

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
E-Filed: May 10, 2012

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TABATHA FISHER, as the parent and natural guardian of MEGAN FISHER, a minor	*	UNPUBLISHED
Petitioner,	*	No. 10-784V
v.	*	Chief Special Master Campbell-Smith
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	Failure to Prosecute; Failure to Communicate with Counsel; Dismissal of Claim
Respondent.	*	
* * * * *	*	

Mark T. Sadaka, Sadaka Associates, LLC, Englewood, NJ, for petitioner.
Heather L. Pearlman, U.S. Dep’t of Justice, Washington, D.C., for respondent.

DISMISSAL DECISION¹

Pending before the undersigned is petitioner’s counsel’s Motion to be Relieved as Counsel of Record (“Motion for Relief”), as well as counsel’s Response to the second show cause order issued in this case (“Second Show Cause Response”).

¹ Because this decision contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this ruling on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a 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.” Vaccine Rule 18(b).

For the reasons discussed more fully below, the undersigned hereby **DISMISSES** this case for failure to prosecute, thereby **RENDERING AS MOOT** petitioner's Motion for Relief.

I. BACKGROUND

On November 12, 2010, Tabatha Fisher ("petitioner") filed a petition on behalf of her minor child, Megan, seeking compensation under the National Vaccine Injury Compensation Program ("the Program").²

Petitioner alleges that as a result of the administration of a number of vaccinations – namely, the Gardasil vaccination series on November 13, 2007, January 16, 2008, and May 23, 2008, as well as a hepatitis A vaccination on July 27, 2009 – Megan thereafter suffered from neuritis, weakness, muscle pain, seizure disorder, and immune dysfunction. Pet. at 1.

On July 25, 2011, respondent's counsel filed a Rule 4(c) Report, recommending against Program compensation in this case. See Resp't's Rule 4 Report and Mot. for Order to Show Cause. By that same filing, respondent's counsel moved for the issuance of a show cause order, citing the lack of credible evidence in the record to demonstrate that Megan suffered a vaccine-related injury. Id. at 18.

To address respondent's counsel's concerns, the undersigned conducted a status conference on August 1, 2011. During the status conference, the undersigned questioned the reasonableness of maintaining this claim and indicated that the issuance of a show cause order was appropriate. See Order, Aug. 1, 2011. The first show cause order, issued by the undersigned on August 1, 2011, directed petitioner's counsel to show why petitioner's claim should not be dismissed. See First Order to Show Cause, Aug. 1, 2011. Specifically, petitioner's counsel was directed to address the pronounced lag in time between Megan's receipt of the various vaccines at issue and the onset of her diverse symptoms, including symptoms of Charcot-Marie-Tooth disease – a genetic condition marked by the same symptoms of which Megan complained. Id. at 4.

² The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (hereinafter "Vaccine Act" or "the Act"). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

On October 18, 2011, after two enlargements of time, petitioner's counsel filed a response to the first order to show cause ("First Show Cause Response"). See First Show Cause Response, Oct. 18, 2011. Petitioner's counsel asserted that Megan's "declining neurological condition" and diagnosis of Guillain-Barré syndrome ("GBS") were "undisputed" facts. Id. at 2.

On November 18, 2011, respondent's counsel replied to the First Show Cause Response ("Reply"). See Reply, Nov. 18, 2011. Noting that petitioner's First Show Cause Response did not speak to the issues that petitioner's counsel was directed to address, respondent's counsel reiterated that, among other failings, the record did not suggest a temporal association between the vaccines Megan received and the onset of her symptoms. Id. at 9.

On November 29, 2011, petitioner's counsel filed a sur-reply ("Sur-Reply"). See Sur-Reply, Nov. 29, 2011. Petitioner's counsel argued that claim dismissal was inappropriate, in light of "[unresolved and] key factual issues" in this case. Id. at 2.

On December 20, 2011, the undersigned issued an order, directing petitioner's counsel to file, on or before February 21, 2012, an expert report explaining how the onset of Megan's symptoms, more than nine months after her receipt of the vaccines at issue, could be vaccine-related. Order, Dec. 20, 2011, at 2.

After requesting and receiving an enlargement of time, petitioner's counsel filed, on April 19, 2012, a motion requesting to be relieved as counsel. See Mot. for Relief. Petitioner did not file an expert report. Petitioner's counsel explained in the Motion for Relief that, despite repeated efforts, he had been unable to contact his client since March 30, 2012. Id. at 2. By way of certified and regular mail, petitioner's counsel informed his client of his intent, and subsequent request, to withdraw as counsel based on her unresponsiveness. Id.

Advised of petitioner's counsel's desire to withdraw from legal representation in this case, the undersigned issued a second show cause order, affording petitioner a final opportunity to pursue her claim by filing an expert report within fourteen (14) days. See Second Order to Show Cause, Apr. 19, 2012, at 1-2. The undersigned stayed petitioner's Motion for Relief and advised petitioner's counsel that a failure to respond to the second show cause order would be interpreted as either a failure to prosecute, or as an inability to provide supporting documents for petitioner's claim. Id. at 1.

Although petitioner's counsel timely filed a response to the second show cause order, counsel so did so "without the assistance of [petitioner]." Second Show Cause Response at 2. In the Second Show Cause Response, petitioner's counsel explained that he had notified his client, by certified and regular mail, of the issuance of the second show cause order and the pending response date of May 4, 2012. Id., Ex. A. Although petitioner's counsel acknowledged that his client's "lack of cooperation" prevented him from being able to "properly handle this matter," he maintained that her lack of cooperation did not render her vaccine claim "invalid[.]" Id. at 2. Petitioner's counsel requested that the undersigned grant his motion requesting to be relieved as counsel as well as afford petitioner additional time to seek other counsel. Id.

II. FAILURE TO PROSECUTE

It is the duty of petitioner to respond to court orders. The failure to follow court orders, as well as the failure to file medical records or an expert medical opinion to substantiate the allegations set forth in the petition, will result in dismissal of the claim. See Vaccine Rule 21(b)(1) ("The special master or the court may dismiss a petition or any claim therein for failure of the petitioner to prosecute or comply with these rules or any order of the special master or the court."). See also Sapharas v. Sec'y of Health & Human Servs., 35 Fed. Cl. 503, 505 (1996) (affirming claim dismissal where petitioner failed to comply with issued court orders); Tsekouras v. Sec'y of Health & Human Servs., No. 90-2761V, 26 Cl. Ct. 439, 443 (1992), aff'd per curiam, 991 F.2d 810 (Fed. Cir. 1993) (sustaining claim dismissal where petitioner was given two warnings and thereafter an additional opportunity to explain her noncompliance).

The failure to respond to issued orders, occasioned in this case by petitioner's failure to maintain contact with her attorney, is deemed noncompliance with a court order. Schoenfeld v. Sec'y of Health & Human Servs., No. 3-0338V, 2012 WL 848146, at *2 (Fed. Cl. Spec. Mstr. Feb. 21, 2012). Petitioner has received ample notice that her failure to respond to court orders would result in the dismissal of her claim. Through her own unresponsiveness to counsel, petitioner has failed to prosecute her claim. Accordingly, dismissal is now appropriate.

III. PETITIONER'S COUNSEL'S REQUEST FOR ADDITIONAL TIME

Petitioner's counsel requests that his client be afforded additional time to seek other counsel. But, petitioner's persistent unresponsiveness to her current counsel's attempts to contact her does not demonstrate either the commitment or diligence necessary to maintain this claim. The undersigned is not persuaded, on the facts of this case, that granting petitioner's counsel's request would prompt her to become more responsive.

Petitioner's medical records do not support a finding of a vaccine-related injury. Nor has petitioner submitted a medical opinion in support of her claim. See Everett v. Sec'y of Health & Human Servs., No. 91-1115V, 1992 WL 35863, at *2-3 (Fed. Cl. Spec. Mstr. Feb. 7, 1992) (denying an award of attorneys' fees and costs after dismissal of a claim where the medical records did not support a claim of adverse reaction to vaccination and where petitioner failed to further substantiate her claim with a medical opinion). The evidentiary support for petitioner's claim is wanting, and absent affirmative efforts by petitioner to meet her burden of proof, the undersigned declines petitioner's counsel's request to afford petitioner more time to pursue this claim.

IV. CONCLUSION

For the reasons detailed above, the undersigned hereby **DISMISSES** this case for failure to prosecute, thereby **RENDERING AS MOOT** petitioner's Motion for Relief. **The clerk shall enter JUDGMENT accordingly.**

IT IS SO ORDERED.

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