In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

E-Filed: May 7, 2012

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MIRCALE MORMAN,	*	PUBLISHED
Petitioner,	*	No. 10-814V
v.	*	Chief Special Master Campbell-Smith
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	Motion to Compel; Seeking Compliance with Subpoena for Medical Records; Records Not Necessary for Claim Evaluation
Respondent.	*	
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ORDER DENYING PETITIONER'S UNOPPOSED MOTION TO COMPEL COMPLIANCE WITH A SUBPOENA[1]

Pending before the undersigned is petitioner's Unopposed Motion to Compel Compliance with an earlier-issued subpoena ("Mot. to Compel").

For the reasons discussed more fully below, the undersigned hereby **DENIES** petitioner's Motion to Compel.

[1] Because this order contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this ruling on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a 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." Vaccine Rule 18(b).

I. BACKGROUND

This Motion to Compel arises from petitioner's claim of alleged vaccine-related injury under the National Vaccine Injury Compensation Program ("the Program").[2]

Petitioner alleges that she suffered from "dizziness and weakness" as a result of the administration of a number of vaccinations on November 28, 2007 – namely, the Flu Mist, tetanus-diphtheria-acellular pertussis ("Tdap"), Menactra, and human papillomavius ("HPV") vaccinations. Pet. at 1.

A. Initial Fact Development of the Case

Pursuant to the directives set forth in the undersigned's initial order, see Order, Nov. 30, 2010 (directing petitioner's counsel to file supporting medical records or a status report detailing the status of the medical record collection effort), petitioner's counsel filed a number of medical records in support of petitioner's claim, see Pet'r's Exs. 1-4, Jan. 18, 2011; Pet'r's Exs. 5-6, Mar. 16, 2011; Pet'r's Exs. 7-8, July 27, 2011, as well as a statement of completion, indicating petitioner's belief that all relevant medical records had been filed, see Pet'r's Statement of Completion, July 27, 2011.

Despite the filing of a statement of completion, petitioner's counsel asserted, during a status conference conducted on October 5, 2011, that he would be requesting, and subsequently filing, additional medical records to supplement petitioner's claim. See Order, Oct. 7, 2011. Specifically, petitioner's counsel "stated that petitioner [had] recently been diagnosed with Guillain-Barr[é] [s]yndrome" ("GBS") and "indicated that he would be filing the underlying medical records." Id.

Over the next few months, through a number of filed motions for enlargements of time and status reports, petitioner's counsel detailed his efforts to obtain additional medical records – specifically, those from Health & Healing Services, P.C. See, e.g., Pet'r's Unopposed Mot. for Enlargement of Time, Oct. 28, 2011.

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[2] The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (hereinafter "Vaccine Act" or "the Act"). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

The first request for the additional medical records issued on October 5, 2011. See id. By status report dated December 12, 2011, petitioner's counsel asserted that he had "yet to receive confirmation that [the] records [were] forthcoming," despite "numerous attempts" to obtain such a confirmation, see Pet'r's Status Report, Dec. 12, 2011. Accordingly, petitioner's counsel filed, and the undersigned granted, pursuant to her authority under Vaccine Rule 7(c), an unopposed motion for the issuance of a subpoena to be served on the offices of Dr. George Mangle at Health & Healing Services, P.C. See Order, Dec. 20, 2011 (granting Pet'r's Unopposed Mot. to Issue a Subpoena, Dec. 19, 2011).

Petitioner's counsel subsequently filed a set of "partial medical records" from Health & Healing Services, P.C. on January 26, 2012. See Pet'r's Ex. 10; Pet'r's Unopposed Mot. for Enlargement of Time, Jan. 26, 2012. The filed records reflected petitioner's visits with Gene Adams – a physician's assistant at Health & Healing Services, P.C. – on July 21, 2011 and August 22, 2011, rather than visits with Dr. Mangle himself. See Pet'r's Ex. 10; Pet'r's Unopposed Mot. for Enlargement of Time, Jan. 26, 2012. The filed medical records also revealed that on these two occasions, petitioner sought treatment for, and subsequently received oxycodone to relieve, her lower back pain. Pet'r's Ex. 10.

Petitioner's counsel indicated that "technical difficulties" prevented him from obtaining the balance of the requested medical records from the offices of Dr. Mangle. See, e.g., Pet'r's Status Report, Jan. 26, 2012 (asserting that medical records from petitioner's visits with Dr. Mangle were "being catalogued at the office and therefore unavailable for copying until an unspecified time"); Pet'r's Status Report, Mar. 9, 2012 (explaining that Dr. Mangle's office was "continuing to experience technical difficulties, which render the printing of petitioner's medical records impossible for an unspecified period of time"). Due to the delay in the production of these medical records, the undersigned suspended the filing date for petitioner's expert report. See NON-PDF Order, Nov. 10, 2011 ("Petitioner's expert report is suspended pending receipt of the outstanding medical records.").

Thereafter, petitioner's counsel requested the reinstatement of, and proposed a filing deadline for, the submission of petitioner's expert report, indicating that petitioner's expert could form his opinion on the record as developed. See Pet'r's Status Report, Dec. 12, 2011 ("[P]etitioner's expert has indicated[, in spite of the outstanding medical records,] that he can proceed in forming his opinion at this point in time."). The undersigned granted the request to reinstate the deadline for the filing of the expert report. See NON-PDF Order, Dec. 12, 2011 (directing counsel to file petitioner's expert report within the forty-five (45) days time period requested by counsel). A month later, petitioner's counsel again advised the undersigned that the outstanding records would not

impede the preparation of petitioner's expert report, adding that the awaited records were not expected to be "crucial" to the filing of petitioner's expert report. See Pet'r's Status Report, Jan. 26, 2012 ("Petitioner does not anticipate that the outstanding records will be crucial to petitioner's expert report.").

On February 28, 2012, petitioner's counsel filed, prior to the filing deadline, an expert report from Dr. Lige Rushing, along with supporting medical literature. See Pet'r's Exs. 12-19. See also NON-PDF Order, Jan. 26, 2012 (establishing the filing deadline for petitioner's expert report as March 9, 2012).

To address further proceedings in light of the filed expert report, the undersigned conducted a status conference on March 14, 2012. During that status conference, the undersigned identified a number of factors that complicate petitioner's claim, as well as noted the existing deficiencies located in petitioner's expert report. See Order, Mar. 15, 2012, at 2 (raising the concern that Dr. Rushing's expert report does not clearly set forth or address the bases for his opinion that petitioner suffers from vaccine-induced fibromyalgia). See also Order, Oct. 7, 2011; Resp't's Rule 4 Report at 11-13.

The undersigned directed petitioner's counsel to file, on or before May 14, 2012, a supplemental expert report, clarifying, among other things, the factual premises relied upon by Dr. Rushing in his expert report and how these facts support a finding that petitioner has fibromyalgia. Order, Mar. 15, 2012, at 2.

B. Petitioner's Motion to Compel Compliance with an Earlier-Issued Subpoena

On April 11, 2012, in response to the directives provided by the order issued by the undersigned on March 12, 2012, see NON-PDF Order, Mar. 12, 2012 (directing petitioner's counsel to file the outstanding medical records or a status report detailing the status of the medical record collection effort), petitioner's counsel filed the Motion to Compel at issue.

In his Motion to Compel, petitioner's counsel explains that Dr. Mangle's office is "still continuing to experience technical difficulties . . . for an unspecified period of time." Mot. to Compel at 2. Counsel asserts that Health & Healing Services, P.C. has not complied with his repeated requests for production of the medical records documenting petitioner's visits with Dr. Mangle – despite numerous attempts made to confer with Dr. Mangle's office. Id. Because "[p]etitioner has received the same excuse for the absence of Dr. Mangle's records for several months," petitioner's counsel contends that the granting of this Motion to Compel is necessary to direct Dr. Mangle's compliance with the earlier-served subpoena. Counsel adds that any continued non-compliance by Dr. Mangle

should "possibly result[] in a further order compelling [Dr. Mangle's] testimony." Id. at 2-3.

II. LEGAL STANDARD

In conducting a proceeding on a petition under the Act, a special master may, among other things, "require" the submission of evidence, or the production of documents, as may be "reasonable and necessary" for the special master's resolution of the case. § 12(d)(3)(B). See Simanski v. Sec'y of Health & Human Servs., 671 F.3d 1368, 1380 (Fed. Cir. 2012); Phillips-Deloatch v. Sec'y of Health & Human Servs., No. 9-171V, 2010 WL 5558349, at * 1 (Fed. Cl. Spec. Mstr. July 28, 2010), pet. of mandamus denied by Phillips-Deloatch v. Sec'y of Health & Human Servs., 2012 WL 1372740, __ Fed. Cl. __ (2012); King v. Sec'y of Health & Human Servs., No. 3-584V, 2008 WL 1994968, at *2 (Fed. Cl. Spec. Mstr. Feb. 7, 2008).

The "reasonable and necessary" standard has been interpreted to require more than mere "relevance." King, 2008 WL 1994968, at *3. Instead, the party must show that the special master could not render a "fair and well-informed ruling on those factual issues without the requested material." Id. (emphasis in original).

In addition, because the production must also be "reasonable" under the circumstances, the "importance of the requested material must be balanced against the burden on the producing party." Id.

III. DISCUSSION

The undersigned finds that the application of the "reasonable and necessary" standard militates against compelling the production of the requested medical records from the offices of Dr. Mangle.

A. Compelling the Production of the Outstanding Medical Records is Not "Necessary"

In light of the representations made by petitioner's counsel throughout his efforts to obtain the outstanding medical records from Health & Healing Services, P.C., the undersigned does not find that the requested medical records from Dr. Mangle are "necessary" to the resolution of petitioner's claim.

By petitioner's counsel's own admission, the outstanding medical records from Health & Healing Services, P.C. were not "crucial to petitioner's expert report." Pet'r's Status Report, Jan. 26, 2012. See also Pet'r's Status Report, Dec. 12, 2011 ("[P]etitioner's expert has indicated[, in spite of the outstanding medical records,] that he can proceed in forming his opinion at this point in time."). Although certain records from that medical provider were still missing, petitioner's counsel requested the reinstatement of the filing deadline for the submission of petitioner's expert report. See id. Counsel then filed the expert report in advance of the deadline established for its submission. See Pet'r's Exs. 12-19. The filing of petitioner's expert report – without the outstanding medical records from the offices of Dr. Mangle – demonstrates that petitioner's claim can be evaluated without the requested records.[3]

During the status conference held on October 5, 2011, petitioner's counsel "stated that petitioner [had] recently been diagnosed with [GBS]" and "indicated that he would be filing the underlying medical records." Order, Oct. 7, 2011. But, the filed expert report rests instead on the unsupported conclusion that petitioner suffers from vaccine-induced fibromyalgia. See Order, Mar. 15, 2012.

Counsel has not explained, in his Motion to Compel or through any of his status reports filed to date, why it might be "necessary" for the undersigned to consider, during her evaluation of petitioner's claim, the medical records from the offices of Dr. Mangle. Specifically, counsel has not clarified whether the requested medical records include petitioner's alleged diagnosis of GBS,[4] are

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[3] See, e.g., The Office of Special Masters, Guidelines for Practice Under the National Vaccine Injury Compensation Program 6 (rev. ed. 2004) (advising that an expert opinion, in "address[ing] the facts and circumstances surrounding the vaccinee's individual case," should "provide a reference to the medical records that the expert relied upon in reaching his or her medical opinion.").

[4] It is not entirely clear why medical records from Health & Healing Services, P.C. would contain a diagnosis for petitioner's alleged GBS.

A diagnosis of GBS is generally confirmed by the results of electromyography and nerve conduction ("EMG/NCV") studies. See Mosby's Manual of Diagnostic and Laboratory Tests 577-83 (4th ed. 2010). Previously filed medical records in this case, including the results of an EMG/NCV study conducted on January 22, 2009, revealed no abnormalities. Pet'r's Ex. 5 at 1-2. See also Pet'r's Ex. 6 at 46 (demonstrating one treating physician's belief that petitioner presented no clinical signs of neuropathy, myopathy, demyelinating illness or GBS).

supportive of the medical theory posited by petitioner's expert report,[5] are responsive to the records identified as missing in respondent's Rule 4 report,[6] or are merely informative of petitioner's treatment to the present. Without more, the undersigned is not persuaded that the requested medical records are necessary.

B. Compelling the Production of the Outstanding Medical Records is Not "Reasonable"

The undersigned also concludes that, under the circumstances, it would not be "reasonable" to compel Dr. Mangle to comply with the earlier-issued subpoena.

There is no reason to believe, without more, that the outstanding medical records have been withheld for any purpose other than the "technical difficulties" asserted by Dr. Mangle's office. Petitioner's counsel has detailed, on numerous

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In addition, publicly available records indicate that Dr. Mangle specializes in internal medicine and podiatry, rather than in neurology. See Dr. George M. Mangle, DO; DPM – Internal Medicine, Podiatry, Everyday Health, http://www.everydayhealth.com/doctors/dr-george_m_mangle_do_dpm-33574766 (last visited May 1, 2012). Given the nature of petitioner's two visits with a physician's assistant at Health & Healing Services, P.C., during which petitioner sought medication for her back pain, see Pet'r's Ex. 10, it does not appear that the requested medical records from Dr. Mangle would reveal medical visits of a different nature. Moreover, although the record documenting petitioner's visit with the physician's assistant on July 21, 2011 indicates that she was directed to "continue treatment as set by Dr. Mangle" and to "follow up with Dr. Mangle [in the] next month," id. at 5, petitioner was seen, again, the following month, by the same physician's assistant, for a refill of her pain medication. See id. at 1-3.

[5] In the same manner that the requested medical records do not appear to provide factual support for petitioner's alleged diagnosis of GBS, they similarly do not appear to support the theory of vaccine-induced fibromyalgia, as set forth in petitioner's expert report.

[6] In her Rule 4 report, respondent identified a number of medical records that remained outstanding. See, e.g., Rule 4 Report at 5 n.1 (results from a Holter Monitor Report); id. at 6 n.2 (results from further evaluation or repeat testing for an elevated level of creatine kinase); id. at 9 n.6 (results from multiple laboratory studies conducted on October 28, 2009). However, a brief review of medical records from UT Medical Group, filed by petitioner's counsel on February 6, 2012, appear to contain a number of these records. See Pet'r's Ex. 11 at 15-20, 33, 37-39, 66-67.

occasions, the alleged "technical difficulties," which have subsequently "render[e]d the printing of petitioner's medical records for her visits with Dr. Mangle impossible for an unspecified period of time." Mot. to Compel at 2. See also Pet'r's Status Report, Jan. 26, 2012 ("Dr. George Mangle's records are currently being catalogued at the office and are therefore unavailable for copying until an unspecified time."); Pet'r's Status Report, Mar. 9, 2012 ("[A]s of March 9, 2012, [Dr. Mangle's] office is continuing to experience technical difficulties, which render the printing of petitioner's medical records impossible for an unspecified period of time.").

Accordingly, under these circumstances, the undersigned concludes that it would not be "reasonable" to compel Dr. Mangle to comply with the earlier-issued subpoena in this case. In considering the burden on the producing party, the undersigned finds that the balance of interests do not weigh in favor of requiring Dr. Mangle to provide the medical records in question.

IV. CONCLUSION

Based on the representations of petitioner's counsel, compelling production of the outstanding medical records from Dr. Mangle is neither "necessary" nor "reasonable." Should petitioner's counsel possess contrary information, he may renew the request to compel.

For the reasons set forth above, the undersigned hereby **DENIES** petitioner's Motion to Compel.

Moreover, as presently advised, the undersigned begins to question the reasonableness of petitioner's claim, in light of the discrepancies surrounding the alleged nature and extent of this vaccine claim. Although petitioner's counsel has indicated that petitioner was recently diagnosed with GBS, see Order, Oct. 7, 2011, the medical theory of causation advanced by petitioner's expert rests instead on the unsupported conclusion that petitioner suffers from vaccine-induced fibromyalgia, see Order, Mar. 15, 2012. In either event, neither the filed – nor the requested – medical records appear to support these divergent claims of alleged vaccine-related injury.

IT IS SO ORDERED.

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