the United States may offer evidence outside the presence of the jury regarding the nature, source and circumstances surrounding the receipt of these benefits. The court will then be in a position to address the collateral source question with respect to each defendant.

For the reasons set forth herein and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the plaintiff, Marquies David Winston, for an order in limine (DN 172) is **GRANTED IN PART AND DENIED IN PART**, as set forth more specifically in this opinion.

IT IS SO ORDERED this _____ day of _____, 1998.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record