

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 01-162V

Filed: March 16, 2009
To Be Published

COLTEN SNYDER, by and through *
KATHRYN SNYDER and JOSEPH SNYDER, *
his natural guardians and next friends *

Petitioners, *

v. *

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Omnibus Autism
Proceeding;
Motion for Reconsideration,
Additional Evidence,
Untimely Filing

RULING ON MOTION FOR RECONSIDERATION¹

On Friday, March 13, 2009, at 6:02 PM, petitioners filed a motion for reconsideration of my February 12, 2009 decision denying compensation in this case. The instant motion, which was untimely filed, was accompanied by over 140 pages of what purportedly is “new evidence.”²

¹ Vaccine Rule 18(b) provides the parties 14 days to request redaction of any material “(i) which is trade secret or commercial or financial information which is privileged and confidential, or (ii) which are medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” 42 U.S.C. § 300aa12(d)(4)(B). Petitioners have waived their right to request such redaction. See Petitioners’ Notice to Waive the 14-Day “Waiting” Period as Defined in Vaccine Rule 18(b), filed December 2, 2008. Respondent also waived the right to object to the disclosure of information submitted by respondent. See Respondent’s Consent to Disclosure, filed January 14, 2009.

² This “new evidence” consists of several book chapters from a book published in January, 2009 (Cedillo Petitioners’ Exhibit [“Pet. Ex.”] 134); two medical journal articles, one published in September, 2008, and one published in March, 2009 (these two exhibits, Cedillo Pet. Exs. 135 and 136 were erroneously substituted for one another in filing); additional medical records for Michelle Cedillo (Cedillo Pet. Ex. 137) that were available, but not filed, at the time of the hearing in her case; and an affidavit from Dr. Ronald Kennedy challenging some of Dr. Burtus Rima’s trial testimony (Cedillo Pet. Ex. 138) (without offering any explanation for why such testimony could not have been offered in rebuttal during the *Snyder* hearing, in which both witnesses testified). I note that the book chapters are not generally “cutting edge” in terms of new scientific research, and that the chapters filed in this case cite many of the same medical journal articles already filed into the record and discussed in my decision. With the exception of the article

Vaccine Rule 10(c) clearly sets forth that, within 21 days of a special master's decision, either party may file a motion for reconsideration. In this case, that 21 day period expired March 5, 2009. Petitioners offered no explanation for missing this filing deadline. This untimely filing was not accompanied by a motion for leave of court to file the motion out of time or a motion for enlargement of time.³ Either petitioners' attorneys were unaware of the existence of Vaccine Rule 10(c) or simply chose to ignore it.

I am mindful of the importance of this case as one of the three test cases on the theory that a combination of the measles, mumps, and rubella vaccine and thimerosal-containing vaccines cause autism. For that reason, I accepted supplemental expert reports and additional medical literature filed months after the conclusion of the hearing in this case in 2007. See Order, dated February 7, 2008 (requiring petitioners to explain why a supplemental expert opinion could not have been offered at the hearing) and Order, dated February 28, 2008 (granting the motion to file a supplemental opinion). For that reason, I did not close the evidentiary record in this case until July, 2008, some eight months after the hearing concluded. See Order, dated July 31, 2008.

The untimely filing of this motion for reconsideration, on the eve of the deadline for filing a motion for review of my decision, suggests a thinly veiled effort by petitioners' counsel to obtain additional time for filing their motion for review, while placing additional evidence before the reviewing court.⁴ In the process, petitioners' counsel seriously mischaracterizes several aspects of my decision denying compensation and the evidence adduced in the general causation case.

Because Vaccine Rule 10(c) is not based on any statutory time constraint,⁵ I will

at Cedillo Pet. Ex. 136, all of this "new evidence" was published before my decision issued. A cursory review of that article indicates that it does not address the central question of vaccine causation of autism spectrum disorders. Petitioners' failure to request to reopen the evidentiary record to present the other "new evidence" prior to the decision issuing in this case says volumes about the value of this evidence to any causation decision and speaks loudly about the motivation for this untimely filing.

³ Vaccine Rule 19(b) requires the moving party to contact opposing counsel before filing a motion for enlargement of time.

⁴ 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 an appeal. Vaccine Rule 10(c)(1). Because this motion was untimely filed, there remains no opportunity to seek respondent's views on whether the motion should be granted "in the interest of justice," prior to the deadline for filing a motion for review. Vaccine Rules 10(c) and 23; 42 U.S.C. § 300aa-12(e)(1).

⁵ Thus, this case is unlike *Widdoss v. Sec'y, HHS*, 989 F.2d 1170, 1175-77 (Fed. Cir. 1993) (holding that a motion for review filed 31 days after the special master's decision was untimely and that the Court of Federal Claims lacked jurisdiction to consider it). Vaccine Rule 23, setting forth a 30 day period for filing a motion for review, also provided that no exceptions to that rule were permitted. Vaccine Rule 23 was based on 42 U.S. C § 300aa-12(e)(1), which provided 30 days, following the issuance of a special master's decision, to file a motion for review. *Accord Waller v. Sec'y, HHS*, 76 Fed. Cl. 321 (2005). Vaccine Rule 10(c) is not based on any similar statutory constraint on the time period for filing motions for

assume, for the purposes of deciding this motion, that I have discretion to consider an untimely filing. However, based on the last minute nature of the filing and petitioners' failure to demonstrate good cause for that untimely filing,⁶ the motion for reconsideration is **DENIED**. See Vaccine Rule 19. Alternatively, even were I to consider petitioners' arguments and the accompanying exhibits, petitioners have failed to demonstrate that the interest of justice would be served by the granting of their motion, and for that reason their motion would be denied. Vaccine Rule 10(c).

IT IS SO ORDERED.

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

reconsideration.

⁶ In most cases, I would order that the Clerk of Court strike an untimely filed motion (and the accompanying exhibits), with leave to file a motion to file out of time. Because of petitioners' last minute filing (after normal business hours on the last working day of the time period before their petition for review must be filed), complying with this procedure would have the same practical effect as denying it.