In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(E-Filed: February 1, 2007)
No. 99-504V
PUBLISHED

RONALD ALLEN III, a minor, by his parents and natural guardians, RONALD and JANET ALLEN, Petitioners, v. SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	Request for Judicial Notice of a Causal Relationship between Hepatitis B Vaccine and Rheumatoid Arthritis

Order Ruling on Petitioners' Request for Judicial Notice of "the Fact that H[epatitis]BV[accine] Can Cause R[heumatoid]A[rthritis]"[1]

By Order dated October 3, 2006, the undersigned addressed the effect of the Rheumatoid Arthritis (RA) Omnibus Proceedings[2] on this proceeding. See Order Ruling

[1]Because this document contains a reasoned explanation for the action of the undersigned, the document shall post on the website of the United States Court of Federal Claims in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has fourteen days within which to request the redaction "of any information furnished by that party (1) that is trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of timely objection, the entire document will be made publicly available.

[2]The Rheumatoid Arthritis Omnibus Proceedings refer to the proceedings held in connection with the five test cases designated by the parties'counsel for a joint hearing on the

on the Effect of the Rheumatoid Arthritis Omnibus Proceedings dated 10/3/06. By subsequent Order dated October 17, 2006, the undersigned directed petitioners' counsel to "file a status report indicating whether or not petitioners intend to introduce as evidence in this case any evidence from the RA Proceedings." See Order dated 10/17/06. The Order stated that "[i]f petitioners intend to rely on any evidence from the RA Proceedings, petitioners must designate, with specificity, the evidence they intend to introduce in this case[, and] petitioners must also indicate how the designated evidence is relevant to the facts of this case." Id.

In response to the Order of October 17, 2006, petitioners filed a status report indicating that petitioners would not designate any evidence from the RA proceedings for consideration in this case. Petitioners' Status Report (Ps.' SR) dated 10/23/06. Rather, petitioners stated that they would "rely on the experts retained to render their opinions in this case." Id. at 1. Additionally, petitioners requested

> that the Special Master take [judicial] notice of the fact that HBV can cause RA, and that it would be impossible for such a finding to be made if there were no valid medical theory of causation. It will be left to Petitioner to prove that it did cause Ronald Allen's JRA.

Id. at 2.

Respondent responded to petitioner's request for judicial notice of a causal relationship between hepatitis B vaccine and rheumatoid arthritis by filing a Response to Petitioners' Request Regarding Judicial Notice (R's Resp.). The issue is ripe now for a ruling.

The Federal Rules of Evidence address the type of information that a court may deem, by judicial notice, as factual. See Fed. R. Evid. 201. Although the Federal Rules of Evidence do not apply in proceedings on a petition filed pursuant to the National Vaccine Injury Compensation Program[3] (the Act or the Program), see 42 U.S.C. § 300aa-

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general issue of whether the hepatitis B vaccine can in fact cause rheumatoid arthritis. See Order Ruling on the Effect of the Rheumatoid Arthritis Omnibus Proceedings dated 10/3/06 (addressing the process described in Capizzano v. Secretary of HHS, 2004 WL 1399178 (Fed. Cl. Spec. Mstr. June 8, 2004) (Capizzano II)).

[3] The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10-§ 300aa-34 (2000 & West Supp. 2002) (Vaccine Act or the Act). All

12(d)(2)(B); Vaccine Rule 8(c), Rules of the Court of Federal Claims, Appendix B, the federal evidentiary rules, which are to "be construed . . . [in a manner that permits] the truth [to] be ascertained and proceedings [to be] justly determined," Fed. R. Evid. 102, provide valuable guidance for the evaluation of record evidence that a party desires a special master to consider in Program proceedings.

Rule 201 of the Federal Rules of Evidence governs "judicial notice of adjudicative facts." Fed. R. Evid. 201. Subpart (b) of Rule 201 describes the "[k]inds of facts" that may be subject to judicial notice:

> [A] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b) (emphasis added). If a party requests judicial notice of a fact and the party supplies the court with the necessary information, Federal Rule of Evidence 201 states that the court "shall take judicial notice." Fed. R. Evid. 201(d).

Here, petitioners urge the undersigned to take judicial notice "of the fact" that hepatitis B vaccine "can cause RA" Ps.' SR at 2. Petitioners reason that a causal connection between the vaccine and the injury "would be impossible . . . if there were no valid medical theory of causation." Id.

Respondent argues that petitioners' request for judicial notice is wanting. Specifically, respondent asserts, petitioners have failed to demonstrate, as required by Rule 201(b), that the asserted "facts" are either "'generally known' within the jurisdiction of the court or . . . [are] 'capable of accurate and ready determination' by resort to indisputable resources." R's Resp. at 5.

Respondent also argues that "findings of fact based on another special master's weighing of competing opinions are not subject to judicial notice." Id. Although "respondent agrees, as a general matter, that evidence adduced in an omnibus proceeding can be considered by a special master in a non-omnibus case," respondent contends that "the court's conclusions regarding whether hepatitis B vaccine 'can cause' RA . . . do not constitute 'medical facts' subject to judicial notice as petitioners here assert." Id. at 5-6 (citing Hines v. Sec'y of HHS, 21 Cl. Ct. 634, 647-48 (1990), aff'd, 940 F.2d 1518, 1526

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citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

(Fed. Cir. 1991)). Respondent reasons that a legal conclusion on the issue of whether hepatitis B vaccine can cause RA "result[s] from the weighing, inter alia, of competing medical opinions[, and] '[a] medical opinion is not a fact of which judicial notice may be taken [.] . . .'" Id. at 6 (quoting Grigg v. Dir. of Workers' Comp. Programs, 28 F.3d 416, 418 (4th Cir. 1994) and citing Cook v. Celebrezze, 217 F. Supp. 366 (W.D. Missouri 1963)).[4]

The court agrees. In Program proceedings, whether a vaccine can "cause" a particular injury, and specifically, whether the hepatitis B vaccine can cause rheumatoid arthritis, is a legal question informed by a factual investigation of a sequence of events and by offered medical opinions that address the significance of the ascertained facts. Under the Act, petitioners bear the burden of proving by preponderant evidence that an administered hepatitis B vaccination brought about the alleged injury. See 42 U.S.C. § 300aa-11(c)(1) (addressing the required content of a petition filed for compensation); 42 U.S.C. § 300aa-13(a)(1)(A) (addressing petitioners' burden of proof). Petitioners satisfy this burden by providing: "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of proximate temporal relationship between vaccination and injury." Althen v. Secretary of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). The "logical sequence of cause and effect" proffered by petitioners must be supported by a "reputable" scientific or medical explanation. Grant v. Secretary of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992); Knudsen v. Secretary of HHS, 35 F.3d 543, 548 (Fed. Cir. 1994) (requiring that a "sound and reliable" medical or scientific explanation support a causation theory before a special master).

Here, without addressing how the asserted fact is "generally known" or is "capable of accurate and ready determination," petitioners ask the undersigned to take judicial notice of a causal relationship between the hepatitis B vaccine and rheumatoid arthritis. The undersigned perceives that petitioners' request is a recasting of petitioners' earlier asserted arguments in this case that the findings and conclusions in the RA Omnibus Proceedings are binding in this proceeding. As addressed in the Order Ruling on the Effect of the Rheumatoid Arthritis Omnibus Proceedings issued on October 3, 2006:

> "Special masters are neither bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on

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[4]Respondent cites the court's decision in Cook v. Celebrezze, 217 F. Supp. 366 (W.D. Missouri 1963) for the proposition that the "[a]bsence of evidence to sustain [a] hearing examiner's findings could not be supplied by extra record medical opinion not subject to judicial notice." R's Resp. at 6.

> remand." Guillory v. United States, 59 Fed. Cl. 121, 124 (2003) (quoting Hanlon v. Secretary of HHS, 40 Fed. Cl. 625, 630 (1998)). However, as respondent has observed, the reasoning underlying the decisions of other special masters or the Court of Federal Claims may be informative or persuasive in a particular case. Moreover, when the considered decisions involve factual underpinnings that are substantially similar to the facts before the deciding special master, the reasoning underlying the decisions of other special masters or the Court of Federal Claims may be of particular interest to a special master. A special master's decision must reflect consideration of "all relevant and reliable evidence." RCFC, Appendix B, Vaccine Rule 8(c). Accordingly, the undersigned will consider all reliable evidence in the Rheumatoid Arthritis Omnibus Proceedings that is relevant to Ronald's case.

Id. at 7-8. The undersigned further informed petitioners in this case that:

> Although petitioners are able to introduce findings from the Rheumatoid Arthritis Omnibus Proceedings for consideration by the undersigned in this case, it is petitioners' onus to demonstrate the applicability of particular findings from that omnibus proceeding to Ronald's case. Moreover, not only must petitioners demonstrate how the evidence adduced in the Rheumatoid Arthritis Omnibus Proceeding is relevant to Ronald's case, petitioners must also identify, with specificity, the evidence from the Rheumatoid Arthritis Omnibus Proceeding on which they intend to rely in support of their claim of causation in this case.

Id. at 9.

Petitioners, however, have declined to designate any evidence from the RA proceedings for consideration in this case. Rather, petitioners' request that the undersigned judicially notice as fact a legal conclusion on the issue of causation. Effectively, the presented request asks the undersigned to relieve petitioners of their burden of establishing "a medical theory causally connecting the vaccination and the injury" as required by the Federal Circuit in Althen. The court cannot relieve petitioners of the statutorily imposed burden of proof by applying an evidentiary rule that pertains to facts "not subject to reasonable dispute." Fed. R. Evid. 201(b). Among the issues most vigorously contested in Program proceedings is the issue of causation. The Act's Vaccine Injury Table lists certain injuries and conditions which, if found to occur within a prescribed time period, create a rebuttable presumption that the vaccine caused the injury or condition. 42 U.S.C. §300aa-14(a); see also 42 C.F.R. § 100.3. If, as in this case,

petitioners have not asserted an injury listed on the Table (referred to in Program proceedings as an "on-Table" case), petitioners must prove, by a preponderance of the evidence, that a received vaccine caused the suffered injury (referred to in Program proceedings as an "off-Table" case).

The "fact" of causation advanced by petitioners is not the type of adjudicative fact contemplated by Rule 201 as subject to judicial notice. See In re Kahn, 441 F.3d 977, 990 (Fed. Cir. 2006) (noting, on an appeal of a final decision of the Board of Patent Appeals and Interferences, that a finding that can reasonably be questioned "is not the kind of undisputed fact to which courts are accustomed to taking 'judicial notice'"). Accordingly, the undersigned cannot take judicial notice of the proposed fact as petitioners have requested.

For the foregoing reasons, petitioners' request that the undersigned take judicial notice of a causal connection between the hepatitis B vaccine and rheumatoid arthritis is **DENIED**.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Special Master