In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-0120V

Filed: 8 June 2007

ERIN ZELLER and BENJAMIN S. ZELLER, parents of BENJAMIN J ZELLER, a minor,	*	
Petitioners,	*	
v.	*	**PUBLISHED**[1]
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Motion to Strike; Late-Filed Exhibits
Respondent.	*	

ORDER GRANTING MOTION TO STRIKE AND SETTING BRIEFING SCHEDULE

A status conference was held before the Undersigned regarding the above-captioned matter on 4 June 2007, at Respondent's request, to discuss certain filings submitted by Petitioners subsequent to the recent entitlement hearing held on 25 May 2007. Petitioner filed a Compact Disc which contained their Exhibits 40 and 41. Petitioners' Exhibit 40 constituted medical literature referred to at the recent hearing, which the Court had ordered Petitioner to file in a broader selection than had previously been filed. At the status conference, neither party raised any issue about that filing, and the Court presumes that any discussion on that exhibit will be adequately addressed in closing briefs.

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[1] Because this Order contains a reasoned explanation for my action in this case, it may be published or posted to the Court of Federal Claims website. Therefore, Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), Petitioner has 14 days from the date of this Order 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, it 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).

Petitioners' Exhibit 41, however, contained a typed letter dated 13 June 2005[2] from Fonda Schenk, RN, who was a neighbor to Petitioners (and presumptively an acquaintance or associate of theirs) at some point, and who performed CPR on Benjamin on the day of his seizure. Petitioner submitted the letter as "rebuttal evidence" to contradict statements and opinions from Respondent's Expert, Dr. Wiznitzer, made during the Entitlement Hearing. In it, the writer states facts that were not previously introduced into the record by any other source, and which, both parties aver, were not available nor relied upon by either expert testifying in this case.

Respondent objected to the filing of Exhibit 41 and moved the Court to strike it from the Record. Petitioner opposed this motion, arguing for its admission, and for the Court to consider its contents for making factual determinations in deciding this case. The Court then entertained arguments from both parties, giving each party ample opportunity to be heard on this issue.

Petitioner argued that the exhibit should be admitted, to be addressed in the parties' closing briefs, or, in the alternative, that another hearing be held to give the experts an opportunity to address the factual contentions contained therein. Respondent argued that the exhibit be stricken entirely from the record, or, in the alternative, that the Court convene another full hearing to receive live testimony from Schenk and have the experts reevaluate their opinions in light of the late-offered evidence.

The Court, having thoughtfully considered the arguments presented by each party, **granted** the motion to strike the exhibit. An explanation of the Court's reasoning follows.

Rule 2(e)(1) of the Vaccine Rules of the United States Court of Federal Claims (the "Vaccine Rules") states, *inter alia*, the following provisions, which govern the issue raised by the instant motion:

> **(1)** As required by 42 U.S.C. § 300aa-11(c), every petition shall be accompanied by the following:
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> > **(A)** medical records and detailed affidavit(s) supporting all elements of the allegations made in the petition. If petitioner's claim does not rely on medical records alone, but is based in any part on the observations or testimony of any persons, the substance of each person's proposed testimony in the form of an affidavit executed by the affiant must accompany the petition...

[2] At least for the purpose of analyzing the instant issue, this letter is not to be categorized as a contemporaneous physician or hospital record, as it was written 6 ½ months after the event(s) which it attempts to recount, and was not prepared pursuant to standardized professional treatment. Therefore the Court assumes, for the sake of this motion, that subsection B of Vaccine Rule 2(e)(1) does not govern resolution of this issue. Moreover, the disputed letter would likewise not be given the weight specially afforded contemporaneous medical records in the Vaccine Program (see Cucuras v. Secretary of HHS, 993 F.2d 1525, 1528 (Fed. Cir.1993)).

The Vaccine Rules, as well as the Vaccine Statute[3] itself, contemplate a utopian vision seldom encountered in cases commonly before the Program: a petition accompanied by all necessary and relevant filings at the date of initial filing. In many cases, it may be months before medical records and fact witness affidavits are filed by petitioners, to say nothing of medical expert opinion reports. In most instances, this Court strives to accommodate petitioners by providing adequate time to complete these filings during the early pendency of the action, a period frequently lasting several months.

This accommodation should never be confused with laxity under the mandate of the Vaccine Statute and the Vaccine Rules, however. Even considering the period typically allowed to petitioners by this Court to develop the factual record in Vaccine cases, a line must be drawn somewhere. In this case, Petitioners should have provided notice of this potential source of evidence to the Court and to the Respondent well before the Entitlement Hearing. To withhold such knowledge, and then to file an unsworn letter to rebut Respondent's expert *after* the hearing on entitlement, is unfairly prejudicial to Respondent because it denies the proper notice due Respondent.[4]

There is no question that, applying the rule quoth above, if Petitioners intended to employ the testimonial evidence at issue in presenting their case, it should have "accompanied" their Petition, either on its initial filing, or by later amendment in the time prior to the recent Hearing. If their claim relied not "on medical records alone," but instead is "based in any part on the observations or testimony of" the newly added witness, then it is abundantly clear that her testimony, "in the form of an affidavit[5] executed by the affiant *must* [have] accompan[ied] the petition" (emphasis added). The use of the word "must" does not allow latitude to the parties. As such, the text of the Vaccine Rules itself establishes the outcome of this issue.

The simple answer to the question presented is that the disputed exhibit should have been filed as evidence *ab initio*, and is therefore improperly termed "rebuttal evidence" by Petitioners. Petitioners were instructed early in these proceedings to file *all* relevant fact-witness affidavits, not merely those they estimated would be supportive to their position, and not at some time of their own choosing that denies Respondent adequate notice to prepare or respond. Assuming, *arguendo*, that

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[3] The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 et seq. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

[4] If Petitioners had disclosed Schenk's knowledge earlier in these proceedings, Respondent could have questioned the witness by deposition and/or at trial, and experts for both parties could have based their opinions upon the further-developed set of facts. Instead, Petitioners wish to be rewarded for their litigative gamesmanship by offering unquestioned, uncontested testimony for the Court's consideration, leaving Respondent without an opportunity to assay that testimony.

[5] In the Second Edition (1989) of the Oxford English Dictionary, "affidavit" is defined as "A statement made in writing, confirmed by the maker's oath, and intended to be used as judicial proof." Whatever else Exhibit 41 may be, it is not an affidavit. Irrespective of the other reasons stated for the exclusion of Petitioners' Exhibit 41, such exhibit was not suitable to be filed in accord with the dictates of Vaccine Rule 2(e)(1)(A).

this testimony is as relevant as Petitioners have indicated, they should have filed an affidavit from the witness at issue while the Record was being developed, well before the entitlement hearing.

Fonda Schenk possessed knowledge of those crucial, disputed moments surrounding, during, and/or after Benjamin's seizure on 27 November 2004. She was, albeit, a neighbor and associate of the Petitioners–perhaps even a friend; however, she was (and presumably still is) a medical professional with contemporaneous, first-person knowledge of Benjamin's acute symptoms in those critical moments. Under the circumstances, Petitioners should have alerted the Court (and Respondent) to the existence of this witness, even if they did not elect to file a fact witness affidavit from her in support of the Petition, pursuant to § 11(c) of the Vaccine Statute and Vaccine Rule 2(e)(1)(A). When evidence, which is uniquely within a petitioner's purview, and which is germane, lies in their possession, there exists a duty to bring it to the Court's attention.

In reality, Petitioners have admitted maintaining possession of the disputed 2005 letter long before the Entitlement Hearing, since the early interval of this case. The Court allows supplemental filings of recently-discovered evidence or previously nonexistent medical records, but this letter is neither. This was potential evidence that Petitioners did not previously elect to disclose, based upon their own exercise of discretion. If Petitioners had any inclination to offer Schenk's testimony, the existence of such testimony should have been disclosed several months ago and, in any event, well before the Entitlement Hearing.

There is no need to reopen proceedings, as was suggested by the alternative arguments of the parties. Petitioner had every opportunity to present proper evidence on this point such that it might "accompany the [completed] petition," but made the deliberate, strategic choice not to do so. They are therefore estopped from presenting it now in this fashion, and the Court will not hear them to argue that this outcome prejudices their case, when the remedy was within their own possession at the time when such filing was germane.

As an additional point, the existence of the letter appears to have been unknown to all the testifying experts–including Petitioners' own–and (according to the averments of both parties) was not relied upon by any expert opinion rendered. As such, there is no one-sided or unfair result arising from its exclusion.

Wherefore, the Court has not considered, and will not consider, the materials submitted as Petitioners' Exhibit 41, and will not be considered part of the Record in this case. Respondent's motion is therefore **granted**.

That matter being resolved, and no others yet lingering since the Entitlement Hearing of 25 May 2007, the following briefing schedule was **ordered** by the Court:

- Petitioners **shall file** a closing brief on or before **14 August 2007**;
- Respondent **shall file** a closing brief on or before **11 September 2007**; and
- Petitioners **may file** a surresponsive brief on or before **25 September 2007**, if they so desire.

A status conference may be had at the request of either party, and any issues encountered during the interim may be addressed to my law clerk, Isaiah Kalinowski, Esq., at (202) 357-6351.

IT IS SO ORDERED.

Richard B. Abell
Special Master