In the United State Court of Federal Claims

OFFICE OF SPECIAL MASTERS

94-89V

Filed: September 8 , 2000

HELEN D. ROGERS Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	*	**TO BE PUBLISHED**

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION and ORDER DENYING PETITIONER'S MOTION TO STRIKE

I

On June 6, 2000, this court filed its decision in favor of Petitioner's claim that the administration of a tetanus toxoid (TT) inoculation, more likely than not, triggered or significantly exacerbated a latent condition described, by subsequent treating physicians, as an autoimmune demyelinating disease of the central nervous system.[1] The court concluded that the TT inoculation

[1] Throughout this case, Petitioner's condition has been discussed frequently as "MS." The court understands that "MS" was at times used as a shorthand or catch-all term rather than using the more lengthy diagnosis of "autoimmune demyelinating disease of the central nervous system." Respondent argues that her condition is, in fact, Multiple Sclerosis. Petitioner's treating physicians agreed that her condition was "MS-like" but a final diagnosis was never established. Petitioner's experts argue that her condition was inconsistent the classical MS. The court takes

caused or triggered an adverse reaction that resulted in severe and permanent injuries. On August 4, 2000, Respondent filed a Motion to Reconsider the court's June 6, 2000 decision arguing that the court's evaluation of the evidence was in error.

Respondent's Motion for Reconsideration presents two issues. The first issue is straight forward and will be forthrightly addressed: Having reviewed the arguments and the evidence, and relying upon the reasons set forth in its June 6, 2000 decision, and published on September 1, 2000, the court finds no valid reason to change its mind as to the outcome of this case and denies Respondent's Motion to Reconsider its decision. The second is an issue raised by Petitioner. On August 14, 2000, Petitioner filed a Motion to Strike a portion of Respondent's Motion for Reconsideration. Although it will not now affect the outcome of the court's decision denying Respondent's Motion to Reconsider, the motion carries with it significant consequences that must be addressed. Compelling arguments exist on both sides of the issue.

THE ISSUE

Respondent's Motion for Reconsideration of the Court's June 6, 2000 decision consists of 73 pages in all. Respondent identifies the last seven pages of its lengthy motion as Respondent's Exhibit Q, which is a letter, submitted out of time, by one of Respondent's medical experts criticizing the court's June 6, 2000 decision and challenging the qualifications and opinions of Petitioner's medical experts. The letter's author, Dr. Roland Martin, argues that his comments at hearing were misunderstood and that his research paper, discussed at length at hearing, was misinterpreted.[2] Dr. Martin's letter-- Respondent's Exhibit Q-- contains a detailed, scholarly restatement of his oral testimony which Dr. Martin believes to have been misconstrued. Petitioner objects to Exhibit Q for the reason that it appears to be an attempt to supplement the record after the record was closed and the decision rendered. Petitioner argues that its inclusion in the record at this late date, is prejudicial, redundant, and affords Respondent a second bite of the apple. Petitioner moves to strike Exhibit Q. Respondent counters by arguing that Exhibit Q goes to the heart of one of the key issues raised in its Motion for Reconsideration. (Respondent's Response to Petitioner's Motion to Strike filed August 17, 2000).

PETITIONER'S ARGUMENTS FAVORING ITS MOTION TO STRIKE

Petitioner argues first that Respondent's opposition must fail because Exhibit Q does not constitute "newly found and offered evidence" and, therefore, is contrary to Horner v. Secretary of

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no position as to her specific diagnosis except as discussed in the court's June 6, 2000 decision at the footnote on page 2, and at page 6. MS is a constellation of symptoms, rather than a disease, according to Petitioner, and use of that term in the record and extensive discussions should not be taken as an agreement of the parties as to her diagnosis.

[2] Dr. Martin's hearing testimony is found on pages 60 through 98 of the Transcript of Proceedings of January 27, 2000.

HHS, 35 Fed. Cl. 23, 27 (1996). (Petitioner's Reply to Respondent's Opposition to Petitioner's Motion to Strike filed August 18, 2000.)

In further support, Petitioner cites in addition to Horner ,the following cases. In Leonard v. Secretary of HHS, (Unpublished Order of Jan. 5, 1999) Respondent's expert attempted to file a post-hearing, post-decision argument that the Special Master's decision "was not scientifically, medically, or logically justified." The Special Master in Leonard granted Petitioner's motion to strike stating that the expert should have presented his arguments at the hearing.

In Sword v. Secretary of HHS, 44 Fed. Cl. 183 (1999) the Court of Federal Claims scolded Respondent for attempting "to supplement the factual record on appeal" by filing affidavits of expert witnesses after the Special Master had issued findings and a decision. Id. at 10. In that case, Judge Baskir upheld the Special Master's refusal to allow the supplemental argument into the record:

> [B]ecause of the deference afforded fact-finders, this Court will not aid a party who seeks to present additional evidence after his initial effort proves unsuccessful. To do so would be to sacrifice the legislature's goal of making the proceedings both expeditious and generous toward the claimant. (Citations omitted.) What trial attorney worth his or her salt would not try a case differently once counsel knew what the fact-finder found important within the body of evidence? But fairness does not require that we accede to this all-too-human desire. In fact, under the circumstances it would impose an undue burden to delay the resolution of this case any further. Id. at 11.

RESPONDENT'S ARGUMENTS

Respondent argues that although Exhibit Q may not affect the decision of the undersigned Special Master, it may affect the decision of a reviewing judge in the event of an appeal. And further, it may prove useful to future claims. In support of Respondent's effort to admit Exhibit Q, Respondent urges the court to consider Vant Erve v. Secretary of HHS, No. 99-5093, 2000 WL 425005 (Fed. Cir. April 18, 2000) in which the U.S. Court of Appeals for the Federal Circuit affirmed the holding of the U.S. Court of Federal Claims finding that the Special Master had abused his discretion when he denied the government's motion in Vant Erve, to reopen the issue of entitlement. The court held that the Special Master erred because the government had offered "new information that was highly probative." (Emphasis added).

THE COURT'S ANALYSIS OF THE ARGUMENTS

Respondent's reliance on Vant Erve is misplaced; Rogers, the instant case, is distinguishable. In contrast to the facts in Vant Erve, the court cannot conclude that Respondent's Exhibit Q, provides new evidence; it merely restates arguments already presented in the record. See Transcript of Proceedings of January 27, 2000 at 60-98. The difference, if any, is evident only in the strong manner in which the opinions are reworded. That factor is understandable inasmuch as Dr. Martin is endeavoring to protect the validity of his opinion. I cannot fault Dr. Martin's intentions.

Petitioner's objections to Exhibit Q do have merit. Respondent's untimely proffer is not only redundant but precludes cross examination or rebuttal. It is a strong attack against the qualifications of Petitioner's experts to which those experts cannot respond unless the court would reopen the record which the court declines to do at this belated point. Unfortunately, it also prolongs this case to Petitioner's sore detriment. Nonetheless, the court is constrained to deny Petitioner's Motion to strike for reasons that will be set forth hereafter.

Whether the court grants or denies Petitioner's Motion to Strike, neither changes the outcome of this court's decision. Indeed, Dr. Martin is articulate and knowledgeable, and his letter presents persuasively his position that his published research cannot be used to support the causal link to Petitioner's injury as Petitioner alleges. Even so, Dr. Martin has failed to persuade me as to the ultimate issue in this case. Based on the record as a whole, even if the court accepts Dr. Martin's disclaimer, the court remains convinced that the tetanus toxoid was a significant factor in dramatically worsening Petitioner's condition based on the evidence that remains. As the trier of fact, I have observed and heard the witnesses in person, and weighed the evidence. Every case is unique and must be evaluated on its own merits. Based on a complete review of the record, including a fair appraisal of the testimony, both in person and in Dr. Martin's supplemental letter, I stand by my decision.

The court, however, denies Petitioner's Motion to strike Dr. Martin's letter for the following reasons: First, this appears to be a case of first impression and is highly controversial. Therefore, any effort to strike Exhibit Q might suggest that the court is insecure in its decision. Such action could be viewed with suspicion, and construed as suppressing valuable evidence. Second, the issues reviewed in Dr. Martin's letter have already been heard, analyzed and discussed. Finally, the evidence, even omitting the claims challenged in Dr. Martin's research, tips the weight in Petitioner's favor from different sources. Dr. Martin testified that he has never negated "the theoretical possibility of an activation of autoreactive T cells by Tetanus Toxoid," (Exhibit Q at 5), but that it has not been proved by scientific standards. Dr. Martin's viewpoint reflects the position of the laboratorian and is measured against scientific certainty. The Vaccine Act provides an altogether different standard. The weight of the evidence by which the court is required to render its decision, consistent with the standards required by the Vaccine Act, is a more relaxed standard. As one Special Master has quipped, to prove a causation in fact case, Petitioner's evidence requires only "fifty percent and a feather." As will be discussed briefly hereafter, the court's decision is not dependent upon Petitioner's position about the research evidence which Dr. Martin believes has been misconstrued and to which he takes exception. For this reason, it is not likely that Petitioner will be unfairly harmed by allowing Respondent's post hearing arguments to remain in the record.

A REVIEW OF THE WEIGHT OF THE EVIDENCE

The court will not indulge the temptation to address every argument raised in Respondent's motion. A few additional statements, however, are in order. Petitioner's experts believe that in addition to their own experience and research, Dr. Martin's research somehow tends to support their position. Dr. Martin insists just as strongly that they have misconstrued his intentions. The court will not challenge either view nor presume to second guess Dr. Martin's intentions and opinions nor, in any way, detract from Dr. Martin's credentials or expertise. Dr. Martin merits respect, and I accept

his testimony at face value. Moreover, the court acknowledges that the position he takes is a reasonable position.

The evidence in this case provides other positions that I consider also reasonable, and I find them more persuasive. The court's role differs from that of the medical experts. If I were to summarize what I believe Dr. Martin brings to this case, it is his opinion that the evidence may possibly suggest the theory claimed by Petitioner, but it merits further study and has not been proved. That position, as stated earlier, does not change my opinion as to the ultimate issue in this particular case. Dr. Martin believes that the court misunderstands the evidence; the court is of the opinion that Dr. Martin misunderstands the level of proof required under this statue.

The court gives superior weight in this case to the opinions of the clinicians who present a valid, although alternative approach . If laboratory science does not yet have sufficient proof, the clinicians, those in the trenches of diagnosis and treatment, as in this case, take a different posture. Petitioner's experts and her treating physicians, five in all, ascribe Petitioner's drastically worsened condition to the TT antigen. Respondent argues that Petitioner's experts are "Junior", that Respondent's experts have superior credentials, and that their experts should have been given greater weight. The court gives their positions respect, but finds Petitioner's evidence more persuasive from a practical standpoint. As stated by the Chief Special Master, Gary Golkiewicz, in Cruz v. Secretary of HHS, No. 96-820V, 1998 WL 928418 (Fed. Cl. Spec. Mstr. Dec. 21, 1998):

> The court is permitted in Vaccine cases to defer to the treating physician or any other expert where testimony presented is done so cogently, credibly, and persuasive. Id. at 12.

Helen Rogers' treating physicians assessed their patient by their own standards using the honored tools of their trade--differential diagnosis, informed intuition based on experience and learning, and on the clinical course of the injured individual-- that is, "hands on" expertise, a respectable and practical approach. As stated earlier, causation need not be proved at the level of the laboratorian; a "preponderance" of the evidence means "more likely than not."[3]

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[3] The court's reliance on the practical position taken by the treating physicians does not mean that the medical literature has not discussed the possible impact of certain named antigens, including tetanus toxoid, in MS patients. One example is found at Respondent's Exhibit H, "Immunological features in multiple sclerosis." G, Lamoureux, et al. British Medical Journal, 1:183-186, 1976. The article states that patients with MS have more infectious problems than normal people and that both their T and B cell systems cannot mount a fully normal immunological response to some viral and bacterial antigens, while they give an increased response to others. In other words, MS patients may have an increased susceptibility to those antigens. The article notes that patients with MS had significantly lower serum antibody titres than controls against many naturally occurring antigens, including TT. The court is not qualified to draw any conclusions but notes merely than the proposed link has scientists interested in this issue.

In the case of Gall v. Secretary of HHS, No. 91-1642V, 1999 WL 1179611 (Fed. Cl. Spec. Mstr. Oct. 31, 1999) the court recognized that a novel theory of causation need not be rejected because it lacks scientific proof or epidemiological evidence, or has not yet been tested formally within the medical community by being subjected to peer review and publication. As the Supreme Court acknowledges in Daubert, 509 U.S. at 593, 596, the theory must rest only upon a reliable foundation of medical knowledge. The medical expert in Gall relied upon his own experience to support a novel theory regarding the effect of vaccines upon a child who had an off-Table injury. In Gall, the doctor's theory had not yet been tested formally within the medical community by being subjected to peer review and publication. He explained that the general knowledge of that particular condition was just now evolving. Gall, at 6. The Supreme Court in Daubert acknowledged that "in some instances well-grounded but innovative theories will not have been published . . . Some propositions, moreover, are too particular, too new, or of too limited interest to be published." Gall, Id. citing Daubert, 509 U.S. at 593. The court notes that the expert in Gall, did not appear as a professional witness, nor did he formulate his opinion merely for litigation, but as a treating physician. In like manner, the undersigned gives considerable weight to the treating physicians in this case for the reasons discussed heretofore.

Dr. Martin was offended that the court ascribed less weight to the opinions of Dr. Arnason for whom Dr. Martin obviously has great respect. The court is fully aware of Dr. Arnason's renown. He has testified with great skill in other cases and found to be extremely knowledgeable and highly persuasive. See, Trojanowicz v. Secretary of HHS, 43 Fed. Cl. 469 (1999) But he has not been credible in all cases. See for example, Cruz v. Secretary of HHS, No. 96-820V (Fed. Cl. Spec. Mstr. Dec. 21, 1998). In this particular case, Dr. Arnason failed to support his views.

In short, Respondent's research evidence was not the major factor in evaluating the evidence. In this particular case, the court suspects that in spite of the reverence which Respondent ascribes to their more famous experts, it is Petitioner's experts and the treating physicians, with their practical wisdom, who are more on the cutting edge of this issue. No evidence has been produced to negate Petitioner's theory of causation; The Institute of Medicine concludes that although "no clear-cut causal relation" has been proved, that theory is feasible. The medical literature suggests that an autoimmune response may have a trigger, although not invariably so.[4] The extremely close temporal relationship between the inoculation and onset of Helen Rogers' symptoms does not legally or scientifically establish a causal relationship, but it is a consideration. Dr. James Matthews, a specialist in internal medicine, Dr. Reuben Richardson, a neurologist, and Dr. John Whitaker, a neurologist and Professor and Chairman of the Department of Neurology at the University of Alabama, Birmingham School of Medicine, were of the opinion that Petitioner was probably suffering from a demyelinating process secondary to her tetanus injection.[5] Based on the record as a whole, this court is convinced that the evidence supports that diagnosis.

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[4] See June 6, 2000 decision at footnote 2 on page 2.

[5] The following doctors also concurred with that diagnosis: Dr. Ronald Hillyer: "Demyelinating syndrome secondary to tetanus toxoid." Petitioner's Exhibit 10 at p.3. Dr. Toras Koshno: "Tetanus myelopathy." Petitioner's Exhibit 14 at p. 9, 58.

Petitioner's Motion to Strike is denied.

Respondent's Motion for Reconsideration of the June 6, 2000 decision is denied.

IT IS SO ORDERED.[6]

E. LaVon French
Special Master

[6] As Petitioner notes, this is not the first time Respondent has attempted to circumvent the rules by introducing post-decision expert testimony. Leonard and Sword have been discussed. In the strongest words possible, this court finds that Respondent's method of supplementing a closed record constitutes extremely bad practice, sets bad precedence, and is getting to be a bad habit. Respondent's approach relegates the hearing process to the level of a deposition in which Respondent gains information then reacts by taking another bite of the apple by reformulating old arguments. The court and the legal profession have vested interests in encouraging closure rather than imposing further delays and multiple responsive motions *ad nauseam.* This court will not consider future efforts to supplement the record in similar fashion with post- hearing argument once the record is closed.