

In the United States Court of Federal Claims
NOT FOR PUBLICATION
No. 02-725

(Originally Filed May 9, 2005)
(Reissued June 1, 2005)

NORA A. HAYMAN, by her *
father and natural guardian, *
ROBERT HAYMAN, *
 *
 Petitioner, *
 *
 v. *
 *
THE UNITED STATES, *
 *
 Respondent. *

Clifford John Shoemaker, Vienna, VA, attorney of record for petitioner Nora A. Hayman, by her father and natural guardian, Robert Hayman.

Lisa Ann Watts, Department of Justice, Washington, D.C., with whom was *Assistant Attorney General Peter D. Keisler*, for respondent. *Timothy P. Garren*, Director, Torts Branch, Civil Division, and *Mark W. Rogers*, Deputy Director, Torts Branch, Civil Division.

OPINION & ORDER

Futey, Judge.

This case is before the court on petitioner's motion for review of the special master's order dismissing the petition under **Vaccine Rule 21(c)**¹ for failure to prosecute. Petitioner alleges, however, that the transfer of the case from Special Master E. LaVon French to Special Master John Edwards "caused [p]etitioner's inability to respond in a timely manner."² Respondent argues that not only did

¹ The Vaccine Rules are located in Appendix B of the Rules of the United States Court of Federal Claims.

² Petitioner's Motion For Review (Petitioner's Mot.) at 1.

petitioner have over two years to provide the report, but petitioner also failed to respond to a show cause order. Respondent also argues that petitioner failed to meet his burden to show a prima facie case to demonstrate actual causation between the vaccine and the injury.

Factual Background

Petitioner, Nora A. Hayman, by her father and natural guardian, Robert Hayman, filed a petition seeking compensation for alleged vaccine related injuries in accordance with the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 *et seq.* (1994). On September 25, 2000, Nora received a pneumococcal conjugate (Prevnar) vaccination. Nora's father contends that as a result of such vaccination she suffered a "rash and welts and a high fever."³ In late October 2000, Nora was checked into the Children's Medical Center in Washington, D.C., to evaluate "the subacute onset of ataxia, dysarthria and abnormal body movements."⁴ After conducting a comprehensive evaluation, Nora's treating doctor, pediatric neurologist Lucy A. Civitello, M.D., concluded that Nora "exhibited likely Sydenham[']s chorea, due to the presence of an elevated antistreptolysin titer."⁵ Mr. Hayman relates these medical conditions to the Prevnar vaccination that Nora received earlier.⁶

On June 21, 2002, Mr. Hayman filed a petition for compensation under the Vaccine Act. On April 7, 2003, petitioner proffered a letter from Dr. Civitello that stated "it is medically possible that Nora's symptoms" of Sydenham's chorea "were related to an adverse reaction of Prevnar."⁷ On January 30, 2004, petitioner proffered a letter from Dr. Latimer, M.D., that stated:

Since Nora had such a dramatic response to the vaccination and because the movement disorder occurred just weeks following the vaccination, it is my opinion that the vaccine was the cause of the Sydenham's [c]horea.⁸

³ Decision issued by Special Master Edwards on January 14, 2005, at 1 (citing Petition ¶ 9) (hereinafter January 14 decision).

⁴ *Id.* (citing Petitioner's Mot., Exhibit (Ex.) 10, at 1).

⁵ *Id.*

⁶ *Id.*

⁷ January 14 decision at 2 (citing Petitioner's Mot., Ex. 10, at 1).

⁸ *Id.* (citing Petitioner's Mot., Ex. 13, at 1).

On April 2, 2004, petitioner filed a status report where he informed Special Master French that Dr. Latimer was "working on expanding" the report and requested an additional 30 days to file Dr. Latimer's supplemental report.⁹ Petitioner did not file the "complete expert report" and on December 14, 2004, Special Master French issued an order requiring petitioner to show cause why the case should not be dismissed or to file a complete expert report by December 31, 2004.¹⁰ On December 22, 2004, the case was transferred to Special Master Edwards. On January 14, 2005, Special Master Edwards dismissed the petition on two independent grounds. First, the special master held that petitioner did not respond to the order at all and failed to file the "complete expert report." The special master further held that, under **Vaccine Rule 21(c)**, petitioner did not prosecute the case by "inexplicabl[y] fail[ing] to advance the case in nearly a year."¹¹

Second, Special Master Edwards concluded that letters from Dr. Civitello and Dr. Latimer were "individually and collectively, woefully insufficient"¹² to satisfy petitioner's burden of proof of establishing a prima facie case. The letter from Dr. Civitello failed to meet a proper evidentiary standard to show medical probability. Rather, it stated that it was "medically possible" that the Sydenham's chorea was a reaction to Prevnar.¹³ Although the letter from Dr. Latimer attributes Nora's Sydenham's chorea to the vaccination, the letter did not explain the relationship between the condition caused by streptococcal infection and a vaccine to prevent pneumococcal infection.¹⁴

On February 14, 2005, petitioner filed a motion for review. The motion was filed within 30 days of the special master's decision and is, therefore, timely. **Vaccine Rule 23**. Respondent's response likewise is timely as it was filed within 30 days of petitioner's motion. **Vaccine Rule 25(a)**.

⁹ *Id.* at 3 (citing Status Report of April 2, 2004, at 1).

¹⁰ *Id.* (citing Order to Show Cause at 1).

¹¹ *Id.* (citing Petitioner's Mot., Ex. 13, at 1).

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *Id.*

Discussion

Under the Vaccine Act, when deciding the motion for review, the court may:

- (A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision,
- (B) set aside any findings of fact and conclusions of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or
- (C) remand the petition to the special master for further action in accordance with the court's direction.

42 U.S.C. § 300aa-12(e)(2). This Act "contemplates three distinct levels of review." See *Johnson v. Sec'y of DHHS*, 33 Fed. Cl. 712, 720 (1995) (citing *Ankenbauer v. Sec'y of DHHS*, 31 Fed. Cl. 637, 640 (1994)). The court in *Carraggio* further delineated the levels of review:

The fact findings are reviewed under the arbitrary and capricious standard. Legal questions are reviewed under the 'not in accordance with law' standard, and discretionary rulings are reviewed under the abuse of discretion standard.

Carraggio v. Sec'y of DHHS, 38 Fed. Cl. 211, 217 (1997) (quoting *Perreira v. Sec'y of DHHS*, 27 Fed. Cl. 29, 32 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994)). This court will be highly deferential to the factual findings of the special master. See *Johnson*, 33 Fed. Cl. at 720 (citing *Munn v. Sec'y of DHHS*, 970 F.2d 863, 869 (Fed. Cir. 1992)). The decision of the special master should be affirmed as long as the special master "considers all the relevant factors, makes no clear error in judgment, and articulates a rational connection between the facts found and the choice made." *Johnson*, 33 Fed. Cl. at 720 (citing *Fricano v. United States*, 22 Cl. Ct. 796, 798 (1991)). Consequently, under the arbitrary and capricious standard, the court should not substitute its judgment for that of the special master even though it may have reached a different conclusion. See *Id.* at 720 (citing *Carter v. Sec'y of DHHS*, 21 Cl. Ct. 651, 653 (1990)).

I. Show Cause Order

Petitioner's only argument is a contention that due to the "procedural activities of the court in transferring Special Master French's cases," petitioner was

delayed in filing his response.¹⁵ The court, first, will address this argument and review petitioner's motion that Special Master Edwards abused his discretion when he ruled that "[p]etitioner had not responded to the previously issued Order to Show Cause."¹⁶

Both this court and the United States Court of Appeals for the Federal Circuit (Federal Circuit) have not been hesitant, in appropriate circumstances, to dismiss cases for failure to prosecute or comply with orders. For example, in *Sapharas*, the court held that the petitioner failed to file his motion in a timely manner and, therefore, failed to prosecute. *Sapharas v. Sec'y of DHHS*, 35 Fed. Cl. 503 (1996). The petitioner filed a petition seeking relief under the Vaccine Act. The petitioner requested an extension of time to file additional medical records. Seven months later, the special master issued an order "placing petitioner on notice that failure to comply with the court's order would result in dismissal of the claim." *Id.* at 503. The order granted the petitioner "one last opportunity to respond." *Id.* The petitioner, however, failed to file the records. The special master accurately noted that the petitioner demonstrated "either inability or unwillingness to prove its case." *Id.* at 504. The court held that even the "noblest" efforts to "locate medical records are in vain if a party fails to respond to court orders which affect those records." *Id.* at 505. The court continued, "not only did petitioner fail to meet the court's April 13, 1995 deadline, but he also ignored the chief special master's 'warning' order." *Id.* In *Tsekouras*, another vaccine case, the court also upheld the special master's dismissal of the case for failure to prosecute when the petitioner ignored court "warnings" and an additional opportunity to comply with the order. *Tsekouras v. Sec'y of DHHS*, 26 Cl. Ct. 439 (1992).

The same legal principle has also been applied outside the context of Vaccine Act cases. The Federal Circuit in *Kadin Corp.*, held that the Claims Court did not abuse its discretion in dismissing the complaint for failure to prosecute. *Kadin Corp. v. United States*, 782 F.2d 175, 177 (Fed. Cir. 1986). There, the appellant filed a complaint seeking additional compensation from the government for work it had performed under a construction contract with the Small Business Administration. After the appellant failed to comply with the Claims Court's order to respond to the government's discovery requests, the Claims Court issued an order to show cause why the appellant's complaint should not be dismissed for failure to prosecute. The appellant did not submit his response before the date set in the order to show cause. The court refused to accept his late response and *sua sponte* dismissed the claim for failure to prosecute. *Id.* at 176. The Claims Court noted, and the Federal Circuit

¹⁵ Petitioner's Mot. at 3.

¹⁶ *Id.*

agreed, that "in view of the gravity of the show cause order, every effort should have been made to comply in a timely fashion." *Id.*

Claude E. Atkins Enterprises is another case, where the Federal Circuit found no abuse of discretion when a lower court dismissed the appellant's complaint pursuant to RCFC 41(b)¹⁷ for failure to prosecute. See *Claude E. Atkins Enters., Inc. v. United States*, 899 F.2d 1180 (Fed. Cir. 1990). In that case, the appellant was warned by two orders, that were issued six months apart, to comply with the orders and provide its pretrial statements to the government by a certain date. The appellant, however, ignored both orders and did not submit the pretrial statements. Further, in *Adkins*, the Federal Circuit found no abuse of discretion and dismissed the parties, "when, after a year, the dismissed parties had evidenced no interest in the litigation beyond joining in the filing of a complaint." *Adkins v. United States*, 816 F.2d 1580, 1583 (Fed. Cir. 1987) (citation omitted). The appellants received three enlargements of time to file the interrogatories and a "warning " notice that the court would dismiss non-responding parties if they failed to comply. The Federal Circuit noted that "given the nature of the interrogatories, the repeated failures of appellants to meet discovery time limits, the order of the court setting the final deadline dates, and the absence of an explanation for delay, there was substantial justification for the Claims Court's action." *Id.*

In the underlying case, similarly to *Sapharas*, petitioner neither timely responded to the order to show cause nor did he request additional time. Petitioner had to submit the "complete expert report" that would demonstrate that the cause of Nora's symptoms was indeed an adverse reaction to Prevnar because previously submitted evidence was not sufficient to meet the evidentiary standards to show a prima facie case. On April 2, 2004, petitioner filed a status report stating that Dr. Latimer was "working on expanding her report" and requested an additional 30 days to file the expanded report.¹⁸ Eight months later, petitioner still did not file the report, nor did he request an extension of time.¹⁹ Since dismissal is a rather "harsh sanction," see *Kadin*, 782 F.2d at 176, on December 14, 2004, Special Master French issued a "warning" - an order to show cause why the case should not be dismissed or

¹⁷ RCFC 41(b) allows the court to dismiss a case *sua sponte* or on defendant's motion "for failure of the plaintiff to prosecute or to comply with these rules or any order of court."

¹⁸ January 14 decision at 3 (quoting Status Report, filed April 2, 2004, at 1).

¹⁹ Although respondent claims that petitioner had over two years to submit the report, the court only considers the time from the date of expiration of 30 days that petitioner requested on April 2, 2004.

alternatively to file the "complete expert report." Special Master French particularly emphasized that "failure to comply with this order will result in dismissal of the matter."²⁰ Petitioner, however, failed to respond to the order.

Petitioner asserts that he was delayed as a result of the "procedural activities of the Court in transferring Special Master French's cases."²¹ Specifically, petitioner argues that due to the transfer of the case to another special master and the holidays, he was not able to file his response on time. Here, the court concurs with respondent and holds that petitioner's reasons are without merit. The transfer of the case from one special master to another is completely irrelevant to petitioner's ability to timely file the report. Filing of the documents after the petition was submitted must be done with the Clerk of the Court, and not with a specific special master's office. See **Vaccine Rule** 17(a).

Further, the transfer of the case from Special Master French to Special Master Edwards took place on December 22, 2004, *after* the order to show cause was issued and the deadline to submit the "complete expert report" was set for December 31, 2004. Since petitioner received the notice of the case transfer on or after December 28, 2004,²² it necessarily follows that by the time petitioner received the notice, petitioner's response to the order should have been in the stage of preparation to meet the December 31, 2004 deadline. Thus, the fact that petitioner was unable to locate "Special Master French's files"²³ in other special master's offices in order to file his report has no bearing on the late filing of petitioner's response on January 14, 2005.²⁴

Petitioner's claim that his response to the show cause order was delayed due to the holidays is also without merit. While the clerk's office did not accept filings

²⁰ January 14 decision at 3 (quoting *Hayman v. Secretary of HHS*. No. 02-0725V, Order to Show Cause at 1 (Fed. C. Spec. Mstr. Dec. 14, 2004)).

²¹ Petitioner's Mot. at 3.

²² *Id.* at 2.

²³ *Id.*

²⁴ On January 14, 2005, Special Master Edwards dismissed the petition. In Petitioner's Motion For Review filed February 14, 2005, petitioner states that the status report/response to the show cause order was filed on January 14, 2005. While petitioner dated his status report January 14, 2005, and stated that it was faxed and mailed to respondent on that day, petitioner's status report/response was not received and filed in this court until January 19, 2005.

on Christmas day,²⁵ it did accept filings on December 31, 2004. Even if petitioner failed to file the "complete expert report" by December 31, 2004, he still had an opportunity to do so by January 3, 2005,²⁶ the new extended deadline.²⁷ Further, even if petitioner was not ready to file the report, he could have responded to the order by asking for an extension of time. Petitioner, however, failed to do either. Thus, the response filed on January 14, 2005, was eleven days late, and petitioner's argument that the holidays were the reason for the delay is plainly insufficient. ***J.R. Youngdale Const. Co., Inc. v. United States***, 210 Cl. Ct. 459, 466 (1976) (court found no abuse of discretion when the Armed Services Board of Contract Appeals held that a six-day delay in mailing the documents was not justified and "the mere fact that the Christmas holidays occurred near the end of the 30-day period was insufficient for this purpose").

This court previously held that all parties in a Vaccine Act case should strictly follow procedural rules and make every effort to meet the established deadlines. See ***Baker v. Sec'y of DHHS***, 61 Fed. Cl. 669 (2004) (when a *per se* petitioner failed to file a motion for review within 30 days, the court held that there should be strict compliance with the filing date for all parties and dismissed the petition); see also ***Brice v. Sec'y of DHHS***, 240 F.3d 1367, 1369 (Fed. Cir. 2001) (affirming this court's decision and holding that the petition was untimely filed as it exceeded the statutory established time of "36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury"). If a party, however, does not follow the rules, ignores set deadlines, or does not provide valid justifications for the delays in filings, the court must take appropriate actions. See ***Grimes v. Sec'y of DHHS***, 988 F.2d 1196, 1198 (Fed. Cir. 1993) (when a party does not comply with the 30-day limit, "the clerk's entry of judgment ends the matter").

II. Actual Causation

The court will now turn its attention to the letters submitted by petitioner. Although petitioner did not raise any argument as to the special master's second ground for the dismissal of the petition, the court nevertheless finds it appropriate to

²⁵ "Legal Holiday includes New Year's Day, Inauguration Day, Martin Luther King's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, or any other day appointed as a holiday by the President or the Congress of the United States." **RCFC** 6(a).

²⁶ Petitioner's Motion For Review states that the deadline was January 5, 2005. Petitioner's Mot. at 2.

²⁷ Respondent's Response To Petitioner's Motion For Review at 13.

address the matter.²⁸ Petitioner submitted two letters from experts - one from Dr. Civitello and another from Dr. Latimer. Special Master Edwards carefully reviewed both letters and correctly held that petitioner failed to show actual causation between Nora's Sydenham's chorea and the Prevnar vaccine.

Generally, under the causation standard, the petitioner has to show either a table injury under § 300aa-11(c)(1)(A) and (C)(i), or causation-in-fact under § 300aa-11(c)(1)(A) and (C)(ii). See *McClendon v. Sec'y of DHHS*, 23 Cl. Ct. 191, 194 (1991) (explaining the three elements necessary to demonstrate a table injury: (1) vaccine listed on the table was administered, (2) one or more injuries listed on the table occurred, (3) the first symptoms of injury appeared within the time frame listed on the table). In this case, Nora's injury is not a table-injury, thus, the court finds it appropriate to use the causation-in-fact standard. Under this standard, petitioner must demonstrate "that it is more likely than not that the vaccine actually caused the injury." *Id.* at 196. To show actual causation, however, it is not sufficient to show the temporal association of the onset of injury. *Grant v. Sec'y of DHHS*, 956 F.2d 1144, 1148 (Fed. Cir. 1992); see also *Hasler v. United States*, 718 F.2d 202, 205-06 (6th Cir. 1983). Although petitioner, as Special Master Edwards correctly notes, does not have to show that his explanations are based on medically or scientifically certain data, see *Knudsen v. Sec'y of DHHS*, 35 F.3d 543, 548-49 (Fed. Cir. 1994); see also *Bunting v. Sec'y of DHHS*, 931 F.2d 867, 873 (Fed. Cir. 1991), petitioner has to demonstrate that "a medical theory causally connecting" the showing that the vaccination was the reason for the injury and in support of such "logical sequence of cause and effect" there should be reputable medical or scientific explanation presented. See *Grant*, 956 F.2d at 1148.

In *Carter*, which was strikingly similar to the case at bar, the court ruled that the mere possibility that juvenile rheumatoid arthritis (JRA) might be caused by rubella vaccination was insufficient to meet the burden of supporting reputable medical or scientific theory causally connecting vaccination and injury. *Carter v. Sec'y of DHHS*, 21 Cl. Ct. 651 (1990). The petitioner claimed that the JRA was caused by rubella vaccination and presented evidence that "some members of the medical community believe that there is a *possibility* that *some* cases of JRA *might* be caused by rubella." *Carter*, 21 Cl. Ct. at 654 (emphasis in original). The court, however, rejected this argument and held that the special master's decision was "consistent with the uncertainty reflected in the medical testimony. . . ." *Id.* at 654-55.

²⁸ Although petitioner stated that Special Master Edwards "erred by dismissing the matter for lack of a prima facie case," petitioner does not support this claim as required by the **Vaccine Rule 24**. Petitioner's Mot. at 1.

In *Hasler*, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) found that the plaintiff failed to show that her injury "flow[ed] in logical sequence from the defendant's conduct." *Hasler*, 718 F.2d at 206. The plaintiff filed a suit seeking monetary compensation for the alleged injuries resulting from an inoculation with swine flu. The lower court found for the plaintiff and the government appealed. The Sixth Circuit reversed the lower court's decision and held that any causal connection between the swine flu inoculation and the plaintiff's rheumatoid arthritis was merely conjectural. *Id.*

Like in *Carter*, petitioner's first letter from Dr. Civitello stated that it was "medically possible"²⁹ that Nora's condition was caused by the Pevnar. As the special master correctly held, however, mere possibility is not enough to show a causal link between Sydenham's chorea and the Pevnar vaccine. Accordingly, the special master's decision was fully consistent with Dr. Civitello's explanation in the letter. In addition, similar to *Hasler*, petitioner's second letter from Dr. Latimer, did not show the logical connection between the injury and the vaccine. The letter stated that the Pevnar vaccination "was the cause of the Sydenham's chorea" because "Nora had such a dramatic response to the vaccination and because the movement disorder occurred just weeks following the vaccination."³⁰ The letter, however, failed to elaborate how the vaccination to prevent pneumococcal infection in a logical sequence led to the Sydenham's chorea, a condition caused by the streptococcal infection. The court, therefore, finds that the special master did not abuse his discretion and correctly issued an order to dismiss the case.

²⁹ January 14 decision at 2 (emphasis added).

³⁰ *Id.*

Conclusion

For the above-stated reasons, petitioner's Motion For Review is hereby DENIED. The Clerk of the Court is directed to DISMISS the complaint for failure to prosecute.

IT IS SO ORDERED.

BOHDAN A. FUTEY
Judge