In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(E-Filed: September 29, 2009)

No. 01-707V

MICHAEL STEPHEN SHAW, Petitioner, v. SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	PUBLISH Denial of Motion for Reconsideration

Ronald Homer, Boston, MA, for petitioner.

Voris R. Johnson, Department of Justice, Civil Division, Torts Branch, Washington, DC, for respondent.

ORDER DENYING MOTION FOR RECONSIDERATION OF AUGUST 31, 2009 DECISION DENYING COMPENSATION[1]

By decision dated August 31, 2009 (Merits Decision), the undersigned determined that "petitioner has failed to establish a logical sequence of cause and effect in this case as

[1] Because this order contains a reasoned explanation for the special master's action in this case, the special master intends to post this order on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has fourteen days within which to request the redaction "of any information furnished by that party (1) that is 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." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of timely objection, the entire document will be made publicly available.

now presented and thereby, has failed to satisfy his evidentiary burden showing that the received vaccination at issue brought about his injury." Merits Decision at 38. As detailed in the Merits Decision, the undersigned set forth the reasons for her ruling.

On September 21, 2009, petitioner filed a motion for reconsideration of the issued Merits Decision on the grounds that the undersigned "failed to consider the 'record as a whole' when she rejected his claim" and failed to afford petitioner "the 'fundamental fairness' contemplated by the Vaccine Rules" by not considering the "new evidence" filed as Petitioner's Exhibit 66 (P's Ex. 66). Petitioner's Motion for Reconsideration of Special Master's Decision of August 31, 2009 (Reconsideration Motion) at 5-7. Comprised of two excerpted pages from a 2005 edition of a neurology textbook, Petitioner's Exhibit 66 was filed at the same time that petitioner filed his motion for reconsideration.

On September 25, 2009, the undersigned conducted a recorded, telephonic status conference to address petitioner's motion.[2] As discussed at length during the status conference, the undersigned observed that while petitioner strenuously reargued the merits of his case in the motion for reconsideration, he did not address the legal standards applicable to motions for reconsideration. Nonetheless, the undersigned reasonably could infer from petitioner's request that the undersigned "carefully consider" as "new evidence" Petitioner's Exhibit 66, Reconsideration Motion at 7, that petitioner may have contemplated seeking reconsideration on the ground that previously unavailable evidence had now become available. After the undersigned shared her impressions of the reconsideration motion, the parties offered their views, and a responsive briefing schedule was established. See Order dated September 28, 2009.

On September 28, 2009, respondent filed a Response to Petitioner's Motion for Reconsideration (R's Response). On September 29, 2009, petitioner filed a reply (P's Reply). The matter is now ripe for a ruling.

I. The Applicable Legal Standard

A party seeking reconsideration "must support the motion by a showing of extraordinary circumstances which justify relief." Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 300 (1999). The motion for reconsideration "must be based 'upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court.'" Prati v. United States, 82 Fed. Cl. 373, 376 (2008) (quoting Fru-Con Constr. Corp., 44 Fed. Cl. at 300). "Specifically, the moving party must show: (1) the occurrence of an intervening change in the controlling law; (2)

[2] A transcript of the proceeding will be forthcoming within 30 days.

the availability of previously unavailable evidence; or (3) the necessity of allowing the motion to prevent manifest injustice." Matthews v. United States, 73 Fed. Cl. 524, 526 (2006) (citing Griswold v. United States, 61 Fed. Cl. 458, 460-61 (2004)).

An evaluation of a motion for reconsideration is to be "guided by the general understanding 'that, at some point, judicial proceedings must draw to a close and the matter deemed conclusively resolved . . . .'" Northern States Power Co. v. United States, 79 Fed. Cl. 748, 749 (2007) (quoting Withrow v. Williams, 507 U.S. 680, 698 (1993)). The "decision whether to grant reconsideration lies largely within the discretion of the [trial judge]." Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir.1990). Courts must "consider motions for rehearing with exceptional care." Carter v. United States, 518 F.2d 1199, 1199 (Ct. Cl. 1975).

A motion for reconsideration will not be granted "if the movant 'merely reasserts . . . arguments previously made [,] . . . all of which were carefully considered by the Court.'" Ammex, Inc. v. United States, 52 Fed. Cl. 555, 557 (2002) (quoting Principal Mut. Life Ins. Co. v. United States, 29 Fed. Cl. 157, 164 (1993)). Nor will a party "prevail on a motion for reconsideration 'by raising an issue for the first time on reconsideration when the issue was available to be litigated at the time the complaint was filed.'" Six v. United States, 80 Fed. Cl. 694, 697 (2008) (quoting Matthews, 73 Fed. Cl. at 525). Similarly, a motion for reconsideration "should not be based on evidence that was readily available at the time" the matter was being decided. Seldovia Native Ass'n v. United States, 36 Fed. Cl. 593, 594 (1996). Additionally, where a party seeks reconsideration on the ground of manifest injustice, the party must be mindful that "[m]anifest" means "clearly apparent or obvious." Ammex, Inc. v. United States, 52 Fed. Cl. 555, 557 (2002). Accordingly, a party cannot prevail on the ground of manifest injustice unless the party demonstrates that the asserted injustice is "apparent to the point of being almost indisputable." Pac. Gas & Elec. Co. v. United States, 74 Fed. Cl. 779, 785 (2006).

II. Evaluating the Parties' Positions

In the motion for reconsideration, petitioner focuses on the determination by the undersigned that he "had failed to show a logical sequence of cause and effect and had not satisfied Althen prong 2." Reconsideration Motion at 2-3 (citing Merits Decision at 37). Petitioner pointed specifically to the following excerpt from the Merits Decision addressing the proposed theory of causation advanced by petitioner's medical witness, Dr. Sherri Tenpenny:

> Impressed by both the constellation of petitioner's symptoms and the timing of the onset of petitioner's symptoms, Dr. Tenpenny proposed a theory of causation based on her view that petitioner's symptoms were consistent with the symptoms that present in cases of either TM or CIDP. She asserted that petitioner had suffered a hepatitis B vaccine-induced demyelination. See Tr. at 40-46. She explained that the destruction of the myelin sheath surrounding petitioner's nerve fibers was the cause of his neurological problems.

Reconsideration Motion at 3 (quoting Merits Decision at 42-43).

Petitioner added that "the special master found that Dr. Tenpenny's proposed mechanism of injury, destruction of the myelin sheath, was not possible[,]" stating:

> And further compromising petitioner's claim is the inapplicability of the biological mechanism of demyelination proposed by petitioner's medical witness, Dr. Tenpenny, where petitioner's injury is most consistently viewed in the record as a small fiber neuropathy. As respondent's expert pointed out, and petitioner's witness did not rebut, small nerve fibers lack the myelin sheaths that would be harmed by the proposed demyelination process.
> . . .
>
> Although it is true that a number of physicians that examined petitioner after the onset of his symptoms noted a possible causal relationship between the vaccination and petitioner's neuropathic symptoms, the examining doctors suggested that either an inflammatory or autoimmune-type process may have been triggered by the received vaccination. It is not clear from the records, however, whether the biological mechanism contemplated by these various treaters involved demyelination, the particular process suggested by Dr. Tenpenny.

Reconsideration Motion at 3 (quoting Merits Decision at 36-37) (internal citations omitted).

Petitioner added further:

> Thus, the special master concluded, "[w]ithout myelin sheaths surrounding the affected small nerve fibers, petitioner's theory of demyelination cannot be sustained." In these circumstances, the special master said, she "cannot

credit the sequence of cause and effect proposed by Dr.Tenpenny as logical."

Reconsideration Motion at 4 (quoting Merits Decision at 32, 37) (internal citations omitted).

Petitioner asserts that by relying on the "misleading" testimony of respondent's expert, Dr. Thomas Leist, that small nerve fibers are not myelinated, the undersigned "chose to accept the opinions of the respondent's expert, Dr. Leist, to castigate Michael's treating physician, Dr. Tenpenny, and to ignore the opinions of several treating neurologists who unanimously associated Michael's injury with the vaccine." Reconsideration Motion at 5-6. Petitioner urges the undersigned to reverse her decision based on the now presented evidence that some small nerve fibers are myelinated, and petitioner has established a logical sequence of cause and efffect. See Reconsideration Motion at 7-9. The evidence that is referenced in the motion for reconsideration for evaluation with petitioner's requested relief is an excerpt from the Adams and Victor's text on Principles of Neurology, filed as Petitioner's Exhibit 66, that contains a table entitled "Classification and function of sensory peripheral nerve fiber types and symptoms associated with intrinsic dysfunction of each type." See Reconsideration Motion at 7 (citing P's Ex. 66 at 112).

Respondent opposes the motion on the ground that the evidence that he has submitted "was available to petitioner at the time of the hearing in March 2008[, and] . . . petitioner was on notice of the issue purportedly addressed by this evidence no later than when Dr. Leist testified about it at the hearing." R's Response at 3. Moreover, respondent points out, "[p]etitioner has had over a year and a half since the hearing [during the period of post-trial briefing and while the matter was pending for decision] to ask that the record be reopened so he could submit this evidence." Id. Respondent observes that "[p]etitioner has offered no good reason why this evidence was discovered so late, or why he waited until after the Ruling on Entitlement issued to file it." Id.

Noting that petitioner has supplied a statement in a medical textbook explained by counsel rather than a medical expert, respondent argues that the undersigned cannot credit counsel's interpretation as correct without the support of a reliable medical opinion. See id. at 5. Respondent also notes that the statement contained within the filed textbook excerpt that at least some small nerve fibers are not myelinated "is not inconsistent with Dr. Leist's testimony." Id.

Respondent argues that even if the undersigned determined that counsel's interpretation of the submitted evidence is correct, "that would not require a different decision with respect to entitlement, because there were other findings that supported the

decision." Id. Among the other findings that militated against finding in petitioner's favor were the lack of test results that supported Dr. Tenpenny's testimony and the weight of petitioner's treating physicians' opinions that were at variance with that of Dr. Tenpenny's opinions. Id. at 5-6.

Respondent draws the attention of the undersigned to the decision of the United States Court of Federal Claims in Sword v. Secretary of Health and Human Services, 44 Fed. Cl. 183 (1999), in which the court denied a request to supplement the record with additional evidence after a decision had issued on the ground that:

> [T]his Court will not aid a party who seeks to present additional evidence after his initial effort proves unpersuasive. . . .
> ***
> . . . What trial attorney worth his or her salt would not try a case a bit 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.

R's Response at 4 (quoting Sword, 44 Fed. Cl. at 190-91). Respondent contends that the reasoning of Sword "applies equally" in this circumstance. Id.

Petitioner replies arguing that "[t]he special master based her decision on a mistake of material fact." P's Reply at 2. Petitioner contends that "[c]ontrary to what the special master and the respondent argued at the September 25, 2009 status conference, and what respondent claims in its response, the unknown fact was that the special master's ruling would depend upon this fact." Id. at 3 (emphasis added).

The undersigned has reviewed and considered the parties' arguments, and the undersigned is not persuaded that petitioner has demonstrated a proper ground for reconsideration of the decision issued on August 31, 2009 denying petitioner's claim for Program compensation.

The evidence petitioner now seeks to introduce is, as indicated on the copyright page of the textbook included with the filed exhibit, an excerpt from a neurology textbook published in 2005. The information was available two years before Dr. Tenpenny filed her expert report in May 2007, and thus, was available at the time of the hearing when Dr. Leist testified, in the presence of Dr. Tenpenny, that small nerve fibers are unmyelinated.

That petitioner did not appreciate the significance of Dr. Leist's testimony during

the hearing cannot be attributed to any effort by Dr. Leist to mislead the undersigned, and the undersigned does not find that Dr. Leist committed such an unethical act. Rather, in the view of the undersigned, the failure of petitioner's medical witness to rebut Dr. Leist's statement during the hearing or even to appreciate any need to rebut the statement may be attributed directly to Dr. Tenpenny's acknowledged lack of expertise in neurological matters. She made clear during her testimony, as did petitioner's counsel, that she is not an expert in neurology and that she does not treat patients for either of the medical conditions, specifically transverse myelitis (TM) and chronic inflammatory demyelinating polyneuropathy (CIDP), that she identified as petitioner's vaccine-related injuries. Merits Decision at 16-17. Moreover, although the records of Dr. Tenpenny's treatment of petitioner were not available, references to her treatment of Mr. Shaw contained in other filed medical records do not reveal that she treated petitioner for either TM or CIDP. See Merits Decision at 11, 17-18. Instead, the records indicate that Dr. Tenpenny treated petitioner for mercury toxicity, a condition that she believed had been caused by his received vaccinations but that independent testing confirmed he did not have. See Merits Decision at 11.

Dr. Tenpenny explained that she formed the medical opinions she presented in this case, not based on her own treatment of petitioner for the neurological injuries that she addressed in her expert report and about which she testified at hearing, but based on a review of petitioner's medical records and her internet research on medical conditions that present with symptoms similar to petitioner's symptoms. See Merits Decision at 17-18. Without specialized expertise in neurology acquired by either training or experience, however, Dr. Tenpenny was unable to respond to Dr. Leist's statement either at hearing or thereafter. Although Dr. Tenpenny testified as a treating doctor for petitioner, she effectively offered an expert opinion without the requisite qualifications to do so. See Merits Decision at 37 n.40. Efforts by counsel to suggest now that petitioner was denied fundamental fairness by the undersigned's reference in her decision to the unrebutted statement by Dr. Leist at hearing distorts not only the manner in which the proceedings were conducted but also distorts the undersigned's reasoning in reaching her decision.

To be clear, it was petitioner's own election to present the testimony of Dr. Tenpenny in support of his vaccine claim. In spite of her own acknowledged inability to diagnose the neurological injuries she attributed to petitioner and her own acknowledged lack of experience ever treating a patient with the neurological injuries that she attributed to petitioner, Dr. Tenpenny opined that petitioner's injuries were most consistent with the injuries of TM and CIDP, and she offered a biological mechanism of harm for those injuries in particular. In addition to finding that Dr. Tenpenny lacked the appropriate expertise in the area in which she ultimately testified in this case, the undersigned found that the injuries of TM and CIDP that Dr. Tenpenny attributed to petitioner were not

attributed to petitioner by any of petitioner's other treating doctors in general or any of his treating neurologists in particular. See Merits Decision at 35-36. The proposed biological mechanisms that Dr. Tenpenny addressed in her testimony were for the injuries of TM and CIDP. She did not propose a biological mechanism for the injury of small fiber neuropathy, and it was not clear from the supplied medical records what biological mechanism of vaccine-related harm was contemplated by those of petitioner's treating doctors who diagnosed him with small fiber neuropathy and wondered whether petitioner's condition was associated with his hepatitis B vaccination. To now supply a textbook excerpt stating that some small nerve fibers are thinly myelinated and others are unmyelinated does not compel reconsideration of the issued decision to effect a different outcome, in the absence of any evidence presented by petitioner regarding how this evidence supports the theory of causation proposed by petitioner in this case for the specific injuries of TM and CIDP that Dr. Tenpenny's opinion contemplated. Moreover, the unrebutted testimony of Dr. Leist, now alleged by petitioner to constitute a "mistake of fact," was not the sole consideration that informed the decision that the undersigned made based on the "record as a whole."

Because the undersigned' s decision was premised on more than simply whether or not small nerve fiber are myelinated, petitioner has not demonstrated that he has suffered an injustice that is "apparent to the point of being almost indisputable." Pac. Gas & Elec. Co. v. United States, 74 Fed. Cl. 779, 785 (2006). Accordingly, for these reasons set forth in this order, petitioner's motion for reconsideration is **DENIED**.

IT IS SO ORDERED.

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