IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 03-0059V
Filed: August 14, 2012

* *		
NERY N. ORTIZ-MUTILITIS, parent of Frankie Leigh Ann Mutilitis, an infant,	*	
Petitioner,	*	Motion for Relief from Judgment;
	*	RCFC 60(a); RCFC 60(b)(6);
v.	*	Extraordinary circumstances
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

ORDER DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT[1]

Vowell, Special Master:

On January 10, 2003, petitioner Nery N. Ortiz-Mutilitis filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq*.[2] [The "Vaccine Act" or "Program"], on behalf of her minor daughter, Frankie Leigh Ann Mutilitis ["Frankie"]. On April 27, 2011, the case was dismissed per petitioner's request and attorney fees and costs were awarded. Judgment entered on May 31, 2011. On May 30, 2012, petitioner's counsel, David H. Rosenberg ["Mr. Rosenberg"], filed a Motion for Relief from Judgment. Because I find that the initial judgment does not reflect an error or oversight by the court, and Mr. Rosenberg failed to establish "extraordinary circumstances" warranting relief, I deny the motion.

[1] Because this unpublished order contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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).

I. Procedural History.

On January 10, 2003, petitioner filed a "short form" petition authorized by Autism General Order # 1.[3] By filing a short form petition, petitioner asserted that (1) Frankie had a disorder on the autism spectrum, and (2) that one or more vaccines listed on the Vaccine Injury Table[4] were causal of this condition.[5] No medical records were filed with the petition. Like most other cases in the Omnibus Autism Proceeding ["OAP"],[6] the case remained on hold until discovery in the OAP was concluded, causation hearings in the test cases were held, and entitlement decisions were issued in the test cases.[7]

After the final appeal in the OAP test cases was decided on August 27, 2010, *Cedillo*, 617 F.3d 1328, the court began the process of determining how the approximately 4800 remaining OAP claims would be resolved, and began contacting petitioners in this regard. In January 2011, I ordered petitioner to inform the court if she wished to proceed with her claim, or if she wished to exit the Vaccine Program. Order, filed Jan. 24, 2011. In February 2011, petitioner filed a status report informing the court that she wished to exit the program, and that negotiations with respondent were underway to determine attorney fees and costs. Petitioner's Status Report, filed Feb. 23, 2011. After several extensions, petitioner filed a motion to dismiss this claim. The motion included an unopposed application for attorney fees and costs. Petitioner's Motion, filed Apr. 26, 2011.

On April 27, 2011, I dismissed the claim and awarded the attorney fees and costs requested, in the amount of $5,509.53. Pursuant to existing case law and § 15(e), the award was to be paid in the form of a check payable jointly to the petitioner and her counsel, Mr. Rosenberg. Decision, issued Apr. 27, 2011. On May 30, 2012, Mr. Rosenberg filed the instant motion, requesting relief from judgment pursuant to Rule 60

---

[3] The text of Autism General Order #1 can be found at http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf ["Autism Gen. Order #1"], 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002).

[4] 42 C.F.R. § 100.3 (2010).

[5] The two theories of causation specifically addressed in Autism Gen. Order # 1 were that the measles, mumps, and rubella ["MMR"] vaccine was causal [the "MMR theory" or "Theory 1"] or that vaccines containing a mercury-based preservative called thimerosal [the "TCV theory" or "Theory 2"] were causal, or that a combination of the MMR vaccine and TCVs were causal.

[6] The OAP is discussed in detail in *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

[7] The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), *aff'd*, 88 Fed. Cl. 706 (2009). Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims. The Theory 2 cases are *Dwyer*, 2010 WL 892250; *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The petitioners in each of the three Theory 2 cases chose not to appeal.

of the Rules of the United States Court of Federal Claims ["RCFC"], because he has been unable to get petitioner to endorse the check for his fees and costs. Motion for Relief at 3. He seeks to reopen the case so that I may order payment of fees and costs directly to him, not jointly to him and petitioner.

II. The Applicable Legal Standards.

Under Vaccine Rule 36, Appendix B, RCFC ["Vaccine Rule"], a party may seek relief from judgment pursuant to RCFC 60. Mr. Rosenberg's motion cites both Rule 60(a) and Rule 60(b)(6). I discuss the standards for relief under these two subsections below. Because there is little caselaw interpreting RCFC 60, and because RCFC 60 is identical to Federal Rule of Civil Procedure ["Fed. R. Civ. Pro."] 60, decisions interpreting that rule are instructive and are discussed below.

A. Rule 60(a).

Rule 60(a) allows a court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." RCFC 60(a). Relief under Rule 60(a) is appropriate where the order, decision or judgment does not reflect what the court intended. *See Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1192 (Fed. Cir. 2009) (finding that under Fed. R. Civ. Pro. 60(a) courts may "correct clerical errors in previously issued orders in order to conform the record to the intentions of the court and the parties."); *see also Companion Health Services, Inc. v. Kurtz*, 675 F.3d 75, 87 (1st Cir. 2012) (finding relief under Rule 60(a) appropriate only where "the judgment failed to reflect the court's intention" and not where the correction would alter the deliberate choice of the judge) (quoting *Bowen Inv., Inc. v. Carneiro Donuts, Inc.,* 490 F.3d 27, 29 (1st Cir. 2007)).

B. Rule 60(b)(6).

Rule 60(b) provides, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding." Subsections (1) through (5) list various grounds for such relief, and subsection (6) authorizes relief from judgment for "any other reason that justifies relief." RCFC 60(b). To qualify for relief under Rule 60(b)(6), petitioner must show "extraordinary circumstances" warranting such relief. *See Ackerman v. United States*, 340 U.S. 193, 198, 202 (1950) (finding petitioner did not fulfill the "extraordinary circumstances" requirement necessary for vacating judgment). The determination of extraordinary circumstances is within the discretion of the judge, and generally, Rule 60(b)(6) allows courts to vacate judgments when necessary to ensure administration of justice. *See Klapprott v. United States*, 335 U.S. 601, 615 (1949) (finding subsection (6) gives courts the power to "vacate judgments whenever such action is appropriate to accomplish justice."); S*waka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir. 1993)[8] (finding Rule 60(b)(6) relief appropriate only under extraordinary circumstances where, "without such relief, extreme and unexpected hardship would occur.").

[8] Although not binding, I find this authority persuasive in my determination of whether the circumstances in this claim are "extraordinary."

The Court of Federal Claims has granted relief under RCFC 60(b)(6) where, without such relief, substantial rights of a party would be violated. *See Freeman v. Sec'y, HHS*, 35 Fed. Cl. 280, 281 (1996) (finding the alleged circumstances "warrant the reopening of the case in the interest of justice."); *Coleman v. Sec'y, HHS*, No. 06-0710, 2011 WL 6828475, *4 (Fed. Cl. Spec. Mstr. Dec. 07, 2011) (finding relief from judgment proper under Rule 60(b)(6) to prevent "harm to substantial rights of petitioner that would result if the requested relief were not granted."); *see also Vessels v. Sec'y, HHS*, 65 Fed. Cl. 563, 568 (2005) (finding relief will not be granted under Rule 60(b)(6) if "substantial rights of the party have not been harmed.").

In *Freeman*, the Court of Federal Claims granted petitioners relief from dismissal of their Vaccine Act claim for failure to state a claim upon which relief could be granted, because their attorney had misinformed them about filing certain medical documents, and had actively encouraged them to let him handle all contact with the court. *Freeman*, 35 Fed. Cl. at 282. The court found that relief was warranted "in the interest of justice," because petitioners lost an opportunity to have their cases decided on its merits "through no fault of their own." *Id*. at 284. Further, the court noted that gross negligence by counsel constitutes the special circumstances necessary for affording relief under Rule 60(b)(6). *Id.* at 283.

In *Coleman*, the Chief Special Master granted relief from a judgment dismissing a claim for failure to prosecute, to protect the rights of the plaintiff. *Coleman*, 2011 WL 6828475, at *4. The Chief Special Master's decision focused on the injustice that would occur from dismissing petitioner's well-developed claim based solely on counsel's tardiness. *Id.*

Therefore, in evaluating the instant motion, I consider whether (1) the alleged oversight or omission resulted in a reflection of something other than what the court intended, and (2) if Mr. Rosenberg establishes circumstances that are "extraordinary" such that without relief, harm to a substantial right would occur.

III. The Motion for Relief from Judgment.

In the instant claim, Mr. Rosenberg contends that he should be granted relief from judgment because his client, Ms. Ortiz-Mutilitis, refuses to endorse the check issued for attorney fees and compensation. Motion for Relief at 3. Mr. Rosenberg cites RCFC Rule 60(a) and Rule 60(b)(6) in support of his motion. *Id.* at ¶ 16, 19. I address the application of each of these subsections to the facts of the instant case below.

A. Application of Rule 60(a) to the Motion for Relief.

Mr. Rosenberg asserts that he had no reason to believe that his client would be uncooperative in endorsing the reimbursement check, and this oversight has led to his inability to collect attorney fees and costs. Motion for Relief at 3. Mr. Rosenberg, relying on Rule 60(a), expects the court to redress his oversight by vacating the judgment. His reliance on the rule in the instant case is unsupported by case law, and is based on a flawed interpretation. I concur with respondent's position that Mr. Rosenberg has failed to identify a mistake or oversight in the judgment. Respondent's Response to Motion

for Relief, filed June 13, 2012, at 3. Rule 60(a) provides for correction of mistakes due to clerical errors, omissions and oversight by the court, and not by counsel. Because the judgment reflected my intent, I do not find that Rule 60(a) applies in the instant case.

B. Application of Rule 60(b)(6) to the Motion for Relief.

Mr. Rosenberg argues that petitioner's refusal to permit him to recoup costs and attorney fees justifies relief under RCFC 60(b)(6), and requests that the court reissue a decision granting attorney fees and costs directly to him or his law firm. He does not cite any case law establishing that his circumstances are so extraordinary as to warrant relief from judgment. The court has not previously addressed a situation analogous to the present case, where an attorney has filed a motion to vacate judgment to enable him to obtain compensation for his services. The court has, however, encountered cases where the attorney of record, after being unable to locate petitioner, requested that attorney fees and costs be paid in the form of a check made out directly to the attorney. *See Gitesatani v. Sec'y, HHS,* 09-799V, 2012 WL 5025006 (Fed. Cl. Spec. Mstr. Sept. 30, 2011); *Tutza v. Sec'y, HHS,* 04-223V, 2012 WL 2362594 (Fed. Cl. Spec. Mstr. Apr. 20, 2012).

In *Gitesatani*, counsel had been forced to withdraw as petitioner's attorney because of a breakdown in communication. *Gitesatani*, 2011 WL 5025006, at *1. Petitioner had relocated to Afghanistan, with no intention of returning to the United States, and refused to communicate with counsel. *Id.* The Special Master granted the attorney's request, noting that the circumstances were extraordinary because "[c]ounsel does not have the option . . . of going into court to enforce a written agreement, even if one existed." *Id.* at *7. Similarly, in *Tutza*, I granted a motion for direct payment to counsel based on the fact that petitioner had disappeared, thereby preventing him from securing endorsement on any checks made payable jointly. *Tutza*, 2012 WL 2362594. In both these cases, the request to issue the payment check solely to counsel was made prior to the issuance of the decision on attorney fees or judgment being entered therein.[9]

The instant motion is distinguishable from the *Gitesatani* and *Tutza* cases because here, counsel is able to locate and communicate with petitioner. I understand that Mr. Rosenberg faces a frustrating situation,[10] but I see no harm to a substantial right here that might persuade me to vacate the judgment. The appropriate remedy for his dispute with his client lies in a state court action, and not with this court. As distasteful as the prospect of an attorney suing his own client for fees may be, Mr. Rosenberg is not the first attorney to be forced to take such action. Because Mr.

[9] Respondent contends that Special Masters lack the authority to award attorney fees and costs directly to counsel. Respondent's Response to Motion for Relief, filed June 6, 2012. Although not an issue in the instant case, as discussed in *Tutza*, 2012 WL 2362594, I maintain that under certain narrow circumstances, a special master may award attorney fees and costs directly to counsel, who is the real party in interest in all fees application.

[10] Mr. Rosenberg and his firm have employed an investigative service to contact petitioner and get an endorsement on the payment check, however, petitioner has been adamant in her refusal to cooperate. Petitioner's Exhibit A, at 2.

Rosenberg has other, more appropriate avenues available to him, I find that he has failed to establish the extraordinary circumstances necessary to vacate the judgment.

IV. Conclusion.

Petitioners' motion to vacate the judgment is denied.

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master