

ORIGINAL

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(Filed: May 29, 2007)

FILED
MAY 29 2007
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U.S. COURT OF
FEDERAL CLAIMS

IN RE: CLAIMS FOR VACCINE INJURIES
RESULTING IN AUTISM SPECTRUM
DISORDER OR A SIMILAR
NEURODEVELOPMENTAL DISORDER
VARIOUS PETITIONERS,
v.
SECRETARY OF HEALTH AND
HUMAN SERVICES,
Respondent.

AUTISM MASTER FILE

ORDER

We hereby place into the Autism Master File a copy of a ruling by Special Master Hastings, denying the respondent's motion for exclusion of the petitioners' expert reports in the autism "test case" of Cedillo v. HHS, No. 98-916V.

Patricia Campbell-Smith
Denise Vowell
George L. Hastings, Jr.
Special Master
Special Master
Special Master

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 98-916V

(Filed: May 29, 2007)

THERESA CEDILLO and MICHAEL CEDILLO, *
as parents and natural guardians of Michelle *
Cedillo, *
Petitioners, *
v. *
SECRETARY OF HEALTH AND *
HUMAN SERVICES, *
Respondent. *

ORDER DENYING MOTIONS FOR EXCLUSION OF EXPERT TESTIMONY

On May 22, 2007, respondent filed four motions, seeking to "exclude the opinions" of four of petitioners' expert witnesses. After studying the four motions, I hereby DENY them, for the reasons set forth below.

I agree with respondent that the principle that scientific evidence must be evaluated for reliability, set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), does have application to Vaccine Act cases. That is made quite clear in Terran v. HHS, 195 F. 3d 1302, 1316 (Fed. Cir. 1999), cert. denied, 531 U.S. 812 (2000). However, in my view, application of the reliability test can be procedurally different in jury vs. non-jury proceedings. In a case to be tried by a jury in a proceeding governed by the Federal Rules of Evidence, a judge is obliged under Daubert (if requested by a party) to apply the Daubert reliability test to proposed expert testimony, and, if the proposed testimony fails the test, to "exclude" such testimony--i.e., keep such testimony from even being presented to the jury.

In a non-jury context, on the other hand, I can see two different reasonable procedures by which to test scientific testimony for reliability. First, the judicial factfinder--such as a special master in a Vaccine Act case--could elect, as in a jury case, to decide an exclusion motion prior to any trial. However, in my view the judicial factfinder may, alternatively, elect to hear the challenged expert testimony at the trial in the case, and, then apply the reliability test in deciding whether to

accord that testimony any weight. That is, only if the judicial factfinder determines that the proffered testimony *passes* the reliability test, will the factfinder accord any *weight* to that testimony when resolving the factual issues in the case.

I conclude that the determination as to which of these two procedures to use, in order to apply the reliability test in a Vaccine Act case, is a matter of *discretion* for the special master, based on all the circumstances of the case.

Given the late date at which respondent filed the motions in question (petitioners filed the expert reports in question on February 20, 2007), I conclude that the best procedure is to hear the testimony of the expert witnesses in question at the evidentiary hearing in this case, already scheduled for June 11 to June 29, 2007. Those experts can at that time explain why they believe their methodologies to be valid. Respondent's counsel can cross-examine those experts if desired, and both sides can present any evidence that might shed light on the issue of the reliability of the expert testimony in question. After the hearing, both sides can also address the *Daubert* test issue in their post-hearing briefs, if desired. I can *then* evaluate the reliability of the expert testimony in question, and determine what weight it should be accorded, if any.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master