In the United States Court of Federal Claims

No. 02-93V
(Filed November 16, 2006)
UNPUBLISHED

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RYAN CHRISTOPHER SMITH, a minor, by his mother and natural guardian DEBORAH A. SMITH,	*	National Childhood Vaccine Act of 1986, 42 U.S.C. §§ 300aa–1-34 (2000); statute of limitations; review of special master's decision, § 300aa-12(e)(2); onset of diabetes.
Petitioner,	*	
v.	*	
	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *	*	

Clifford John Shoemaker, Vienna, VA, for petitioner.

Lynn E. Ricciardella, Washington, DC, with whom was Assistant Attorney General, Peter D. Keisler, for respondent.

MEMORANDUM OPINION & ORDER

MILLER, Judge.

This matter is before the court following briefing on Petitioner's Motion for Review pursuant to the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. §§ 330aa-10 (2000) (the "Vaccine Act"). Petitioner challenges as not in accordance with the law the chief special master's dismissal of her claim for lack of subject matter jurisdiction. Specifically, petitioner objects to the chief special master's determination that the claim was not filed within the applicable statute of limitations. Argument is deemed unnecessary.

FACTS

The facts pertinent to jurisdiction are not disputed. On January 31, 2002, Deborah A. Smith ("petitioner"), on behalf of her minor son, Ryan Christopher Smith ("Ryan"), filed a petition pursuant to the Vaccine Act, alleging that Ryan suffered from Type I Diabetes as a result of a series of vaccinations that he received between October 1986 and October 1998. Chief Special Master Gary J. Golkiewicz issued a decision dismissing petitioner's claim for lack of subject matter jurisdiction on July 21, 2006, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Smith v. Sec'y of HHS, No. 02-93V (Fed. Cl. Spec. Mstr. July 5, 2006) (unpubl.). 1/ Petitioner's motion requests review of the chief special master's decision, pursuant to 42 U.S.C. § 300aa-12(e)(1) and RCFC App. B, Rule 23. 2/

The record on review establishes that Ryan was born on August 23, 1986, and received DTP, OPV/IPV, MMR, Hib, DTP, MMR, DT, and Hep B vaccinations between 1986 and 1998. On February 14, 1999, petitioner, a nurse, obtained a glucometer from work and checked Ryan's blood sugar after observing symptoms that included acid throat and an upset stomach. The glucometer readings showed Ryan's blood sugar level as critical. Petitioner took Ryan to the emergency room; the records of that admission indicate he had a three- or four-week history of symptoms. Pet. filed Jan. 31, 2002, Ex. 8, at 247-49. Ryan was discharged from the hospital on February 18, 2002, with a diagnosis of "[n]ew onset juvenile diabetes mellitus." Id. at 249. Between the beginning of the academic year in 1998 through February 1999, Ryan dropped in weight from 140 pounds to 110-15 pounds. Id.

The chief special master concluded that petitioner failed to meet her burden of proving that the petition was filed within the statutorily prescribed time limit. 42 U.S.C. § 300 aa-16(a)(2) of the Vaccine Act provides:

1/ 42 U.S.C. § 300aa-12(d)(3)(A) provides: "A special master to whom a petition has been assigned shall issue a decision on such petition with respect to whether compensation is to be provided under the Program and the amount of such compensation."

2/ 42 U.S.C. § 300aa-12(e)(1) provides: "Upon issuance of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Court of Federal Claims a motion to have the court review the decision." RCFC App. B, Rule 23 similarly provides: "To obtain review of a special master's decision, within 30 days after the date on which the decision is filed, a party must file with the clerk a motion for review of the decision." Petitioner mistakenly cited to RCFC App. J, Rule 24 in her motion for review. Pet.'s Mot. for Review filed Aug. 21, 2006, at 2. The court interprets petitioner's request to be made pursuant to RCFC App. B.

> In the case of a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury

Id. Based upon the nature of Ryan's emergency room visit and surrounding circumstances, the chief special master found that the manifestation of onset of Ryan's condition occurred at least three to four weeks prior to February 14, 1999. Because the petition was filed on January 31, 2002, the chief special master held that the critical event fell outside of the thirty-six month statute of limitations and dismissed petitioner's claim for lack of jurisdiction.

Petitioner makes three arguments. First, the chief special master failed to apply the law as set forth in Setnes v. Sec'y of HHS, 57 Fed. Cl. 175 (2003). Second, he misinterpreted how the law of Setnes applies to the facts of the case. Finally, the chief special master's finding that the "manifestation of onset" occurred at least three to four weeks prior to February 14, 1999, was contrary to the weight of evidence presented.

DISCUSSION

1. Standard of review

The Vaccine Act specifies three alternative courses of action available to the Court of Federal Claims in reviewing a special master's decision. The court can

> (A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision,
> (B) set aside any findings of fact or conclusions of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or
> (C) remand the petition to the special master for further action in accordance with the court's direction.

42 U.S.C. § 300aa-12(e)(2). 3/

3/ The language of 42 U.S.C. § 300aa-12(e)(2) is identical in substance to RCFC App. B, Rule 27.

The United States Court of Appeals for the Federal Circuit has established that the Court of Federal Claims, while acting within the bounds of the congressional mandate in 42 U.S.C. § 300aa-12(e)(2), should apply different standards of review:

> These standards vary in application as well as degree of deference. Each standard applies to a different aspect of the judgment. Fact findings are reviewed by [the Federal Circuit], as by the Claims Court judge, under the arbitrary and capricious standard; legal questions under the "not in accordance with the law" standard; and discretionary rulings under the abuse of discretion standard.

Munn v. Sec'y of HHS, 970 F.2d 863, 870 n. 10 (Fed. Cir. 1992); see also Turner v. Sec'y of HHS, 268 F.3d 1334, 1337 (Fed. Cir. 2001) (reversing if fact findings are arbitrary and capricious, legal conclusions are not in accordance with law, or discretionary rulings are abuse of discretion) (citing Munn, 970 F.2d at 870 n. 10); Saunders v. Sec'y of HHS, 25 F.3d 1031, 1033 (Fed. Cir. 1994).

The arbitrary and capricious standard of review is a narrow one. See Lampe v. Sec'y of HHS, 219 F.3d 1357, 1360 (Fed. Cir. 2000) (citing Munn for proposition that arbitrary and capricious is most deferential standard); Burns v. Sec'y of HHS, 3 F.3d 415, 416 (Fed. Cir. 1993) (defining arbitrary and capricious standard of review as "'highly deferential'" (quoting Hines v. Sec'y of HHS, 940 F.2d 1518, 1528 (Fed. Cir. 1991)); Cucuras v. Sec'y of HHS, 993 F.2d 1525, 1527 (Fed. Cir. 1993) ("The Supreme Court discussed the arbitrary and capricious standard in terms of reliance on factors Congress placed beyond consideration, of failure to consider an important part of the Vaccine Act, of articulation of a decision running counter to the evidence, or of implausibility beyond a difference of expert opinion."). The Federal Circuit elaborated upon the arbitrary and capricious standard in Hines:

> [I]t is clear from the cases cited above, however, that regardless of the precise formulation used, "arbitrary and capricious" is a highly deferential standard of review. If the special master has considered the relevant evidence of record, drawn plausible inferences and articulated a rational basis for the decision, reversible error will be extremely difficult to demonstrate.

940 F.2d at 1528.

When applying the arbitrary and capricious standard, a reviewing court may not substitute its own judgment for that of the original trier of fact. See Citizens To Pres. Overton Park v. Sec'y of HHS, 401 U.S. 402, 416 (1971); see also Hyundai Elecs. Indus. Co. v. United States Int'l Trade Comm'n, 899 F.2d 1204, 1209 (Fed. Cir. 1990). The Federal

Circuit has emphasized the restricted fact finding allowable on review of a Vaccine Act decision:

> Only in extraordinary cases will the [Court of Federal Claims] undertake to do any independent fact finding. In arriving at its judgment, the only time the [Court of Federal Claims] can make its own findings of fact is when that court, as a matter of law, has concluded that the special master was 'arbitrary and capricious' . . . ; and that it is necessary for the [Court of Federal Claims] to substitute its own findings of fact. Absent that, there are no separate findings of fact by the [Court of Federal Claims].

Munn, 970 F.2d at 870 (internal citations omitted). The legislative history of the Vaccine Act supports the limited application of findings of fact by the Court of Federal Claims, as it cautions that "the conferees have provided for a limited standard for appeal from the [special] master's decision and do not intend that this procedure be used frequently, but rather in those cases in which a truly arbitrary decision has been made." H.R.Rep. No. 101-386, at 517, reprinted in 1989 U.S.C.C.A.N. 3018, 3120.

2. Review of the chief special master's decision

Petitioner challenges the factual finding that the first symptom or manifestation of onset of Ryan's diabetes occurred at least three to four weeks prior to February 14, 1999.

While petitioner contends that the finding of the chief special master was contrary to the law as set forth in Setnes, 57 Fed. Cl. 175, special masters are not bound by precedent of the Court of Federal Claims except in the same case on remand. See Werderitsh v. Sec'y of HHS, 2005 WL 3320041, *8 (Fed. Cl.); Hanlon v. Sec'y of HHS, 40 Fed. Cl. 625, 630 (1998). Petitioner in Setnes brought a claim pursuant to the Vaccine Act, alleging that her son developed autism as a result of the vaccinations that he received on September 11, 1988. The special master dismissed petitioner's claim for lack of subject matter jurisdiction, finding that the symptoms of autism began more than thirty-six months prior to the filing of the claim, thus not within the statute of limitations. Petitioner requested review, arguing that

> because of the unique nature of autism spectrum disorder, there can be no "manifestation of onset" until such time as the medical and psychological professionals verify through reliable medical and psychological means that a constellation of behaviors presented in a specific child meet the criteria for autism spectrum disorder.

Id. at 179. The Court of Federal Claims held that "where the symptoms of autism develop 'insidiously over time' and the child's behavior cannot readily be connected to an injury or

disorder, the court may rely on the child's medical or psychological evaluations for guidance in ascertaining when the 'manifestation of onset' occurred." Id. at 181. Noting that the treating physician did not associate the behavior relied upon by the special master as evidence of onset of autism, the court set aside the findings and conclusions and remanded the claim to the special master for further proceedings. Id.

As described in more detail below, the chief special master devoted attention to petitioner's arguments and distinguished the facts of petitioner's case from the facts in Setnes. Moreover, his decision accurately observed that the legal correctness of the Setnes decision remains in question. See Smith, No. 02-93V, slip op. at 7; see, e.g., Markovich v. Sec'y of HHS, 69 Fed. Cl. 327, 335 (2005), argument held, No. 06-5039 (Fed. Cir. Nov. 8, 2006). Because the chief special master gave particular attention to distinguishing the facts of Ryan's case from those in Setnes, and because Setnes is not binding precedent, petitioner cannot argue that the decision was made contrary to the law.

Petitioner next asserts that the chief special master misinterpreted the law of Setnes as it applies to the facts of this case. Even if this court were to disregard the non-binding nature of Setnes, the chief special master distinguished petitioner's case from Setnes, primarily relying on the oral testimony of Dr. Crawford, Ryan's treating physician and the attending physician during Ryan's emergency room visit, and medical records relating to Ryan's emergency room admission on February 14, 1999. The decision explained that Ryan suffered from several symptoms, such as excessive drinking of liquids and urination, which occurred at least three to four weeks prior to February 14, 1999. Contrary to the facts in Setnes, where the affidavit of a medical expert "attested to the difficulty of ascertaining the subtle symptoms of autism and that 'the characteristics [of autism] . . . are usually not apparent until after the child is two years of age,'" 57 Fed. Cl. at 180, diabetes was not demonstrated by petitioner to have similar difficulties in diagnosis. In particular, Setnes presented a situation which involved observation of a child two years of age, while Ryan was over the age of twelve. In addition, in Setnes the special master relied upon symptoms of "'humming,' 'babbling,' 'kicking and screaming' or 'eating [videotape] cardboard boxes,'" id. at 181, as the original "manifestation of onset." In the instant case, however, Ryan suffered from excessive drinking and urination, acid stomach, and a loss of more than 20% of his body weight – symptoms that are more readily observed as unusual and indicative of diabetes, as compared to those noted in Setnes.

Finally, petitioner contests that the evidence was sufficient to justify a finding that the "manifestation of onset" did not occur until shortly before February 14, 1999. Petitioner argues that the date of "manifestation of onset" of Ryan's illness was on or around February 14, 1999, when she took a glucometer reading of Ryan and brought him to the emergency room, contrary to the chief special master's finding. Petitioner highlights five areas in which the chief special master misinterpreted the evidence.

In evaluating these allegations, it is important to acknowledge the perspective of the court in reviewing Vaccine Act claims. The Federal Circuit, rejecting the applicability of the doctrine of equitable tolling to Vaccine Act claims, held in Brice v. Sec'y of HHS, 240 F.3d 1367 (Fed. Cir. 2001), that "the statute of limitations here begins to run upon the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not have known at that time that the vaccine had caused an injury." Id. at 1373.

Petitioner charges that the chief special master misinterpreted the affidavit of Deborah A. Smith and the letter and testimony of Dr. Crawford in concluding that these symptoms were sufficient to demonstrate "manifestation of onset." In petitioner's view Ryan's symptoms of increased thirst, urination, weight loss, mild upset stomach, and "acid throat" easily were confused with typical child behavior and could not have been evidence of the "manifestation of onset" requirement. Dr. Crawford's dictated report following examination of Ryan on February 14, 1999, reflects that Ryan presented "with a three to four week history of illness," Pet. filed Jan. 31, 2002, PX 8, at 248; moreover, Dr. Crawford's letter dated September 28, 2005, stated that "[f]rom the hospital admission, it would appear that something had been going on for 3-4 weeks involving increasing thirst and increasing urination." Id. at PX 9. Finally, Dr. Crawford testified that the symptoms probably began three to four weeks prior to February 14, 1999. The chief special master's reliance on the hindsight determinations of Dr. Crawford comports with the Federal Circuit's instruction in Brice. Petitioner's arguments therefore are insufficient to discharge her burden of proof in showing an arbitrary and capricious decision.

Petitioner next asserts that Ryan's weight loss from 140 to 110 pounds between September 1998 and February 1999 was evidence of nothing more than ordinary childhood behavior. Petitioner highlights a Centers for Disease Control weight and height chart that demonstrates that Ryan's weight loss placed him above the 75% range, which she attributes to dieting, not diabetes. Moreover, she posits that "for an overweight child to lose weight is not only not abnormal, but is to be encouraged. Only in hindsight did it become apparent that the weight loss was probably not due to normal growth or dieting to become more socially accepted by his classmates." Pet.'s Mot. for Review at 5. While this may be the case, the chief special master's decision did not place any significant reliance on Ryan's weight loss and pointed out that petitioner did not present any medical support or citation to law that confirmed that weight loss was a typical childhood behavior. Brice instructs that a failure to have reasons to know the "manifestation of onset" at the time of the manifestation is not evidence that the manifestation did not occur. Rather, petitioner's failure to realize the significance of the weight loss until a later date has no direct effect upon the chief special master's determination of the "manifestation of onset." Brice, 240 F.3d at 1372.

Third, petitioner challenges the chief special master's reliance on Ryan's reported excessive urination and thirst in the three to four weeks prior to February 14, 1999, which

she considers to be evidence of ordinary childhood behavior. Petitioner, however, failed to present medical or legal support for this argument. The chief special master, on the other hand, distinguished the autism spectrum disorder present in Setnes from diabetes, which has a "distinct set of symptoms that are indicative of an adverse medical event." Smith, No. 02-93V, slip op. at 10.

Fourth, petitioner cites the chief special master's failure to take the testimony of Ryan or herself and the reliance on Dr. Crawford's hindsight determinations as being "misdirected at best, and designed to undermine Petitioner and chip away at Setnes, a decision that the Special Master clearly does not agree with." Pet.'s Mot. for Review at 5. While taking the testimony of Ryan or petitioner may have been of some value, the findings of the chief special master provide ample support for his conclusions. He cannot be faulted for not developing the record further.

Finally, petitioner argues that, because she herself is a nurse, her failure to diagnose Ryan's condition prior to February 14,1999, was sufficient to demonstrate that the "manifestation of onset" occurred on and not prior to February 14, 1999. Brice instructs that the "first symptom or manifestation of the onset of injury" is evaluated from an objective, rather than subjective, perspective. The fact that petitioner, a nurse, did not diagnose Ryan's condition prior to February 14, 1999, is not evidence that renders the chief special master's decision arbitrary and capricious.

Because petitioner cannot demonstrate that the decision or review as arbitrary and capricious, the court upholds his findings. See Munn, 970 F.2d at 870.

CONCLUSION

Accordingly, based upon the foregoing, the decision of the chief special master is sustained.

The Clerk of the Court shall enter judgment for respondent in accordance with the decision of the chief special master.

IT IS SO ORDERED.

No costs on review.

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Christine Odell Cook Miller
Judge