

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

No. 08-245V

Filed: November 13, 2012

KAREN MCPHAIL, *

Petitioner, *

v. *

SECRETARY OF HEALTH *

AND HUMAN SERVICES, *

Respondent. *

Failure to Prosecute; Failure to
Follow Court Orders; Dismissal

DECISION¹

Vowell, Special Master:

Karen McPhail [“petitioner”] filed a petition for compensation under the National Vaccine Injury Compensation Program [“the Program”]² on April 7, 2008. Petitioner alleges that she suffered “significantly aggravated immune system dysfunction, including, in part, deteriorating effects on muscles, tissues, [and] nervous system” as a result of a tetanus-diphtheria (Td) vaccine she received on April 8, 2005. She did not, however, file supportive records with her petition.

On June 11, 2008, the special master then assigned to this case held an initial status conference during which she explained to petitioner how the Program operates and strongly encouraged her to seek representation. In her subsequent order, the special master directed petitioner to file all medical records covering the three years prior to her vaccination to the present date. Order, filed June 12, 2008.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), petitioner has 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, I agree that the identified material fits within this definition, I will delete such material 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).

During the next status conference, held on August 20, 2008, petitioner requested additional time to pursue representation. At that time, she had yet to file any records. Nearly six months later, during a status conference held on February 19, 2009, petitioner again requested additional time to pursue representation. No records had been filed by that date.

On September 23, 2010, after petitioner failed to return several telephone calls from the court to schedule a status conference, petitioner was ordered to show cause by October 29, 2010, why her case should not be dismissed for failure to comply with court orders and failure to prosecute. Additionally, petitioner was notified that, in failing to submit any evidence, she had not met the minimal level of proof required to support her claim.

While petitioner did not respond to the special master's order to show cause by October 29, 2010, she did file a notice of intent to remain in the program on September 29, 2011, following the expiration of the statutory 240-day time period for the special master's issuance of a decision.

On January 13, 2012, in light of the fact that she still had not filed any supporting documentation, petitioner was again ordered to show cause why her case should not be dismissed for insufficient proof and failure to prosecute. Petitioner was warned that if she failed to respond to that order by March 13, 2012, her case would be summarily dismissed.

On March 14, 2012, petitioner filed her first set of medical records. Thereafter, on June 21, 2012, respondent filed her Rule 4(c) report, noting the absence of several sets of records, *see, e.g.*, Respondent's Report at p. 3 n. 2, p. 5 n. 4, p. 7 n. 5, and concluding that petitioner had failed to provide sufficient evidence to support her petition. *Id.* at 20.

On July 11, 2012, petitioner was ordered to file by September 10, 2012, all remaining medical records dating from three years prior to the vaccination to the present, as well as an expert report setting forth a reliable medical theory of how her injuries were caused by vaccination. In the interest of moving her case forward and providing a suitable expert report, petitioner was again advised to seek representation.

This case was reassigned to me on September 10, 2012. On October 2, 2012, after petitioner failed to comply with the previous special master's July 11, 2012 order, and after she failed to return voice messages left with her by my judicial assistant, I issued a third order to show cause in this case. In my order, I directed petitioner to comply with the previous special master's order or otherwise show cause why her case should not be dismissed for failure to prosecute, by no later than November 1, 2012. Additionally, I warned petitioner that failure to comply with my order would result in

immediate dismissal of her claim.

To date, petitioner has failed to comply with my October 2, 2012 order to show cause. **As such, this case is dismissed for failure to prosecute. The clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

Denise K. Vowell
Special Master