In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 98-916V

(Filed: May 10, 2007)

TO BE PUBLISHED

THERESA CEDILLO and MICHAEL CEDILLO, as parents and natural guardians of Michelle Cedillo,	*	
Petitioners,	*	Vaccine Act Discovery; Respondent requesting videotapes.
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

RULING ON RESPONDENT'S "MOTION FOR PRODUCTION"

This is an action in which the petitioners, Theresa and Michael Cedillo, seek an award under the National Vaccine Injury Compensation Program (hereinafter "the Program[1]"), on account of the condition of their daughter, Michelle Cedillo. This constitutes my ruling concerning the respondent's "Motion for Production" filed on April 26, 2007.

For the reasons set forth below, I hereby order certain relief, to be detailed below.

I

BACKGROUND

Under the Vaccine Act, a petitioner may obtain a compensation award by demonstrating that his or her injury or illness was caused by a vaccination. In this particular action, the parties dispute

[1]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2000 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2000 ed.). I will also at times refer to the statute that governs the Program as the "Vaccine Act."

whether Michelle Cedillo's condition, known as autism, was caused by certain vaccinations that she received. An evidentiary hearing concerning that "causation" dispute has been scheduled for June 11, 2007. On February 20, 2007, the petitioners filed their expert reports, while on April 24, 2007, the respondent filed respondent's expert reports. Both parties also filed, along with their expert reports, numerous items of medical literature.

On April 26, 2007, respondent filed the motion here at issue, the "Motion for Production." The motion requests that I direct petitioners to produce all videotapes of Michelle Cedillo from birth to age 4. The motion was discussed during unrecorded telephonic status conferences held on April 30, May 2, and May 7, 2007. During the April 30 conference, petitioners' counsel, Ronald Homer, stated that the petitioners opposed the motion on relevancy and privacy grounds, and were also hesitant to allow their original VHS videotapes of their child out of their possession for copying. Petitioners' counsel requested that he be allowed until May 7, 2007, to file a written response, and I granted that request. During the May 2 conference, I noted that certain medical literature, which respondent had supplied, appeared to support the relevance of the request. I also noted, however, that I wished to accommodate the Cedillos' privacy concerns and their desire not to surrender the original videotapes. Opposing counsel agreed to attempt to settle the dispute.

At the May 7 conference, the parties reported that they had been unable to fully settle the dispute. They did report, however, that the Cedillos had been able to accomplish the copying of their VHS footage of Michelle onto a DVD.[2] Petitioners' counsel noted that he would file the petitioners' written opposition to *any* production, but that, if so ordered by the special master, the petitioners would supply a copy of that DVD. Respondent's counsel did not express opposition to receiving the DVD copy as compliance with the Motion for Production.

Later on May 7, the petitioners did file their written opposition, which I will discuss below.

II

THE STANDARD FOR MY RULING

In this section II of this Ruling, I set forth and discuss the *standard* upon which I will base my ruling. I will divide my discussion into four parts, below.

A. The relevant statutory provisions and court rules

The Vaccine Act contains provisions with respect to discovery in Program cases. The statute states that this court shall adopt rules that--

[2]It was my understanding, from the statements of Mr. Homer at the conference, that *all* of the family's video footage of Michelle, including "mini-cassette" footage, was copied onto a single DVD.

provide for limitations on discovery and allow the special masters to replace the usual rules of discovery in civil actions in the United States Court of Federal Claims.

§ 300aa-12(d)(2)(E). That Act further provides that a special master--

(i) may require such evidence as may be reasonable and necessary,

(ii) may require the submission of such information as may be reasonable and necessary,

(iii) may require the testimony of any person and the production of any documents as may be reasonable and necessary * * *.

§ 300aa-12(d)(3)(B). In turn, the "Vaccine Rules"[3] of this Court contain Rule 7 regarding discovery, which reads as follows:

Rule 7. Discovery.

There shall be no discovery as a matter of right.

(a) Informal Discovery Preferred. The informal and cooperative exchange of information is the ordinary and preferred practice.

(b) Formal Discovery. 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 why informal techniques have not been sufficient. Such a motion may also be made orally at a status conference.

(c) Subpoena. When necessary, the special master upon request by a party may approve the issuance of a subpoena. In so doing, the procedures of RCFC 45 shall apply. * * *

Accordingly, the statutory language plainly provides a special master with the authority to "require" testimony, or "require" the submission of "evidence" or "information" or "documents," whenever that master deems such testimony, evidence, information, or documents to be "reasonable

[3]In actions before the special masters of the U.S. Court of Federal Claims, the special masters follow two sets of rules. The "Vaccine Rules of the United States Court of Federal Claims" (*hereinafter* "Vaccine Rules") are found in Appendix B of the Rules of the Court of Federal Claims (*hereinafter* "RCFC"). At the same time, special masters are bound by the other portions of the RCFC to the extent that such additional parts of the RCFC are referenced in the Vaccine Rules. Vaccine Rule 1; *Patton v. DHHS*, 25 F.3d 1021, 1026 (Fed. Cir. 1994).

and necessary" for the master's resolution of the case. And Vaccine Rule 7 implements that statutory authority, by authorizing a special master, when that master deems it "necessary," to (1) utilize the formal discovery procedures of RCFC 26-37, and (2) authorize a party to issue subpoenas, utilizing the procedures of RCFC 45, which includes provisions for subpoena enforcement.

2. Difference from other litigation

It is important to note that the statute provides this "discovery" authority to a special master in a context *quite distinct* from discovery in most legal proceedings. This context differs from most other litigation in two respects.

The first difference is that under the Vaccine Act there is a distinctly different orientation concerning the basic purpose of discovery. That is, in the context of most litigation, in discovery *a party* is seeking information that it hopes to later present before a factfinder; the judge's role in such discovery proceedings is merely to *referee disputes* concerning whether the discovery requested is appropriate within the prescribed discovery rules and precedents. In the Vaccine Act context, however, the special master is not only the referee of procedural disputes, but also the *ultimate factfinder* on all disputed factual issues; thus, when a master decides whether to use his or her discovery authority, the test is whether the master concludes that the production of the material in question is "reasonable and necessary" to the *master's own resolution* of the factual issues to be resolved. In other words, when a special master contemplates whether to utilize his or her authority to require testimony or document production, the master's task is apparently to evaluate the importance and relevance of the material in question in light of the *overall context of the factual issues to be decided* by the master, determining whether the master reasonably needs that material in order to reach a well-informed decision concerning those factual issues.

The second crucial difference is that in Vaccine Act cases the *standard* for determining whether to require testimony or document production is quite different from the standard utilized in most litigation discovery disputes. Both RCFC 26(b)(1) and its counterpart in the Federal Rules of Civil Procedure, FRCP 26(b)(1), provide that "[p]arties may obtain discovery regarding any matter, not privileged, that is *relevant to the claim or defense* of any party * * *." Thus, the test is simply whether the material being sought is *relevant* to the issues in the case. In Vaccine Act cases, in contrast, the test, as noted above, is whether the special master finds that the material being sought is *reasonable and necessary* to the master's resolution of contested issues. Obviously, given the ordinary meanings of the words "relevant" and "necessary," material could be "relevant" to an issue without being "necessary" to the resolution of that issue. Therefore, it seems clear that the Vaccine Act sets a substantially higher standard.

3. The standard that I will utilize here

As noted above, the Vaccine Act's use of the phrase "reasonable and necessary" clearly indicates that the special master, in deciding when to "require" testimony or the submission of evidence, is to use a standard that is higher than the "relevance" test generally used in other

litigation. But, *how much* higher is the standard? That is not completely clear. The statute does not provide further guidance beyond the words "reasonable and necessary," and the legislative history contains no assistance. Certainly, the statute seems to afford the special master broad *discretion* in determining whether material is "necessary" or not, in the overall context of the case.

One might argue that the word "necessary" implies that the special master should require production only when it would be *absolutely impossible* to decide the factual issues in the case *without* the requested material. After consideration of this possibility, however, I conclude that the "reasonable and necessary" standard cannot be that strict. Such an interpretation would illogically set up a standard that could *never* be met, since a factfinder in a legal case can *always* rule on a factual issue no matter how scanty the evidence, even in the absence of *any* evidence. That is, in legal factfinding, if there is no evidence, the factual issue simply is resolved against the party having the "burden of proof." The "absolutely impossible" standard, therefore, plainly seems to be too strict, since under such a standard a special master would *never* require production, even of a petitioner's own medical records, and the master's statutory power to "require * * * testimony and * * * production" would amount to a nullity.

Instead, it seems to me that the "reasonable and necessary" standard means that a special master should require production if the master concludes that, given the overall context of the factual issues to be decided by the master, he or she could not make a *fair and well-informed* ruling on those factual issues without the requested material. Requiring the requested testimony or submission of evidence must also be "reasonable" under all the circumstances, which means that the special master must consider the *burden* on the party who would be required to testify or produce evidence. That is, the importance of the requested material for purposes of the special master's ruling must be balanced against the burden on the producing party. This is the interpretation of the "reasonable and necessary" standard that I will utilize here.

4. Vaccine Act precedent supports the use of this standard.

There is relatively little case law relating to discovery questions during the 18-year history of the Vaccine Act. This is not to say that the special masters during that time period have not utilized their statutory authority to require testimony and submission of evidence. To the contrary, special masters have routinely employed such authority in order to obtain *medical records* pertaining to a particular vaccinee seeking compensation, by authorizing the parties to serve subpoenas to obtain records from hospitals, physicians, etc. I have found virtually no case law concerning this use of subpoenas, however, probably because such use is so plainly appropriate under the statutory language that it has never been challenged.[4]

[4]I have identified one case in which it is merely mentioned, without discussion, that a special master had authorized the issuance of a subpoena to obtain medical records. *Vant Erve v. Secretary of HHS*, No. 92-341V, 1997 WL 383144 at *3 (Fed. Cl. Spec. Mstr. June 26, 1997), *rev'd on other grounds*, 39 Fed. Cl. 607 (1997).

I have, however, identified several items of Vaccine Act case law that offer support to the standard that I have adopted here. In the first such opinion, I myself adopted the same standard that I have utilized here. See *In re: Claims for Vaccine Injuries Resulting in Autism Spectrum Disorder*, 2004 WL 1660351, at *8-9 (Fed. Cl. Spec. Mstr. July 16, 2004). Thereafter, the same standard was endorsed by Special Master Margaret Sweeney[5] in *Werderitsh v. HHS*, 2005 WL 3320041 (Fed. Cl. Spec. Mstr. Nov. 10, 2005). A third relevant decision is *Golub v. Secretary of HHS*, 44 Fed. Cl. 604 (1999), *rev'd on other grounds*, 243 F. 3d 561 (Fed. Cir. 2000). In *Golub*, a special master denied the petitioners' claim that their daughter's injury was caused by several vaccines, including the pertussis vaccine. On appeal to a judge of the Court of Federal Claims, the petitioners argued that the master had abused her discretion by failing to grant their discovery request that a government agency be required to divulge certain information. Judge Andewelt of this Court denied the appeal, concluding that the special master had not abused her discretion. (*Id*. at 609.) The judge noted that there existed "extensive available information" upon which the petitioners could argue their causation claim, and upon which the special master could evaluate that claim. Given this existence of available information, the judge found that it was "not necessary for the special master to require the Department of Health and Human Services to search for additional unpublished materials, the existence of which is uncertain." (*Id*.) This precedent, thus, provides additional support for the standard that I have adopted here. That is, the ruling indicates that the special master should evaluate a request for production of material by considering the *overall context of what other evidence is available* to the master.[6]

[5]Then a special master of this court, Margaret Sweeney has since been appointed a judge of this court.

[6]I have identified several other published Vaccine Act opinions which include discussion of a special master's "discovery" authority. *McNerney v. Secretary of HHS*, No. 90-1689V, 1992 WL 120345 (Cl. Ct. Spec. Mstr. May 5, 1992) (special master ordered petitioner to provide a release authorizing the vaccinee's physician to be interviewed by respondent's counsel); *Crossett v. Secretary of HHS*, No. 89-73V, 1990 WL 608690 (Cl. Ct. Spec. Mstr. May 4, 1990) (special master denied respondent's request that he order vaccinee to undergo testing); *Baggott v. Secretary of HHS*, No. 90-2214V, 1992 WL 79987 (Cl. Ct. Spec. Mstr. April 2, 1992) (special master ordered respondent to produce certain records from government files, but did not discuss the "reasonable and necessary" standard); *DeRoche v. Secretary of HHS*, No. 97-643V, 2002 WL 603087 (Fed. Cl. Spec. Mstr. March 28, 2002) (special master indicated willingness to subpoena treating physician to testify); and *Schneider v. HHS*, 2005 WL 318697 (Fed. Cl. Spec. Mstr. Feb. 1, 2005), *aff'd* 64 Fed. Cl. 742 (2005) (special master denied petitioner's request that he order a government agency to perform a study).

III

DISCUSSION

After careful consideration, I conclude that it is appropriate that, in this situation, I utilize my authority to order that the petitioners provide to respondent a copy of the DVD in question. I will explain my reasoning below.

A. I conclude that the production of the DVD is "necessary" to my resolution of the causation issue in this case.

The causation issue in this case depends, in significant part, on the question of when Michelle Cedillo experienced the first symptoms of her autism. The expert reports filed by *both* petitioners and respondent make that clear.

Further, in respondent's motion here at issue, respondent cited a number of items of medical literature, previously filed into the record of this case, which indicate that a retrospective review of videotape of an autistic child can provide important evidence as to when the child experienced the first symptoms of the condition. See Resp. Ex. P, Tabs 8, 36 (p. 134), 109, 154, 155; Resp. Ex. DD, Tab 13 (p. 140). Petitioners have not filed any evidence to the contrary. Indeed, I note that one of the *petitioners' own experts*, Dr. Krigsman, indicates that he relied upon "home videos" of Michelle in reaching his conclusion that Michelle developed normally during the first year of life. (Ex. 59, p. 2.) Thus, Dr. Krigsman's report also supports the proposition that home videos of an autistic child can yield relevant information.

Accordingly, it is undisputed (1) that the onset of Michelle's autistic symptoms is a crucial issue in this case, and (2) that review of videotapes might yield valuable evidence concerning that issue. Accordingly, in my view it seems clear that to make a *well-informed* ruling concerning the causation issue in this case, it is "necessary" for me to be aware of any evidence concerning the onset issue that is available from the videos of Michelle. Therefore, it is necessary that copies of the DVD in question be provided to the experts for *both* sides, so they can review the video footage and advise me as to whether such footage provides any assistance in resolving the onset issue in this case.

B. I conclude that it is "reasonable" to order that petitioners provide a copy of the DVD to respondent.

As explained above, the determination concerning whether to order production of material for use in a Vaccine Act case requires a *balancing* test. That is, the importance of the requested material must be balanced again the burden on the producing party. In this case, as explained above, the evidence indicates that there is a substantial chance that review of the videos in question could yield important evidence concerning the crucial onset issue. On the other hand, according to their counsel, the petitioners now have converted their video footage of Michelle into DVD form, so it

apparently would be an extremely light burden on the petitioners to supply a copy of the DVD to respondent.

Accordingly, in this situation, I conclude that the balance of interests weighs in favor of requiring that petitioners provide a copy of the DVD to respondent.

C. Petitioners' arguments

As noted above, on May 7, 2007, petitioners filed a written opposition to the respondent's motion. After careful review, however, I do not find the brief arguments raised by petitioners to be persuasive.

First, petitioners seem to take issue with the medical articles cited by respondent, concerning the issue of whether review of videotapes can yield important information about the onset issue. (Opp. at 3-4.) Petitioners' argument in this regard, however, consists of the simple, one-sentence, unexplained assertion by petitioners' counsel that evidence from review of videotapes "is not even good evidence." Petitioners' counsel does not explain *why* he believes that such videotape analysis is "not good evidence." Nor do petitioners cite any *evidence*, from any expert or medical articles, that contradicts the numerous articles cited by respondent which indicate that review of video *can* yield "good evidence." Accordingly, I do not find merit in this argument of petitioners.

Second, petitioners argue that there exists no *precedent* under Vaccine Act case law for requiring a petitioner to produce videotape of an injured vaccinee. (Opp. at 2.) In this regard, petitioners seem to be correct, insofar as I have identified no published case law addressing the issue of such a request. This means, however, that while there appears to be no published case law documenting a special master's *approval* of such a request for videotape, there also is no case law indicating that any special master has ever *denied* such a request. In my own experience in presiding over Vaccine Act cases, I do not remember any cases in which the respondent has asked me to order the production of videotapes. However, I have no idea whether any petitioners have ever *voluntarily* complied with such a request by respondent.[7]

Perhaps it is not too surprising that a request for videotapes by respondent has never been the subject of published case law. In my experience, in most cases, the time of onset of an injury or

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[7] In *Corrigan v. HHS*, 1993 WL 189952 at *6 (Fed. Cl. Spec. Mstr. May 18, 1993), it is noted that the respondent's expert "requested and reviewed a videotape" of the injured vaccinee. The opinion, however, does not state whether the videotape was provided voluntarily, or pursuant to an order of the special master.

I do remember several instances, in cases before me, in which *petitioners* have utilized their own home videotapes, as interpreted by their experts, as evidence concerning the onset of a seizure disorder. See also *Stewart v. HHS*, 2007 WL 1032377, at *8 (Fed. Cl. Spec. Mstr. Mar. 19, 2007), and *Gruber v. HHS*, 61 Fed. Cl. 674, 678 n.2 (2004); in both cases, the petitioners relied on their own home videos as evidence.

illness, which is alleged to be vaccine-related, will be fairly well-documented in the medical records. Autistic disorders, however, seem to be different. It appears that the initial symptoms of autism are often quite subtle, and are often not initially recognized as such. (*See, e.g., Setnes v. United States*, 57 Fed. Cl. 175, 180 (2003).) And, to date, very few autism-related Vaccine Act cases have been decided.[8] Therefore, as far as I can tell, the lack of any published case law concerning any similar prior request by respondent may not be surprising, and, more importantly, does *not* indicate that any special masters have denied similar requests or that there is anything inappropriate about such a request.

Instead, given the lack of precedent, I have evaluated this request on its own merits, as a matter of first impression, in the context of this particular case.[9] And, for the reasons set forth above, I conclude that under the applicable balancing test, it is appropriate to grant the respondent's request *in the circumstances of this case--i.e.*, a case in which (1) the respondent has supplied *evidence* showing the need for the videos in question, (2) the petitioners' own expert has already relied on the home videos, and (3) the burden on the petitioners appears to be negligible.

Third, and finally, petitioners' counsel seems to suggest that the best procedure would be that *he and his co-counsel* review the available videos, so that they themselves can "make a determination which videotapes, if any, will assist the Special Master." (Opp. at 5.) Again, I do not find merit in this suggestion. It seems likely that only *experts* can determine whether the videos shed any light on the onset issue. Again, I find it appropriate that the DVD containing *all* of the video footage of Michelle be provided to the experts of both sides, and those *experts* can interpret those videos and determine whether they shed any light on the onset issue.

IV

CONCLUSION AND ORDER

For the reasons set forth above, I hereby Order that the petitioners immediately supply a copy of the DVD in question to the respondent. Given the circumstances here, however, I must also add certain additional directions.

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[8]About 5,000 autism-related Vaccine Act petitions have been *filed*, but almost all of those cases remain pending, delayed at the *petitioners' own requests*. See the Autism Master File for more details.

[9]In the petitioners' opposition, their counsel at one point refers to the "special masters in this case," using the plural "masters." (See Opp. at 4.) I note that this *Cedillo* case is assigned to, and will be decided by, myself only. To be sure, during the evidentiary hearing to be held in this case, I will be joined on the bench by Special Masters Vowell and Campbell-Smith. Their role, however, will not be to decide this *Cedillo* case itself, but to hear the *general causation* evidence that is to be presented at the hearing, so that they can apply that "general causation" evidence to *other* Vaccine Act autism cases. (See the Autism Master File.)

As noted above, I am quite sympathetic to the privacy interests of the Cedillo family. Therefore, I specifically ORDER that the respondent treat the video material on the DVD as follows, consistent with the privacy provisions of § 300aa-12(d)(4)(A). The video material shall be reviewed only by the respondent's counsel and experts. It shall not be disclosed to any other persons, except to the extent that such video material may be presented to the court at the evidentiary hearing in this case, as discussed below.

Further, respondent's experts shall review the video material *immediately*. If they identify any footage that they find relevant to the causation issues, respondent's counsel must immediately, and by no later than May 25, call that specific footage to the attention of petitioners' counsel, so that petitioners' experts can review the footage and determine whether they agree or disagree with the impression of respondent's experts as to the relevance of that footage. (In other words, I do not want any "trial by ambush" concerning the video footage at the hearing in this case.)

Similarly, if petitioners' experts also review the video footage prior to the hearing, and identify any specific footage that they find relevant to the causation issue, then petitioners' counsel, similarly shall immediately, and by the same deadline of May 25, call that specific footage to the attention of respondent's counsel.

Either party shall promptly notify my office if there are any difficulties in compliance with this Order.

/s/ George L. Hastings, Jr.

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George L. Hastings, Jr.
Special Master