

OFFICE OF SPECIAL MASTERS

(Filed: November 23, 2005)

MONA SMITH,)	
)	
Petitioner,)	
)	
v.)	No. 01-0068V
)	DO NOT PUBLISH
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

DECISION¹

Petitioner, Mona Smith (Ms. Smith), seeks compensation under the National Vaccine Injury Compensation Program (Program).² Ms. Smith filed her Program petition on February 6, 2001. *See* Petition (Pet.). She alleged merely that she “experienced adverse reactions to” hepatitis B “vaccinations” that she received “[i]n late February of 1998.” Pet. ¶ 2. Ms. Smith did not proffer with her petition any of the documents required by §§ 300aa-11(c)(2) & (3) and Vaccine Rule 2(e)(1).

Chief Special Master Gary J. Golkiewicz monitored the initial development of the case. On February 14, 2001, Chief Special Master Golkiewicz directed Ms. Smith to file a status report by March 12, 2001, regarding “petitioner’s progress in obtaining the outstanding records.” *Smith v. Secretary of HHS*, No. 01-0068V, Order of the Chief Special Master at 1 (Fed. Cl. Spec. Mstr. Feb. 14, 2001). In addition, Chief Special Master Golkiewicz directed Ms. Smith “to file status reports

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

every ninety (90) days” after March 12, 2001, “until the petition is completed.” *Id.* (emphasis in original).

On April 5, 2001, Chief Special Master Golkiewicz transferred the case to Special Master Richard B. Abell. *See Smith v. Secretary of HHS*, No. 01-0068V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. April 5, 2001). On July 31, 2001, Ms. Smith moved for subpoenas “for the purpose of obtaining any and all records concerning the care and treatment of Petitioner.” Application for Issuance of Subpoenas, filed July 31, 2001, at 1. On August 14, 2001, Special Master Abell granted Ms. Smith’s motion. *See Smith v. Secretary of HHS*, No. 01-0068V, Order of the Special Master (Fed. Cl. Spec. Mstr. Aug. 14, 2001).³

On July 10, 2002, Special Master Abell issued an order indicating that the instant case “is one of several hundred cases that concern the theory of the Hepatitis B vaccine causing injury.” *Smith v. Secretary of HHS*, No. 01-0068V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. July 10, 2001). Special Master Abell offered Ms. Smith the opportunity to “temporarily stay” her case “pending the resolution process formed by the Hep B Committee formed to handle these types of cases en mass.” *Id.* On July 19, 2002, Ms. Smith elected to stay her case. *See Status Report*, filed July 19, 2002.⁴

In early 2004, Ms. Smith decided apparently to pursue her action. Ms. Smith intended apparently her case to proceed with a loose grouping of cases asserting vaccine-related chronic fatigue syndrome (CFS). On April 2, 2004, Chief Special Master Golkiewicz transferred the case to this special master. *See Smith v. Secretary of HHS*, No. 01-0068V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. April 2, 2004).

This special master reviewed thoroughly the scant record. On May 18, 2004, this special master directed Ms. Smith to file by no later than June 18, 2004, a status report informing “this special master about Ms. Smith’s progress in obtaining all outstanding medical records” and proposing “to this special master a reasonable schedule for the submission of an amended petition that contains a comprehensive statement of facts, with citation to the medical records; affidavits from all potential fact witnesses; and all outstanding medical records.” *Smith v. Secretary of HHS*, No. 01-0068V, Order of the Special Master at 1-2 (Fed. Cl. Spec. Mstr. May 18, 2004). On May 19, 2004, this special master issued the formal statutory notice alerting Ms. Smith regarding her right

³ This special master cannot discern whether Ms. Smith complied timely with Chief Special Master Golkiewicz’s February 14, 2001 order. The official docket sheet for the case does not contain entries reflecting that Ms. Smith filed a status report on March 12, 2001, or a status report 90 days after March 12, 2001.

⁴ Again, this special master cannot discern whether Ms. Smith complied timely with Chief Special Master Golkiewicz’s February 14, 2001 order. The official docket sheet for the case does not contain entries reflecting that Ms. Smith filed any status reports between March 12, 2001, and July 19, 2002.

to withdraw her petition from the Program. *See Smith v. Secretary of HHS*, No. 01-0068V, Notice (Fed. Cl. Spec. Mstr. May 19, 2004).

On June 18, 2004, Ms. Smith's attorney represented that he had lost contact with Ms. Smith. *See* Status Report (SR), filed June 18, 2004. On July 30, 2004, Ms. Smith's attorney represented that he had "found a possible address and phone number for Petitioner." Status Report, filed July 30, 2004, at 1. On September 8, 2004, Ms. Smith's attorney represented that he "had left several messages for Petitioner" and "sent a letter to the Petitioner requesting updated medical provider information." Status Report, filed September 8, 2004, at 1.

On September 30, 2005, Ms. Smith filed 34 pages of medical records.

In October 2005, Ms. Smith's attorney represented that he was still "[t]rying to contact the Petitioner to compile a complete list of the providers she has seen." *D'Angiolini v. Secretary of HHS*, No. 99-0578V, Status Report, filed October 7, 2005, Attachment (CFS Cases) at 4. In a November 1, 2005 order, this special master expressed: "Based upon the record, the special master is not confident that petitioner's counsel has located, in fact, his client." *Smith v. Secretary of HHS*, No. 01-0068, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. Nov. 1, 2005). This special master commanded Ms. Smith to file by no later than November 10, 2005, "a letter that contains her signature in ink (not a photocopy of her signature) indicating that she intends to prosecute the claim." *Id.*

Ms. Smith did not file the letter contemplated by this special master's November 1, 2005 order. Rather, on November 9, 2005, Ms. Smith's attorney represented that he was attempting still to contact Ms. Smith. *See* Status Report, filed November 9, 2005. Thus, this special master is still not confident that Ms. Smith's attorney has located, in fact, Ms. Smith.

Vaccine Rule 21(c) states:

For failure of the petitioner to prosecute or comply with the Vaccine Rules or any order, the special master or the court may dismiss a petition or any claim therein.

The record as a whole provides two related bases for this special master to dismiss the petition. First, Ms. Smith failed wholly to comply appropriately with this special master's November 1, 2005 order. Given the procedural history of this case, any reasonable person would understand that this special master's November 1, 2005 order was not simply a silly exercise.⁵ After all, the record reflects that although the petition has been pending for nearly five years, Ms. Smith has filed few

⁵ This special master recognizes that in his November 1, 2005 order, he directed respondent to "move expeditiously to dismiss the petition" if Ms. Smith did not respond to the November 1, 2005 order. The special master determines that a motion to dismiss would be a waste of everyone's resources.

records *and* there is absolutely no evidence that Ms. Smith is willing currently to complete the record. Second, Ms. Smith's failure to comply appropriately with this special master's November 1, 2005 order reflects certainly that Ms. Smith has failed wholly to prosecute her claim.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition under Vaccine Rule 21(c) for failure to prosecute and for failure to comply with this special master's November 1, 2005 order.

The clerk of court shall send Ms. Smith's copy of this decision to Ms. Smith by overnight express delivery.

John F. Edwards
Special Master