OFFICE OF SPECIAL MASTERS

No. 04-0041V

Filed: November 3, 2004

JILL ROBINSON, Petitioner,		
v.		TO BE PUBLISHED
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.		

ORDER[*]

This case highlights a procedural trap for the unwary petitioner. Due to the Vaccine Act's statutory language regarding the election of judgment, see 42 U.S.C. § 300aa-21(a), the procedural manner in which a case is resolved dictates whether petitioner retains the option of pursuing a future civil action. This procedural trap has already caught several petitioners, and unfortunately has ensnared Ms. Robinson, the petitioner in this case.

On April 6, 2004, petitioner filed a "Notice of Voluntary Dismissal" in the above-captioned case. On April 9, 2004, the court issued an Order, which notified the Clerk of the Court that proceedings in this case had concluded and "no judgment 'on the merits' should be entered."[1] On April 27, 2004, petitioner filed "Petitioner's Request for Reconsideration of the Court's April 9, 2004 Order and Motion for Ruling on the Record," in which petitioner requested

[*]The Clerk of the Court is hereby instructed that this Order concludes proceedings "on the merits" of this Vaccine Act petition, but does not constitute a "decision." **The Clerk shall not enter judgment**.

[1]This Order followed the procedures outlined by Special Master Hastings in Hamilton v. Secretary of HHS, No. 02-838V, 2003 WL 23218074, at * 5 (Fed. Cl. Spec. Mstr. Nov. 26, 2003).

the undersigned to reconsider his April 9, 2004 Order and to instead make a ruling on the merits based on the existing record.[2]

On April 30, 2004, the undersigned issued an Order vacating his April 9, 2004 Order and permitting respondent the opportunity to file a response to petitioner's Motion for Ruling on the Record. On May 28, 2004, respondent filed his "Response to Petitioner's Request for Reconsideration of the Court's April 9, 2004 Order and Motion for Ruling on the Record" ("Resp."). On June 14, 2004, petitioner filed "Petitioner's Reply to Respondent's Response to Petitioner's Request for Reconsideration of the Court's April 9, 2004 Order and Motion for Ruling on the Record" ("Reply").

On June 29, 2004, in response to the parties' submissions in this case, the undersigned ordered the parties to file briefs providing further guidance on several issues concerning voluntary dismissal; specifically, whether voluntary dismissal is permitted under the Act, and if a voluntary dismissal is filed, whether the undersigned has jurisdiction to set it aside. The undersigned raised a number of other issues that were discussed previously in the decision of Hamilton v. Secretary of HHS, No. 02-838V, 2003 WL 23218074 (Fed. Cl. Spec. Mstr. Nov. 26, 2003). In Hamilton, respondent argued before Special Master Hastings that judgments should only be entered in cases where the special master issued a final ruling as to whether compensation should be awarded in petitioner's claim and in which ruling there were "findings of facts and conclusions of law." Id. at * 1. Accordingly, if a petition was voluntarily dismissed or the parties filed a stipulation of dismissal, then no judgment would issue. Id.

On July 30, 2004, respondent filed his "Response to Order Concerning Voluntary dismissal" ("R. Resp. to Order"). On August 4, 2004, petitioner filed "Petitioner's Reply to the Court's June 29, 2004 Order" ("P. Reply to Order"). After reviewing the parties' responses, the undersigned concludes that, consistent with Hamilton, voluntary dismissals and joint stipulations of dismissal pursuant to Vaccine Rule 21(a) are authorized under the Act and that no judgment should be entered in either case. Further, such dismissals are self-executing upon filing by petitioner without action by the special master. Accordingly, the undersigned did not have jurisdiction to act on the voluntary dismissal filed in this case, nor can the undersigned set aside the voluntary dismissal.[3]

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[2]Presumably, petitioner's motivation was to obtain a judgment in the matter. Pursuant to Hamilton, a special master's ruling on the record would result in a court judgment being entered. See id. at * 5. In turn, a judgment would preserve petitioner's right to elect pursuing a civil action. See 42 U.S.C. § 300aa-21(a).

[3]The apparent delay in issuing the ruling on these issues is due to the parties' efforts to informally resolve this matter. On October 22, 2004, the parties informed the undersigned that those efforts were unsuccessful.

Background under Hamilton

It is first important to understand what is not at issue in this matter. As respondent argued and Special Master Hastings found in Hamilton v. Secretary of HHS, No. 02-838V, 2003 WL 23218074 (Fed. Cl. Spec. Mstr. Nov. 26, 2003), the Vaccine Act provides petitioners with only two methods by which to exit the Program. Id. at * 3. First, petitioners may choose to withdraw from the Program after notice that the statutory time for a decision has elapsed. Id. (citing 42 U.S.C. § 300aa-21(b)). Second, petitioners may leave the Program following entry of judgment pursuant to a final "decision" by the special master. Id. (citing 42 U.S.C. § 300aa-12(d)(3)(A)). As defined by § 300aa-12(d)(3)(A), a "decision" shall provide "whether compensation is to be provided under the Program and the amount of such compensations" as well as "include findings of facts and conclusions of law." Id. Leaving the Program by either means, withdrawal pursuant to § 300aa-21(b), or election to, in essence, reject the court ordered judgment pursuant to § 300aa-21(a), preserves petitioner's right to file a civil action.

Voluntary Dismissal

The initial issue presented in this case is whether a voluntary dismissal is permitted under the Act. After some initial questions, the consensus of the parties and the undersigned is that, yes, voluntary dismissals are permitted.[4]

While the Act does not explicitly provide petitioners with any additional options for leaving the Program other than the statutorily prescribed means, the statute does grant the Court of Federal Claims authority to promulgate rules "to provide for a less-adversarial, expeditious, and informal proceeding for the resolution of petitions." Reply at 3; 42 U.S.C. § 300aa-12(d)(2)(A). Accordingly, the Court adopted Vaccine Rule 21(a), pursuant to which:

> A petition may be dismissed by the petitioner without order of the special master or the court (1) by filing a notice of dismissal at any time before service of respondent's report, or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the proceeding.

Consistent with the discussion in Hamilton, since there is no "decision" entered by the special master as defined in 42 U.S.C. § 300-12(d)(3)(A), Rule 21(a) voluntary dismissals do **not** merit the entry of judgment. As stated in the undersigned's June 29, 2004 Order, Vaccine Rule 21(a) is analogous to Federal Rule of Civil Procedure ("FRCP") Rule 41(a):

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[4]Thus, in addition to withdrawing a petition pursuant to 42 U.S.C. § 300aa-21(b) and obtaining a final decision pursuant to 42 U.S.C. § 300aa-12(d)(3)(A), petitioners may exit the Program by voluntarily dismissing their claim. However, as discussed above, a voluntarily dismissed petition is not entitled to a judgment and thus the election under 42 U.S.C. § 300aa-21(a), including the option to file a civil action.

> Federal Rule of Civil Procedure ("FRCP") Rule 41(a) mirrors Vaccine Rule 21(a). The purpose of FRCP 41(a) is "to permit the plaintiff voluntarily to dismiss the action when no other party will be prejudiced. This right, although far-reaching at common law, is now limited to the period before service of the answer or a motion for summary judgment."

Order, filed June 29, 2004 (quoting WRIGHT & MILLER, 9 FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2362). The parties do not take issue with Vaccine Rule 21(a) and petitioner's right to voluntarily dismiss their claim.

Effect of Filing the Voluntary Dismissal

The key issue presented in this case concerns what occurs procedurally when a petitioner files a voluntary dismissal only to find that he is unable to receive a court ordered judgment and thus cannot elect to file a civil action. Is petitioner able to seek relief from his filing of the voluntary dismissal? Unfortunately, I conclude that he cannot.

Petitioner argues that given the Program's "flexibility and relaxed rules," reinstatement of a case voluntarily dismissed under Rule 21(a) should rest within the discretion of the special master. See P. Reply to Order at 4. Petitioner acknowledges, however, that a voluntary dismissal may remove the case from the special master's jurisdiction and, given that no court judgment would enter, petitioner would have no standing to request relief under FRCP 60(b) and Vaccine Rule 36. Id.

Noting the undersigned's concern regarding the absence of any means for petitioner to reverse the effects of a voluntary dismissal, respondent argues that "clear-cut rules affecting the parties' rights and responsibilities under the Act may indeed have harsh effect, but are in keeping with the Act's goal of efficient, predictable functioning of the Program." R. Resp. to Order at 7 (citing Brice v. Secretary of HHS, 240 F.3d 1367, 1373 (Fed. Cir. 2001)). Respondent contends that a ruling which permits petitioners to obtain reversal of a prior dismissal would render such dismissals uncertain and create a new area of collateral litigation, contrary to "Act's spirit and purpose." Id. at 8. Respondent believes that because no judgment is issued on a voluntary dismissal, neither RCFC 60(b) nor Vaccine Rule 36 can be used to reverse a voluntarily dismissed petition.[5] Id. at 7.

Pursuant to FRCP Rule 41(a), the civil law counterpart of Vaccine Rule 21(a), a notice of voluntary dismissal "is 'effective at the moment it is filed with the clerk....No order of the court

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[5]While both parties maintain that RCFC 60(b) and Vaccine Rule 36 provide no avenue of relief, although Vaccine Rule 36 refers to "relief from judgment," nothing in the rule limits the scope of Rule 60(b). Thus, it is arguable that the broad relief available under 60(b) may provide a basis for relief from the mistakenly filed voluntary dismissal even in the absence of a resulting court judgment.

is required and the court may not impose conditions.'" Order, filed June 29, 2004 (quoting WRIGHT & MILLER, 9 FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2363). Moreover, as the notice automatically terminates the action,

> "[t]here is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by [an] adversary of court."

Id. (quoting American Cyanamid Co. v. McGhee, 317 F.2d 295, 297 (C.A.5th 1963)).

Thus, as a notice of voluntary dismissal automatically terminates the action, dismissal is effective immediately upon filing of the notice by the petitioner without any intervention, action or approval by the special master. Petitioner has the right to file a voluntary dismissal or a joint stipulation for dismissal; however, following the dismissal, the special master no longer has jurisdiction over the case.

Both parties agree that Vaccine Rule 21(a) is a potential procedural trap. Petitioner maintains that all petitioners filing voluntary dismissals should be notified that such dismissal may affect their ability to refile, to request attorneys fees and costs, and to file a civil action. P. Reply to Order at 4. Similarly, respondent suggests that the court may find it necessary to make changes to Vaccine Rule 21, to provide additional guidance to petitioners, should the court be concerned that such dismissals "could create confusion concerning the conditions under which a petitioner may dismiss and obtain the right to file a civil action." R. Resp. to Order at 8. The undersigned agrees. Unfortunately, this case serves as a warning to petitioners – beware of what you file.

The above-captioned case was dismissed by petitioner with her filing of a voluntary dismissal on April 6, 2004. Accordingly, the undersigned's Order of April 9, 2004, which notified the Clerk of the Court that proceedings in this case had concluded and "no judgment 'on the merits' should be entered," was a legal nullity. Thus, the undersigned's Order of April 30, 2004 is moot, as the undersigned no longer had jurisdiction to act on the case, which was dismissed by petitioner on April 6, 2004. See Baker v. Secretary of HHS, No. 99-653V, Slip Op., at 7 (Fed. Cl. Aug. 31, 2004) (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) ("The court is merely adhering to the 'age-old rule that [it] may not in any case, even in the interest of justice, extend its jurisdiction where none exists....'")). This Order hereby notifies the Clerk of this Court that proceedings "on the merits" of this petition are now concluded, but **no judgment** "on the merits" should be entered by the Clerk's office.

IT IS SO ORDERED.

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Gary J. Golkiewicz
Chief Special Master