In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-1120V

Filed: 14 January 2008

SCOTT BERGER,	*	
Petitioner,	*	
v.	*	**PUBLISHED**[1]
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT AND CERTAIN DISCOVERY

On 20 November 2006, Petitioner filed his Motion for Partial Summary Judgment, moving the Court to find that "the 'acute' phase of petitioner's illness [as differentiated from a longer-term condition of clearly disputed causation] was caused by Td immunization," based on a reading of Respondent's proffered medical expert report of Dr. Paul E. Phillips. Petitioner's Motion at 5. Petitioner argues that Dr. Phillips' report effectively concedes the issue of causation on the initial portion of Petitioner's post-vaccinal course, inasmuch as the report allows for the possibility of causation by the vaccine, along with bacterial infection and other immunizations, in the universe of potential *causata*. Cf. Respondent's Exhibit A at 8.

Petitioner argues that since Dr. Phillips included the Td vaccination among the possible causes of the initial course of Petitioner's condition, and used the words "may" and "perhaps" to introduce and qualify each of these potential *causata*, that the inclusion of these others "cannot be

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[1] Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of this ruling within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

said to contravene Dr. Lehman's opinion [proffered by Petitioner] to the contrary," such that, now, "[R]espondent has the burden of refuting Dr. Lehman's opinion in this regard." Petitioner's Motion at 6.

The same filing also moves the Court for an Order requiring Respondent to submit to "limited discovery", which Petitioner describes as "interrogatories", but which primarily follow the format of "Concede that...." See Petitioner's Motion at 8; Petitioner's Exhibit 27.

On 18 May 2007, Respondent submitted a memorandum in opposition to Petitioner's Motion (Respondent's Memo), which argues for denial because Petitioner "has not established a *prima facie* case of causation in fact," and "has yet to prove...actual causation." Respondent's Memo at 1. Respondent essentially argues that Dr. Phillips' report does not dispositively concede any issue of causation relating to any portion of Petitioner's injury or condition, if indeed any such injury or condition can be affirmatively identified. Respondent's Memo also argues against the grant of discovery, noting that discovery is not had as of right in Vaccine Program cases (citing RCFC App. J [sic][2], Rule 7), and stating the statutory intent behind this Rule.

On 8 June 2007, Petitioner filed a Reply Memorandum (Petitioner's Reply Memo) arguing that "there exists no legal impediment which precludes petitioner from proceeding in the summary fashion here at issue," and characterizing Respondent's oppositional arguments as "very thin." Petitioner's Reply Memo at 2. Likewise, Petitioner argues that Respondent effectively conceded certain matters, even if doing so was unintentional, and that, therefore, the discovery requested regarding "remaining issues becomes quite germaine" [sic] in the remaining issues left in the case. *Id*. at 3.

Having carefully considered the memoranda submitted by the parties, in light of the pleadings and exhibits filed already in this case, it is now incumbent upon the Court now to rule on the motion.

I. PARTIAL SUMMARY JUDGMENT

The Court takes time to note its appreciation for Petitioner's effort to narrow the disputed issues requiring the Court's consideration and resolution. Summary Judgment serves to preserve judicial economy and to focus the Court's attention on truly disputed, central issues of fact upon which the case turns. It is in the best interest of all concerned for courts to grant motions for summary judgment where appropriate.

[2] The Court understands Respondent to be citing to Appendix B, Vaccine Rules of the United States Court of Federal Claims, not an Appendix J, which is not included in the Rules of the Court.

A. The Standard for Adjudication

RCFC 56, addressing summary judgment in the United States Court of Federal Claims, includes the following instruction:

> Rule 56. Summary Judgment
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> (a) For Claimant. A party seeking to recover upon a claim...may...move with or without supporting affidavits for a summary judgment in such party's favor upon all or any part thereof.
>
> ...
>
> (c) Motion and Proceedings Thereon. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

"Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Mann v. United States, 334 F.3d 1048, 1050 (Fed. Cir. 2003) (citing predecessor of current RCFC 56).

The Court is therefore to grant Petitioner's Motion for Partial Summary Judgment if it has been established that there is no genuine issue as to any material fact relating to the causation of Petitioner's symptoms in the interval immediately following the vaccination.

B. Analysis

The Court reads and understands Petitioner's argument to say that Dr. Phillips's report not only agrees that "Td *can cause* systemic reactions with headache, malaise and fever in approximately 2% of vaccinees, and also myalgias, arthralgias and muscle stiffness" (Resp. Ex. A at 8, emphasis added), but that the language of the report effectively concedes that the Td vaccination Petitioner received *did in fact* cause the "myalgic and arthralgic illness with fever, peaking during the first 2-4 weeks" (*Id*. at 7), which Petitioner experienced. As the Court understands Respondent's argument, it is, in essence, that a preponderance of the evidence has not demonstrated that the Td vaccine did in fact actually cause those early symptoms. See 42 U.S.C. § 11(c)(1)(C)(ii)(I) & (II); Grant v. Secretary of HHS, 956 F.2d 1144 (Fed. Cir. 1992); Strother v. Secretary of HHS, 21 Cl. Ct. 365, 369-70 (1990), aff'd, 950 F.2d 731 (Fed. Cir. 1991).

The Court has often analyzed actual causation claims with the following two-part test, which has been viewed with approval by the Federal Circuit,[3] and which guides the Court's practical

[3] See Pafford v. Secretary of HHS, No. 01-0165V, 2004 U.S. Claims LEXIS 179, *16, slip op. at 7 (Fed. Cl. Spec. Mstr. Jul. 16, 2004), aff'd, 64 Fed. Cl. 19, 2005 U.S. Claims LEXIS 31 (2005), aff'd 451 F.3d 1352, 1356 (2006) ("this court perceives no significant difference between the Special Master's test and that established by this court in Althen and Shyface"), rehearing and rehearing *en banc* denied, 2006 U.S. App. LEXIS 28907, cert. den., 168 L. Ed. 2d 242,

approach to analyzing the elements elucidated by Althen v. Secretary of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005):

> The Undersigned has often bifurcated the issue of actual causation into the "can it" prong and the "did it" prong: (1) whether there is a scientifically plausible theory which explains that such injury could follow directly from vaccination; and (2) whether that theory's process was at work in the instant case, based on the factual evidentiary record extant.

Weeks v. Secretary of HHS, No. 05-0295V, slip op. at 25, n. 15 (Fed. Cl. Spec. Mstr. Apr. 13, 2007).

In order for this two-part test to be met, such that causation is proven, both elements must be satisfied. Therefore, Dr. Phillips' acceptance that Td *can* cause certain symptoms, on its own, does not mean that the test has been met, without the further proof or concession that Td *did* cause those symptoms. This Dr. Phillips' report does not do.

Dr. Phillips' statement that "Td can cause systemic reactions..." is immediately followed by a clear statement that it does *not* appear likely that such a biologic mechanism was at work in Petitioner's case. Resp. Ex. A at 8. Dr. Phillips reasons there that "it seems unusual that Petitioner had had multiple previous exposure to tetanus and diphtheria antigens during his prior childhood immunizations, apparently without reactions, and then becomes very symptomatic following the [vaccination at issue]." *Id*. Dr. Phillips immediately then goes on to state other plausible potential *causata* that could have been at work to explain those symptoms. *Id*.

In Dr. Phillips' report, the Td vaccination was listed as a potential *causa*, not with certainty as an actual, substantial cause in fact of the illness, to a preponderance of the evidence. It is this standard which must be met for the Court to make a finding of actual causation in order for the burden of persuasion to be lifted from Petitioner's shoulders with regard to any condition alleged to be vaccine-related.

It appears that Respondent's argument is therefore correct: that, regardless of Dr. Phillips' mention that Td can cause certain like symptoms in particular cases, that does not mean that the issue of causation is decided, such that Petitioner's burden of proof is satisfied entirely on this matter. In fact, this matter is still largely contestable. In cases heard in the Vaccine Program, it is very often the case that, through medical literature (e.g., case studies, epidemiological research, or findings of the IOM), it is manifest that a vaccine can cause a specified condition through a specified mechanism, yet, even so, the central dispute of whether such mechanism was at work in the case under consideration is strongly contested. In all such cases, Petitioner retains the burden of proof to meet the preponderance standard for causation in fact. This question then becomes necessarily the central focus of evidentiary hearings, and not even an overwhelming deluge of medical literature

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75 U.S.L.W. 3644 (2007).

can definitively prove, in summary fashion, that a particular mechanism was at work in the particular case of the petitioner therein.

Such must also be the case here with Petitioner in this case. Whatever condition or injury Petitioner seeks to prove was suffered may and should be explained with reference to medical literature explaining the mechanism believed to be at work within the medical profession. But to stop at that point would obviate the need for affidavits and fact witness testimony in all cases before the Court. As this is not the result contemplated by the Statue, nor the approach dictated by reason, the Court cannot accede to its application.

Accordingly, the Court **rules** that due to the disputed nature of this material, even quite essential issue of fact, the summary judgment requested by Petitioner's motion is not appropriate in this case. Wherefore, the Court **denies Petitioner's motion for partial summary judgment**.

II. DISCOVERY

The second portion of relief requested by Petitioner is resolved with less need for detailed analysis of the facts of this case and of the unique statutory requirements of proof applied within the Vaccine Program. As Respondent has noted, discovery is not had as of right in the Program, but may be granted at the discretion of the Court. See Rules of the United States Court of Federal Claims, Appendix B, Vaccine Rules of the United States Court of Federal Claims (Vaccine Rules), Rule 7. However, Respondent's Memo did not address how the Court should exercise that discretion since Petitioner has requested the Court's exercise of discretion to grant discovery here, as required by the Rule. Therefore, the Court undertakes the question in that void. Consequently, the Court views first the standard set by the appropriate Rule in determining whether Petitioner's motion is proper:

> 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 as to why informal techniques have not been sufficient. Such a motion may also be made orally at a status conference.

Vaccine Rule 7(b)

Critical to the Court's analysis of Petitioner's motion is the type of discovery requested. Petitioner's self-described label for the mode of discovery requested is to term the questions as "interrogatories." Interrogatories are typically specific, factual questions asked of an opposing litigant to discover information not known to the interrogator. See Black's Law Dictionary 825 (7th ed. 1999). Interrogatories are typically differentiated from requests for admission, the latter of which usually do not seek new information from an opposing party, but instead state a factual or legal conclusion which the opposing party must then "admit, deny, or object to the substance of the statement." Id. at 1307.

In Vaccine Act cases, it may often be helpful to the Court's fact-finding function for a party in sole custody of certain information to divulge that information to the Court, and to do so prior to an evidentiary hearing so that the other party is not caught by unfair surprise. In that regard, interrogatories or depositions may be useful where the Court discerns it so. In contrast, requests for admission do not address the disclosure of pertinent information, and are therefore less critical from the Court's fact-finding perspective. Such a discovery device may still be allowed if sufficient reason exists, but the distinction remains an important one.

Turning to the written discovery proposed by Petitioner's motion, and set forth in Pet. Ex. 27, the Court apprehends five separate, numbered points seeking a response from Respondent. The Court notes that three out of those five points (#1, #3, and #5) are not even phrased as questions, but are unqualified demands to "concede that" certain facts proposed by the Petitioner are true. These are not properly labeled as interrogatories, but are, in actuality, requests for admission. Of the two that remain (#2 and #4), they are phrased such that, if Respondent does not concede the preceding assertion, Respondent is to state the nature, reasoning, and evidentiary support for such position of denial.

As a piece, the proposed discovery does not seek information in Respondent's possession for the purpose of discovering facts relevant to the proper litigation and adjudication of the Petition. Instead, it seeks legally strategic ends of determining and fixing Respondent's position on those points. As that is the case, the Court is more reluctant to grant such discovery, absent strong, clearly-articulated reasons for doing so.

The Vaccine Program, relying upon the Vaccine Act and the Vaccine Rules, requires clear explication of parties' positions within their pleadings, for the benefit of the Court's understanding and so that opposing parties are not unfairly surprised. However, the Court recognizes that the Vaccine Program was not designed to operate the same way as federal district courts in their discovery, but is to follow a more circumscribed approach to discovery than other courts.

As a general rule within the Vaccine Program, Petitioners' counsel are encouraged to communicate informally with Respondent's counsel to determine and clarify disputed issues, and Respondent is expected to cooperate in that endeavor. If and when Respondent may be shown to be uncooperative in this regard, the Court may grant more thoroughgoing discovery to fill in gaps left by the pleadings and Respondent's voluntary disclosures. However, that situation has not been shown to be present here.

Here, Petitioner's sole justification for the requested discovery is "to further define the basis of respondent's defense and to enable petitioner to appropriately prepare to refute said defense." Petitioner's Motion at 9. Petitioner did not reference any body of purely factual data unknown to him, which lies within Respondent's sole custody. There is no showing made therein that Respondent has not articulated his position in the Rule 4(c) Report, or that Respondent was uncooperative in delineating that position through informal communication. Certainly, Petitioner has not included in the materials filed "an explanation as to why informal techniques have not been sufficient." Vaccine Rule 7(b). In this absence, the Court is left unpersuaded that the proposed

discovery is appropriate here. Wherefore, the Court **denies Petitioner's motion for certain discovery**.

As Petitioner's motions have been herein denied, this case appears ready for an evidentiary hearing on the issue of entitlement, at which all issues are to be considered yet in dispute and all burdens of proof yet to be satisfied. The Court encourages the parties to discuss which disputed issues are relevant and material to the Court's adjudication, and to inform the Court of their existence and general tenor.

Furthermore, the parties are **ordered** to contact the Court to schedule a status conference, so that any further preliminary matters may be addressed, and a hearing may be scheduled. The Court may be reached by contacting my law clerk, Isaiah Kalinowski, Esq., at (202) 357-6351.

IT IS SO ORDERED.

Richard B. Abell
Special Master