

ORIGINAL

FILED
OCT 15 2003
U.S. COURT OF
FEDERAL CLAIMS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF THE SPECIAL MASTERS

IN RE: CLAIMS FOR VACCINE
INJURIES RESULTING IN AUTISM
SPECTRUM DISORDER, OR A SIMILAR
NEURODEVELOPMENTAL DISORDER,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

AUTISM MASTER FILE
Special Master Hastings

**PETITIONERS' RESPONSE TO THE SPECIAL MASTER'S
QUESTION AS TO WHETHER JUDGMENT SHOULD ISSUE
FOLLOWING THE DISMISSAL OF A PETITION FOR UNTIMELY FILING**

The Petitioners' Steering Committee (the "PSC"), at the request of this Honorable Court, files its response to the Special Master's additional question regarding the issue of judgments and would show the Court the following:

I.

Introduction

Special Master Hastings previously requested Petitioners' views as to whether a judgment should enter under seven scenarios: (1) where the petitioner files a notice of dismissal prior to the issuance of a Rule 4 report; (2) where a joint stipulation of dismissal is filed; (3) where petitioner files a motion to dismiss without prejudice after

the issuance of a Rule 4 report, and the motion is granted; (4) where the special master dismisses the petition with prejudice under scenario (3); (5) where the petition is dismissed without prejudice for failure to prosecute; (6) where the petition is dismissed with prejudice for failure to prosecute; (7) and, where a notice to withdraw a petition is filed following the issuance of a formal notice pursuant to 42 U.S.C. §300aa-12(g). Petitioners responded that the Vaccine Act is silent as to whether a judgment should enter under scenarios one through six, but that entry of judgment was neither determinative of the jurisdiction of a state or federal court over a claim timely withdrawn from the NVIC program pursuant to 42 U.S.C. §300aa-21(b), nor of whether fees and costs are recoverable under any of the seven scenarios.

By order of September 9, 2003, Special Master Hastings requested Petitioners' views on whether judgment should enter under an additional scenario: where a petition is dismissed because it was not timely filed. Petitioners maintain that the Vaccine Act and Rules expressly authorize the clerk to enter judgment following a special master's decision to dismiss a petition on statute of limitations grounds, all as more fully set forth below.

II.

Discussion

The Vaccine Act requires the special master to whom a petition has been assigned to issue a final decision as to whether compensation is to be provided and, if so, the amount of that compensation. 42 U.S.C. §300aa-12(d)(3)(A). The Act further provides that such a decision shall include findings of fact and conclusions of law. *Id.* at (A)(1). A decision dismissing a petition on grounds that it was not timely filed

constitutes just that - a final decision that, based upon the facts before the special master, the petitioner is not entitled to compensation as a matter of law. Such a decision necessarily entails making findings of fact as to the timing of the filing of a petition in relationship to those factual events that initiate the running of the time within which a petition may be filed, as set forth in 42 U.S.C. §300aa-16, and then concluding that it was not brought in accordance with the law and is, therefore, without merit.

The Act grants an individual whose petition has been dismissed 30 days in which to file a motion to have the Court of Federal Claims review the special master's decision. 42 U.S.C. §300-12(e)(1). In the absence of such motion, or if the Court of Federal Claims sustains the special master's dismissal, the Act very clearly provides that "the clerk of the United States Court of Federal Claims shall immediately enter judgment in accordance with the special master's decision." *Id.* at (e)(3); *See also*: R.C.F.C. App. B, R. 11(a).

In the event a motion to review a special master's decision to dismiss is made and results in the remand of a petition for further action in accordance with the Court of Federal Claim's direction, pursuant to 42 U.S.C. §300aa-12(e)(2)(C), the special master is then required to file a decision resolving the case, following the completion of the remand assignment. R.C.F.C. App. B, R.28A. At that instance, "judgment automatically will be entered in conformance with the master's decision unless a new motion for review is filed pursuant to Vaccine Rule 23." *Id.*¹

Following the entry of judgment by the clerk, or if an appeal is taken to the U.S.

¹ If a motion to review a special master's dismissal of a petition results in the Court of Federal Claims setting aside the dismissal, pursuant to 42 U.S.C. §300aa-12(e)(2)(B), judgment would, of course, not enter at that point, as the prosecution of the case would continue.

Court of Appeals for the Federal Circuit pursuant to § 300(12)(f), subsequent to the appellate court's mandate, the petitioner who filed the petition that was ultimately dismissed and resulted in no award of compensation would then be entitled to elect in writing either to accept the judgment, or to reject the judgment and thereafter file a civil suit. See: §300aa-21 (a)(2). Whether or not the civil court in which a subsequent lawsuit might be filed had subject matter jurisdiction to entertain the case at that point would then be a matter for that particular court to decide. In any event, the Vaccine Act and Rules mandate entry of judgment by the clerk once a final decision is issued by the special master dismissing the case on the basis that it was not timely filed and the right of review is not pursued, or when, following review, the Federal Court of Claims issues its decision. 42 U.S.C. §300-12(e)(1); R.C.F.C. App. B, R. 11a & R. 30.


Conclusion

In summary, a decision to dismiss a claim on the basis that it was filed outside the statute of limitations constitutes a final order disposing of the case and subjects it to appellate review. In the absence of a motion to have the Federal Court of Claims review a special master's final decision on the petition, or where the Federal Court of Claims is requested to review such a decision and thereafter issues a decision, the Vaccine Act and Rules authorize the clerk to enter judgment in accordance with that decision.

Additionally, Petitioners wish to reiterate their position that while the Act is silent as to whether judgment should enter under any of the first six scenarios and that it does not require a judgment to enter under the seventh scenario, entry of judgment is not a prerequisite to the recovery of attorneys' fees and costs. Rather, the Act provides for the recovery of attorneys' fees and costs under **any** of the eight scenarios posed by

Special Master Hastings upon a finding that the petition, even though not fully adjudicated, was brought in good faith and with a reasonable basis, pursuant to 42 U.S.C. §300aa-15(e)(1).

Respectfully submitted,


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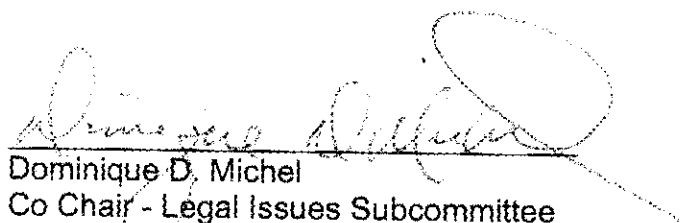
CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing pleading to be delivered by mail on this 15th day of October, 2003 to:

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