OFFICE OF SPECIAL MASTERS

(Filed: August 31, 2007)
No. 03-1585V

JILLIAN LOWRIE, parent and next friend of EMILY PAIGE LOWRIE, a minor,	)	PUBLISH
Petitioner,	)	Motion for Summary Judgment; Moving Party's Burden of Identifying Particular Facts in Record that Support a Grant of Judgment
v.	)	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Respondent.	)	

Robert T. Moxley, Cheyenne, WY, for petitioner.

Lynn E. Ricciardella, Department of Justice, Civil Division, Torts Branch, Washington, DC, for respondent.

Ruling on Petitioner's Motion for Summary Judgment[1]

On March 9, 2007, petitioner moved for summary judgment. Petitioner's Motion for Summary Judgment; Argument, Points, and Authorities (P's MSJ) at 1. As explained in her motion, petitioner relies on the medical records filed in this case rather than the "sketchy" factual findings made by the special master in the Ruling Regarding Onset of Symptoms and Findings of Fact issued on December 12, 2005. See id. at 1-2. Petitioner

[1] In accordance with Vaccine Rule 18(b), when a special master files a decision or substantive order with the Clerk of the Court, each party has 14 days within which to identify and move for the redaction of privileged or confidential information before the document's public disclosure. If the special master agrees, upon review of the party's motion, that the identified material falls within the described categories of protected information, the special master shall delete that material from the publicly accessible document.

argues that "there is no dispute of material fact, and that petitioner is entitled to judgment on the claim that Emily Lowrie's current condition of static encephalopathy is a 'vaccine-related injury'" as contemplated by the Vaccine Act. Id. at 3-4. Petitioner contends that she has supplied "competent evidence of causation" in the sworn declaration of Dr. James Wheless, which petitioner filed as Exhibit 37 with the motion for summary judgment. Id. at 4. Dr. Wheless's declaration contains the opinion and diagnosis of a treating physician, which petitioner asserts, offers a "reliable theory of causation." Id.

For the following reasons, petitioner's motion is **DENIED**.

I. Facts

On June 30, 2003, Jillian Lowrie (petitioner or Ms. Lowrie), as the parent and next friend of her daughter Emily Paige Lowrie (Emily), filed a petition pursuant to the National Vaccine Injury Compensation Program[2] (the Act or the Program). 42 U.S.C. §§ 300aa-10 to -34 (2000 & Supp. II 2003). Petitioner alleged that the four vaccinations[3] administered to Emily on July 6, 2000, caused Emily to suffer an encephalopathy as defined by the Vaccine Injury Table (Table), 42 C.F.R. § 100.3(a)(2).

Because petitioner asserted that Emily showed symptoms and suffered an injury that her medical records did not document, the formerly-presiding special master conducted two fact hearings to evaluate the completeness of Emily's medical records. See December 12, 2005 Ruling Regarding Onset of Symptoms and Findings of Fact (12/12/05 Ruling) at 1-2. The fact hearings permitted the special master to hear the testimony of Emily's mother, the testimony of Emily's maternal grandparents with whom Emily and her mother lived, and the testimony of Emily's pediatrician, Dr. Jean W. Bryant. Id. at 2. Based on a review of the medical records, the supplied affidavits, and the witness testimony at both hearings, the special master determined that "the medical records in this case are clear, internally consistent, and complete" and decided that

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[2] 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 (West 1991 & Supp. 2002) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

[3] The administered vaccinations included a diphtheria, tetanus, and acellular pertussis (DtaP) vaccination. The DTaP vaccine is "a combination of diphtheria toxoid, tetanus toxoid, and pertussis vaccine; administered intramuscularly for simultaneous immunization against diphtheria, tetanus, and pertussis." Dorland's Illustrated Medical Dictionary 1998 (30th ed. 2003).

petitioner could "not supplement the written record with contradictory testimony." Id.

Specifically considering the testimony regarding the onset of Emily's symptoms after her vaccinations, the special master found that contrary to the testimony of Emily's family that she "appeared 'lifeless' or resembled a 'CPR dummy' for much of the time after her July 6, 2000 vaccinations," id. at 26 (internal citations omitted), the contemporaneous medical records did not support the assertions of petitioner and her witnesses, id. In the December 12, 2005 Ruling, the special master wrote:

> If the events of July 6-9, 2000, occurred as described, the special master believes that (1) petitioner would have taken her daughter to the hospital, despite the alleged advice of her pediatrician's office not to bother or that the crisis would pass; (2) Mrs. Lowrie, [Emily's grandmother,] a trained nurse, lactation consultant, doula, and health care educator, would have insisted on taking Emily to the hospital as she had done for her other children when they experienced possible vaccine reactions; and (3) Mr. Lowrie[, Emily's grandfather,] would not have valued his personal participation in a baseball tournament more than the health of his granddaughter. The depictions of Emily's appearance and behavior by the witnesses at hearing convinces the special master that, if true, all three family members directly responsible for Emily's well-being would have sought immediate medical attention for Emily. Yet no one did. Based on the foregoing, it is not reasonable to believe that the events occurred as described in the testimony at hearing.

Id. at 30. Although the special master did not believe that the witnesses were being untruthful in their testimony, the special master declined to credit the testimony of petitioner and of her parents as being either accurate or reliable. The special master explained that "given the traumatic events [that petitioner and her witnesses] endured over a compressed time period, coupled with the passage of five years, it would not be unusual for memories to fade or for witnesses to misremember." Id. at 30.

On February 8, 2006, this case was reassigned to the undersigned. On June 1, 2006, petitioner filed a Motion for Reconsideration, and in the Alternative, for Certification to the Federal Circuit (Petr's Mot.). In the Ruling on Petitioner's Motion for Reconsideration of the December 12, 2005 Ruling Regarding Onset of Symptoms and Findings of Fact, and in the Alternative, for Certification to the Federal Circuit issued on November 29, 2006 (November 29, 2006 Reconsideration Ruling), the undersigned denied the motion for reconsideration of the applied evidentiary standard in the December 12, 2005 Ruling because the applied legal standard was proper. November 29, 2006

Reconsideration Ruling at 16. The undersigned declined to reconsider the fact findings set forth in the December 12, 2005 Ruling without first rehearing the testimony of the fact witnesses. Id. Additionally, the undersigned denied the motion for certification to the Federal Circuit because petitioner's request did not satisfy the standards for interlocutory review. Id. at 16-17.

On March 9, 2007, petitioner filed this motion for summary judgment. P's MSJ at 1. Respondent opposed the motion, see Respondent's Opposition to Petitioner's Motion for Summary Judgment (R's Opp.) at 1, and petitioner filed a reply, see Petitioner's Reply to "Respondent's Opposition to Petitioner's Motion for Summary Judgment" (P's Reply) at 1. Respondent filed a surreply, see Respondent's Response to Petitioner's Proposed Findings of Fact and Conclusions of Law for Summary Judgment (R's Resp. To P's PFOF), and petitioner filed a document styled as "Petitioner's Traverse of 'Respondent's Response to Petitioner's Proposed Findings,' Etc." (P's Traverse). Additionally, following a status conference during which the undersigned signaled to counsel her intention to deny petitioner's motion and urging counsel to consider the next steps in this litigation, petitioner filed a document styled as "Petitioner's Combined Motions for Elucidation of 'Material Facts in Dispute," for Notice Under Section V of "Guidelines for Practice," Etc., and For Opportunity To Present Written Evidence Under 42 U.S.C. § 300aa-12(d)(3)(B)" (P's Combined Mots.). Oral argument is deemed unnecessary, and the matter is now ripe for a ruling.

II. Discussion

A. Parties' Arguments

Petitioner moves for summary judgment upon the medical records. P's MSJ at 2. Petitioner asserts that the record is "sufficient to establish the existence of the vaccine injury as a seizure disorder and a static encephalopathy." Id. Petitioner adds that "[i]t is further clear from the record and the [December 12, 2005] Ruling that Emily's neurological condition arose immediately after the shot, and that the first symptoms--of a condition that thereafter developed in an uninterrupted course--occurred, literally, within hours of the cocktail of vaccines." Id. at 2-3 (footnote omitted).

In support of her motion, petitioner filed a declaration by one of Emily's treating neurologists, Dr. James Wheless. See Petitioner's Exhibit (P's Ex.) 37. Dr. Wheless states:

> Based upon the work-ups done, the review of Emily's charts and medical history, and her clinical presentation, I concluded that Emily had

> suffered an encephalopathy in the wake of multiple vaccinations, which, according to her records, had been administered at [her pediatrician's] office[] . . . in Houston on or about the 6th day of July, 2000.
>
> It was my impression, as reflected in the medical records contemporaneous to my treatment of Emily, that Emily began to suffer her current condition of global developmental delay as the result of an acute encephalopathy that occurred in close temporal proximity to her multiple vaccinations in July of 2000.

Id. ¶¶ 5-6. After "reasonable efforts to rule out other causes . . . of Emily's condition, . . . [Dr. Wheless] concluded . . . that Emily's condition represents a vaccine-related neurological injury." Id. ¶ 7. Dr. Wheless opines that Emily's "injury arose in a medically significant time period after the shots, and in fact significant symptoms were present within the three-day window that the Vaccine Act once regarded as the sine qua non of causation for encephalopathy." Id.

Respondent opposes petitioner's motion stating:

> Notwithstanding the fact that petitioner has filed her Motion before respondent has even had the opportunity to submit his own evidence, by way of a medical expert report, petitioner maintains that she "relies for summary judgment upon the medical records." Yet, missing from the Motion is any citation whatsoever to the medical records upon which petitioner apparently relies.

Respondent's Opposition to Petitioner's Motion for Summary Judgment (R's Opp.) at 2 (internal citations omitted). Respondent argues that "[p]etitioner cannot sustain a motion for summary judgment on the grounds that there are no material facts in dispute when she fails to mention, let alone establish, what the material facts even are." Id. Noting that petitioner fails to refer to specific medical records or specific factual findings in the December 12, 2005 Ruling in support of her assertions, respondent challenges petitioner's conclusory statements regarding the alleged onset of Emily's symptoms "within hours" of the received vaccinations. Id. at 3.

Respondent also challenges the opinion expressed in the declaration of Dr. Wheless because "missing" from his declaration are the "facts upon which he bases his opinion." Id. Citing the Federal Circuit's decision in Capizzano v. Secretary of Health and Human Services, 440 F.3d 1317, 1326 (Fed. Cir. 2006), respondent acknowledges that the diagnosis and opinion of a treating physician must be considered in the evaluation

of a case. R's Opp. at 5. But, respondent argues, the conclusions of treating physicians are not exempt from scrutiny. Id. Rather, respondent urges, before a special master may accept an expert's testimony, "there should be evidence that the treating physician actually formed a conclusion concerning the cause of the patient's injury, and that conclusion was explained through a logical sequence of cause and effect grounded in reliable scientific evidence." Id. (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 580, 590 (1993) (requiring that an expert's opinion is grounded "in science's methods and procedures" and requiring that inferences or assertions are "derived by the scientific method") and citing the Rules of the United States Court of Federal Claims, Appendix B, Vaccine Rule 8(c) (instructing the special master to consider evidence that is "relevant and reliable")).

In response to respondent's arguments, petitioner moves for leave to file proposed findings of fact that rely heavily on the testimony of petitioner and her parents during one of the two fact hearings that informed the December 12, 2005 Ruling regarding the onset of Emily's symptoms. See P's Reply at 4 (referencing Petitioner's Proposed Findings of Fact and Conclusions of Law for Summary Judgment). Petitioner argues that "a proper application of summary judgment law would . . . lead to a finding of entitlement for Emily Lowrie, as the record now stands." Id. at 2-3.

Addressing petitioner's proposed findings of fact, respondent contends that "despite the averment in the [petitioner's] Motion, petitioner's proposed findings of fact hardly refer to the medical records at all. Instead, petitioner relies principally upon oral testimony given by her fact witnesses during an onset hearing held on May 24, 2005," one of the two fact hearings on which the issued December 12, 2005 Ruling was based. R's Resp. To P's PFOF at 1. Respondent states that "the then-presiding Special Master . . . ruled that the fact witness testimony was 'insufficient to materially alter the contemporaneous medical records' . . . and, based on the medical records, she made twenty-two, specific factual findings." Id. at 1-2 (internal citations removed). Respondent argues that "[t]hese twenty-two factual findings are the undisputed material facts upon which the court must assess petitioner's Motion." Id. at 2.

Asserting that petitioner "has the right to show . . . that [the] identified 'disputes' are not legitimate. . . [and] are not 'material,'" petitioner moves "for [e]lucidation of [the] [m]aterial [f]acts [t]hat [c]ould [d]efeat [e]ntitlement," moves for "[n]otice of [the] [r]ecord [d]eficiencies," and moves for an "[o]pportunity to [p]resent [w]ritten evidence." P's Combined Mots. at 2-4. Petitioner explains that she "seeks to know what additional information is required in order to prove her case, and to know what additional information if any continues to defeat her case." Id. at 4.

B. Legal Standard and Analysis

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c) of the Rules of the Court of Federal Claims (RCFC); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). A material fact is one that would affect the outcome of the litigation. Id. at 248. A genuine issue exists if the evidence would permit a reasonable trier of fact to find in favor of the nonmoving party. Id. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Accordingly, the party moving for summary judgment satisfies its burden of proof by showing the absence of factual evidence to support an element of the non-moving party's case. Id. at 322. The Supreme Court has observed that that "a party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion." Id. at 324 (emphasis added). That "initial responsibility" includes identifying the particular portions of the filed record that support the party's summary judgment motion. Id. at 323-24. ("[A] party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material.")(emphasis added).

Once the moving party satisfies this burden, the burden shifts to the non-moving party to present evidence that points to the existence of a genuine issue of material fact. Id.; Arthur A. Collins, Inc. v. N. Telecom Ltd., 216 F.3d 1042, 1047 (Fed. Cir. 2000) (requiring the non-moving party to "set forth . . . in sufficient detail . . . th[e] factual foundation [that] would support a finding" in its favor, with all reasonable inferences resolved in its favor). The nonmoving party must designate particular facts in the record that demonstrate the existence of a triable fact issue. Id. ("Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.")

Here, petitioner asserts in her motion that "the 'small sampling' of Emily's history at [footnote]17 of [the then-presiding special master's December 12, 2005] Ruling, etc, is sufficient to establish the existence of a vaccine injury as a seizure disorder and a static encephalopathy." P's MSJ at 2. Petitioner further asserts that "[i]t is . . . clear from the record and the Ruling that Emily's neurological condition arose immediately after the shot, and the first symptoms[, described in a footnote in petitioner's brief as blank staring spells "from time to time after her July 6, 2000 vaccinations"]–of a condition that thereafter developed in an uninterrupted course–occurred literally, within hours of the

cocktail of vaccines." Id. at 2-3 (footnote omitted). Petitioner does not elaborate further in her motion on the particular symptoms that she alleges support her claim of an encephalopathy.

Attached to petitioner's motion is the declaration of Dr. Wheless, a pediatric neurologist. See P's Ex. 37 at ¶1. Dr. Wheless states that "[b]ased upon the work-ups done, the review of Emily's charts and medical history, and her clinical presentation, [he] concluded that Emily had suffered an encephalopathy in the wake of multiple vaccinations, which, according to her records, had been administered . . . on or about the 6th day of July, 2000." Id. at ¶ 5. Dr. Wheless, who first examined Emily in April of 2003, nearly three years after the immunizations at issue, id. at ¶¶ 3-4, further states that Emily's "seizure disorder, speech delay, motor skill regression, anxiety disorder, and the panoply of symptoms Emily displayed to us at the Comprehensive Epilepsy Program, are in [his] opinion the result of vaccine-induced encephalopathy." Id. at ¶ 8. Dr. Wheless does not specify, however, what details in Emily's medical history or clinical presentation persuaded him that Emily had suffered a vaccine-related encephalopathy.

Respondent is correct in its assertions that petitioner has failed to specifically identify the particular facts contemporaneous to Emily's vaccination on which she and Dr. Wheless rely in support of their assertions that Emily suffered an encephalopathy within days of receiving her July 6, 2000 vaccinations. Rather, petitioner points to a "'small sampling' of Emily's history at [footnote] 17 of [the then-presiding special master's December 12, 2005] Ruling, etc" as "sufficient evidence." See P's MSJ at 2. As the Supreme Court made clear in its 1986 Celotex decision, see 477 U.S. at 324, the moving party bears the burden of identifying what facts in the record support its claim.

Footnote 17, to which petitioner refers, appears in the December 12, 2005 Ruling by the then-presiding special master. The footnote addresses Emily's neurological problems and her treatment "by various physicians, hospitals, and other health care professionals." December 12, 2005 Ruling at 7. In part, the footnote states:

> Dr. Wheless diagnosed Emily with "[e]ncephalopathy characterized by speech delay and probable global development delay that occurred in the setting of temporal association with immunizations as an acute encephalopathy." The medical records also show that on May 21, 2003, Emily was admitted to Hermann Hospital for twelve hours of video EEG monitoring. Further, Emily visited the emergency room on November 10, 2003, because of a possible seizure. These are but a small sampling of Emily's medical records.

Id. (internal citations omitted).

The undersigned cannot discern from "a 'small sampling'" and "etc" to what particular facts petitioner is referring and on what particular facts petitioner is relying in support of her claim of a vaccine-related encephalopathy. Dr. Wheless states that "it was [his] impression . . . as reflected in the medical records contemporaneous to [his] treatment of Emily, that Emily began to suffer her current condition of global developmental delay as the result of an acute encephalopathy that occurred in close temporal proximity to her multiple vaccinations in July of 2000." P's Ex. 37 at ¶ 6. The portions of the records to which petitioner and Dr. Wheless specifically refer concern Emily's ongoing health problems for which Emily first sought treatment from Dr. Wheless in 2003, the same year in which petitioner filed her vaccination claim. The medical records to which petitioner and Dr. Wheless refer do not address the particular symptoms that Emily experienced "in close temporal proximity to her multiple vaccinations," received in July 2000. See P's Ex. 37 at ¶ 6. Absent this factual identification by petitioner, the undersigned cannot properly evaluate whether genuine issues of material fact exist. Moreover, Dr. Wheless does not provide a scientific basis for his opinion.

Unable to determine on which onset facts petitioner is relying, the undersigned notes that to the extent that petitioner is relying on facts asserted in her testimony during the onset hearing and the testimony of her fact witnesses that are not contained in the twenty-two factual findings set forth in the December 12, 2005 Ruling, those factual claims are likely to be in dispute. As the then-presiding special master explained in considerable detail in her December 12, 2005 Ruling, she determined that she could not credit the testimony of the witnesses concerning Emily's "dramatic" symptoms within the three days following her vaccinations as either reliable or accurate. See December 12, 2005 Ruling at 30. She first conducted an onset hearing, during which petitioner and her fact witnesses testified, for the purpose of determining whether Emily's "medical records were vague, incomplete, or otherwise susceptible to interpretation." Id. at 2. She also conducted "a second hearing on August 31, 2005, to take the testimony of Emily's pediatrician." Id. After reviewing the medical records and after hearing the witnesses' fact testimony that differed from what was recorded in the medical records, the special master concluded that the medical records were "clear, internally consistent, and complete." Id. On that basis, the special master declined to supplement the written record with contradictory testimony, stating:

> The special master cannot accept as true the contention that [the Lowries] described to anyone at the pediatrician's office that Emily had suffered a reduced level of consciousness within 72 hours of her July 6, 2000

> vaccinations. To the contrary, Dr. Bryant's notes mention, inter alia, Emily's inconsistent and decreased response, irritability and crankiness, inconsolability, decreased eye contact, and blank stares. Given the level of detail contained throughout Emily's medical history as recorded by Dr. Bryant and her colleagues, had the Lowries described Emily as having a reduced level of consciousness, Dr. Bryant would have recorded that symptom. Moreover, a child who is irritable or cranky cannot be said to have a decreased level of consciousness.

Id. at 29 (internal citations omitted). The special master made twenty-two specific factual findings which were set forth in the issued onset ruling. Id. at 30-32.

Petitioner here has not identified what specific facts during the onset of Emily's symptoms following her vaccination support her claim of a vaccine-related encephalopathy. Nor has petitioner indicated whether or not the allegedly undisputed facts on which she relies in her summary judgment motion are factual claims that were included in the twenty-two factual findings set forth in the December 12, 2005 Ruling on the onset of petitioner's symptoms. By failing to identify with particularity the factual evidence that supports her claim, petitioner has failed to carry her burden of proof as discussed in Celotex. See 477 U.S. at 322, 324.

And to the extent that the unidentified "facts" concerning the onset of Emily's symptoms are not included in the factual findings set forth in the December 12, 2005 Ruling and petitioner urges the undersigned to credit fact testimony that was heard previously and not credited as accurate or reliable, the undersigned cannot credit the testimony of petitioner and her fact witnesses without an independent opportunity to evaluate the credibility of the witnesses and their testimony. See also November 29, 2006 Reconsideration Ruling at 16 (finding that the proper evidentiary standard was applied in the December 12, 2005 Ruling, the undersigned declined "to reconsider whether the application of the law on the factual record of this case was proper without an opportunity to evaluate the credibility of the fact witnesses whose testimony the [prior] special master heard but decided not to credit as accurate."). Where, as in this case, a determination cannot be made regarding what particular facts are alleged to support petitioner's motion and, in turn, whether those factual claims are in dispute, the motion for summary judgment must fail.

Moreover, petitioner's Combined Motions seeking "[e]lucidation of [the] [m]aterial [f]acts [t]hat [c]ould [d]efeat [e]ntitlement," and "[n]otice of [the] [r]ecord [d]eficiencies," see P's Combined Mots. at 2-4, effectively request the reassignment to the court of petitioner's burden of "initially" identifying the portions of the factual record

that support petitioner's claim of entitlement to summary judgment. That burden does not rest with the undersigned but properly lies with petitioner. See Celotex, 477 U.S. at 322, 324. Accordingly, petitioner's combined motions are **DENIED**.

III. Conclusion

For the foregoing reasons, petitioner's motion for summary judgment is **DENIED**. Petitioner's Combined Motions are also **DENIED**. The parties shall contact chambers **on or before September 14, 2007**, to address further proceedings in this matter.

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Special Master