In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-584V

(Filed: February 7, 2008)

NOT TO BE PUBLISHED

FRED and MYLINDA KING, Parents of JORDAN KING, a minor,	*	
Petitioners,	*	Vaccine Act Discovery; Respondent requesting videotapes.
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

RULING ON RESPONDENT'S "MOTION FOR PRODUCTION OF VIDEOTAPES"

This is an action in which the petitioners, Fred and Mylinda King, seek an award under the National Vaccine Injury Compensation Program (hereinafter "the Program[1]"), on account of the condition of their son, Jordan King. This constitutes my ruling concerning the respondent's "Motion for Production of Videotapes" filed on February 5, 2008.

For the reasons set forth below, I hereby order certain relief, to be detailed below.

I

BACKGROUND

Under the Vaccine Act, a petitioner may obtain a compensation award by demonstrating that his or her injury or illness was caused by a vaccination. In this particular action, the parties dispute whether Jordan King's condition, known as autism, was caused by certain vaccinations that he

[1]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2000 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2000 ed.). I will also at times refer to the statute that governs the Program as the "Vaccine Act."

received. An evidentiary hearing concerning that "causation" dispute has been scheduled for May 12, 2008.

On February 4, 2008, during a telephonic status conference,[2] respondent's counsel requested that I direct petitioners to produce copies of all videotapes of Jordan King from birth to age 4. Respondent's counsel, Lynn Ricciardella, explained that respondent had informally requested that petitioners provide such copies, but petitioners had declined to do so. Respondent's counsel explained respondent's reasons for the request, but also stated that respondent would file a written motion, detailing respondent's request, the next day. Petitioners' counsel, Thomas Powers, stated during the conference that the petitioners opposed the motion, and stated their reasons for opposing. Mr. Powers did acknowledge, however, that the petitioners do have videotapes of that period of Jordan's life.

On February 5, 2008, respondent's counsel filed a written "Motion for Production of Videotapes." Later that same day, Mr. Powers informed my office by phone that petitioners would not file a written opposition, but relied upon Mr. Powers' oral opposition stated during the February 4 status conference.

II

THE STANDARD FOR MY RULING

In this section II of this Ruling, I set forth and discuss the *standard* upon which I will base my ruling. I will divide my discussion into four parts, below.

A. The relevant statutory provisions and court rules

The Vaccine Act contains provisions with respect to discovery in Program cases. The statute states that this court shall adopt rules that--

> provide for limitations on discovery and allow the special masters to replace the usual rules of discovery in civil actions in the United States Court of Federal Claims.

§ 300aa-12(d)(2)(E). That Act further provides that a special master--

> (i) may require such evidence as may be reasonable and necessary,

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[2] That status conference was held as part of a joint status conference involving *three different* Vaccine Act cases which are scheduled to be jointly tried on May 12, 2008. The other cases are *Mead v. HHS*, No. 03-215V, and *Krakow v. HHS*, No. 03-03-632V. Accordingly, participating in that conference, as well as myself, were Special Masters Denise Vowell and Patricia Campbell-Smith. That conference was digitally recorded, and the audio file of that recording will be placed into the record of this case.

(ii) may require the submission of such information as may be reasonable and necessary,

(iii) may require the testimony of any person and the production of any documents as may be reasonable and necessary * * *.

§ 300aa-12(d)(3)(B). In turn, the "Vaccine Rules"[3] of this Court contain Rule 7 regarding discovery, which reads as follows:

Rule 7. Discovery.

There shall be no discovery as a matter of right.

(a) Informal Discovery Preferred. The informal and cooperative exchange of information is the ordinary and preferred practice.

(b) Formal Discovery. If a party considers that informal discovery is not sufficient, that party may seek to utilize the discovery procedures provided by RCFC 26-37 by filing a motion indicating the discovery sought and stating with particularity the reasons therefor, including an explanation why informal techniques have not been sufficient. Such a motion may also be made orally at a status conference.

(c) Subpoena. When necessary, the special master upon request by a party may approve the issuance of a subpoena. In so doing, the procedures of RCFC 45 shall apply. * * *

Accordingly, the statutory language plainly provides a special master with the authority to "require" testimony, or "require" the submission of "evidence" or "information" or "documents," whenever that master deems such testimony, evidence, information, or documents to be "reasonable and necessary" for the master's resolution of the case. And Vaccine Rule 7 implements that statutory authority, by authorizing a special master, when that master deems it "necessary," to (1) utilize the formal discovery procedures of RCFC 26-37, and (2) authorize a party to issue subpoenas, utilizing the procedures of RCFC 45, which includes provisions for subpoena enforcement.

[3]In actions before the special masters of the U.S. Court of Federal Claims, the special masters follow two sets of rules. The "Vaccine Rules of the United States Court of Federal Claims" (*hereinafter* "Vaccine Rules") are found in Appendix B of the Rules of the Court of Federal Claims (*hereinafter* "RCFC"). At the same time, special masters are bound by the other portions of the RCFC to the extent that such additional parts of the RCFC are referenced in the Vaccine Rules. Vaccine Rule 1; *Patton v. DHHS*, 25 F.3d 1021, 1026 (Fed. Cir. 1994).

2. Difference from other litigation

It is important to note that the statute provides this "discovery" authority to a special master in a context *quite distinct* from discovery in most legal proceedings. This context differs from most other litigation in two respects.

The first difference is that under the Vaccine Act there is a distinctly different orientation concerning the basic purpose of discovery. That is, in the context of most litigation, in discovery *a party* is seeking information that it hopes to later present before a factfinder; the judge's role in such discovery proceedings is merely to *referee disputes* concerning whether the discovery requested is appropriate within the prescribed discovery rules and precedents. In the Vaccine Act context, however, the special master is not only the referee of procedural disputes, but also the *ultimate factfinder* on all disputed factual issues; thus, when a master decides whether to use his or her discovery authority, the test is whether the master concludes that the production of the material in question is "reasonable and necessary" to the *master's own resolution* of the factual issues to be resolved. In other words, when a special master contemplates whether to utilize his or her authority to require testimony or document production, the master's task is apparently to evaluate the importance and relevance of the material in question in light of the *overall context of the factual issues to be decided* by the master, determining whether the master reasonably needs that material in order to reach a well-informed decision concerning those factual issues.

The second crucial difference is that in Vaccine Act cases the *standard* for determining whether to require testimony or document production is quite different from the standard utilized in most litigation discovery disputes. Both RCFC 26(b)(1) and its counterpart in the Federal Rules of Civil Procedure, FRCP 26(b)(1), provide that "[p]arties may obtain discovery regarding any matter, not privileged, that is *relevant to the claim or defense* of any party * * *." Thus, the test is simply whether the material being sought is *relevant* to the issues in the case. In Vaccine Act cases, in contrast, the test, as noted above, is whether the special master finds that the material being sought is *reasonable and necessary* to the master's resolution of contested issues. Obviously, given the ordinary meanings of the words "relevant" and "necessary," material could be "relevant" to an issue without being "necessary" to the resolution of that issue. Therefore, it seems clear that the Vaccine Act sets a substantially higher standard.

3. The standard that I will utilize here

As noted above, the Vaccine Act's use of the phrase "reasonable and necessary" clearly indicates that the special master, in deciding when to "require" testimony or the submission of evidence, is to use a standard that is higher than the "relevance" test generally used in other litigation. But, *how much* higher is the standard? That is not completely clear. The statute does not provide further guidance beyond the words "reasonable and necessary," and the legislative history contains no assistance. Certainly, the statute seems to afford the special master broad *discretion* in determining whether material is "necessary" or not, in the overall context of the case.

One might argue that the word "necessary" implies that the special master should require production only when it would be *absolutely impossible* to decide the factual issues in the case *without* the requested material. After consideration of this possibility, however, I conclude that the "reasonable and necessary" standard cannot be that strict. Such an interpretation would illogically set up a standard that could *never* be met, since a factfinder in a legal case can *always* rule on a factual issue no matter how scanty the evidence, even in the absence of *any* evidence. That is, in legal factfinding, if there is no evidence, the factual issue simply is resolved against the party having the "burden of proof." The "absolutely impossible" standard, therefore, plainly seems to be too strict, since under such a standard a special master would *never* require production, even of a petitioner's own medical records, and the master's statutory power to "require * * * testimony and * * * production" would amount to a nullity.

Instead, it seems to me that the "reasonable and necessary" standard means that a special master should require production if the master concludes that, given the overall context of the factual issues to be decided by the master, he or she could not make a *fair and well-informed* ruling on those factual issues without the requested material. Requiring the requested testimony or submission of evidence must also be "reasonable" under all the circumstances, which means that the special master must consider the *burden* on the party who would be required to testify or produce evidence. That is, the importance of the requested material for purposes of the special master's ruling must be balanced against the burden on the producing party. This is the interpretation of the "reasonable and necessary" standard that I will utilize here.

4. Vaccine Act precedent supports the use of this standard.

There is relatively little case law relating to discovery questions during the 18-year history of the Vaccine Act. This is not to say that the special masters during that time period have not utilized their statutory authority to require testimony and submission of evidence. To the contrary, special masters have routinely employed such authority in order to obtain *medical records* pertaining to a particular vaccinee seeking compensation, by authorizing the parties to serve subpoenas to obtain records from hospitals, physicians, etc. I have found virtually no case law concerning this use of subpoenas, however, probably because such use is so plainly appropriate under the statutory language that it has never been challenged.[4]

I have, however, identified several items of Vaccine Act case law that offer support to the standard that I have utilized here. In the first such opinion, I myself first articulated and adopted that standard. See *In re: Claims for Vaccine Injuries Resulting in Autism Spectrum Disorder*, 2004 WL 1660351, at *8-9 (Fed. Cl. Spec. Mstr. July 16, 2004). I also used the same standard again in *Cedillo v. HHS*, 2007 WL 1577972 (Fed. Cl. Spec. Mstr. May 10, 2007.) In addition, the same standard was

[4] I have identified one case in which it is merely mentioned, without discussion, that a special master had authorized the issuance of a subpoena to obtain medical records. *Vant Erve v. Secretary of HHS*, No. 92-341V, 1997 WL 383144 at *3 (Fed. Cl. Spec. Mstr. June 26, 1997), *rev'd on other grounds*, 39 Fed. Cl. 607 (1997).

endorsed by Special Master Sweeney[5] in *Werderitsh v. HHS*, 2005 WL 3320041 (Fed. Cl. Spec. Mstr. Nov. 10, 2005), and was adopted by Special Masters Vowell and Campbell-Smith, writing jointly with myself, in *In re: Omnibus Autism Proceeding*, 2007 WL 1983780 (Fed. Cl. Spec. Mstrs. May 25, 2007).

A fifth relevant decision is *Golub v. Secretary of HHS*, 44 Fed. Cl. 604 (1999), *rev'd on other grounds*, 243 F. 3d 561 (Fed. Cir. 2000). In *Golub*, a special master denied the petitioners' claim that their daughter's injury was caused by several vaccines, including the pertussis vaccine. On appeal to a judge of the Court of Federal Claims, the petitioners argued that the master had abused her discretion by failing to grant their discovery request that a government agency be required to divulge certain information. Judge Andewelt of this Court denied the appeal, concluding that the special master had not abused her discretion. (*Id*. at 609.) The judge noted that there existed "extensive available information" upon which the petitioners could argue their causation claim, and upon which the special master could evaluate that claim. Given this existence of available information, the judge found that it was "not necessary for the special master to require the Department of Health and Human Services to search for additional unpublished materials, the existence of which is uncertain." (*Id*.) This precedent, thus, provides additional support for the standard that I have utilized here. That is, the ruling indicates that a special master should evaluate a request for production of material by considering the *overall context of what other evidence is available* to the master.[6]

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[5]Then a special master of this court, Margaret Sweeney has since been appointed a judge of this court.

[6]I have identified several other published Vaccine Act opinions which include discussion of a special master's "discovery" authority. *McNerney v. Secretary of HHS*, No. 90-1689V, 1992 WL 120345 (Cl. Ct. Spec. Mstr. May 5, 1992) (special master ordered petitioner to provide a release authorizing the vaccinee's physician to be interviewed by respondent's counsel); *Crossett v. Secretary of HHS*, No. 89-73V, 1990 WL 608690 (Cl. Ct. Spec. Mstr. May 4, 1990) (special master denied respondent's request that he order vaccinee to undergo testing); *Baggott v. Secretary of HHS*, No. 90-2214V, 1992 WL 79987 (Cl. Ct. Spec. Mstr. April 2, 1992) (special master ordered respondent to produce certain records from government files, but did not discuss the "reasonable and necessary" standard); *DeRoche v. Secretary of HHS*, No. 97-643V, 2002 WL 603087 (Fed. Cl. Spec. Mstr. March 28, 2002) (special master indicated willingness to subpoena treating physician to testify); and *Schneider v. HHS*, 2005 WL 318697 (Fed. Cl. Spec. Mstr. Feb. 1, 2005), *aff'd* 64 Fed. Cl. 742 (2005) (special master denied petitioner's request that he order a government agency to perform a study).

III

DISCUSSION

After careful consideration, I conclude that it is appropriate that, in this situation, I utilize my authority to order that the petitioners make the videotapes in question available to respondent for copying. I will explain my reasoning below.

A. I conclude that the production of the videotapes is "necessary" to my resolution of the causation issue in this case.

The causation issue in this case depends, in significant part, on the question of *when* Jordan King experienced the first symptoms of his autism. The expert reports filed by petitioners' experts make that clear, as respondent's counsel argued during the status conference.

First, Dr. Mumper's report indicates that her opinion is based in significant part on the assumption that Jordan was developing normally for his first year of life, then began to significantly regress. (*E.g.*, p. 2--"clearly documented normal behavior and physical developmental milestones in the first year of life;" "clearly documented regression * * * emerging between 15-20 months.")

Second, the entire point of Dr. Greenland's report is that the epidemiologic studies leave open the possibility that one specific form of autism--the "regressive" form of autism--is vaccine-caused. And the regressive form of autism is *defined* by its time of onset.

Therefore, it seems clear, from those two expert reports, that petitioners' theory of causation in this case is dependent on the assumption that Jordan developed normally for a time, then later significantly regressed. Therefore, as the respondent argues, the videotapes of Jordan could shed light on the issues of (1) whether his development was, in fact, normal during his early months of life, and (2) when his first symptoms of autism appeared.

Further, as respondent's written motion pointed out, much testimony and other evidence in the *Cedillo* (No. 98-916V) case, the first autism test case (no ruling has yet been issued), was devoted to review of video of the autistic child in her first 18 months of life. A number of items of medical literature filed in that case supported the proposition that a retrospective review of videotape of an autistic child can provide important evidence as to when the child experienced the first symptoms of the condition. *Cedillo*, 2007 WL 1577972 at *5. To be sure, respondent's counsel has not yet filed copies of those items of evidence from *Cedillo*, mentioned in the previous sentence, into the record of *this case*. (Though respondent certainly *should* have filed those items, or something similar, along with the instant motion.) However, petitioner's counsel has full access to and is quite familiar with the *Cedillo* file. Moreover, Mr. Powers, and the other petitioners' attorneys who participated in the *Cedillo* trial last year, had a chance to introduce any evidence to the contrary at that time, but failed to do. In other circumstances, I would require that respondent place those evidentiary items from *Cedillo* (or similar evidence) into the record of *this case*, before granting

respondent's motion for production. However, because of the extremely short time remaining before the scheduled trial of this case, in the interest of time, I am granting the respondent's motion in this case at this time, but respondent is hereby instructed *to file those items into the record of this case promptly*.

Accordingly, it seems clear (1) that the onset of Jordan's autistic symptoms is a crucial issue in this case, and (2) that review of videotapes might yield valuable evidence concerning that issue. Accordingly, in my view it seems clear that to make a *well-informed* ruling concerning the causation issue in this case, it is "necessary" for me to be aware of any evidence concerning the onset issue that is available from the videos of Jordan. Therefore, it is necessary that copies of the videotapes in question be provided to the experts for *both* sides, so they can review the video footage and advise me as to whether such footage provides any assistance in resolving the onset issue in this case.

B. I conclude that it is "reasonable" to order that petitioners make the videotapes available to respondent for copying.

As explained above, the determination concerning whether to order production of material for use in a Vaccine Act case requires a *balancing* test. That is, the importance of the requested material must be balanced again the burden on the producing party. In this case, as explained above, it seems that there is a substantial chance that review of the videos in question could yield important evidence concerning the crucial onset issue. On the other hand, petitioners' counsel did *not* give me any reason to believe that providing the videotapes for copying would be a significant burden for the King family.

Accordingly, in this situation, I conclude that the balance of interests weighs in favor of requiring that petitioners provide their videotapes in question to the respondent for copying.

C. Petitioners' arguments

As noted above, during the February 4 status conference petitioners' counsel made a brief oral argument in opposition to respondent's motion. After careful review, however, I do not find the brief arguments raised by petitioners to be persuasive.

As I understood his comments, petitioners' counsel did *not* argue that it would be a burden on *petitioners* to produce the videotapes for copying. His comments, rather, were to the effect that it would be expensive and burdensome for *petitioners' counsel* and/or *petitioners' experts* to review the tapes for evidence concerning onset, and that it is questionable whether such review would provide significant evidence concerning the onset issue.

However, for reasons set forth above, I am persuaded that the onset issue is of crucial importance to this case. Further, based on the above-described evidence introduced in the *Cedillo* case, and also based on the actual expert discussion of the video of Michelle Cedillo during the *Cedillo* trial, I am persuaded that review of videos does have significant *potential* to shed light on

the onset issue in a particular case. Therefore, I conclude that any burden and expense on petitioners' counsel and/or experts to review the videos is justified by the potential value of evidence that might be obtained from the videos.

IV

CONCLUSION AND ORDER

For the reasons set forth above, I hereby Order that the petitioners *immediately* make their videotapes in question available to the respondent for copying. Given the circumstances here, however, I must also add certain additional directions.

First, opposing counsel shall work together immediately to ensure that *respondent* bears the burden of expense and any inconvenience in the process of copying the videotapes.

Second, I am quite sympathetic to the privacy interests of the King family. Therefore, I specifically ORDER that the respondent treat the video material as follows, consistent with the privacy provisions of § 300aa-12(d)(4)(A). The video material shall be reviewed only by the respondent's counsel and experts. It shall not be disclosed to any other persons, except to the extent that such video material may be presented to the court at the evidentiary hearing in this case, as discussed below.

Further, respondent's experts shall review the video material *immediately*. If they identify any footage that they find relevant to the causation issues, respondent's counsel must immediately, and by no later than March 7, call that *specific* footage--specified by date and description of the activity in question--to the attention of petitioners' counsel, so that petitioners' experts can review the footage and determine whether they agree or disagree with the impression of respondent's experts as to the relevance of that footage. (In other words, I do not want any "trial by ambush" concerning the videos at the hearing in this case.)

Given the time situation, it is obviously crucial that the videotapes be made available *very promptly*. Counsel for both parties are instructed to work reasonably with each other to make this happen. Either party shall *immediately* notify my office if there are any difficulties in compliance with this order.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master