

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF THE SPECIAL MASTERS

**IN RE: CLAIMS FOR VACCINE
INJURIES RESULTING IN AUTISM
SPECTRUM DISORDER, OR A SIMILAR
NEURODEVELOPMENTAL DISORDER,**

Petitioner,

v.

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

Respondent.

AUTISM MASTER FILE
Special Master Hastings

**PETITIONERS' RESPONSE TO THE SPECIAL MASTER'S
QUESTIONS REGARDING THE ISSUE OF JUDGMENTS**

Comes Now, Petitioners Steering Committee (the "PSC"), by leave of this Honorable Court, and files its response to the Special Master's questions regarding the issue of judgments and would show the Court the following:

I.

INTRODUCTION

In the June 27, 2003 Autism Update and Order, Special Master Hastings requested Petitioners and Respondent to respond to the issue of when judgments should enter in a Vaccine Program case. Specifically, Special Master Hastings posed seven different scenarios and asked whether a judgment should enter under each scenario. The seven different scenarios listed in the June 27, 2003 are as follows:

- 1) The petitioner files a notice of dismissal prior to the respondent's "Rule 4 report";
- 2) The parties file a joint stipulation of dismissal;
- 3) After the respondent has filed a "Rule 4 report," the petitioner files a unilateral motion for dismissal without prejudice, and the special master grants the motion;
- 4) After the respondent has filed a "Rule 4 report," the petitioner files a unilateral motion for dismissal, and the special master files an order dismissing the petition with prejudice;
- 5) The special master dismisses the petition without prejudice for failure to prosecute;
- 6) The special master dismisses the petition with prejudice for failure to prosecute; and
- 7) After the special master files a formal notice under 42 U.S.C. §300aa-12(g), the petitioner files a notice of withdrawal of the petition pursuant to 42 U.S.C. § 300aa-21(b).

II.

DISCUSSION

A. THE JURISDICTION OF CIVIL COURTS OVER CASES WITHDRAWN FROM THE PROGRAM DOES NOT REQUIRE A JUDGMENT, AND A JUDGMENT IS NOT NEEDED IN SCENARIO 7.

Under the express language of the Vaccine Act a judgment need *not* enter under the seventh scenario, and the jurisdiction of a state or federal court over a claim withdrawn from the NVIC program under the circumstances in the seventh scenario does *not* depend on whether a judgment has entered or not. Respondent's argument on this point—that only a judgment can determine the jurisdictional boundary between the Special Masters and the state or federal courts—completely ignores the plain language of the statute governing properly withdrawn claims.

The language of the statute at 42 U.S.C. §300aa-21(b) describes the jurisdiction of the Special Master as terminating upon the petitioner's timely filing of a notice of withdrawal after receiving the Special Master's notice pursuant to 42 U.S.C. §300aa-12(g). There is

nothing about the language of the statute that might sow confusion among state and federal court judges, as respondent inexplicably contends. If Congress intended to require a judgment as a jurisdictional “boundary” in claims withdrawn under §21(b), Congress could have put that requirement into the statute. In fact, where Congress did decide that entry of a judgment was a prerequisite for filing a civil action, Congress made that intent clear—in §21(a) a judgment is entered for claims that are completely adjudicated on the merits, whether compensation was awarded or not. Congress clearly knew how to require a judgment in some circumstances and not in others, and the civil justice system is fully capable of resolving any jurisdictional challenges that a defendant might assert against a case withdrawn from the NVIC program under §21(b). The Special Master need not, and should not, take respondent’s invitation to issue an advisory opinion regarding subject matter jurisdiction to the state and federal judges who will necessarily make individual, case-by-case assessments of any relevant jurisdictional arguments.

Petitioners therefore agree with respondent that a judgment need not issue under the seventh scenario, but strongly disagree with respondent’s analysis.

Simply put, a judgment should not enter under the seventh scenario because the Act draws the jurisdictional boundary between the Special Masters and the civil justice system with the exchange of the Special Master’s §12(g) Notice and petitioner’s timely §21(b) Notice—there is no requirement for a judgment.

B. An Award of Attorneys Fees and Costs does not Require a Judgment, and Entry of a Judgment is Not Required in Scenarios 1 – 7 if there is a Mechanism for Deciding Fee Petitions Without a Judgment.

The Act is silent as to whether a judgment should enter under any of the first six scenarios. There is no concern in any of these instances about the jurisdiction of the

Special Masters or the civil justice system—any claim leaving the program under any of those scenarios could not be filed in state or federal court because such a claim would not have complied with either §21(a) or §21(b). The central issue of concern in these cases is the recovery of attorneys' fees and costs for claims terminated under any of these scenarios.

Well-established precedent under the Act allows an attorney to receive fees and expenses on a case, even though the case is not fully adjudicated in the Vaccine Program.

See Grice v. Secretary of HHS, 36 Fed. Cl. 114 (1996); *Saunders v. Secretary of HHS*, 25 F.3d 1031 (Fed. Cir. 1994); *Wells v. Secretary of HHS*, 28 Fed. Cl. 647 (1993). Attorneys' fees and costs are recoverable in "any proceeding" on a petition so long as the petition was "brought in good faith and there was a reasonable basis for the claim." 42 U.S.C. §300aa-15(e)(1). There is no express requirement that a judgment enter before fees and costs may be awarded. Under the Act, attorneys' fees and costs are potentially recoverable in **any** of the seven scenarios for any petition satisfying §15(e)(1).

Although not required by the Act, it has been the practice in the program that entry of a judgment serves as the "trigger" for filing and deciding fee petitions. Respondent now argues that judgments should not enter in any of the seven scenarios, a position that appears to foreclose the recovery of attorneys' fees and costs if the historical practice of the program serves as a guide. Petitioners do not insist upon the entry of judgments in scenarios 1 – 6, ***so long as the attorneys' fees and costs remain recoverable based on a Special Master's determination that a petition was brought in good faith and with a reasonable basis pursuant to §15(e)(1)***. Similarly, petitioners believe that the Act allows the recovery of attorneys' fees and costs under the seventh scenario without entry

of a judgment.

Petitioners agree that a judgment is not needed in any of the seven scenarios if Respondent agrees that petitioners can file attorneys' fee petitions absent a judgment.

III.

CONCLUSION

The Act does not require a judgment to enter under the last scenario because once a petitioner withdraws from the Vaccine Program under section 300aa-21(b), the petitioner has authority to bring an action in state court. In addition, the recovery of attorneys fees and costs does not depend on entry of a judgment under any of the seven scenarios. Absent a judgment, however, and in light of historical practice in the Program, the Special Master should make it clear that attorney fee and cost petitions will be considered under any of the seven scenarios in cases brought in good faith and where there was a reasonable basis for the claim.

Respectfully submitted,



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CERTIFICATE OF SERVICE

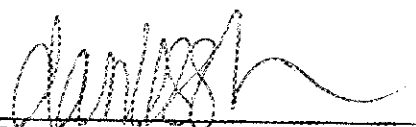
I hereby certify that I caused a copy of the foregoing pleading to be delivered by Overnight Mail.

_____ this 22 day of August, 2003 to:

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