

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(E-Filed: December 7, 2011)

No. 06-0710V

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JUANITA COLEMAN,

Petitioner,

v.

SECRETARY OF THE
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Respondent.

* * * * *

TO BE PUBLISHED

Motion to Vacate Judgment;
Vaccine Rule 36; RCFC 60(b)(6);
Motion for Reconsideration;
Vaccine Rule 10(e); interest of
justice standard; counsel’s failure
to make timely filings into
a meaningfully developed record;
a full and fair opportunity to
present case.

William Dobreff, Dobreff & Dobreff, Clinton Township, MI, for petitioner.
Althea Walker Davis, U.S. Dep’t of Justice, Washington, D.C., for respondent.

**ORDER GRANTING PETITIONER’S MOTION
TO VACATE JUDGMENT AND MOTION FOR RECONSIDERATION¹**

Pending before the undersigned is petitioner’s motion to vacate the judgment entered in this case on November 18, 2011 (Judgment) and motion for reconsideration of the October 12, 2011 decision to dismiss her claim (Decision).

For the reasons discussed more fully below, the undersigned **GRANTS** the petitioner’s Motion to Vacate Judgment. The undersigned also **GRANTS** petitioner’s

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).

Motion for Reconsideration. To put the undersigned's rulings on these motions into proper context, some background discussion is helpful.

I. Background

The dismissal decision in this case issued following petitioner's counsel's failure to comply with the deadline for filing a supplemental expert report.

As detailed more fully in the undersigned's Decision, petitioner's counsel has failed repeatedly in this case to respond timely to the undersigned's issued orders.

A. Petitioner's Counsel's Failure to Comply with Court Orders and Deadlines

Petitioner's counsel's disregard for timeliness dates back to the beginning of his representation.² His failure to timely comply with ordered filing dates has led to the issuance of two show cause orders.

On October 16, 2007, after petitioner's counsel missed two sets of deadlines for filing outstanding medical records and for contacting chambers to schedule a status conference, the undersigned issued the first of two show cause orders in this case. Show Cause Order, Oct. 16, 2007. In that order, the undersigned reprimanded counsel for "repeatedly ignor[ing] communication from the court, and . . . fail[ing] to prosecute his client's case." Id.

Since the issuance of the first show cause order in October 2007, petitioner's counsel has missed at least 18 deadlines that were established by order of the undersigned. In each of the 18 noted instances, petitioner's counsel failed to move for an enlargement of time or to acknowledge that the filings, most of which were eventually made, were out of time.³

² Petitioner filed this claim pro se. Based on counsel's expressed intention to represent petitioner, counsel was directed to substitute for counsel in this case by December 15, 2006. Counsel did not properly do so until over three months later, on March 19, 2007.

³ One example is particularly demonstrative of how petitioner's counsel's unresponsiveness to court orders has consumed judicial resources needlessly and has delayed the course of proceedings unnecessarily. On January 27, 2010, the undersigned issued a pre-hearing order directing petitioner's counsel to file petitioner's anticipated witness list for the March 24, 2010 onset hearing. Prehearing Order, Jan. 27, 2010. On March 10, 2010, the undersigned issued an order observing that no witness list had been filed and directing petitioner's counsel to file the witness list by March 12, 2010. Order,

On August 5, 2011, the undersigned issued a second show cause order. Show Cause Order, Aug. 5, 2011. The issuance of that order was prompted by petitioner's counsel's failure to file petitioner's expert report by the established deadline and his failure to seek an enlargement of time for the filing. Id.

Petitioner's counsel responded by filing on August 29, 2011 an expert report from petitioner's treating dermatologist, Dr. Mack Rachal.

On September 7, 2011, the undersigned held a status conference with the parties to discuss the shortcomings of petitioner's expert report. To address the noted concerns, petitioner was ordered to file a supplemental expert report. Order, Sept. 9, 2011. Petitioner's counsel's practice of untimely filing in this case was discussed again. Id.

Petitioner's counsel made assurances that he understood what the circumstances might be if he failed to file the supplemental expert report as directed. Respondent's counsel indicated that she would move for dismissal of the claim if petitioner did not make a timely filing. Id.

B. Dismissal of Petition

Petitioner's counsel did not file the supplemental expert report in a timely manner. Nor did counsel seek an enlargement of time. This non-compliance led to the dismissal of petitioner's claim. In light of the ample warnings given to petitioner's counsel regarding the importance of timely filings, the undersigned construed petitioner's counsel's failure to file a supplemental expert report or to move for an enlargement of time as an acknowledgment that petitioner could not prove her claim. Accordingly, the undersigned dismissed the petition on October 12, 2011 for insufficient proof of causation and for failure to prosecute. See Decision. The decision issued electronically.

C. Petitioner's Request

On October 21, 2011, nine days after issuance of the dismissal decision, petitioner filed a motion for reconsideration. Petition for Reconsideration or Relief from Decision and/or for a Status Conference (Motion for Reconsideration). The motion explained at length that petitioner's counsel's failure to file a request for enlargement was due to clerical error. Id. Specifically, counsel focused on his secretary's anemia, a medical condition that counsel claimed could cause forgetfulness. Id. at 1, 3-4. Counsel pointed

March 10, 2010. On March 15, 2010, the undersigned had to issue yet another order noting petitioner's counsel's failure to comply with her previously issued orders and directing him to file his witness list by March 17, 2010 at noon. Order, March 15, 2010. Petitioner's counsel filed the witness list on March 16, 2010.

to his secretary's forgetfulness as the reason an enlargement of time was not filed. Id. at 1, 4.

On November 10, 2011, the undersigned conducted a status conference to address petitioner's motion. Respondent expressed an interest in responding to petitioner's motion. Order, Nov. 10, 2011. The undersigned afforded respondent's counsel an opportunity to respond and declined to grant petitioner's counsel's oral request to withdraw the dismissal decision while respondent's counsel prepared her response. Id. The undersigned noted that she preferred to afford petitioner the opportunity to have her case evaluated on the merits of her claim rather than on the failure of counsel to make timely filings in this case. Id. Nonetheless, the undersigned allowed respondent's counsel to address the issue. Id.

On November 18, 2011, respondent filed a response to petitioner's counsel's Motion for Reconsideration. Response to Petitioner's Motion for Reconsideration or Relief from Decision and/or for a Status Conference. Respondent stated that "[t]he special master is well aware of the proceedings in this matter and has carefully documented the record." Id. Respondent deferred "to the court's discretion in determining the appropriate actions in this case." Id.

Later in the day, on November 18, 2011, judgment entered pursuant to Vaccine Rule 11(a) for insufficient proof of causation and for failure to prosecute (Judgment).

On November 23, 2011, petitioner's counsel reasserted his Motion for Reconsideration as part of a filed Motion to Vacate Judgment. Motion for Reconsideration Pursuant to RCFC 59 and Vaccine Rule 36, Relief from Judgment Pursuant to RCFC 60 and Vaccine Rule 36 to Alter or Modify Judgment and/or Vacate Judgment (Motion to Vacate Judgment). Again, petitioner's counsel explained that the dismissal of the claim arose from a clerical error attributable to his secretary's illness. Id. at 2, 4, 6-7.

Counsel further represented in his motion that he did not receive the supplemental expert report from Dr. Rachal until October 19, 2011, twelve days after the report was due to be filed. Id. at 2. See also Order, Sept. 9, 2011 (establishing a filing date of October 7, 2011 for the filing of the supplemental expert report). The supplemental expert report, which is dated October 17, 2011, was attached as Exhibit 13 to petitioner's renewed Motion for Reconsideration and Motion to Vacate Judgment. Because Dr. Rachal's supplemental expert report was filed as an exhibit to the Motion to Vacate Judgment, it was not filed until November 23, 2011.

Petitioner has requested that the undersigned vacate the judgment and reinstate the case. The matter is now ripe for a ruling.

II. Analysis

A. A Full and Fair Opportunity to be Heard

Vaccine Rules apply to proceedings in the National Vaccine Injury Compensation Program (“the Program”).⁴ Vaccine Rule 3 compels a special master to afford each party a full and fair opportunity to present its case. Vaccine Rule 3(b)(2). To date, petitioner has not received a full opportunity for her claim to be heard on a meaningfully developed record due to the failings of her counsel to make timely filings.

B. Motion to Vacate Judgment

i. Applicable Legal Standards

In accordance with the Vaccine Rules promulgated by the Court of Federal Claims,⁵ a party may seek relief from a judgment or order pursuant to Rule 60. Vaccine Rule 36(a). The motion is then referred to the assigned special master, who must file a written ruling on the motion. Vaccine Rule 36(a)-(b).

Rule 60 of the Rules of the Court of Federal Claims (RCFC) outlines several grounds for relief from a final judgment, order, or proceeding based “on motion and just terms.” RCFC 60(b).⁶ Among the listed grounds for relief is “any other reason that justifies relief.” RCFC 60(b)(6).

⁴ 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.

⁵ As authorized under Section 12(d)(2) of the Vaccine Act and on the recommendation of the special masters, the Court of Federal Claims has promulgated Vaccine Rules that govern petitions filed under the Act.

⁶ RCFC 60(b) provides:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

A motion for relief from judgment under Rule 60(b)(6) may be granted only upon a showing of “extraordinary circumstances.” Kennedy v. Sec’y of Health & Human Servs., 99 Fed. Cl. 535, 548 (2011) (citing Ackermann v. United States, 340 U.S. 193, 202 (1950) and finding no extraordinary circumstances warranting relief).⁷ Generally, Rule 60(b) enables a court to grant a party relief from judgment in circumstances in which a “grave miscarriage of justice” would otherwise result. Id. at 540 (quoting United States v. Beggerly, 524 U.S. 38, 47 (1998)). Relief will not be granted under this provision if “substantial rights of the party have not been harmed by the judgment or order.” Vessels v. Sec’y of Health & Human Servs., 65 Fed. Cl. 563, 568 (2005). See also id. at 568, 570 (indicating that relief may be granted under Rule 60(b) where “the need for truth outweighs the value of finality in litigation” and acknowledging that a “strong case could be made for relief under Rule 60” if “there was some [] problem with the evidence that would have been material to the special master’s decision”);⁸ Freeman

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- (4) the judgment is void;
 - (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
 - (6) any other reason that justifies relief.

⁷ In Kennedy, a special master afforded the parents of a vaccinee, who were acting pro se, numerous opportunities to file the necessary documentation demonstrating that an administration of DPT vaccine caused the vaccinee’s mental retardation. Id. at 549. The parents understood that a qualified medical opinion was necessary to support the claim, because they successfully sought extensions of time on at least three different occasions for the purpose of filing a sufficient expert report. Id. Because the parents were unable to produce an expert report, their claim was dismissed and no motion for review was filed. Id. at 539. Seventeen years later, the vaccinee filed a claim, with the help of counsel, alleging that his parents’ representation was ineffective and unlawful, and warranted relief from judgment under Rule 60(b)(6). Id. Finding that courts have generally refused to grant relief under Rule 60(b)(6) based either on a claim of ineffective assistance of counsel or a request for relief from a litigant claiming to have “suffered adverse consequences from a decision to proceed pro se,” the Court of Federal Claims similarly refused to grant relief under Rule 60(b)(6). Id. at 548.

⁸ In Vessels, a special master dismissed petitioners’ claim, finding that the applicable statute of limitations barred recovery. Id. at 564. Petitioners did not file a motion for review of the special master’s decision. Id. Citing the recently issued Court of Federal Claims decision, Setnes v. United States, 57 Fed. Cl. 175 (2003), petitioners subsequently sought relief from judgment pursuant to Vaccine Rule 36. Id. Positing that “to deny the petitioners the benefit of our Court’s holding in Setnes would be ‘manifestly unfair and inequitable,’” the special master granted petitioners’ motion for relief from

v. Sec’y of Health & Human Servs., 35 Fed. Cl. 280, 284 (1996) (citing Solitron Devices, Inc. v. United States, 16 Cl. Ct. 561, 564 (1989)) (recognizing that Rule 60(b)(6) may be used “to vacate judgments whenever such action is appropriate to accomplish justice”).⁹

ii. Evaluating Petitioner’s Request to Vacate Judgment

On November 23, 2011, petitioner timely filed a motion to vacate judgment pursuant to Rule 60. Motion to Vacate Judgment.

Although petitioner’s Motion to Vacate Judgment focuses on the illness of his counsel’s secretary and the resulting “clerical error,” the undersigned is inclined to grant relief based not on the “clerical error” but instead to avoid – as the court in Kennedy, Vessels, and Freeman indicated – the harm to substantial rights of petitioner that would result if the requested relief were not granted. Here, a failure to grant the motion would unduly and significantly impair petitioner’s right to receive consideration of a meaningfully developed record based solely on her counsel’s repeated failures to make timely filings.

Petitioner’s counsel was directed in this case to file a supplemental expert report to clarify “whether the time frame for symptom onset in this case is consistent with the time frame that would be medically expected for the occurrence of a ‘vaccine-induced

judgment. Id. at 568. The Court of Federal Claims determined that “this case does not present the sort of exceptional circumstances warranting relief from judgment” and that the case should remain closed. Id. at 570. The court noted, “[a]ll that has happened is that an opinion of the Court adopted a different rule than was applied to petitioners’ matter.” Id.

⁹ In Freeman, the then chief special master dismissed petitioners’ claim with prejudice pursuant to Vaccine Rule 21(c) for failure to state a claim upon which relief could be granted and for failure to substantiate any claim. Id. at 282. The Court of Federal Claims ultimately granted petitioners’ request for relief from judgment under Rule 60(b)(6) because “through no fault of their own, [petitioners] lost an opportunity to have their case decided based upon its merits.” Id. at 284. In this case, petitioners alleged that the attorney they had retained actively misled them by encouraging them to let him handle the case and all contact with the court, while on the other hand, failing to prosecute the case. Id. at 282. Petitioners also asserted that the attorney had misinformed them by stating that he had filed certain medical documentation, when, in fact, he had not. Id. In addition, petitioners contended that they never received a notice of dismissal from the court because it was sent to an incorrect postal address. Id. The court found that if petitioners’ version of events were correct, then the alleged circumstances would “warrant the reopening of the case in the interest of justice.” Id. at 281.

autoimmune phenomenon.”” Order, Sept. 9, 2011. In addition, petitioner’s expert was directed to “provide either specific citations for the literature or copies of the referenced literature” to which he adverted in his initial expert report. Id.

The undersigned directed the filing of a supplemental expert report because the initial expert report was conclusory and did not assist petitioner in meeting the legal burden articulated under Althen v. Sec’y of Health & Human Servs., 418 F.3d 1274 (Fed. Cir. 2005).¹⁰ The filing of a supplemental expert report was necessary to allow the undersigned to gain an understanding of petitioner’s theory of vaccine-related causation. It appears from the October 17, 2011 date on the supplemental expert report that preparation of Dr. Rachal’s report was more than likely underway when the case was dismissed, a fact that could have been drawn to the attention of chambers had counsel properly alerted the undersigned to his need for a brief enlargement of time.

Petitioner’s counsel’s habit of failing to timely comply with established deadlines has been addressed on multiple occasions in this case and will be taken into account when counsel submits a final fee application in this case. Because petitioner’s counsel has filed, albeit out of time, the ordered supplemental expert report and because the undersigned desires to avoid compromising petitioner’s reasonably well-developed claim based solely on counsel’s pattern of tardiness and noncompliance with orders, the undersigned **GRANTS** petitioner’s motion to vacate judgment.

Granting petitioner’s request for relief from judgment allows the undersigned to address the pending Motion for Reconsideration.

C. Motion for Reconsideration

i. Applicable Legal Standards

Under Vaccine Rule 10, a party may file a motion for reconsideration of a special master’s decision within 21 days of the issuance of the decision. Vaccine Rule 10(e)(1). The decision whether to grant reconsideration “lies largely within the discretion of the [trial judge].” Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990).

Vaccine Rule 10(e)(3) affords a special master the discretion to grant or deny the motion “in the interest of justice.”

¹⁰ Petitioner must demonstrate by preponderant evidence: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury. Althen v. Sec’y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005).

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 RCFC. Epps v. Sec’y of Health & Human Servs., 2011 WL 4711911, at *3 (Fed.Cl.Spec.Mstr. Aug. 3, 2011). Recently, however, the “interest of justice” standard set forth in Vaccine Rule 10(e)(3) has been more closely examined in three different cases. In these cases, the “interest of justice” standard has been construed to be a standard that appears to be less onerous than the “manifest injustice” showing that is required for reconsideration under Rule 59(a). Krakow v. Sec’y of Health & Human Servs., 2010 WL 5572074, at *5 (Fed.Cl.Spec.Mstr. Nov. 12, 2010). See also Shaw v. Sec’y of Health & Human Servs., 91 Fed. Cl. 715, 720-21 (2010) (implicitly considering an “interest of justice” standard); Epps, 2011 WL 4711911 (applying the “interest of justice” standard).

The undersigned addresses here two of the recently issued decisions, namely Krakow and Epps, that invoke factual circumstances similar to this case.¹¹ In both of these cases, the motions for reconsideration followed dismissals for failure to comply timely with filing deadlines.¹²

In Krakow, the special master found that the “interest of justice” standard weighed in favor of granting the motion for reconsideration so that petitioners could have an opportunity to prosecute their case in the first instance. Krakow, 2010 WL 5572074, at *8. The special master noted that petitioners’ motion for reconsideration “describes a series of mistakes, misunderstandings, misjudgments, and an overall failure of counsel and petitioners to manage the case.” Id. The special master reasoned, however, that, because the claim involved the legal rights of a minor with a severe disability and because counsel demonstrated in the motion for reconsideration that progress was being made towards presenting the case for a ruling on entitlement, it was in the “interest of justice” to permit petitioners to prosecute their case on the merits. Id.

¹¹ The third case, Shaw, is factually distinct from the circumstances presented in this case. In Shaw, the Court of Federal Claims considered whether the “interest of justice” standard weighed in favor of remanding a claim to permit petitioner to present evidence that had not been introduced prior to the hearing on the claim or prior to the issuance of the decision finding no entitlement to Program compensation. Shaw, 91 Fed. Cl. at 721.

¹² In Krakow, petitioners’ counsel did not respond to an order directing petitioners to file a status report identifying their retained experts. Krakow, 2010 WL 5572074, at *3. In Epps, petitioner’s counsel did not respond to an order directing the filing of an amended petition and a status report on efforts to obtain an expert. Epps, 2011 WL 4711911, at *1-2.

In Epps, on the other hand, the undersigned was not persuaded that it was in the “interest of justice” to grant petitioner’s motion for reconsideration. Epps, 2011 WL 4711911, at *5. In Epps, petitioner had failed to timely file her motion for reconsideration, and her claim was based on an “already considered and rejected theory that [petitioner’s son’s] autism resulted from his receipt of the MMR vaccine.” Id. at *4, 1. Petitioner’s failure to file anything more than a few medical records demonstrated little progress made by petitioner’s counsel toward advancing the case. Id. at *1. Furthermore, petitioner had been advised by earlier consulting counsel that her legal burden in moving forward with a vaccine claim was a steep one. Id.

ii. Evaluating Petitioner’s Request for Reconsideration

On October 21, 2011, petitioner timely filed a motion pursuant to Vaccine Rule 10(e) seeking reconsideration of the dismissal decision. Motion for Reconsideration.

Although petitioner’s counsel has demonstrated a pattern of noncompliance and untimeliness in this case, counsel has made affirmative efforts to advance petitioner’s claim and has succeeded in developing the record for consideration, after much prodding to make the requisite filings. The filing of the supplemental expert report in this case serves to clarify petitioner’s theory of causation and allows the undersigned to evaluate petitioner’s claim on its merits.

Similar to the circumstances in Krakow, petitioner in this case would be unduly prejudiced if she were not given an opportunity to receive review of her claim in the first instance due to counsel’s failure to meet filing deadlines timely. Moreover, unlike the circumstances in Epps, counsel in this case has made demonstrable efforts to advance petitioner’s case by obtaining the requested supplemental expert report. Counsel failed, however, to communicate timely with the court regarding the few additional days needed to file the report. Indeed, the effort shown to obtain a supplemental expert report but not timely file is distinguishable from the failure to prepare or the inability to present petitioner’s claim for an initial evaluation on the merits.

For these reasons, the undersigned is persuaded that the “interest of justice” weighs in favor of allowing petitioner the opportunity to prosecute her case on the merits. Petitioner’s Motion for Reconsideration of the dismissal decision is **GRANTED**.

III. Conclusion

Due to the failings of her counsel to make timely filings, petitioner has developed record evidence that has not been considered. In this factual circumstance, the undersigned is persuaded that considering the late filed evidence in support of petitioner's claim is in the interest of justice.

To afford petitioner a full and fair opportunity to present her claim, the undersigned **GRANTS** petitioner's Motion to Vacate Judgment and petitioner's Motion for Reconsideration.

IT IS SO ORDERED.

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