

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

DR. YULIYA DOBRYDNEVA and *
DR. BORIS DOBRYDNEV, Parents of *
ILYA DOBRYDNEV, a Minor, *

Petitioner, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

No. 04-1593V
Special Master Christian J. Moran

Filed: April 7, 2009

scope of expert's report,
rebuttal testimony, supplemental
hearing

Mark P. Friedlander, Jr., McLean, VA, for petitioners;
Heather L. Pearlman, United States Dep't of Justice, for respondent.

PUBLISHED RULING ON MOTION FOR SUPPLEMENTAL HEARING*

Yuliya Dobrydneva and Boris Dobrydnev claim that a dose of the hepatitis B vaccine caused their son, Ilya, to develop chronic fatigue syndrome. Ms. Dobrydneva and Mr. Dobrydnev seek compensation pursuant to the National Childhood Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq.

A hearing was held. After the hearing, Ms. Dobrydneva and Mr. Dobrydnev filed a motion requesting a supplemental hearing on the ground that the testimony of one of respondent's experts, Dr. Wientzen, exceeded the scope of his expert report. For the reasons

* Because this published ruling contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

explained below, although Ms. Dobrydneva and Mr. Dobrydnev are entitled to some relief, a supplemental hearing is not necessary. Instead, Ms. Dobrydneva and Mr. Dobrydnev are limited to submitting a supplemental report from an expert whom they retained, Dr. Oleske. Therefore, to the extent their motion requests a supplemental hearing, the motion is denied.

I. Factual History

The following facts are relevant to adjudicating the petitioners' motion. These facts are abbreviated. The question of whether Ms. Dobrydneva and Mr. Dobrydnev are entitled to compensation will necessarily involve more facts, which will be set out in a forthcoming decision.

Ilya was born on April 14, 1991. Petition at 1. His health, at least from 1996-2000, is disputed, but not relevant to the pending motion.

In early 2001, Ilya was ill and was eventually diagnosed with mononucleosis. Petition at ¶ 1. Mononucleosis is a disease caused by the Epstein-Barr virus. Ilya experienced symptoms of mononucleosis for a period of time that was longer than expected. Two doctors retained by Ms. Dobrydneva and Mr. Dobrydnev opined that Ilya had recovered from the Epstein-Barr infection by April or May 2001. Pet'r Expert Rep't, filed Aug. 22, 2005; Pet'r Expert Rep't, filed Feb. 9, 2005. In contrast, two doctors retained by respondent opined that Ilya continued to show signs of Epstein-Barr infection for months later. Exhibit A at 2 (Dr. Weitzen's opinion); Exhibit D at 1-2 (Dr. Brenner's opinion).

On November 5, 2001, Ilya received a dose of the hepatitis B vaccine. Exhibit 9 at 3. His mother testified that he experienced certain problems that evening. However, Ilya's mother did not consult a medical doctor. Tr. 47-48. No medical record created close in time to November 5, 2001, indicates that Ilya experienced the problems described by his mother.

On November 19, and November 26, 2001, Ilya was seen by his pediatrician, Dr. Fink. Ilya appeared to have an upper respiratory infection. Exhibit 5 at 37, filed Oct. 25, 2004; see also Exhibit 11 at 120, filed June 26, 2007.

On November 30, 2001, Ilya was seen by doctors at a local emergency room. The doctors eventually diagnosed him with vestibular neuronitis. Exhibit 11 at 1-2, filed Oct. 25, 2004.

In early 2002, Ilya complained about being fatigued and other problems. See generally, Exhibit 5 at 29-33, filed Oct. 25, 2004. Eventually, Dr. Fink diagnosed Ilya as suffering from chronic fatigue syndrome. Exhibit 5 at 25, filed Oct. 25, 2004. Ms. Dobrydneva and Mr. Dobrydnev seek compensation for this condition. Respondent, in turn, questions whether Ilya actually suffers from chronic fatigue syndrome. Resp't Resp. at 20.

II. Procedural History

A. Pre-Trial and Trial

Ms. Dobrydneva and Mr. Dobrydnev filed their petition on October 25, 2004. They filed more than fifteen exhibits of medical records with their petition. They filed a report from Dr. David Bell on February 7, 2005, and a report from Dr. Nancy Kilimas, two days later.

In March 2005, respondent filed his report pursuant to Vaccine Rule 4 and a report from Dr. Raoul Wientzen. Exhibit A. The primary thrust of Dr. Wientzen's report was that "[i]t is not proper to diagnose Ilya's disorder as CFS – this diagnosis can only be made after alternative medical and psychiatric causes of chronic fatigue have been excluded. In Ilya's case, the latter has not been excluded." Exhibit A at 4. In the last paragraph of Dr. Wientzen's report, he added "if there hypothetically were a CFS to be diagnosed in Ilya, the precipitating event would have been not the vaccine he was given, but one of the two closely spaced viral illness[es] that occurred between that night and the onset of vestibular neuronitis." Id. at 5.

Ms. Dobrydneva and Mr. Dobrydnev filed a report from Dr. James Oleske on February 23, 2006. Pet'r Expert Rep't, filed Feb. 23, 2006. Respondent filed a supplemental report from Dr. Wientzen in response. Exhibit C.

Beginning no later than October 2006, the parties and the special master to whom the case was assigned were discussing the need for a hearing to determine whether Ms. Dobrydneva and Mr. Dobrydnev were entitled to compensation. This hearing was eventually scheduled for April 25, 2007, in Norfolk, Virginia. Order, filed Feb.15, 2007. Both parties filed a memorandum before trial.

The hearing was held on two days, April 25-26, 2007 in Norfolk. The transcript runs more than 600 pages. Although five witnesses testified, the motion requires analysis of the testimony of two witnesses, Dr. Oleske and Dr. Wientzen.

Dr. Oleske testified that Ilya suffered from chronic fatigue syndrome. Tr. 465-66. On cross-examination, Dr. Oleske explained the criteria for chronic fatigue syndrome and the requirement to exclude other possible causes of fatigue. Tr. 486-91. When Dr. Oleske finished testifying, he left the courtroom. See tr. 552.

Dr. Wientzen also testified. Consistent with his report, Dr. Wientzen testified that Ilya should not be diagnosed with chronic fatigue syndrome. Tr. 646. The primary reason is that Ilya has not been evaluated to rule out psychiatric causes for his fatigue. Tr. 647-48, tr. 657-68, tr. 679-89.

Dr. Wientzen also discussed chronic fatigue more generally. He stated that the cause of chronic fatigue syndrome is not known. Doctors believe chronic fatigue syndrome is often

preceded by a virus, such as the Epstein-Barr virus. Dr. Wientzen continued and stated that if Ilya has chronic fatigue syndrome – a proposition that Dr. Wientzen questioned – Ilya’s chronic fatigue syndrome may have started with his Epstein-Barr virus. Tr. 653-54 (direct examination). Dr. Wientzen made a similar point during cross-examination. Tr. 670, tr. 702, tr. 707, tr. 707.

On cross-examination, Dr. Wientzen offered an opinion as to the meaning of certain serologic tests for the presence of the Epstein-Barr virus. Dr. Wientzen explained that because Ilya was taking an antiviral drug, acyclovir, the Epstein-Barr virus could not replicate in Ilya’s system. Thus, the Epstein-Barr virus could not be detected. Tr. 675. Dr. Wientzen elaborated on how he believed acyclovir affected Ilya in response to questions from the presiding special master. Tr. 722-724.

The holding of the hearing, however, did not conclude the development of the case.

B. After Trial

Within a week of the hearing, the special master issued an order directing Ms. Dobrydneva and Mr. Dobrydnev to file certain items that were discussed during the hearing. Order, filed May 4, 2007. Such post-hearing orders happen frequently in the Vaccine Program cases because witnesses refer to documents that were not previously produced.

Ms. Dobrydneva and Mr. Dobrydnev filed some information that was requested. Ms. Dobrydneva and Mr. Dobrydnev also filed some information that was not requested, such as a report by Dr. Charles Parker. Pet’r Expert Rep’t, filed Aug. 22, 2007.

On August 21, 2007, the assigned special master conducted an unrecorded status conference. Following this status conference, Ms. Dobrydneva and Mr. Dobrydnev filed a motion requesting permission to file a supplemental report addressing whether Ilya suffered from the Epstein-Barr virus. Pet’r Mot., filed Sept. 10, 2007. Respondent objected. Respondent also noted that if Ms. Dobrydneva and Mr. Dobrydnev submitted additional information, he “will likely have to ask the court to conduct another hearing to examine the supplemental report’s contents, and possibly present rebuttal testimony.” Resp’t Resp., filed Sep. 18, 2007.

Ms. Dobrydneva and Mr. Dobrydnev filed a letter from Dr. Oleske on October 1, 2007. Dr. Oleske asserts that the Epstein-Barr virus did not cause Ilya’s chronic fatigue syndrome. Exhibit 23.

In February 2008, a supplemental hearing was scheduled for June 17, 2008. The hearing was supposed to be conducted by telephone. Order, filed March 12, 2008.

On May 2, 2008, Ms. Dobrydneva and Mr. Dobrydnev requested an interim award of costs. Application for Interim Payment of Medical Expert Witness Costs (“Pet’r Application”). The Federal Circuit determined that special masters possess the authority to award attorneys’ fees

and costs on an interim basis in Avera v. Sec’y of Health & Human Servs., 515 F.3d 1343, 1352 (Fed. Cir. 2008), which the Federal Circuit had issued on February 6, 2008. Ms. Dobrydneva and Mr. Dobrydnev requested only the amount owed to Dr. Oleske for his work in the case to date. Ms. Dobrydneva and Mr. Dobrydnev asserted that Dr. Oleske stated that he would not continue to participate in the case unless his outstanding bill was paid. Pet’r Application at 1-2.

Respondent opposed an interim award of costs. Respondent argued, as he had argued in other related filings described above, that Ms. Dobrydneva and Mr. Dobrydnev created the need for an additional hearing when their attorneys permitted Dr. Oleske to leave the hearing before respondent’s witnesses testified. Resp’t Opp., filed May 20, 2008, at 3-4. Respondent also objected to the amount of compensation sought for Dr. Oleske as unreasonable. Id. at 5-7.

Ms. Dobrydneva and Mr. Dobrydnev requested that the June 17, 2008 hearing be continued until their motion for an interim award of costs was resolved. Pet’r Mot., filed June 9, 2008. This request was granted. Order, filed June 17, 2008.

The previously assigned special master resigned. This case was assigned to the undersigned on August 1, 2008. Order, filed Aug. 1, 2008. An unrecorded status conference was held following which the undersigned asked for additional briefs addressed to the question of whether a supplemental hearing was necessary.

Respondent stated that a new hearing is not necessary. Resp’t Status Rep’t, filed Jan. 9, 2009, at 1. Respondent’s position seems to have been a change from the position he took in his Sept. 18, 2007 status report. In the earlier status report, respondent stated that if Ms. Dobrydneva and Mr. Dobrydnev filed a supplemental report from Dr. Oleske, then respondent “will likely have to ask the court to conduct another hearing.” Resp’t Resp., filed Sep. 18, 2007. Now, after the petitioners filed a supplemental report, respondent maintained that a new hearing is not necessary.

Ms. Dobrydneva and Mr. Dobrydnev responded to respondent’s position. They stated that “there is adequate evidence in the record to permit the [successor] Special Master to resolve the issues . . . provided Petitioners are allowed to offer rebuttal to address” Dr. Wientzen’s opinion. Pet’r Resp., filed Jan. 30, 2009, at 1. Ms. Dobrydneva and Mr. Dobrydnev attached medical literature, which was not assigned an exhibit number. Dr. Oleske’s supplemental report did not cite this medical literature.

However, Ms. Dobrydneva and Mr. Dobrydnev did not respond to a particular topic in the December 11, 2008 order. Ms. Dobrydneva and Mr. Dobrydnev were expected to explain “whether exhibit 23 [Dr. Oleske’s supplemental report] eliminates the need for a hearing to present rebuttal testimony.” Order, filed Dec. 11, 2008, ¶ 2.b.

III. Analysis

There are two issues to consider. The first issue is whether Dr. Wientzen's testimony exceeded the scope of his report, such that Ms. Dobrydneva and Mr. Dobrydnev are entitled to rebuttal testimony. The second issue is assuming that Dr. Wientzen's testimony introduced new topics, what relief is appropriate.

A. Comparison of Dr. Wientzen's Report and His Testimony

The preliminary question is whether Dr. Wientzen testified to opinions not disclosed in his expert report. If his report placed Ms. Dobrydneva and Mr. Dobrydnev on notice about the scope of his testimony, then Ms. Dobrydneva and Mr. Dobrydnev cannot legitimately request an opportunity to present rebuttal information.

Here, Dr. Wientzen's testimony introduced a new topic.¹ His report discussed whether Ilya is properly diagnosed as suffering from chronic fatigue syndrome. Dr. Wientzen offered various reasons why the diagnosis is not correct. Exhibit A.

Dr. Wientzen's report said very little about the cause of chronic fatigue syndrome. To the extent the cause of chronic fatigue syndrome was discussed, Dr. Wientzen's report stated that the cause would be "one of the two closely spaced viral illnesses" from November 2001. Exhibit A at 5. The report did not mention the Epstein-Barr virus.

However, Dr. Wientzen's testimony attributed causation to the Epstein-Barr virus. Dr. Wientzen offered this opinion both on direct examination and cross-examination.

It appears that the virus infections from November 2001 are not manifestations of Ilya's Epstein-Barr infection. But, even if Dr. Wientzen's reference to the two viruses in November 2001, could be construed to encompass the Epstein-Barr virus, Dr. Wientzen's testimony still exceeded the scope of his report. Dr. Wientzen's opinion about acyclovir was not disclosed. Ms. Dobrydneva and Mr. Dobrydnev are entitled to an opportunity to respond to this portion of Dr. Wientzen's testimony.² Benedict v. United States, 822 F.2d 1426 (6th Cir. 1987) (when defendant introduces new evidence, plaintiff may present evidence on rebuttal); see also Schucker v. F.D.I.C., 401 F.3d 1347 (Fed. Cir. 2005) (vacating decision of administrative judge

¹ The briefs filed by Ms. Dobrydneva and Mr. Dobrydnev were particularly not helpful in identifying the extra information.

² Ms. Dobrydneva and Mr. Dobrydnev did not object to Dr. Wientzen's testimony about acyclovir as beyond the scope of his report when Dr. Wientzen testified. Tr. 653-55. Ms. Dobrydneva and Mr. Dobrydnev have also not filed a motion to strike his testimony at this late date. Thus, whether the appropriate remedy would be to strike testimony is not part of this ruling.

of the Merit Systems Protection Board that did not consider rebuttal evidence submitted by petitioner); Grant v. Sec’y of Health & Human Servs., 19 Cl. Ct. 166 (1989) (rejecting recommendation by special master who considered respondent’s late-filed evidence without giving petitioner an opportunity to respond), aff’d after remand, 956 F.2d 1144 (Fed. Cir. 1992).

B. The Scope of the Relief to Which Ms. Dobrydneva and Mr. Dobrydnev Are Entitled

The next general issue is the relief to which Ms. Dobrydneva and Mr. Dobrydnev are entitled. A particular question is whether Ms. Dobrydneva and Mr. Dobrydnev waived any right to request relief.

The natural and logical place for rebuttal testimony is after the respondent completes his case in chief. If this principle were followed, then after Dr. Wientzen completed his testimony, Ms. Dobrydneva and Mr. Dobrydnev would have called Dr. Oleske to present his opinions about (1) whether Ilya’s Epstein-Barr virus could have caused his chronic fatigue syndrome, and (2) the effect of acyclovir.

Ms. Dobrydneva and Mr. Dobrydnev could not recall Dr. Oleske because he was not present. After Dr. Oleske finished testifying, the attorneys for Ms. Dobrydneva and Mr. Dobrydnev permitted Dr. Oleske to leave the courtroom. All parties agree that Dr. Oleske did not hear Dr. Wientzen’s testimony. Respondent, therefore, argues that Ms. Dobrydneva and Mr. Dobrydnev have created the problem, and should not be rewarded by having a second opportunity to present Dr. Oleske’s testimony. Resp’t Opp. at 3-5.

Respondent’s point has some validity. The petitioners’ representation that Dr. Oleske was required to leave the courthouse to travel seems especially inaccurate. Respondent produced evidence that Dr. Oleske’s flight did not depart for hours after he completed his testimony. Resp’t Opp. at 5 (citing Pet’r Application at 7-8). The decision by the petitioners’ attorneys to let Dr. Oleske leave the courthouse was a mistake. His continued presence could have prevented the problem being addressed in Ms. Dobrydneva and Mr. Dobrydnev’ motion from arising.

Despite the misjudgment by Ms. Dobrydneva and Mr. Dobrydnev’ attorney, Ms. Dobrydneva and Mr. Dobrydnev are entitled to present a rebuttal to Dr. Wientzen’s opinion. Within reasonable limits, it is better to obtain more accurate information. DeFazio v. Sec’y of Health and Human Servs., 40 Fed. Cl. 462, 466-68 (1998). If Dr. Wientzen had not discussed the Epstein-Barr virus in his testimony, then the mistake by the petitioners’ attorney would have been harmless.

Already, Ms. Dobrydneva and Mr. Dobrydnev have introduced some evidence to rebut Dr. Wientzen’s opinion. They filed a supplemental report from Dr. Oleske. Exhibit 23.

Ms. Dobrydneva and Mr. Dobrydnev have offered no reason why Dr. Oleske's supplemental report is not adequate. Ms. Dobrydneva and Mr. Dobrydnev were particularly ordered to address this question. Order, dated Dec. 11, 2008. Yet, the petitioners' brief omits any discussion of this topic. It appears that Ms. Dobrydneva and Mr. Dobrydnev have waived their right to request a supplemental hearing. See Vaccine Rule 8(f).

Exhibit 23, Dr. Oleske's supplemental report, appears reasonably understandable. Thus, there appears to be little need to convene a supplemental hearing, even one by telephone, to obtain additional information at this time. Of course, if the undersigned believes that a supplemental hearing would be useful, the undersigned may request one. See Vaccine Rule 8. Special masters may decide a case without conducting a hearing at all. Vaccine Rule 8(d); Burns by Burns v. Sec'y of Health and Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993); Doe/17 v. Sec'y of Health and Human Servs., 84 Fed. Cl. 691, 704-5 (2008) ("A special master has discretion to determine whether testimonial evidence, in addition[] to written statements[,] is necessary.") (quotation marks omitted).

To some extent, the undersigned's ruling not to conduct a supplemental hearing conflicts with the implicit decision of the previously assigned special master to hold a supplemental hearing. However, interim procedural rulings may be revised as long as they have not been addressed by an appellate court. Exxon Corp. v. United States, 931 F.2d 874, 877-78 (Fed. Cir. 1991).

IV. Conclusion

Ms. Dobrydneva and Mr. Dobrydnev's motion for a supplemental hearing [docket entry 70] is denied on the ground that exhibit 23 appears to address adequately the new testimony given by Dr. Wientzen. A status conference is scheduled for **Thursday, April 23, 2009 at 11:00 A.M.** The parties should be prepared to discuss the following issues: (1) whether the record is complete, (2) the schedule for filing briefs, (3) petitioners' request for an interim award of costs.

IT IS SO ORDERED.

Christian J. Moran
Special Master