OFFICE OF SPECIAL MASTERS

No. 03-377V

(Filed: July 14, 2005)

LYNN WAGNER, parent of Timothy Wagner, a minor, Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	*	

Ronald C. Homer, Boston, Massachusetts, for petitioner.
Traci R. Patton, Department of Justice, Washington, D.C., for respondent.

RULING DENYING PETITIONER'S MOTION[1]

Hastings, Special Master

This is an action in which the petitioner seeks an award under the National Vaccine Injury Compensation Program (hereinafter "the Program").[2] The petitioner at this time requests that I issue to her a *second* notice pursuant to § 300aa-12(g) of the statute governing the Program. For the reasons set forth below, I conclude that petitioner is *not* entitled to the second notice that she now seeks.

[1]Because I have designated this Ruling to be published, this Ruling will be made available to the pubic unless petitioner files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2000 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2000 ed.). I also note that I will sometimes refer to the statute that enacted the Program as the "Vaccine Act."

I

PROCEDURAL BACKGROUND

On February 19, 2003, the petitioner, Lynn Wagner, filed a "Short-Form Autism Petition for Vaccine Compensation" on behalf of her son, Timothy Wagner. By filing that petition, petitioner alleged that Timothy suffers from the disorder known as "autism" or a similar neurodevelopmental disorder, and that such disorder was causally related to one or more vaccinations--that is, "MMR" (measles-mumps-rubella) vaccinations and/or vaccinations containing the preservative thimerosal--that Timothy received. This case, then, became one of several thousand Program cases alleging that a child's neurodevelopmental disorder was caused by such vaccines. Those cases have been grouped, for purposes of evidence-gathering and hearing, into a proceeding known as the Omnibus Autism Proceeding. See *Autism General Order #1*, 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002). The Omnibus Autism Proceeding is currently pending before me.[3] As explained in the *Autism General Order #1*, the general plan is that the attorneys representing the petitioners in the Omnibus Autism Proceeding will place before me, at an evidentiary hearing, their evidence for the proposition that these types of vaccines can cause autism. Respondent will introduce evidence to the contrary. I will analyze the evidence and state my conclusions concerning that general causation issue, and then, if appropriate, apply those conclusions to the individual cases.

The petitioner in this case, as in the case with thousands of other petitioners in these consolidated cases, has chosen, since she filed her petition, to defer any proceedings specific to her own petition until the conclusion of the Omnibus Autism Proceeding.

II

STATUTORY BACKGROUND

To understand the issue now before me, one must begin by examining certain aspects of the Program scheme. The first is the concept of "decision" and "judgment." The statute provides that a Program petition, when filed with the U.S. Court of Federal Claims, is assigned to a special master of that court. After evaluating the petition, the special master must "issue a decision * * * with respect to whether compensation is to be provided under the Program and the amount of such compensation." (§ 300aa-12(d)(3)(A).) That decision, however, does not necessarily become the final ruling of the Court of Federal Claims concerning the petition. Instead, the issuance of the special master's decision triggers a 30-day period in which either the petitioner or the respondent may seek review of that decision by a judge of the Court of Federal Claims. If no motion for review

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[3]I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the Clerk of this court, known as the "Autism Master File." That file may be viewed at the Clerk's office, or viewed on this court's Internet website at www.uscfc.uscourts.gov/osm/osmautism.htm.

is filed within the 30 days, the clerk of that court enters a judgment of the court in conformity with the special master's decision. (§ 300aa-12(e)(3).) If, on the other hand, a motion for review is filed, a judge of the court then completes a review of the decision. (§ 300aa-12(e)(1) and (2).) The court's "judgment" is then filed in conformity with the judge's ruling in the case.[4]

Thus, most Program cases will conclude upon the issuance of the court's "judgment," which is issued either automatically 30 days after a special master's decision, or after review by a judge of the court.

The statute also provides, however, a *second* option for concluding a Program proceeding. This second option seems clearly to have been designed by Congress as a way to prevent a petitioner from being locked indefinitely into the Program compensation system, against that petitioner's will. This provision provides generally that if the special master fails to issue a *decision* concerning the petition within a designated time period, or the court's *judgment* is not entered within a certain period, the petitioner will be entitled to exit from the Program without a judgment, by "withdrawing" his petition.

Specifically, the special master's "decision" is to be filed within 240 days of the date on which the petition was filed.[5] (§ 300aa-12(d)(3)(A)(ii).) And if review of a decision is sought, the court's "judgment" is, in effect to be filed within 180 days after the decision. This 180-day period consists of 30 days for a review motion to be filed (§ 300aa-12(e)(1)), 30 days for the opposing party to respond (§ 300aa-12(e)(1)), plus 120 days for the judge's ruling (§ 300aa-12(e)(2)).

Section 300aa-12(g), then, specifies what is to happen when either the special master's decision is *not* filed within the prescribed 240-day period, or the judge's review is *not* completed in a timely fashion. Section 300aa-12(g) provides as follows:

(g) Notice

If-

> (1) a special master fails to make a decision on a petition within the 240 days prescribed by subsection (d)(3)(A)(ii) of this section

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[4]Although, curiously, parts (1) and (2) of § 300aa-12(e) do not say anything specific about a "judgment" being entered after the judge's review, the implication of those provisions, in combination with part (3), is that, in a case in which the judge either upholds the special master's decision or substitutes the judge's own ruling, a "judgment" is then entered after the judge's review. That has been the practice of the court, as provided by Rule 30 of Appendix B of the court's rules.

[5]That 240-day period may be extended for up to 180 days (see § 300aa-12(d)(3)(C)), as it was in this case, but that exception is not of relevance here, and for convenience' sake I will generally refer in this opinion to the "240-day period" of § 300aa-12(d)(3)(A).

> (excluding (A) any period of suspension under subsection (d)(3)(C) or (d)(3)(D) of this section, and (B) any days the petition is before a special master as a result of a remand under subsection (e)(2)(C) of this section), or
>
> (2) the United States Court of Federal Claims fails to enter a judgment under this section on a petition within 420 days (excluding (A) any period of suspension under subsection (d)(3)(C) or (d)(3)(D) of this section, and (B) any days the petition is before a special master as a result of a remand under subsection (e)(2)(C) of this section) after the date on which the petition was filed,
>
> the special master or court shall notify the petitioner under such petition that the petitioner may withdraw the petition under section 300aa-21(b) of this title or the petitioner may choose under section 300aa-21(b) of this title to have the petition remain before the special master or court, as the case may be.

In other words, although the *exact* meaning of this section is in dispute in this case, the *general intent* of § 300aa-12(g) clearly is that if one of the Program's time deadlines for decision and judgment is not met, then a "notice" (hereinafter the "§ 12(g) notice") must be sent to the petitioner informing the petitioner of that failure.

The final relevant statutory section concerning this second option for leaving the Program is § 300aa-21(b). That subsection reads as follows:

> **(b) Continuance or withdrawal of petition**
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> A petitioner under a petition filed under section 300aa-11 of this title may submit to the United States Court of Federal Claims a notice in writing choosing to continue or to withdraw the petition if--
>
> (1) a special master fails to make a decision on such petition within the 240 days prescribed by section 300aa-12(d)(e)(A)(ii) of this title (excluding (i) any period of suspension under section 300aa-12(d)(3)(C) or 300aa-12(d)(3)(D) of this title, and (ii) any days the petition is before a special master as a result of a remand under section 300aa-12(e)(2)(C) of this title), or
>
> (2) the court fails to enter a judgment under section 300aa-12 of this title on the petition within 420 days (excluding (i) any period of suspension under section 300aa-12(d)(3)(C) or 300aa-12(d)(3)(D) of this title, and (ii) any days the petition is before a special master as

> a result of remand under section 300aa-12(e)(2)(C) of this title) after the date on which the petition was filed.

Again, the general intent of this section is clear. The intent is that when a special master or judge of this court issues a "§ 12(g) notice," the petitioner may, within 30 days, leave the Program by filing a notice of withdrawal of his petition. (I will hereinafter refer to such a notice filed by a petitioner as a "§ 21(b) withdrawal.")

III

THE ISSUE HERE

With this statutory background in mind, the issue raised in this case can be set forth in a relatively straightforward manner. The issue concerns the interpretation of § 300aa-12(g), set forth above. Both parties agree that after the expiration of the 240-day period specified in § 300aa-12(d)(3)(A)(ii), the special master must issue a "§ 12(g) notice," as I did in this case. The two sides differ, however, concerning what should happen when the petition remains pending before the *special master*, without a decision being issued, past the expiration of the *420-day period--i.e.*, 420 days from the petition filing date--specified in § 300aa-12(g)(2). Petitioner argues that in such a situation the special master should file a *second* "§ 12(g) notice," thereby triggering a second opportunity for petitioner to file a "notice to withdraw" from the Program pursuant to § 300aa-21(b). Respondent, on the other hand, argues that a special master should *not* file such a second "§ 12(g) notice."

IV

PRIOR PRACTICE AND RULINGS

My own practice, as a special master presiding over Program claims since 1989, has been to issue a "§ 12(g) notice" only once in each case, at the conclusion of the 240-day period, even if the case remains pending on my docket for more than 420 days after the petition filing date. As far as I am aware, that has also been the practice of all of the other special masters as well.

As far as I am aware, in only one previous Program case has a petitioner, like the petitioner in this case, requested that a special master issue a second "§ 12(g) notice." In that case, Special Master Edwards declined to issue such a second notice, in a non-published ruling. *Bunker v. Secretary of HHS*, No. 02-338V (July 25, 2003). Judge Sypolt of this court later issued an opinion in that same case approving the special master's conclusion on that point. *Bunker v. Secretary of HHS*, No. 02-338V (January 7, 2004).

Both of those rulings in *Bunker* were unpublished, but on June 22, 2005, I placed copies of those rulings into the record of this case.

V

RESOLUTION

A. The parties' arguments

Petitioner's chief argument is that the "plain meaning" of the § 300aa-12(g) mandates her interpretation. Petitioner notes that, when the excess verbiage relating to "exclusions" is stripped away, the relevant language of that subsection remains as follows:

> If-
>
> > (1) a special master fails to make a decision on a petition within the 240 days prescribed by subsection (d)(3)(A)(ii) of this section, * * * or
> >
> > (2) the United States Court of Federal Claims fails to enter a judgment under this section on a petition within 420 days * * * after the date on which the petition was filed,
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> the special master or court shall notify the petitioner [of the withdrawal option under § 300aa-21(b)].

Petitioner argues that, pursuant to this language, in every case *two* "§ 12(g) notices" are to be issued if the petition does not go to judgment within 420 days of the filing date--one after 240 days if no "decision" is yet filed, and one after 420 days if no "judgment" is yet entered. The second notice, petitioner argues, is to be issued by *either* the special master *or* the judge ("the court"), depending upon which of those officials happens to have jurisdiction over the petition at the time when the 420-day period expires. Petitioner relies particularly on the words "the special master or court" in the last part of § 300aa-12(g), arguing that the "plain meaning" of these words, especially the word "or," is that at the end of the 420-day period, *either* the special master *or* the court can file the notice pursuant to § 300aa-12(g)(2).

Respondent, on the other hand, argues that petitioner errs in focusing narrowly on the word "or" in the final part of § 300aa-12(g). Respondent contends that when § 300aa-12(g) is read in its entirety, especially in the context of the Vaccine Act as a whole, it is evident that Congress intended that the notice described in part (2) of § 300aa-12(g) is to be issue only by a *judge* of this court, not a special master.

B. Analysis

After careful consideration of the parties' arguments, I conclude that respondent's argument is superior. To be sure, petitioner's approach has at least some appeal. Reading the statutory

wording of § 300aa-12(g) literally, and focusing primarily on the words "the special master or court" in the final part of that subsection, one can make a rational argument that either the special master or the judge could issue the notice specified by § 300aa-12(g)(2), depending upon which of those officials happens to have jurisdiction over the petition at that time.

However, as respondent points out, the words "special master or court" in the final portion of § 300aa-12(g) must be interpreted in the context of § 300aa-12(g) *as a whole*, and of the Program scheme as a whole. The U.S. Court of Appeals for the Federal Circuit has noted that when interpreting a particular portion of the Vaccine Act, a court must be careful to interpret such portion in the context of the overall statutory scheme. That court observed that "[w]hen the legislative purpose is incorporated in a complex piece of legislation, such as those establishing a major regulatory or entitlement program, the meaning of any particular phrase or provision cannot be securely known simply by taking the words out of the context and treating them as self-evident." *Amendola v. Secretary of HHS*, 989 F. 2d 1180, 1182 (Fed. Cir. 1993). Similarly, the Court of Federal Claims stated that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Champagne v. U.S.*, 35 Fed. Cl. 198, 209 (Fed. Cl. 1996) (internal citations omitted). See also *Ishida v. U.S.*, 59 F. 3d 1224, 1230 (Fed. Cir. 1995) (basic rules of statutory construction direct a court to read each statutory provision with reference to the statute as a whole).

As to the controversy here, when I read § 300aa-12(g) as a whole, in the context of the entire Vaccine Act, I conclude that it is unlikely that Congress intended that a special master issue a second "§ 12(g) notice" in a Program case. Clearly, in providing the 240-day notice provision of §300aa-12(g)(1), Congress was making sure that a petitioner could not be locked into the Program indefinitely before a *special master*. Similarly, it seems likely that what Congress had in mind, in adding the 420-day notice provision of § 300aa-12(g)(2), was a situation in which a special master did issue a decision with 240 days, but the proceeding *thereafter* bogged down before a judge on review. Congress did not want a petitioner to be trapped indefinitely before a *judge*, anymore than before a special master. Congress provided, therefore, in § 300aa-12(g)(2), that a petitioner in a reviewed case would be obligated to remain in the Program no longer than 180 days beyond the original 240 days before the special master.

There is no legislative history, and nothing in the statutory language, on the other hand, indicating that Congress ever intended that a petitioner have *two different* opportunities in the same case to withdraw from the Program under § 300aa-21(b). Rather, I surmise that in adding the 420-day notice provision of § 300aa-12(g)(2), Congress was ensuring that every petitioner would get *one* such opportunity; in other words, a petitioner who never had a chance to "opt-out" under § 300aa-21(b) before the *special master*, because the master issued a timely *decision*, could not thereafter still be locked indefinitely into the Program at the review level before a *judge* of this court.

And what of the words "the special master *or* court," on which the petitioner relies so heavily? From the context of § 300aa-12(g), I conclude that Congress meant that the "special master *or* court" shall issue the notice, *depending on whether it was a notice under part (1) or part (2)* of

§ 300aa-12(g). Congress intended that a *special master* issue any notice needed under part (1), while a *judge* would issue any notice needed under part (2). As Judge Sypolt noted in her opinion in *Bunker* (page 9), while Congress admittedly could have made this meaning more clear by adding the words "as the case may be" after "special master or court," the context makes it seem quite probable that Congress intended that the notice under part (2) was to be issued by a *judge*, not a special master. This is true because part (2) deals with situations in which "the court fails to enter a judgment." "Judgment" under the Program, as discussed above, is something that is never directed by the *special master*, but is issued by the Clerk of court only at a *judge's* direction in a reviewed case, or after both parties decline to seek review of a special master's decision. Therefore, when Congress spoke in § 300aa-12(g)(2) of a situation in which "the court fails to enter a judgment," Congress seems to have had in mind cases in which review of a special master's decision had been sought and the judge, for whatever reason, had taken longer than the prescribed 180-day period in which to resolve the review issue.

In short, I agree with the respondent, and with the opinions of Special Master Edwards and Judge Sypolt in the *Bunker* case, that the better interpretation of the statute is that a special master is *not* to issue a second "§ 12(g) notice" in a Program case.

VI

PETITIONER'S OPTIONS

Petitioner has lamented that if I deny her motion, she will necessarily become a "captive" of the Program, forced to wait indefinitely for a resolution of her claim. (*See* Pet. Reply filed 5-31-05, pp. 9-10.) She is mistaken. Petitioner has not yet received a "decision" on her claim only because she has, by opting into the Omnibus Autism Proceeding, *specifically requested that I defer resolution* of her case until after the conclusion of that Proceeding.[6] As I specifically notified petitioner in my Notice filed in this case on March 20, 2003 (see point #3), petitioner is *not* necessarily bound to wait for the conclusion of the Omnibus Autism Proceeding. She may, instead, at any time request that her case be decoupled from that Proceeding, and request a prompt decision on her claim based upon whatever evidence she may be able to provide.

Of course, petitioner to date has provided no evidence at all indicating that her son has suffered a vaccine-caused injury. Therefore, unless petitioner provides evidence, the only "decision"

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[6]Petitioner has stated that her claim "was filed on February 19, 2003, and is no closer to resolution today than it was when filed. [Petitioner] has given the Vaccine Program a reasonable opportunity to resolve" the claim. (Pet. Reply filed 5-31-05, p. 9.) This statement seems to complain that I have been slow or negligent in failing to resolve the claim. Such a complaint, however, would be absurd. As explained above, *petitioner herself*, by opting into the Omnibus Autism Proceeding, *specifically requested that I defer resolution* of her case until after the conclusion of that Proceeding. Having made that request, petitioner cannot be serious in complaining about the fact that I have done exactly as she herself requested.

that I could reach would be that petitioner has *failed* to demonstrate that Timothy has a vaccine-caused injury. But the point is that petitioner may, in fact, obtain a prompt ruling on her compensation claim whenever she so requests.

VII

CONCLUSION

For the reasons stated above, I hereby deny petitioner's request that I file a second "§ 12(g) notice" in this case. However, if petitioner desires a prompt ruling on her compensation claim without waiting for the conclusion of the Omnibus Autism Proceeding, she may so request.

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George L. Hastings, Jr.
Special Master