

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
Filed: August 15, 2012

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ROSLYN HYMEL,	*	UNPUBLISHED
on behalf of the minor,	*	
CASIE GREEN,	*	Case No. 11-44V
	*	
Petitioner,	*	Chief Special Master
	*	Campbell-Smith
v.	*	
	*	Failure to Prosecute; Dismissal of
SECRETARY OF	*	Claim; Withdrawal of Counsel;
HEALTH AND HUMAN SERVICES,	*	Pro Se Petitioner; Delivery of
	*	Issued Orders.
Respondent.	*	
* * * * *	* * * * *	

Roslyn Hymel, Covington, LA, pro se petitioner.
Debra Begley, U.S. Dep’t of Justice, Washington, D.C., for respondent.

DISMISSAL DECISION¹

On January 14, 2011, Roslyn Hymel (“petitioner”) filed a petition on behalf of a minor, Casie Green, seeking compensation under the National Vaccine Injury Program (“Vaccine Program”).²

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).

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.

A. Initial Case Development

In the first of two petitions filed in this case, petitioner alleges that as a result of the administration of Gardasil vaccines on July 7, 2007, April 8, 2009, and January 15, 2010, Casie thereafter developed seizures, pain in her joints, an increase in the size of a cyst in her breast, an irregular menstrual cycle, and a cyst in her ovaries. Pet. at 1-2.

By order dated October 17, 2011, the undersigned directed petitioner to file an amended petition to clarify the particular injuries for which she sought Program compensation. Order, Oct. 17, 2011, at 2. Petitioner's counsel filed an amended petition on February 10, 2012, but merely appended and reiterated a number of the alleged vaccine-related injuries that were set forth in the original petition.³ Order, Feb. 15, 2012, at 1.

After addressing certain concerns about the amended petition during a status conference held on April 4, 2012, the undersigned afforded petitioner an opportunity to file an expert report in support of her claim. See Order, Apr. 5, 2012, at 1 (directing petitioner's counsel to file an expert report to clarify the mechanism by which petitioner sought Program compensation). During that status conference, petitioner's former counsel indicated that Casie had a myriad of vaccine-related injuries as described in the amended petition, but explained that petitioner intended to focus primarily on a claim of alleged vaccine-related seizure disorder. Id. at 2. Petitioner's former counsel expressed his intent to file at least one expert report to address the relationship between Casie's receipt of the vaccines at issue and her seizure disorder. Id.

³ In the amended petition, petitioner alleged that Casie's vaccine-related injuries included, but were not limited to, the following: headaches, fever, dizziness, fainting, shortness of breath, rash, thyroid problems, tiredness, weakness and confusion, general ill feeling, chest pain, seizure, and stomach aches. Am. Pet at 1. By amending the claim, petitioner added to the many allegations of injury set forth in the original petition. Id.

B. Withdrawal of Petitioner's Former Counsel

1. Petitioner's Former Counsel's First Motion to Withdraw

After receiving an enlargement of time for the filing of an expert report, see NON-PDF Order, June 5, 2012 (granting petitioner's request for additional time, or until July 20, 2012, to file either one or both of the requested expert reports), petitioner's former counsel filed instead, on June 15, 2012, a Motion to Withdraw and For Continuance.

In that motion, petitioner's former counsel indicated that "[t]he Singleton Law Firm no longer wish[ed] to handle the claim and desire[d] to withdraw from the case as counsel of record." Mot. to Withdraw and For Continuance ¶ 2, at 1. Petitioner's former counsel further related that petitioner "ha[d] been informed of the status of the case and that [she] need[ed] to retain counsel in order to further pursue her claim." Id. ¶ 5, at 2.

2. The Undersigned's Order Dated June 19, 2012

By order dated June 19, 2012, the undersigned deferred ruling on the motion to withdraw, pending the filing of an amended motion to withdraw by petitioner's former counsel, that included petitioner's most current contact information. Order, June 19, 2012, at 2.

The undersigned addressed the consequences of counsel's request to withdraw as the attorney of record, and again described the problems with petitioner's claim that had been drawn previously to petitioner's former counsel's attention. Id. at 1-4. The undersigned explained that as a procedural matter, the case would be converted from an electronic case to a paper one. Id. at 2. The undersigned also observed that following the withdrawal of petitioner's counsel, but before the retention of new counsel, petitioner would be expected to represent herself. Id. at 1.

The undersigned observed that the unsubstantiated allegations set forth in the amended petition did not appear to support a claim for Program compensation; nor did they appear to furnish a reasonable basis for moving forward with the claim. Id. at 2. The undersigned instructed petitioner's former counsel to draw to petitioner's attention the current posture of the case, and to provide petitioner with a courtesy copy of the undersigned's order. Id. at 4.

The undersigned noted that no expert report had yet been filed in the case and explained that any retained expert must be willing to opine that the administration of the vaccines at issue can, and in this case did, cause the various symptoms of which Casie has complained. Id. Any expert opinion would have to address the particular causal link between Casie's received vaccines and the subsequent development of her alleged seizure disorder. Id.

The undersigned directed petitioner to contact chambers before July 6, 2012, to schedule a status conference to discuss her claim further and pointed out that petitioner bore the responsibility for meeting all scheduled deadlines until she retained new counsel. Id. at 4-5. The undersigned advised petitioner that a failure to comply with court orders, or to file an expert opinion, would result in the dismissal of the claim. Id. at 4 (citing Vaccine Rule 21(b)(1)).

3. Petitioner's Former Counsel's Amended Motion to Withdraw

On June 20, 2012, petitioner's counsel filed an Amended Motion to Withdraw and For Continuance, with petitioner's most current contact information. The undersigned granted petitioner's former counsel's request to withdraw as counsel of record, and the case was converted from an electronic case to a paper one. Order, June 21, 2012, at 2.

The undersigned reminded petitioner that the deadline set forth in the order dated June 19, 2012 – directing petitioner to contact chambers by July 6, 2012 to schedule a status conference to discuss her claim – remained in place. Id. (citing Order, June 19, 2012, at 4). The undersigned directed the Clerk's Office to provide, by certified mail, courtesy copies of the June 21, 2012 order, as well as the previous order dated June 19, 2012, to petitioner at the address provided by petitioner's former counsel in the amended motion to withdraw. Id. at 2 n.1.

C. Petitioner's Failure to Comply with Court-Ordered Directives

Petitioner did not contact the undersigned's chambers to schedule a status conference by the established deadline of July 6, 2012. Noting the unsuccessful effort to deliver to petitioner, by certified mail with return receipt requested, a copy of the order dated June 21, 2012, the undersigned afforded petitioner **one final opportunity** to pursue her claim.⁴ Order, July 17, 2012, at 3 (emphasis in original). The undersigned afforded petitioner an additional three (3) weeks, or until August 7, 2012, to contact chambers. Id.

To prevent any confusion that might arise in connection with the delivery of the July 17, 2012 order or any of the other previous orders issued by the undersigned, the undersigned directed the Clerk's Office to mail copies of the last order, along with copies of the two earlier orders, to petitioner by way of United States Postal Service (USPS) certified mail with return receipt requested, as well as by USPS First-Class mail with delivery confirmation. Id. at 3.

Again, the undersigned advised petitioner that the failure to prosecute her claim – by failing to contact timely the undersigned's chambers to schedule a status conference – would be construed as a decision to no longer pursue the claim or as an acknowledgment that she could not support the claim for Program compensation. Id. In either event, the undersigned warned that petitioner's failure to contact the undersigned's chambers would result in claim dismissal. Id.

⁴ According to the tracking number provided by the United States Postal Service (USPS), despite the Delivery Attempt Notices that were left at petitioner's address, the delivery effort at petitioner's address was unsuccessful. Order, July 17, 2012, at 2. The mailing was labeled as "unclaimed" and returned to the undersigned's chambers on July 16, 2012. Id.

D. Failure to Prosecute

As it has been repeatedly communicated, petitioner must respond to court orders. See, e.g., Order, June 19, 2012, at 4; Order, July 17, 2012, at 3. As petitioner has been informed, the failure to follow court orders or to file an expert report to support this vaccine petition will lead to 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 undersigned has taken careful steps to ensure the delivery of the three latest orders to petitioner at her most current mailing address. Yet even with the repeated notices, as well as the ample opportunity afforded for petitioner to contact chambers, petitioner has not done so. Nor has petitioner filed the expert report necessary to support her claim.

E. Conclusion

For the foregoing reasons, this petition is **DISMISSED FOR FAILURE TO PROSECUTE**. The Clerk of Court shall **ENTER JUDGMENT ACCORDINGLY**.

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Chief Special Master