In the United States Court of Federal Claims

Case No. 01-647V
Filed: November 21, 2008

REGINA and SHANNON LEMIRE, Parents of DESTINY LEMIRE, *Petitioners,*	*
v.	*
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Respondent.*	*

D. Michael Noonan, Counsel of Record, argued by ***Christine M. Craig***, Shaheen & Gordan, P.A., Dover, New Hampshire, for Petitioners.

Catharine E. Reeves, Senior Trial Counsel, Torts Branch, Civil Division, U.S. Department of Justice, Washington, DC, for Respondent.

Sharon J. Kim, Law Clerk.

OPINION AND ORDER

Baskir, Judge.

Regina and Shannon Lemire, parents of Destiny Lemire ("Petitioners") seek review of the special master's decision to dismiss as untimely their petition for compensation under the National Childhood Vaccine Compensation Program, 42 U.S.C. §§ 300aa-10 to -34 (2000) ("the Vaccine Act" or "Act"). The special master styles his dismissal as both a reconsideration of the previous reinstatement order and a ruling on the Government's current Motion to Dismiss. Under either theory, we find the dismissal correct. **Accordingly, the Court AFFIRMS the decision of the special master and DENIES Petitioners' Motion for Review.**

I. BACKGROUND

The issue before the Court is one of timeliness. The Lemires filed their petition for compensation under the Vaccine Act on November 16, 2001. The Court must determine whether this filing date is within 36 months of the "occurrence of the first symptom or manifestation of onset" of the alleged vaccine-related injury. 42 U.S.C. § 300aa-16(a)(2). We start with the relevant medical history.

A. Medical History

Petitioners' daughter, Destiny Lemire, was born on January 3, 1997. Like most newborns, Destiny began receiving various vaccinations by the age of two months. Her development up to her first year was unremarkable. Shortly after her first birthday, however, the Lemires noticed Destiny was regressing developmentally. Administrative Record (AR), p. 204. After age one, Destiny stopped developing new language skills and ceased using the few words that she had learned. *Id.* at 202. She continued to regress in language development, eye contact, and overall attention span. *Id.* at 202-04; *see also* Petitioner's Motion for Review (July 2, 2008) ("Pet. Motion"), p. 2.

At the Lemires' request, Child Development Services (CDS) conducted an initial screening on August 18, 1998. AR, p. 201. This revealed concerns as to "many aspects" of Destiny's development, including her language, adaptive, and fine motor skills. *Id.* at 202, 204. CDS pen-and-inked the following notations: "no language, same babbling w/inflection/ same (m) sound; no true words/ no sounds / min. imitation/ poor eye contact; comprehension questionable . . .". *Id.* at 201. Further evaluation was recommended in light of these findings. *Id.*

On September 2, 1998, CDS conducted a joint speech/language and occupational therapy evaluation. *See* AR, p. 202-04. The reports confirmed that Destiny was experiencing delays in "all areas of communication development," including "regression of language development, resistance in self care skills, and avoidance of social skills, eye contact and interaction." *Id*. at 203. The most significant delay occurred in Destiny's language comprehension and expression, where she had acquired only 50% of the language skills for her age bracket. *Id.* No improvement in those areas had occurred in the last six months. *Id.* CDS recommended further testing to identify the extent of Destiny's delay. *Id.* at 203, 205.

A neurology examination conducted on November 17, 1998, determined that Destiny "appear[ed] to have a developmental aphasia with autistic spectrum disorder." *Id*. at 352. Epileptic aphasia was subsequently ruled out, and Destiny was officially diagnosed with autism on April 12, 1999. *Id.* at 353, 354.

B. Procedural History

On November 16, 2001, 30 months after Destiny's autism diagnosis, the Lemires filed a petition for compensation under the Vaccine Act. Under the Act, petitioners have 36 months to file a petition after the "occurrence of the first symptom or manifestation of onset" of vaccine-related injury. 42 U.S.C. § 300aa-16(a)(2). The Lemires believe their petition to be timely filed because Destiny had not "manifested" a symptom of vaccine-related illness until the diagnosis of autism in April 1999. Pet. Motion, p. 15.

Initially, Special Master Laura Millman disagreed. *See* Special Master Millman's Decision (September 25, 2002) ("2002 Dismissal"). She found the limitations period triggered as early as April 1998 and no later than July 1998, when the Lemires first

became aware of Destiny's regression. 2002 Dismissal, p. 4, 7. Accordingly, Petitioners had "violated" the filing requirements under the Act. *Id.* at 4. The special master dismissed the petition for lack of subject matter jurisdiction. *Id.* at 10. The Lemires did not appeal this dismissal, and judgment was entered on October 30, 2002.

Eight months later, on June 13, 2003, Senior Judge Futey of this Court reversed the dismissal of another autism vaccine case that had been before Special Master Millman. *See Setnes v. Sec'y HHS*, 57 Fed. Cl. 175 (2003). We discuss in detail the *Setnes* case below. In brief, Judge Futey distinguished autism from other medical conditions, particularly as to the difficulty in autism cases of identifying a first symptom or manifestation of onset of injury. *Id.* at 180-81. He therefore held that a recognizable sign of a vaccine injury was required before the triggering of the limitations period. *Id.* Accordingly, he ruled that the limitations period began when the terms "probable PDD/autism" were first used, some 13 months after the symptoms first appeared in the Setnes' child. *Id.*

Petitioners apparently believed the *Setnes* decision effectively reversed the terms of their own dismissal. They petitioned the Court to have the earlier decision vacated pursuant to RCFC Rule 60(b). *See* Petition to Seek Relief Pursuant to Rule 60(b) (July 31, 2003). This time Special Master Millman agreed. Conceding that *Setnes* was non-binding, she nonetheless asserted it was "unfair to hold petitioners to knowing that the disease had an onset until a doctor diagnosed it." Order of Reinstatement (September 12, 2003) ("2003 Reinstatement"), p. 2. Having contrary rulings as to the statute of limitations in the Lemire and Setnes' petitions would be "manifestly unfair and inequitable." *Id.* Hence, because "equity [so] demand[ed]," Special Master Millman reinstated the petition. *Id.*

On October 10, 2003, the Government filed in this Court a motion to review the reinstatement order. We determined that the special master's action granting RCFC 60(b) relief was not a final decision and therefore not ripe for review. *See Lemire v. Sec'y HHS*, 60 Fed. Cl. 75, 80 (2004). Accordingly, we declined review and remanded the petition back to the Office of Special Masters (OSM). *Id.*

While the matter was pending before the OSM, the Federal Circuit resolved a similar statute of limitations issue contrary to the *Setnes* decision. *See Markovich v. Sec'y HHS*, 477 F.3d 1353 (Fed. Cir. 2007) (involving allegedly vaccine-induced seizures). In that opinion, the Federal Circuit criticized the rationale in *Setnes* and rejected its subjective standard as to the trigger date of the limitations period. *Id.* at 1356-57. Instead, it held that the "first symptom or manifestation of onset" for statute of limitations purposes was the "first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." *Id.* at 1360.

In light of *Markovich*, the Government moved for dismissal of the instant petition as untimely filed. At this point, the matter had been transferred to Special Master Richard Abell. On June 3, 2008, Special Master Abell granted the Government's motion

and struck the reinstatement order. *See Lemire v. Sec'y HHS*, 2008 WL 2490654, at *1 (Cl. Ct. June 3, 2008). Petitioners now move this Court to review Special Master Abell's decision pursuant 42 U.S.C. 300aa-12(e). The special master's dismissal constitutes a final decision within the meaning of the Vaccine Act. We now have jurisdiction to review this case on the merits.

II. DISCUSSION

Special Master Abell's order conflates the grounds for dismissal. He grants the Government's Motion to Dismiss on jurisdictional grounds and simultaneously invokes his discretion to reconsider his predecessor's reinstatement order. The Government asks that the Court find the special master was correct to dismiss the petition under either theory. *See* Respondent's Memorandum in Response to Petitioners' Motion for Review (Aug. 1, 2008) ("Govt's Resp."). We agree, for the reasons set forth below.

Standard of Review

In reviewing a special master's decision, the Court may "set aside any findings of fact or conclusions of law found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 300aa-12(e)(2)(B). The Court reviews findings of fact under the "arbitrary and capricious" standard; legal questions under the "not in accordance with law" standard; and discretionary rulings for abuse of discretion. *Munn v. Sec'y HHS*, 970 F.2d 863, 870, n. 10 (Fed. Cir. 1992).

With respect to our review of the special master's dual theories, we employ two standards. Issues of statutory interpretation and jurisdiction under the Vaccine Act are questions of law, which we review *de novo*. *Martin v. Sec'y HHS*, 62 F.3d 1403, 1405 (Fed. Cir. 1995). A special master's decision to reconsider RCFC 60(b) relief is a discretionary ruling, which we review for "abuse of discretion." *Patton v. Sec'y HHS*, 25 F.3d 1021, 1029 (Fed. Cir. 1994).

The Relevant Statute of Limitations

The Vaccine Act was established to increase the safety and availability of vaccines. *See* 42 U.S.C. §§ 300aa-1 *et. seq*. Congress established a Vaccine Injury Compensation Program through which claimants could petition to receive compensation for vaccine-related injuries. 42 U.S.C. § 300aa-10(a). In relevant part, the Act states,

> . . . 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 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.

42 U.S.C. § 300aa-16(a)(2). The Federal Circuit has held this limitations period to be

an explicit condition of the waiver of sovereign immunity by the United States. *Brice v. Sec'y HHS*, 240 F.3d 1367, 1370 (Fed. Cir. 2001). The Court must be "careful not to interpret [a waiver] in a manner that would extend [it] beyond that which Congress intended." *Id.* (citations omitted). Accordingly, we strictly construe the Vaccine Act's statute of limitations. *Markovich*, 477 F.3d at 1360 (citations omitted). If the petition is filed outside this time period, it must be dismissed. *See Johns-Manville Corp. v. United States*, 893 F.2d 324, 327 (Fed. Cir. 1989) (where a "court has no jurisdiction, it has no power to do anything but strike the case from its docket").

A. Order Granting the Motion to Dismiss

We consider first whether the special master correctly dismissed the petition as untimely filed. Petitioners argue the correct statute of limitations trigger was the occasion of Destiny's diagnosis in April 1999. A finding to this effect would render their petition timely filed and the special master's dismissal "not in accordance with law." However, to rule as Petitioners suggest would be contrary to Federal Circuit precedent and unsupported even by the *Setnes* decision.

(i) *Setnes* Case

As we indicated earlier, Special Master Millman's reinstatement order relied principally on the *Setnes* decision. The issue in *Setnes* was the statute of limitations trigger date for vaccine-induced autism. *Setnes*, 57 Fed. Cl. at 179. Perhaps not coincidentally, the Setnes petition had initially been dismissed as untimely by Special Master Millman. On review before this Court, Judge Futey held that autism injury warranted special treatment. Because of autism's apparently insidious nature, he held that "prudence mandates [] a court addressing the statute of limitations not hinge its decisions on the `occurrence of the first symptom.'" *Id.* at 179. Rather, a recognizable sign of a vaccine injury is required before there is a "manifestation of onset" of injury that would trigger the limitations period. *Id.* at 181.

The Setnes child's symptoms were apparently not recognized as evidence of autism when they first arose. *Id.* at 180-81. Judge Futey therefore held they were not "manifestations" of vaccine-induced injury for statute of limitations purposes. *Id.* at 181. Instead, the Court found the limitations period to be triggered when the terms "probable PDD/autism" were first used, some 13 months after the symptoms appeared. *Id.*

To be clear, the Court was not holding that medical or psychological diagnosis alone would begin the running of the limitations period, as is apparently the Lemires' position. *Id.* at 181. Rather, Judge Futey found the physicians' failure to connect the symptoms to autism "indicative of the fact that [they were] not recognizable as a sign of a vaccine injury by the medical profession at large." *Id.* at 181. Finding the petition timely, he therefore reversed Special Master Millman's dismissal and remanded the case to the OSM. *Id.*

In the instant matter, Special Master Millman acknowledged that *Setnes* was not binding. 2003 Reinstatement, at 2. However, she found it "manifestly unfair and inequitable" for the Lemires to be dismissed while the Setnes case was able to proceed. *Id.* She presumably found the two cases so analogous to conclude that "equity demand[ed]" reinstatement. *Id.*

(ii) *Markovich* Precedent

Upon reassignment of the matter, the new special master disagreed with his predecessor's conclusions. Likewise, the Government argues the petition is untimely, and dismissal is compelled, by the Federal Circuit's decision in *Markovich.* Govt's Resp., p. 7-9. The *Markovich* decision held that the "`first symptom or manifestation of onset' for the purposes of the limitations period is the first event objectively recognizable as a sign of an alleged vaccine injury by the medial profession at large." *Markovich*, 477 F.3d at 1360 (affirming *Brice v. Sec'y HHS*, 36 Fed. Cl. 474, 477 (1996), *aff'd on other grounds*, 240 F.3d 1367 (Fed. Cir. 2001)). Contrary to *Setnes*, the Federal Circuit interpreted the "first symptom or manifestation of onset" of injury to mean that either a symptom or a manifestation of the alleged vaccine injury, *whichever occurred first*, would trigger the running of the limitations period. *Id.* at 1357 (emphasis supplied). In this way, Congress chose to start the running of the statute before many petitioners would be able to identify, with reasonable certainty, the nature of the injury. *Id.* at 1358 (citing *Brice v. Sec'y HHS*, 36 Fed. Cl. at 477).

The *Markovich* decision is binding precedent. Despite this fact, Petitioners urge the Court to consider *Markovich* in conjunction with the non-binding *Setnes* decision to determine the appropriate trigger for statute of limitations purposes. Pet. Motion, p. 10. They argue that prior to April 1999, "although Destiny showed *some* delayed development," no "manifestation of onset" of illness could have occurred until diagnosis. *Id.* Petitioners' insistence that the Court find the diagnosis date of April 12, 1999, as the correct trigger is unsupported by prevailing law.

Rather, Federal Circuit precedent demands a contrary result. Under *Markovich*'s objective standard, we find that recognizable signs of autism occurred well before the April 1999 diagnosis. Destiny's symptoms were noted around her first birthday, January 1998, and later that year during her vaccinations in April and July. Her CDS screening of August 18, 1998, confirmed these observations. In September 1998, CDS reported Destiny's significant regression in all areas of communication development. Applying even the latter date of September 1998, the November 2001 petition is untimely. That Petitioners recognized these symptoms as the first symptom or manifestation of onset of autism only after definitive diagnosis does not excuse the Vaccine Act's strict filing requirements. *See Markovich*, 477 F.3d at 1357-58.

Even *Setnes* would arguably not compel us to hold differently. *Setnes* requires a recognizable sign of a vaccine injury to trigger the limitations period. *Setnes*, 57 Fed. at 181. Under this standard, the correct trigger would presumably have been as early as

Destiny's first birthday and certainly by August 1998, when an initial screening revealed concerns as to "many aspects of Destiny's development." AR, p. 202, 204. Furthermore, the trigger would have been no later than November 1998, when neurological testing reported the appearance of "developmental aphasia with autistic spectrum disorder." *Id*. at 352. Hence, *Setnes* fails to extend the limitations trigger to the April 1999 diagnosis date upon which the Lemires rely. Ironically then, the entire premise of Special Master Millman's reinstatement is erroneous - fairness and equity do not compel reinstatement of the Lemire petition.

Curiously, Petitioners do not argue for a trigger date of November 17, 1998, when neurological testing first articulated the likelihood of "autistic spectrum disorder." A finding of this date as the correct trigger would have presumably resulted in the November 16, 2001 petition being timely filed. However, Petitioners adamantly insist on the April 1999 diagnosis as the first objectively recognizable symptom of a vaccine injury. Pet. Motion, p. 15. They declined to adopt the November 1999 trigger date even under prompting by the Court during oral argument.

B. Reconsideration of Rule 60(b) Relief

We consider next the propriety of the special master's reconsideration of RCFC 60(b) relief. In reconsidering and striking the reinstatement, Special Master Abell effectively revived Special Master Millman's original dismissal. Petitioners now move this Court to hold Special Master Abell lacked the authority to reconsider the prior reinstatement order. Should the Court find that the special master was within his authority to reconsider, Petitioners claim alternatively that he abused his discretion in striking the reinstatement and ordering dismissal. We find no merit to either argument.

(i) Reconsideration Authority

Petitioners argue that Special Master Abell was barred by law of the case from reconsidering the reinstatement order. The doctrine of "law of the case" holds that when a reviewing court decides upon a rule of law, that decision must govern the same issues in subsequent stages of the litigation. *Arizona v. California*, 460 U.S. 605, 618 (1983). Reconsideration is precluded save in exceptional circumstances, such as new evidence not previously considered or a clearly erroneous decision that works a substantial injustice. *Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir. 1985).

According to Petitioners, our 2004 order and remand back to the OSM became law of the case. Because we found the matter not ripe for review, reconsideration is precluded until the issuance of a final ruling on the merits. Pet. Motion, p. 6. In the absence of new evidence or a clearly erroneous decision, the Court may not depart from the law of the case. *Id.* Thus, the Government effectively seeks "a second bite" in its request for appellate review. *Id.*

Clearly, the doctrine relied upon by Petitioners is inapplicable here. Our remand order was not a final adjudication. On the contrary, we had no jurisdiction then to rule on the merits of the case, and we did not. Our Order expressly limits our observations to dicta, and that dicta was extremely critical of Special Master Millman's Rule 60(b) ruling. *See Lemire*, 60 Fed. at 77 (offering "non-binding and tentative observations"). As no final judgment had been issued, the assigned special master had the discretion to reconsider a prior finding of vaccine entitlement. *See Hanlon v. Sec'y HHS*, 40 Fed. Cl. 625, 629 (1998), *aff'd* 191 F.3d 1344 (Fed. Cir. 1999); *see also Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991) (holding the doctrine has "long been held not to require the trial court to adhere to its own previous rulings if they have not been adopted, explicitly or implicitly, by the appellate court's judgment."). Special Master Abell was therefore well within his authority to reconsider the reinstatement order.

Even if the law of the case were to apply, Petitioners' propositions fail. Under the doctrine, reconsideration is precluded save a clearly erroneous decision that works a substantial injustice. *See Kori Corp.*, 761 F.2d at 657. Admittedly, the standard under this exception is particularly stringent, and requires a strong showing of clear error. *Smith Intern, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1579 (Fed. Cir. 1985). We do not, however, think this case to be even a close call. As stated above, the entire premise of Special Master Millman's reinstatement is erroneous. The Court would therefore not be precluded by the doctrine from remedying this clear judicial error.

(ii) Discretionary Relief

A secondary attack on the special master's decision is based on an abuse of discretion. Petitioners urge this Court to find that unresolved causation issues and public policy with regard to autism injury demonstrate the extraordinary and exceptional circumstances necessary to warrant Rule 60(b) relief. Pet. Motion, p. 8. We find no abuse of discretion in the special master's decision to strike the reinstatement order.

Rule 60(b) allows a court to "relieve a party or his legal representative from a final judgment, order, or proceeding" in limited circumstances, set forth in subsections (1) through (6). Because Petitioners rely solely on subsections (5) and (6), subsections (1) through (4) are inapplicable. A motion for RCFC 60(b) relief is "extraordinary" and is granted in the Court's discretion. *Sioux Tribe of Indians v. United States*, 14 Cl. Ct. 94, 101 (1987), *aff'd* 862 F.2d 275 (Fed. Cir. 1988). Generally, the movant must show exceptional circumstances for the Court to grant relief. *Id.* We acknowledge that as a remedial provision, Rule 60(b) is to be liberally construed for the purposes of doing substantial justice. *Patton*, 25 F.3d at 1030 (citations omitted). Yet, as the Government contends, even the most liberal construction cannot justify relief from the original dismissal. *See* Govt's Resp., p. 12-13.

RCFC 60(b)(5)

Pursuant to RCFC 60(b)(5), relief from judgment may be granted only if "a prior

judgment upon which it is based has been reversed or otherwise vacated." *Lemire*, 2008 WL 2490654, at *7 (citing RCFC 60(b)(5); Vaccine Rule 36). This has been interpreted to apply to prior judgments which are related to the instant case by *res judicata* or collateral estoppel, or those which are somehow part of the same proceeding. *Vessels v. Sec'y HHS*, 65 Fed. Cl. 563, 569 (2005) (citations omitted).

For Rule 60(b)(5) relief to be warranted, Petitioners must demonstrate that Special Master Millman based her initial dismissal, from which Petitioners now seek relief, on a prior judgment that has been vacated or reversed. In her reinstatement, Special Master Millman seemed convinced that the apparent change in law by *Setnes* vacated the grounds for her earlier ruling in *Lemire*. Despite her acknowledgment that *Setnes* was non-binding, she found it to be a sufficient cause for granting this extraordinary relief.

Upon reconsideration, Special Master Abell found to the contrary. In striking the reinstatement, he held that Petitioners failed to identify a judgment that has since been reversed or vacated, let alone one upon which the dismissal judgment was based. *Lemire*, 2008 WL 2490654, at *8. We find no abuse of discretion in this ruling. The *Setnes* decision, moreover, had not been part of the proceedings at issue, nor did it collaterally estop or serve as *res judicata* in the instant case. The mere fact that Special Master Millman had presided over both cases is an insufficient ground for granting this relief.

RCFC 60(b)(6)

Petitioners' argument for Rule 60(b)(6) relief is similarly deficient. Rule 60(b)(6) is a catch-all provision, allowing relief for "any other reason justifying relief from the operation of the judgment." RCFC 60(b)(6). As a residual clause, Special Master Abell noted that "[subsection (6)] is available only in extraordinary circumstances and only when the basis of relief does not fall within any of other subsections of Rule 60(b)." *Lemire*, 2008 WL 2490654, at *8 (citations omitted). He correctly asserted that the "subsection is not a substitute for an appeal, and in all but exceptional circumstances, the failure to prosecute an appeal will bar relief under that clause." *Id.* (citations omitted). Accordingly, Special Master Abell found Petitioners' failure to seek review of Special Master Millman's initial dismissal to constitute "an exercise of free choice which preclude[s] 60(b)(6) relief." *Id.* The circumstances here were not extraordinary. *Id.* On the contrary, he found the dismissal of a petition for untimely filing a rather ordinary occurrence, one that could hardly be characterized as exceptional. *Id.*

We agree. Petitioners' proper course for review was to appeal Special Master Millman's original dismissal. They may not later do through Rule 60(b) what they failed to do directly by an appeal. *See Patton*, 25 F.3d. at 1028.

III. CONCLUSION

After reviewing the submissions of the parties and their oral presentations, the

evidence on the record, and the decisions of the special masters, the Court concludes that the special master did not err in dismissing the petition under the Vaccine Act. **The decision of Special Master Abell is AFFIRMED, and the petition for review is DENIED with prejudice. The Clerk of Court is directed to enter judgment for the Government.**

IT IS SO ORDERED.

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LAWRENCE M. BASKIR
Judge