

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 02-1976V

Filed: August 3, 2011

MELISSA EPPS, Parent of
KAREEM NELSON, a Minor Child,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES

Respondent.

PUBLISHED

Denial of Untimely Motion for
Reconsideration

ORDER DENYING OUT OF TIME MOTION FOR RECONSIDERATION¹

Pending before the undersigned is petitioner's Motion for Reconsideration, filed out of time. For the reasons discussed more fully below, the undersigned **DENIES** the untimely request. To put the undersigned's ruling on the motion into proper context, some background discussion is helpful.

Background

On December 27, 2002, petitioner filed a Short-Form Autism Petition for Vaccine

¹ Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends 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). 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).

Compensation in the National Vaccine Injury Compensation Program (“the Program”).² Petition, Dec. 27, 2011. In effect, by use of the special “Short-Form” developed for use in the context of the Omnibus Autism Proceeding (OAP), petitioner has alleged that various vaccinations caused Kareem’s autism spectrum disorder. At one time, more than 5,000 cases were pending in the OAP. Now, the number of OAP cases is less than 3700 cases.

Since the filing of petitioner’s claim significant developments have occurred in the OAP. In particular, the six “test cases” put forth in the coordinated OAP have been tried under two theories presented by the Petitioners’ Steering Committee (a group of designated petitioners’ counsel responsible for representing petitioners’ interests). The first three test cases presented the theory that a combination of the measles, mumps, and rubella (MMR) vaccine and thimerosal-containing vaccines caused ASDs. The second group of three test cases presented the theory that thimerosal-containing vaccines alone can cause ASDs.

The three special masters assigned to hear the test cases ruled that there was no reliable evidence that the vaccines caused ASDs. The courts that heard the appeals in the test cases all agreed with the special masters that there was no reliable evidence supporting vaccine causation.³ Proceedings related to the test cases are now complete. Petitioners in the Vaccine Program whose claims remain pending in the OAP must now indicate how they would like to proceed.

On September 20, 2010, the undersigned issued an order directing petitioner to inform the court of how she wished to proceed in this case. Order, Sept. 20, 2010. On September 27, 2010, petitioner filed a response indicating that she wished to proceed with her claim. Resp. to Order, 1, Sept. 27, 2010.

The undersigned conducted a digitally-recorded status conference on March 25, 2011, to address further proceedings in this case. The status conference was also attended on petitioner’s behalf by John Miles, an attorney who indicated that he did not intend to enter his appearance in this case but would assist Ms. Epps in assembling the materials needed to proceed.⁴ Ms. Epps communicated her intention to proceed with her

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”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

³ The OAP test case decisions can be found at <http://www.uscfc.uscourts.gov/node/5026>.

⁴ Mr. Miles observed that he has advised Ms. Epps that her burden in this case is

claim on the already considered and rejected theory that Kareem's autism resulted from his receipt of the MMR vaccine.⁵ See e.g., Hazelhurst v. Sec'y of Health & Human Servs., 604 F.3d 1343, 1354 (Fed. Cir. 2010). To complete the record for the undersigned's review, the undersigned directed petitioner to obtain and file as soon as possible any available medical records related to Kareem's receipt of the MMR vaccine and his diagnosis of autism.⁶ See Order, 2, Mar. 29, 2011. Petitioner was further directed to file, on or before Monday, April 25, 2011, a statement amending her original petition to identify: (1) the vaccine she believed to be responsible for Kareem's injury and (2) the theory of causation she intends to pursue. Id. In addition, petitioner was directed to file, on or before Thursday, June 9, 2011, a status report identifying the expert she has retained to provide an opinion addressing how Kareem's receipt of a vaccine caused his injury. Id. at 2-3. Petitioner was advised that if she failed to meet the scheduled deadlines and if she failed to timely request an enlargement of time within which to comply with the deadlines, her claim would be dismissed for failure to prosecute. Id. at 3.

Petitioner failed to comply with the directives in the order dated March 29, 2011. On June 28, 2011, the undersigned dismissed petitioner's claim for failure to prosecute. Decision, 3, June 28, 2011. The decision was sent by certified mail to petitioner.

On June 29, 2011, petitioner contacted the court to advise that she was consulting with counsel who was expected to represent her in this matter. She asked for an enlargement of time to respond to the court's March 29, 2011 order. During a procedural status conference conducted with petitioner and respondent's counsel, petitioner was advised that her claim had been dismissed due to her failure to meet her earlier scheduled

very steep and is one that she is unlikely to meet.

⁵ The undersigned advised Ms. Epps that to prevail on the theory that Kareem's autism resulted from his receipt of the MMR vaccine, she would be required to find an expert offering a theory different from the viral persistence theory already considered and determined to be scientifically unreliable. In addition, the undersigned advised Ms. Epps that if she presents an expert whose offered theory is not distinguishable from the previously presented and rejected theories concerning the MMR vaccine and thimerosal-containing vaccines, she will be unable to recover from the Vaccine Program any expenses she has incurred in proceeding on her claim. See Perreira v. Sec'y of Health & Human Servs., 33 F.3d 1375, 1377 (Fed. Cir. 1994) (holding that a "petitioner is not entitled to attorneys' fees and costs once the reasonable basis for maintaining the claim ceased to exist").

⁶ Very few medical records were filed in support of petitioner's short form petition.

deadlines and her failure to timely contact the court to request additional time to respond to the court's order. Petitioner was advised that she was responsible for managing her case until counsel entered an appearance in the case. Petitioner was further advised that she could seek reconsideration of her dismissal decision. An order setting forth the discussion from the procedural status conference issued on Friday, July 1, 2011. See Order, July 1, 2011. The order was sent to petitioner by certified mail. Petitioner refused to accept delivery of the order.

On June 30, 2011, Richard Gage, who is experienced counsel in the Vaccine Program, telephoned chambers regarding an imminent deadline in another case and indicated that he would be entering an appearance in the case. He also expressed an awareness of the issuance of the dismissal decision in this case.

On July 1, 2011, Mr. Gage filed, with petitioner's consent, a motion for substitution as counsel. Mot. for Substitution of Counsel, July 1, 2011. Because petitioner consented to Mr. Gage's substitution as counsel, no action by the undersigned was necessary on the motion.⁷ See Vaccine Rule 14(c); RCFC 83.1(c)(4)(A)(1).

After substituting as counsel in the case, neither Mr. Gage nor his office contacted chambers again until Tuesday, July 19, 2011. On that date, and again by telephonic communication to the undersigned's chambers, Mr. Gage's office acknowledged miscalendaring the deadline for the filing of the motion for reconsideration and inquired about how to proceed in this matter. The undersigned's law clerk indicated that she could not respond to the request for guidance.

On Friday, July 22, 2011, Mr. Gage filed an Unopposed Motion for Leave to File Motion of Reconsideration. The underlying motion for reconsideration was out of time. Mr. Gage explained in the motion for leave to file that his paralegal had become "seriously ill" while he was out of town, and the motion for reconsideration did not get timely filed in accordance with Vaccine Rule 10(e). Mot. for Leave to File Mot. for Reconsideration, 2, July 22, 2011. Mr. Gage also filed a Motion for Reconsideration of the dismissal decision requesting a period of two weeks to review petitioner's medical records and to indicate to the court whether petitioner maintains her intention to proceed on this claim. Mot. for Reconsideration, 2, July 22, 2011.

The Applicable Legal Standard and The Undersigned's Ruling on Counsel's Request

A motion for reconsideration under Vaccine Rule 10(e) shall be filed within 21

⁷ Contrary to counsel's representations in his Unopposed Motion for Leave to File Motion for Reconsideration, the undersigned did not "accept" Mr. Gage's appearance as counsel. The consented motion for substitution of counsel required no action by the undersigned.

days after the issuance of the special master's decision, if judgment has not been entered and no motion for review has been filed under Vaccine Rule 23. Vaccine Rule 10(e)(1). Rule 10(e)(3) affords a special master the discretion to grant or deny the motion "in the interest of justice."

The "interest of justice" standard has been construed under Program cases to be tantamount to the "manifest injustice" showing that serves as a ground for reconsideration under the standards set forth in Rule 59(a) of the Court of Federal Claims. Recently, the "interest of justice" standard set forth in Vaccine Rule 10(e)(3) has been more closely examined.

In Shaw v. Secretary of Health and Human Services, 91 Fed. Cl. 715, 716 (Fed. Cl. 2010), the Court of Federal Claims granted the motion to review the special master's decision to deny reconsideration of a decision dismissing petitioner's claim. In the motion for reconsideration, petitioner asserted that the special master had dismissed the claim based, in part, on a mistake of material fact. Shaw, 91 Fed. Cl. at 718. In petitioner's view, the critical mistake of material fact was the special master's reliance on an unrebutted conclusion made by respondent's expert. See Shaw v. Secretary of Health & Human Services, No. 01-707V, 2009 WL 3007729 *32 (Fed. Cl. Spec. Mstr. Aug. 31, 2009). In the motion for reconsideration, petitioner offered evidence that was previously available to challenge respondent's representation. Shaw, 91 Fed. Cl. at 718. The special master denied the motion for reconsideration because the evidence petitioner sought to introduce after dismissal of petitioner's claim had been available during the conduct of the entitlement proceedings. Id.

On review, the Court of Federal Claims granted the motion for review and remanded the case to the special master for the limited purpose of considering the previously available but newly presented evidence. Shaw, 91 Fed. Cl. at 721. The court did not explicitly reference Vaccine Rule 10(e) but did use the "interest of justice" language of that rule in the grant of the motion for review. Id. The court determined that "[b]oth the statutory scheme and case law make clear that the Vaccine Act is tilted in favor of compensating injured claimants." "[I]n light of the Vaccine Act's bias toward compensation," the court found that the "interest of justice" counseled a "remand with instruction for the special master to consider the effect of this new evidence." Id. The court acknowledged that the new evidence would not necessarily be sufficient to demonstrate entitlement to compensation. Id. But because it might support such a finding, the court decided that petitioner should have a chance to present it, even if the dismissal that petitioner challenged was occasioned by petitioner's own choice "to offer a treating osteopathic physician with no training or experience in treating the neurological conditions" petitioner ostensibly had. Id. at 720 n.9, 721.

Subsequently, in Krakow v. Secretary of Health and Human Services, 2010 WL 5572074 *9 (Fed. Cl. Spec. Mstr. Nov. 12, 2010), the assigned special master granted a

timely motion for reconsideration of her decision dismissing the petition due to counsel's failure to comply with court orders and an apparent failure to prosecute. The special master observed that the case involved "the legal rights of a minor child who struggles with severe disability" and the timely filed motion for reconsideration "demonstrate[d] that petitioners and their counsel [were] making progress toward presenting th[e] case for an entitlement determination." *Id.* at *8. Based on the legal rights involved and the demonstrated progress toward presenting the case for a ruling on entitlement, the special master concluded that the "interest of justice" militated in favor of granting petitioners additional time to prosecute the case on its merits. *Id.*

The reasoning informing the decisions to grant reconsideration in the Shaw and Krakow cases provides helpful guidance in this case.

An important and notable distinction from the Shaw and Krakow cases is the untimeliness of the motion for reconsideration filed here. Although counsel moved to substitute as counsel shortly after the dismissal decision issued, counsel failed to seek reconsideration within the 21-day time period prescribed by the court's rules. Nor had counsel initiated the medical record review that he now seeks to perform on petitioner's behalf. As counsel indicated in the late filed motion for reconsideration, he has yet to obtain the records in petitioner's possession to evaluate the reasonableness of petitioner's expressed desire to proceed with her claim.⁸ *See* Mot. for Reconsideration at 2.

The undersigned is mindful that representation by counsel is beneficial to both petitioner and the Office of Special Masters. Moreover, in autism cases, the review of a file by counsel can assist a petitioner in identifying a reasonable basis, if such exists, for moving forward with a filed claim. The undersigned does not wish to discourage counsel from assisting pro se petitioners in evaluating their claims. However, counsel's failure in this case to timely comply with the deadline for moving for reconsideration or to timely request an enlargement of time within which to file the motion for reconsideration serves neither petitioner nor the vaccine program well.

The bar for compliance in this circumstance is not unattainably high. Counsel has extensive experience in the vaccine program. Had counsel timely sought a brief enlargement of time for the filing of a motion for reconsideration to review the medical records in this case, such motion may have been favorably considered.⁹ Instead, counsel

⁸ Indeed, it appears from a status report electronically filed by petitioner's counsel on August 2, 2011 that counsel only now has begun to make requests for the records he previously indicated he would review in short order. *See* Status Report, Aug. 2, 2011.

⁹ It is not clear whether the discretionary authority conferred under Vaccine Rule 10(e)(3) extends to granting enlargements of time for the filing of reconsideration

now moves out of time for reconsideration of a dismissal decision on the ground that a yet-to-be-conducted review of Kareem’s medical records over the next two weeks might reveal a colorable vaccine claim. Also absent from petitioner’s request is any evidence of an affirmative effort--beyond the agreement to serve as counsel--to expedite an investigation of petitioner’s claim, particularly in light of the dismissal of petitioner’s claim. That a time limit for seeking reconsideration under the vaccine rules exists, suggests that the ability to seek reconsideration in the ‘interest of justice’ is not unfettered and must be weighed against the need for finality in vaccine proceedings. Adherence to the time limits prescribed in the Vaccine Rules ensures a measure of uniform treatment and fairness for all litigants.

In the view of the undersigned, the “interest of justice” standard under Vaccine Rule 10(e) does not extend to abrogating the twenty-one (21) day time period for filing a motion for reconsideration in the absence of either a motion for a brief enlargement of time or a showing of truly extraordinary circumstances. Cf. Caldwell v. United States, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 300 (Fed. Cl. 1999)) (“Motions for reconsideration must be supported by a showing of extraordinary circumstances which justify relief.”).¹⁰ No such motion or showing has been made in this case. Cf. Cedillo v. Sec’y of Health & Human Servs., 617 F.3d 1328, 1348 (Fed. Cir. 2010) (finding that “[t]he Special Master did not abuse his discretion in denying the motion for reconsideration on the grounds that it was untimely.”). A reluctance to dismiss vaccine cases based on untimely requests to examine medical records for some evidence of a possible claim risks creating unworkable uncertainty in vaccine proceedings. The undersigned declines to do so. See generally, United States v. Ziegler Bolt & Parts, Co., 111 F.3d 878, 882 (Fed. Cir. 1997) (quoting Landis v. North Am. Co., 299 U.S. 248, 254 (1936)) (referring to the inherent power of a trial court to “control the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”). This out-of-time motion for reconsideration of the dismissal decision is **DENIED**.

IT IS SO ORDERED.

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

motions that would encroach on the period of time prescribed for the filing of a motion for review.

¹⁰ In Caldwell the Federal Circuit addressed a motion for reconsideration made under Rule 59(e) of the Court of Federal Claims (RCFC). The court’s rules apply in the Vaccine Program “only to the extent they are consistent with the vaccine rules.” Vaccine Rule 1(e). The undersigned finds no inconsistency between RCFC 59(e) and Vaccine Rule 12(e)(3) as it is applied here.