In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 98-916V

(Filed: March 16, 2009)

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

ORDER DENYING MOTION FOR RECONSIDERATION

On March 13, 2009, petitioners filed a motion for reconsideration of the Decision issued in this case on February 12, 2009. Vaccine Rule 10(c) permits either party to file such a motion "[w]ithin 21 days after the issuance of the special master's decision." Petitioners' motion for reconsideration in this case, therefore, is untimely, as it was filed outside of the 21 days prescribed in Vaccine Rule 10(c). Accordingly, petitioners' motion for reconsideration is DENIED.

It is true that before Vaccine Rule 10(c) took effect on January 2, 2001, when there existed no court rule at all regarding reconsideration of a special master's decision, on a few occasions special masters, in unpublished orders, determined that a special master had discretion to withdraw a decision if neither a judgment nor a motion for review pursuant to 42 U.S.C. § 300aa-12(e)(1) had yet been filed. However, Vaccine Rule 10(c) was subsequently enacted, and that rule *specifies* that reconsideration may be granted if a motion is filed *within 21 days* of the filing of the special master's

decision. The motion in this case was *not* filed within the prescribed 21-day period.[*] Therefore, it is appropriate that I deny the petitioners' motion for reconsideration.

Moreover, I also conclude that even if the petitioners' motion had been timely filed, there would be no good reason for me to grant reconsideration. Vaccine Rule 10(c) states that the special master may withdraw the decision if that would be appropriate "in the interest of justice." Because petitioners' motion was filed in such an untimely fashion, affording me almost no time to consider the roughly 140 pages of attached materials, I base the following comments on a very limited review of the filed materials; however, based upon my quick analysis of the proffered evidence, I do *not* see that it would be "in the interest of justice" for me to withdraw my Decision.

First, petitioners base their motion on several items of "new evidence" which, they assert, were "not available at the time of the hearing in June of 2007." (Motion at 1.) However, it appears that all but one (the Campbell article, which I find to be of very dubious relevance) of those evidentiary items *were* available prior to the *filing of my Decision* in this case on February 12, 2009. Petitioners do not explain why, if those items are important, they did not attempt to bring them to my attention *before* I filed my Decision.

Second, it is significant that *none* of those evidentiary items constitute evidence that *vaccines* can cause autism or gastrointestinal dysfunction. While the proffered evidentiary items do seem to have at least some relevance to *secondary* issues discussed in my Decision, none of them are relevant to the *fatal deficiency* in the petitioners' causation theories: the lack of any persuasive evidence that the *measles vaccine* can contribute to the causation of autism or gastrointestinal dysfunction.

Third, petitioners' motion largely relies on *gross mischaracterizations* of my Decision, and has other obvious flaws. I will cite a few examples. First, petitioners point to a number of excerpts from the Zimmerman textbook that discuss the possible role of environmental factors in the causation of autism, and suggest that this evidence contradicts conclusions stated in my Decision. (Motion at 4-15.) This mischaracterizes my Decision. I stated plainly that it is well-established that *prenatal* environmental factors *can* cause autism. (Decision at 94.) I also noted that a few items of medical literature suggest the possibility of a role for certain (non-vaccine) *postnatal* environmental factors in contributing to the causation of autism. (Decision at 97-98.) Thus, the fact that petitioners have identified a few additional literature sources, again suggesting a possible causal role for *non-vaccine* postnatal factors, does *not* indicate error in the conclusions stated in my Decision, nor does it indicate that there is good reason to reconsider my Decision in this case.

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[*] Petitioners offer no explanation as to why they could not have filed this motion in a timely fashion, nor do they even acknowledge that the motion was not timely filed. Indeed, petitioners filed this motion at 4:52 p.m. on a Friday, when the last day for filing a motion for review of the Decision pursuant to Vaccine Rule 23 was the following Monday. Such a time of filing may have been designed to ensure that I would have to decide whether to withdraw my Decision without the opportunity for respondent to file a measured response to the motion. If that was the intent of the timing of the filing, then I am disappointed that petitioners' counsel would engage in such tactics.

Similarly, petitioners state that I "rejected [petitioners'] theory that neuroinflammation was a factor in [Michelle's] autism." (Motion at 7.) Again, petitioners completely misrepresent my analysis. I did *not* reject the theory that neuroinflammation may play some role in autism. To the contrary, I acknowledged the existence of research articles indicating that inflammation may be present in the brains of autistic persons, and may possibly play a causal role. (Decision at 91, fn. 109.) I wrote, rather, that "although *inflammation* may play a role in causing autism, petitioners have wholly failed to demonstrate that it is probable that the *MMR vaccine* can play a role in causing chronic brain inflammation or autism." (*Id*., emphasis in original.)

Next, petitioners have filed an article by Hornig and colleagues that was published in September of 2008. They argue that this article refutes my conclusion that the Unigenetics laboratory results were unreliable. (Motion at 15-16.) The Hornig article, however, actually *strongly confirms my conclusion* that the vaccine-strain measles virus is very unlikely to have any causal connection to autism. The very title of the article is "*Lack of Association* between Measles Virus Vaccine and Autism with Enteropathy: A Case-Control Study." (Emphasis added.) The abstract (summary) of the article states that "[t]his study provides *strong evidence against* association of autism with persistent MV [measles virus] RNA in the GI tract or MMR exposure." (Emphasis added.)

As a final example, petitioners have now filed Ex. 137, the medical records of Dr. Ziring, a gastroenterologist who has treated Michelle in recent years, and they now rely (Motion at 18-19) on a record made by Dr. Ziring on November 3, 2006. But this record is, obviously, well over two years old, and was created months before the evidentiary hearing in this case. Petitioners do not explain why they did not present these medical records, or indicate reliance on Dr. Ziring's 2006 note, until now. Inexplicably, they assert that in my Decision I made a "finding" that "Dr. Ziring simply followed Dr. Krigsman's diagnosis." (Motion at 19.) However, I made no such finding. I made no mention at all of Dr. Ziring in my Decision. (I did discuss two other gastroenterologists whose records were cited by petitioners, but not Dr. Ziring. Decision at 159-61.) Moreover, while Dr. Ziring may have concluded that Michelle had "inflammatory bowel disease" ("IBD"), the cited record does *not* indicate any finding by Dr. Ziring that such condition was *caused by a measles vaccination* or any other vaccination.

Other flaws in petitioners' motion, too numerous to describe here, also exist. Thus, I do not find that the petitioners have demonstrated a good reason for me to grant reconsideration.

Accordingly, for the reasons set forth above, I hereby DENY the petitioners' motion for reconsideration.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master