

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 3-133V

Filed: October 6, 2011

**DOUGLAS E. BARNES and BRENDA
BARNES, as parents and natural
guardians of Virginia L. Barnes,
a minor,**

Petitioners,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES,**

Respondent.

ORDER GRANTING RECONSIDERATION¹

On October 4, 2011, the undersigned dismissed this case for failure to prosecute. On October 5, 2011, petitioners filed a motion for reconsideration of that decision, along with an unopposed motion for a decision dismissing the petition and awarding attorneys' fees and costs.

Reconsideration of decisions issued pursuant to the Vaccine Act² are governed by Vaccine Rule 10(e). "The special master has the discretion to grant or deny the motion [for reconsideration], in the interest of justice." Vaccine Rule 10(e)(3). This rule

¹ Because this unpublished order contains a reasoned explanation for the action in this case, this order will be published on the United States Court of Federal Claims' website, in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 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, the undersigned agrees that the identified material fits within this definition, such material shall be deleted from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

grants a special master significant discretion to determine in a particular case what result is "in the interest of justice." See *Krakov v. Sec'y, HHS*, No. 03-632V, 2010 WL 5572074, at *5 (Fed. Cl. Spec. Mstr. Nov. 12, 2010); see also *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990) ("The decision whether to grant reconsideration lies largely within the discretion of the [trial] court.").

This petition was dismissed after petitioners were unresponsive to court orders. On June 13, 2011, petitioners were ordered to inform the court whether they intended to proceed with this case. Petitioners failed to respond. On August 17, 2011, counsel for petitioners filed a status report indicating petitioners had been unresponsive to counsel's efforts to contact them. On August 22, 2011, petitioners were again ordered to inform the court whether petitioners intended to proceed with this case or otherwise show cause within thirty days why this case should not be dismissed for failure to prosecute. Petitioners failed to respond to that order as well.

Failure to respond to a court order because petitioners have failed to communicate with their attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As petitioners were reminded in the August 22, 2011 order, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioners' claim. *Tsekouras v. Sec'y, HHS*, 26 Cl. Ct. 439 (1992), *aff'd per curiam*, 991 F.2d 810 (Fed. Cir. 1993); *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b).

Petitioners' motion for reconsideration explains that on or before October 5, 2011, petitioners reestablished contact with counsel and indicated a desire to dismiss this case. Petitioners submitted to respondent a draft motion for a decision dismissing the petition and awarding attorneys' fees and costs, and the motion indicates that respondent does not object. The motion for reconsideration suggests that petitioners' counsel intended to file petitioners' motion for a decision dismissing the petition and awarding attorneys' fees and costs prior to the deadline for responding to the show cause order.

This new development supports a ruling that it is in the interest of justice to reconsider the dismissal to allow the parties to resolve the case pursuant to their mutual understanding, reflected in petitioners' unopposed motion for a decision dismissing the petition and awarding attorneys' fees and costs. **Petitioners' motion for reconsideration is GRANTED, and the clerk of court is instructed to withdraw the October 4, 2011 decision.**

IT IS SO ORDERED.

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