IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 03-632V
Filed: November 12, 2010
Reissued: January 10, 2011
To Be Published

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ROBERT KRAKOW and LORI KRAKOW, parents of A.K., a minor,	*	
Petitioners,	*	Motion for Reconsideration; Vaccine Rule 10(e); Interest of Justice Standard; Failure to Prosecute
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

John F. McHugh, Esq., New York, NY, for petitioners.
Lynn E. Ricciardella, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

ORDER ON MOTION FOR RECONSIDERATION[1]

Vowell, Special Master:

On October 26, 2010, petitioners Robert and Lori Krakow filed a Motion for Relief from Order pursuant to RCFC 60(b)(1) and Motion for Reconsideration of Decision dated October 13, 2010 ["Motion for Reconsideration"].[2] Their petition was dismissed based on a failure to comply with court orders and an apparent failure to prosecute.

[1] Pursuant to a request by petitioners, this order has been redacted to omit some, but not all, of the requested information. *See* Order On Motion to Redact filed Jan. 10, 2011.

[2] Respondent filed a response on November 3, 2010. Petitioners then filed a reply on November 6, 2010. At the request of respondent, a status conference was held on November 12, 2010.

Petitioners' Motion is based on the wrong rules. Although RCFC 59 governs motions for reconsideration, the Vaccine Rules are to be applied in proceedings in the National Vaccine Injury Compensation Program ["the Program" or "Vaccine Act"],[3] and the RCFC apply "only to the extent they are consistent with the Vaccine Rules." Vaccine Rule 1. Motions for reconsideration of a special master's decision are governed by Rule 10(e) of the Vaccine Rules, Appendix B, RCFC ["Vaccine Rule [ ]"]. A "party may file a motion for reconsideration of the special master's decision within 21 days after the issuance of the decision, if a judgment has not been entered and no motion for review under Vaccine Rule 23 has been filed."

Because they based their motion on the wrong rules, petitioners' arguments are focused on the standard set forth in RCFC 60(b)(1), which governs relief from a judgment or order.[4] Vaccine Rule 36 instructs that a motion pursuant to RCFC 60 in a Vaccine Act case is appropriate after the entry of judgment. As judgment has not yet entered in this case, their reliance on the standards found in RCFC 60 is inappropriate.

I consider the substance of petitioners' arguments, but I evaluate them under the proper standard, set forth in Vaccine Rule 10(e). The basis for deciding whether to grant or deny a motion for reconsideration is "the interest of justice." Vaccine Rule 10(e)(3). This operates to petitioners' advantage. Were I to decide this case under the "excusable neglect" standard they argue, I would not grant the motion for reconsideration. There was clearly neglect on the part of the counsel selected by petitioners to present their son's claim, but it was not excusable.

Instead, I resolve this issue under Vaccine Rule 10(e), and grant petitioners' Motion for Reconsideration based solely on the interest of justice as regards terminating a minor child's right to present a case on the merits. An order withdrawing the October 13, 2010, decision[5] is issued concurrently.[6]

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[3] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

[4] Petitioners characterize their motion as a "motion for relief from order pursuant to RCFC 60(b)(1)." My October 13, 2010 decision was not an order. A "decision" under the Vaccine Act has particular meaning, as it is a final determination on an issue, such as entitlement, damages, or attorney fees, and triggers statutory deadlines for appellate review. *See* §§ 300aa-12(d); 300aa-12(e). Vaccine Rule 36, which governs relief from judgment in Vaccine Act proceedings, also addresses orders concluding proceedings under Vaccine Rules 10, 21, or 29. Orders concluding proceedings are issued under circumstances where a judgment will not issue, and this provision is thus inapplicable to this case.

[5] On October 29, 2010, petitioners filed a motion to redact the October 13, 2010 decision. This motion was untimely, as it was filed outside of the 14-day period for filing such motions. *See* Vaccine Rule 18(b).

I. Procedural History.

On March 24, 2003, petitioners filed a Short-Form Petition for Vaccine Compensation on behalf of their minor son. In using the special "Short-Form" petition, they joined the Omnibus Autism Proceeding ["OAP"], and were thus not required to identify with particularity the specific theory upon which their claim for compensation rested. In the instant Motion for Reconsideration, petitioners have focused on two influenza vaccines administered in November and December, 2001.[7]

The prosecution of this petition has been marked by repeated delays, both excusable and otherwise. Initially, the petition was a part of the OAP, and, like all other OAP petitions, the case was delayed pending completion of discovery and hearings in test cases.[8] Later, after the case was withdrawn from the OAP, it was delayed again at petitioners' request as they sought new counsel. Petitioners' Status Report, filed July 1, 2008. In a series of orders, I granted 19 months of delay, including at least one request filed out of time (*see* Status Report, filed June 22, 2009, at 2; Order, filed July 6, 2009), for this purpose, as well as numerous delays to obtain various medical records and reports.[9]

In this case, the Motion for Reconsideration was filed before the decision was made public. **Accordingly, petitioners' motion to redact the October 13, 2010 decision is denied as moot.**

[6] Procedurally, in granting a motion for reconsideration, the special master withdraws the issued decision. A withdrawn decision is void for all purposes, including the triggering of the 30-day period for filing a motion for review. *See* Vaccine Rule 10(e).

[7] I note that, at the time the petition was filed in 2003, the influenza vaccine was not listed on the Vaccine Injury Table. It was not added to the Table until 2005. *See* Addition of Trivalent Influenza Vaccines to the Vaccine Injury Table, 70 Fed. Reg. 19092 (Apr. 12, 2005) (to be codified at 42 C.F.R. 100.3) (noting the effective date of coverage as July 1, 2005). However, at the time it was added, a "lookback" provision authorized claims for vaccines administered up to eight years earlier. *See id.* at 19093. Based on the flexibility of the pleading practices in vaccine injury claims, informal changes in the theory of causation and the vaccines alleged to be causal are not uncommon.

[8] As petitioners note in the instant motion at 20, this case was originally selected as a test case on the theory that thimerosal-containing vaccines caused autism spectrum disorders, but on April 15, 2008, I granted petitioners' motion to withdraw as a test case and to withdraw from the OAP "in order to proceed to an individual hearing on compensation." *See* Motion to Withdraw Claim as a Test Case, filed April 10, 2008. The basis for their request was their intent to "develop and present evidence of additional and alternative causative factors." *Id.* Petitioners later implied that this theory is the impact of vaccinations on a child with [redacted]. *See* Petitioners' Status Report, filed Mar. 3, 2009 (reporting the finding of a [redacted] and probable diagnosis of [redacted]).

[9] Petitioner Robert Krakow is an attorney who represents OAP petitioners. During the period in which he represented himself and his wife, he filed a number of medical records pertaining to his child's case. In a status report filed August 4, 2009, after a number of months seeking counsel, he indicated that he was in discussions with an attorney willing to take over this case. Similar representations were made in a

Petitioners' current attorney, Mr. John McHugh, was substituted for Mr. Krakow on January 7, 2010. Since his substitution, the instant Motion for Reconsideration is the only timely filing of anything, other than medical records, that petitioners have made in this case.[10]

On March 5, 2010, petitioners informed the court that a medical expert, Dr. Marcel Kinsbourne, had been retained, and that he would require at least "two to two and a half months" to prepare an expert report. They indicated that they anticipated retaining two additional experts and that a causation hearing was anticipated by the end of 2010. Three months passed without receiving an expert report or any further indication when one could be anticipated.

I then held a status conference on June 8, 2010, during which petitioners represented that they could not obtain experts or expert reports without funding.[11] I noted that in *Avera v. Sec'y, HHS,* 515 F.3d 1343 (Fed. Cir. 2008), the U.S. Court of Appeals for the Federal Circuit held that interim fees and costs could be awarded in Vaccine Act proceedings. I indicated that, in my opinion, the inability to proceed on a claim due to lack of funding for experts presented a compelling case for an award of interim fees and costs. However, in view of the lack of progress toward resolving the entitlement claim since its 2008 withdrawal from the OAP, I directed petitioners to file any request for advanced funding of experts by July 23, 2010. No request has yet been filed, although petitioners have indicated their intent to do so if their Motion for Reconsideration is granted. *See* Petitioners' Exhibit ["Pet. Ex."] 45 at 22. I also ordered petitioners to file a status report by August 9, 2010, informing me of their progress in obtaining expert reports and telling me when they expected to file them.

September, 2009 status report. *See* Status Report filed Sept. 4, 2009 (requesting "a brief additional period of time to finalize discussions with their prospective attorney of record and to enter into a retainer agreement with the attorney to appear in this proceeding").

[10] At the initial status conference after his substitution, Mr. McHugh was unprepared to proceed. *See* Order filed Jan. 20, 2010. I ordered petitioners to file a status report by February 12, 2010, informing me that they had met with Mr. McHugh and discussed the case in preparation for the next status conference. Petitioners failed to respond, which necessitated the cancellation of the next scheduled status conference. I then ordered petitioners to file a status report on Mar. 4, 2010, informing me that their attorney was prepared to proceed. *See* Order filed Feb. 18, 2010. The status report was belatedly filed on March 5, 2010. Petitioners also missed the deadline to file an August 9, 2010 status report, filing it out of time on August 13, 2010. Petitioners failed to respond at all to an August 18, 2010 order, prompting the issuance of an order to show cause on September 3, 2010. Petitioners' failure to respond to that order resulted in dismissal of this case. As I noted above, petitioners then also filed their motion to redact the October 13, 2010, decision out of time. Petitioners did, however, timely comply with my order to file outstanding medical records by June 18, 2010.

[11] Both Mr. McHugh and Mr. Krakow attended this status conference. *See* Order filed June 8, 2010.

In yet another late status report filed on August 13, 2010, petitioners did not provide any deadlines by which they expected their expert reports to be filed. Instead, they reported that Dr. Kinsbourne was missing medical records and proposed that they submit monthly status reports until the reports of Dr. Kinsbourne and an as-yet unidentified expert were filed, with no indication of when the filing might take place. I rejected their suggestion, noting that, in effect, it would result in an indefinite delay in a case already seven years old. Order filed Aug. 18, 2010. I ordered petitioners to identify their potential expert by August 27, 2010, and to outline the steps taken to contact the expert to date. I further ordered petitioners to file a status report by August 27, 2010, informing the court that Dr. Kinsbourne, their second expert, had received all the records necessary to his opinion and providing a date certain when his expert report would be filed. If Dr. Kinsbourne could not produce an expert report within 75 days,[12] petitioners were to file a letter from Dr. Kinsbourne indicating why a report could not be produced within that period and providing a date by which his report could be filed.[13]

Petitioners failed to respond to this order. As I noted in the Order to Show Cause issued on September 3, 2010 as a result of this failure, petitioners had made little to no progress in resolving this case on the merits since it was removed from the OAP. At best, they had established that their child had an autism diagnosis and some [redacted] that may have accounted for some of his symptoms, although at least one treating physician indicated that the [redacted] the child displayed did not affect those symptoms. *See* Pet. Exs. 33, pp. 1-3, 5; 34, p. 6. There was no persuasive evidence in the record that vaccinations had caused or significantly aggravated the vaccinee's condition.

Petitioners also failed to respond to the Order to Show Cause. Accordingly, in a Decision issued on October 13, 2010, I dismissed the petition for failure to prosecute and insufficient proof, as the record did not contain persuasive evidence indicating that A.K.'s injury was vaccine-caused.[14]

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[12] I note that in March, 2010, petitioners indicated that Dr. Kinsbourne needed at least two months to produce a report. The 75-day deadline was imposed more than four months after that assertion. *See* Petitioners' Status Report filed Mar. 5, 2010.

[13] Doctor Kinsbourne's two and one-half page report accompanied the instant motion. *See* Pet. Ex. 48. It notes that the vaccinee has a diagnosis of [redacted] and that he experienced language regression temporally associated with low grade fever following influenza vaccinations. Doctor Kinsbourne did not opine on causation, as he had been retained "for the specific purpose of determining whether [the vaccinee's] diagnosis of [redacted] is borne out by the facts of the case and supported by his treating physicians." *Id*. at 3. The "date of consultation" on his report was the day prior to the filing of the instant motion. *Id*. at 1.

[14] Petitioners were warned in my September 3, 2010, order that noncompliance with court orders will not be tolerated. Failure to follow court orders, as well as failure to file medical records or a medical opinion

II. The Applicable Legal Standards.

"The special master has the discretion to grant or deny the motion [for reconsideration], in the interest of justice." Vaccine Rule 10(e)(3); *see also Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990) ("The decision whether to grant reconsideration lies largely within the discretion of the [trial] court."). Under the RCFC 59(a) standard, the party seeking reconsideration must show (1) a change in the controlling law; (2) the presence of previously unavailable evidence; or (3) manifest injustice. *System Fuels, Inc. v. United States*, 79 Fed. Cl. 182, 184 (2007) (citing cases). "The moving party must support its motion for reconsideration by a showing of exceptional circumstances justifying relief." *Webster v. United States*, 93 Fed. Cl. 676, 679 (2010).

In essence, a motion for reconsideration balances the need for finality of court decisions against either changed circumstances or concerns related to fundamental fairness. The first two factors appear to apply primarily to decisions rendered on the merits of a claim; the third could apply to cases dismissed on procedural grounds as well as those on the merits. "Manifest injustice" has been defined as an unfairness that is "clearly apparent or obvious." *Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002). When a decision has been rendered on the merits of a claim, and there is no change in the law and no newly discovered evidence, the bar for reconsideration is extraordinarily high. *See Pac. Gas & Elec. Co. v. United States*, 74 Fed. Cl. 779, 785 (2006) (manifest injustice must be so apparent as to be "almost indisputable").

The standard for reconsideration of cases in the Court of Federal Claims expands on the language of RCFC 59(a). The rule itself does not invoke the "manifest injustice" standard. Vaccine Rule 10(e)(3) also does not invoke the "manifest injustice" standard, but does note a special master may grant reconsideration "in the interest of justice." There is a dearth of law interpreting Vaccine Rule 10(e)(3) and most decisions on reconsideration under the Program assume without deciding that "interest of justice" means the same thing as "manifest injustice." *See, e.g.*, *Hall v. Sec'y, HHS*, 93 Fed. Cl. 239 (2010), *appeal docketed*, No. 10-5126 (Fed. Cir. June 3, 2010); *Loving v. Sec'y, HHS*, No. 02-469V, 2010 WL 1076124 (Fed. Cl. Spec. Mstr. Mar. 2, 2010); *Baker v. Sec'y, HHS*, No. 99-653V, 2005 WL 834647 (Fed. Cl. Spec. Mstr. Mar. 23, 2005).

Shaw v. Sec'y, HHS, provides some guidance to clarify the meaning of "in the interest of justice." 91 Fed. Cl. 715 (2010). Petitioner sought reconsideration of the special master's entitlement decision, based on a mistake of material fact, and offered

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on causation, may result in dismissal of a petitioners' claim. *Tsekouras v. Sec'y, HHS*, 26 Cl. Ct. 439 (1992), *aff'd per curiam*, 991 F.2d 810 (Fed. Cir. 1993); *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b).

evidence in support of his position. No. 01-707V, 2009 WL 3007729 (Fed. Cl. Spec. Mstr. Aug. 31, 2009) (appending the order denying reconsideration to the ruling on entitlement). Petitioner challenged a conclusion made by respondent's expert, which petitioner did not rebut before the entitlement decision issued, and on which the special master in part relied in her decision. *See id.* at *30. The special master denied reconsideration because the evidence was previously available. *Id.* at *33. The Court of Federal Claims granted the subsequent motion for review and remanded the case to the special master to consider the new evidence. 91 Fed. Cl. 715 (2010). While the court did not explicitly reference Vaccine Rule 10(e) in discussing the special master's order denying reconsideration, the court concluded that "in light of the Vaccine Act's bias toward compensation, we find it in the interest of justice to remand with instruction for the special master to consider the effect of this new evidence." *Id.* at 721 (also citing the "purposes and structure of the Vaccine Act" as a basis for finding it in the interest of justice to remand). The court noted that "this situation is in largely of [petitioner's] own making, specifically his decision not to present an expert witness and choosing instead to offer a treating osteopathic physician with no training or experience in treating the neurological conditions he ostensibly has." *Id.* at 720 n.9. The court acknowledged that the new evidence would not necessarily be sufficient to demonstrate entitlement to compensation, but found that because it might, petitioner should have a chance to present it. *Id.* at 721.

Shaw is not precisely analogous to this case because the injustice in *Shaw* was not the result of failure to comply with, or even respond to, court orders. Nevertheless, the *Shaw* decision viewed the "interest of justice" standard as one favoring petitioner on the merits, and resolved the request for an opportunity to present additional evidence in his favor.

In *Freeman v. Sec'y, HHS*, petitioners requested relief from judgment under RCFC 60(b). 35 Fed. Cl. 280 (1996). Petitioners had filed their claim *pro se*, and thereafter sought the assistance of an attorney. While the attorney never entered an appearance in the case, the evidence before the court suggested that miscommunications between the petitioners and the attorney led to a failure to respond to court orders. *Id.* at 282. The special master dismissed the case for failure to state a claim upon which relief could be granted and for failure to substantiate any claim. Petitioners learned of the dismissal when judgment had entered against them, and sought relief from the Court of Federal Claims. The court noted that "mere negligence or misrepresentation by a party's attorney does not qualify as excusable neglect" under Rule 60(b). *Id.* at 283 (citing cases). Nonetheless, noting "strong public policy in favor of the resolution of disputes on their merits," and differentiating the actions of the attorney from those of the petitioners, the court concluded that granting relief from judgment "was in the interest of justice." *Id.* at 284 and n.5; *see also Thornton v. Sec'y, HHS*, 34 Fed. Cl. 72 (1995) (vacating judgment and granting review of a special

master's decision when attorney conduct and other circumstances prevented petitioner from filing a timely motion for review).

While these cases are not binding precedent, I find them persuasive in determining that the "interest of justice" standard is likely less onerous than "manifest injustice." I also find them persuasive on the point that in a dismissal for a procedural issue, "the interest of justice" may favor granting reconsideration to afford petitioners an opportunity to prosecute their case. In *Shaw*, after a hearing on the merits in which petitioner had fully presented his case, the court found it in the interest of justice to permit new evidence, even without a showing that the new evidence was likely to change the entitlement determination. Ultimately, Vaccine Rule 10(e) grants a special master significant discretion to determine in a particular case what result is "in the interest of justice."

III. The Motion for Reconsideration.

In the instant motion, petitioners claim that their failure to respond to two successive court orders was based on "excusable neglect" under RCFC 60(b).[15] They argue that their case has not been delayed by their failure to respond and that respondent has not been prejudiced. Because I am granting petitioners' motion for reconsideration under Vaccine Rule 10(e), I address the merits of petitioners' motion under the legal standard for that rule as well.

A. Excusable Neglect.

In support of the excusable neglect argument, petitioners' counsel makes several assertions. First, he contends his Vaccine Act cases "now exceed[ ] my capacity to handle them." Motion for Reconsideration at 2. Second, he has insufficient staff available to handle his workload. *Id*. at 3-4, 9, 10. Third, he has a heavy workload involving matters other than his Vaccine Act cases, work which peaked over the summer months. *Id*. at 4, 9-10. Fourth, he and his clients encountered difficulties in contacting an expert. *Id*. at 4, 6, 12-13. Finally, he did not receive the information and assistance he had expected from his clients. *Id.* at 6, 8, 12. Each of these excuses will be addressed in more detail below.

[15] I note that the Motion for Reconsideration is written in the first person by petitioners' counsel, Mr. McHugh, and primarily addresses Mr. McHugh's explanation for petitioners' failure to respond to the orders in this case. For that reason I will address Mr. McHugh directly where appropriate.

1. Too Many Vaccine Act Cases.

Petitioners' counsel contends that the press of handling 40 Vaccine Act cases exceeds his capacity as a sole practitioner. Motion for Reconsideration at 2. It appears from the Motion for Reconsideration that Mr. McHugh was aware he had too many cases at the time he undertook representation of petitioners. Motion for Reconsideration at 2 ("[Mr. McHugh] agreed to take this case with great reluctance…[and] was having trouble keeping up with the work load imposed."). Mr. McHugh cited recent developments in the OAP for increased activity in his Vaccine Act cases.

An attorney who takes on more work than he can handle cannot cite his workload to excuse his failure to comply with court orders. It is axiomatic that an attorney should not take on more clients than he or she can competently handle. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (1983) ("A lawyer's work load must be controlled so that each matter can be handled competently."). Mr. McHugh professes the noble goal of preserving the legal rights a child may have, particularly under the Vaccine Act. Motion for Reconsideration at 2-3. This goal, however, is not served by taking on more clients than he can competently represent. In this case, Mr. McHugh's failure to manage his workload caused the dismissal of his client's case for a failure to prosecute. The press of other matters may justify granting a delay, but it will not excuse ignoring the court.

2. Not Enough Support Staff.

Mr. McHugh identified insufficient support staff as a significant factor contributing to his failure to file any response at all to my Orders of August 18 and September 3, 2010. The lack of support was blamed on two problems: (a) his office manager's family problems and (b) financial difficulties caused by Vaccine Act litigation. Motion for Reconsideration at 3-4, 8, 10.

a. Staff Deficiencies.

Mr. McHugh cites his office manager's family problems and subsequent absence from the office for both a failure to enter deadlines into his calendar and also for the failure to "do most of [the] work" preparing the response to my September 3, 2010 order. Petitioners acknowledge that Mr. McHugh and petitioners themselves were aware of the deadline to respond to the show cause order. *See* Motion for Reconsideration at 8 (noting that Mr. Krakow and Mr. McHugh had agreed to a course of action to file a response to the show cause order "well before the deadline").

While I agree that the absence of staff, particularly in a small office, can exacerbate a heavy workload, this excuse is insufficient. The office manager's absence in September does not explain the failure to respond to the August 18, 2010 order, which resulted in the September 3, 2010 show cause order. Also, as petitioners have failed to file their submissions on time since Mr. McHugh entered his appearance in January, the office manager's absence in September cannot be to blame for petitioners' unresponsiveness.

b. Financial Problems.

Mr. McHugh asserted that he was forced to lay off staff due to financial concerns caused by delays in receiving payment for his work on Vaccine Act cases.[16] Motion for Reconsideration at 3. Mr. McHugh further averred that "[t]o deal with the vaccine cases effectively and in a timely manner would take at least one additional staff member." *Id.* at 10. "[A]ll efforts to hire staff to deal with vaccine cases have been defeated by the inability to be paid at a rate which pays for those services."[17] Mr. McHugh specifically referenced my decision in *Rodriguez v. Sec'y, HHS,*[18] implying that the rates awarded in that case were too low to sustain his practice. Motion for Reconsideration at 3. In that fees application, Mr. McHugh did not request fees for any support staff, only fees for himself and for another attorney with whom he had contracted to provide assistance on the fees application and the appellate process on that application.[19]

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[16] He also noted that his revenue from cases outside the Vaccine Act has slowed due to those clients' late payments and partial payments. Motion for Reconsideration at 3.

[17] I am unaware of any claim filed by Mr. McHugh requesting payment for an employee (paralegal or attorney), that was reduced or denied. I have, however, reduced the hourly rate claimed for an attorney from California with whom Mr. McHugh contracted to handle fees applications and appellate litigation in one of his Vaccine Act cases. *See Rodriguez v. Sec'y, HHS*, No. 06-559V, 2009 WL 2568468 (Fed. Cl. Spec. Mstr. July 27, 2009), *aff'd*, 91 Fed. Cl. 453, 468-74 (2010), *appeal docketed*, No. 10-5093 (Fed. Cir. Mar. 19, 2010).

[18] *Rodriguez v. Sec'y, HHS*, No. 06-559V, 2009 WL 2568468 (Fed. Cl. Spec. Mstr. July 27, 2009), *aff'd*, 91 Fed. Cl. 453, 468-74 (2010), *appeal docketed*, No. 10-5093 (Fed. Cir. Mar. 19, 2010). In that case, I rejected petitioners' contention that Mr. McHugh was entitled to rates of between $598.00 and $645.00 and awarded him hourly rates between $310.00 and $335.00 as the forum rate, based on the year in which the services were performed. 2009 WL 2568468 at *23. Oral argument on his appeal to the Federal Circuit in that case is scheduled for December 7, 2010. An attorney requesting over $600.00 per hour should have the skill and experience to read and comply with court orders.

[19] I note that the hourly rate awarded in the *Rodriguez* case was slightly lower (by $15.00 per hour) than the hourly rate previously paid Mr. McHugh in other Vaccine Act cases prior to *Avera's* mandate to pay a forum, rather than a local, rate. *See, e.g.*, *Kantor v. Sec'y, HHS*, No. 2007 WL 1032378, at *9 (Fed. Cl. Spec. Mstr. Mar. 21, 2007) (awarding a local rate of $350.00).

Absent advance Vaccine Act funding of staff not yet hired—a proposition that even the Vaccine Act's liberal authorization to pay reasonable fees and costs incurred by nearly every litigant does not countenance—solving his staffing problems is not within my control. While Mr. McHugh may have meant that his hourly rate must be one that can fund the salary of staff considered to be overhead, such as a secretary, attorney fees under the Vaccine Act are not determined by petitioners' counsel's budget. I need not reiterate how Program fees are determined, as Mr. McHugh is well-versed in this area in light of his work on *Rodriguez*. I will note that Mr. McHugh was certainly on notice that, before the *Avera* decision in 2008,[20] Vaccine Act cases were compensated only after final resolution of the underlying claim, and so at the time he assumed representation on at least some of his cases, he could not anticipate payment immediately. In his OAP cases, he was well aware that entitlement determinations would be delayed until the completion of the test case process. Mr. McHugh was obligated to assess whether he had the financial means to competently prosecute his 40 vaccine cases at the time he agreed to assume representation.

While I sympathize with the financial constraints a solo practitioner must face, those constraints cannot excuse a failure to respond at all to two consecutive orders, nor can it excuse a history of untimely filing. Mr. McHugh has asserted an excuse that would apply to any and every failure to meet court imposed deadlines. I cannot accept it as evidence of "excusable neglect."

3. Press of Other Litigation.

Mr. McHugh also referenced his long hours over the summer and fall on other pending matters as an explanation for failing to respond to the August 27 and September 3, 2010 orders. Motion for Reconsideration at 4; 9-10. I note that Mr. McHugh was not specific about when the other pressing matters arose, a request for an en banc hearing before the 9th Circuit in response to a "late July" decision by that court being the sole exception. *Id*. at 9. Although he identified several other matters arising during the "same period," he was not precise about what the deadlines in those other matters involved.

This excuse merely demonstrates that Mr. McHugh was busy; it does not demonstrate that his neglect was excusable. Mr. McHugh never brought these matters to this court's attention, either in a motion for an extension of time or otherwise. Before Mr. McHugh entered his appearance, I granted numerous motions for extension of time in this case. *See, e.g.*, Orders filed Mar. 12, July 6, Aug. 4, Sept. 8, and Oct. 19, 2009.

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[20] In *Avera v. Sec'y, HHS*, 515 F.3d 1343 (Fed. Cir. 2008), the Federal Circuit authorized awards of interim fees in some cases. As I noted above, I encouraged petitioners to file an application for interim fees in this case.

I also tolerated his consistently tardy filings. Petitioners had every reason to expect that I would grant reasonable requests for delay. Even if they expected that I would deny a request for extension, they were still obligated to respond to court orders. While I sympathize with the predicament of many matters coming due at the same time, an attorney cannot be excused from his repeated failure to respond to court orders with a *post hoc* explanation of too much work.

4. Difficulties in Contacting an Expert.

Mr. McHugh noted that he was relying on petitioners themselves to contact and obtain the services of an expert on the specific theory of causation involved[21] and to "obtain a more extensive opinion from Dr. Kinsbourne as to what there is in the record that establishes that [redacted] could mediate the injury in question." [22] Motion for Reconsideration at 5.

Petitioners' Motion for Reconsideration acknowledged the receipt of the August 18, 2010 order and reported a discussion with Mr. Krakow about the order and the need to obtain a second expert report. *Id.* at 6. The motion also acknowledged receipt of and discussions about the show cause order of September 3, 2010. Motion for Reconsideration at 6-7. These and subsequent statements suggest that Mr. McHugh and petitioners had not read the August 18, 2010 order closely.

To cure the failure to respond to the August 18, 2010 order, all petitioners had to file was a status report informing the court about three matters that were delaying their request to hear this case on its merits. They were: (1) the identity of the expert (other than Dr. Kinsbourne) and what was being done by petitioners and counsel to contact him; (2) whether Dr. Kinsbourne had received the records he needed to complete his report; and (3) when the report of Dr. Kinsbourne could be filed.[23] *See* Order to Show Cause, filed Sept. 3, 2010, at 3 (directing petitioners to fully comply with the August 18, 2010 order) and Order, filed Aug. 18, 2010, at 2-3 (setting forth the three required pieces of information).

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[21] The motion indicated that only three such experts exist. Motion for Reconsideration at 4.

[22] Of course, the causation issue is not resolved by an opinion that [redacted] can cause the symptoms from which the vaccinee suffers. The issue is whether vaccines caused or significantly aggravated the vaccinee's condition, whether it stems from [redacted] or otherwise.

[23] In view of the March 5, 2010, status report indicating Dr. Kinsbourne would need at least two to two and a half months to produce an expert report, I indicated that if his report could not be filed within 75 days, I wanted input from Dr. Kinsbourne himself about when he could produce it.

To place the orders in perspective, I note that petitioners indicated in their July, 2008, status report that they were "continuing to discuss with several medical experts their availability to serve as expert witnesses in this matter." Status Report, filed July 1, 2008, at 2. Similar representations were made in the status reports filed on November 2, 2008; March 3, 2009; and June 22, 2009 (seeking a delay, *inter alia*, "to confer with medical experts"). Notwithstanding these representations, at the time I issued the August 18, 2010 order, no expert, other than Dr. Kinsbourne, had been identified. Furthermore, some filed records suggested that whatever [redacted] had been detected was not pathological and not responsible for the vaccinee's symptoms.[24] *See* Pet. Exs. 33, pp. 1-3, 5; 34, p. 6. In light of over two years of delay, I needed to ensure that petitioners actually had an expert in mind.

5. Excusable Neglect Not Established.

Mr. McHugh paints a picture of a practice in disarray, but does not demonstrate why his neglect of legal matters entrusted to him is excusable. After repeatedly failing to file required reports and evidence on time, petitioners failed to respond in any way to two successive court orders. The requirements in those orders were not onerous, and nothing in the handling of this case suggests that a request for extension of time to comply would not have been granted.

B. Change in Law or Previously Unavailable Evidence.

Petitioners do not base their motion for reconsideration on any changes in the law. They do produce additional evidence: a number of scientific journal articles, transcripts, and book chapters; a statement from a pediatrician involved in administering one of the vaccines who observed the vaccinee around the time of his regression and who opines that the vaccinee demonstrated a challenge-rechallenge reaction; a report by Dr. Kinsbourne that does not address causation; and several affidavits. Although this evidence may in some measure advance petitioners' case, nearly all of it was previously available.[25] Even though the reports of the pediatrician and Dr. Kinsbourne

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[24] Although petitioners now contend this physician's statement exceeded the purposes for the medical consultation involved, it is, nonetheless, part of the record as a whole. I cited this statement in the August 18, 2010 order to indicate why I was not willing to countenance indefinite delay (the monthly status reports proposed) to resolve problems in obtaining an expert report from an expert who had not been identified. Furthermore, petitioners had not explained precisely what they had done to contact this unnamed expert. The order did not require the filing of an expert report. It merely required petitioners to identify whom they were seeing and what they were doing to obtain his services.

[25] Pet. Ex.56, a medical journal article, was published October 22, 2010. It does not speak to vaccine causation, but it does speak to a part of one of the causation theories evaluated in the OAP. I reserve comment on the merits of this article at this time.

were not compiled prior to the Motion for Reconsideration, they were contemplated in advance of my decision. *See* Motion for Reconsideration at 7. Accordingly, petitioners are not entitled to reconsideration for a change in the law or previously unavailable evidence.

C. Manifest Injustice or the Interest of Justice.

This case involves the legal rights of a minor child who struggles with severe disability. The Motion for Reconsideration demonstrates that petitioners and their counsel are making progress toward presenting this case for an entitlement determination. I find that it is in the interest of justice to permit petitioners time to prosecute this case on the merits.

Petitioners' Motion for Reconsideration describes a series of mistakes, misunderstandings, misjudgments, and an overall failure of counsel and petitioners to manage this case. I cannot state more clearly how disappointed I am with Mr. McHugh's conduct in this matter. I am also disappointed with petitioners. Mr. Krakow in particular has been actively involved in this case, even after substitution of counsel, and was participating in the retention of experts and the compilation of a response to both of the orders to which petitioners failed to respond. Motion for Reconsideration at 6-8.

Respondent has objected to relief under RCFC 60(b), but has not taken a position on the motion for reconsideration. *See* Respondent's Memorandum in Response to Petitioners' Motion for Relief from Order Pursuant to RCFC 60(b)(1) filed Nov. 3, 2010. Respondent's arguments, particularly those regarding petitioners' culpable conduct and prejudice to respondent and the Program, are relevant to the motion for reconsideration as well, but respondent did not address this part of the Motion for Reconsideration. Because relief under RCFC 60(b) is not appropriate, I need not consider respondent's arguments further.

IV. Conclusion.

Petitioners are on notice that they will not be granted indefinite time to prepare this case. They will not be permitted to ignore court orders. They will not be permitted to respond to court orders out of time. Further failure to respond to court orders will result in dismissal of this case.

Petitioners' motion for reconsideration is **GRANTED**. The Clerk of Court is instructed to **withdraw my October 13, 2010 decision.**

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master