

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-880V

Filed: March 10, 2009

KENNETH J. ASHMAN and LAURA
ASHMAN, parents of SANDER A. ASHMAN,
a minor,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES

Respondent.

Nunc Pro Tunc; Mojica; Motion for
Reconsideration

ORDER DENYING MOTION FOR RECONSIDERATION¹

Petitioners filed a Short-Form Autism Petition for Vaccine Compensation (hereinafter Petition), as well as a Motion for Leave to File Short-Form Autism Petition for Vaccine Compensation, *Nunc Pro Tunc* (hereinafter Motion) on December 10, 2008. The undersigned issued an Order on January 27, 2009 (hereinafter Order) denying petitioners' Motion. On February 17, 2009 petitioners filed a Motion for Reconsideration of the Special Master's January 27, 2009 Order (hereinafter Motion for Reconsideration). For the reasons set forth below the undersigned must deny petitioners' Motion for Reconsideration.

Petitioners argue in their Motion for Reconsideration that the undersigned's Order denying petitioners' Motion contains a "mis-perception of the facts constituting the basis for petitioners' Motion for Leave to File *Nunc Pro Tunc*." Motion for Reconsideration at 1. Petitioners allege the undersigned's statement that "[w]hile petitioners allege that they mailed a copy of the Petition on November 14, 2007 to the clerk of the court, the Petition was *never received* and marked filed by the clerk, as petitioners concede, see Motion at 2, and thus was never filed", is inaccurate. Motion for Reconsideration at 1 citing Order at 2. Petitioners allege "[n]ot only does page 2 of the Motion contain no such concession that the Petition was 'never received' by the clerk, but the statement is inaccurate as a matter of fact." Motion for Reconsideration at 2. Petitioners' allegation is incorrect. The phrase "never received and marked filed" refers to conjunctive acts, *i.e.*, the court's clerk must both receive the filing and

¹Because this Order contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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 Order will be available to the public. Id.

mark it filed. Petitioners concede “this Court does not have evidence of the filing,” Motion at ¶ 2. Thus, it is conceded that there is no evidence the clerk received the filing. Regarding the filing of the document, petitioners stated “why the Short-Form Petition is not docketed with this Court is not, and likely never will be, known . . .” Motion at ¶ 3. Thus, petitioners concede the Petition was not docketed.² Thus, contrary to petitioners’ arguments, petitioners did in fact agree, the conjunctive acts did not occur - the Petition was never received **and** filed by the court’s clerk.

Petitioners argue the reason the “petition was not docketed was ‘probably due to non-delivery by the U.S. Post Office or misplacement by the Clerk’s office of this Court.’” Motion for Reconsideration at 2 (citations omitted). As explained in the undersigned’s January 27, 2009 Order, the issue of non-delivery by a mail carrier was addressed by Acevedo v. Sec’y of HHS, 2007 WL 2706159 at *3 (Fed. Cl. Spec. Mstr. Aug. 31, 2007), aff’d sub nom, 79 Fed. Cl. 633 (2007), aff’d, 287 Fed. Appx. 103 (Fed. Cir. 2008), rehearing en banc denied (Sep. 26, 2008), petition for cert. filed (U. S. Dec. 19, 2008).³

Despite counsel’s diligent efforts in Mojica to timely file the petition, the claim was not timely received by the clerk’s office due to multiple errors on the part of the professional delivery service. As is the case in the instant matter, the petition in Mojica was timely received by respondent. However, the special master was obligated to dismiss the petition in Mojica as untimely filed since the petition was not received by the court’s clerk’s office within 36 months of the occurrence of the first symptom or manifestation of onset of the vaccinee’s injury. The special master’s decision in Mojica was affirmed by the Court of Federal Claims, as well as by the Court of Appeals for the Federal Circuit. The Federal Circuit relying on Brice v. Sec’y of HHS, 240 F.3d 1367 (Fed. Cir. 2001) explained “‘there is no possibility of equitable tolling under the Vaccine Act even in the circumstances presented by this case where counsel took reasonable steps to fulfill her obligation to file in time. This result is draconian but compelled by law.’” Mojica, 287 Fed. Appx. at 104 citing to Mojica, 79 Fed. Cl. at 639. Based upon the binding Federal Circuit precedent, the undersigned is likewise obligated to deny petitioners’ Motion in the instant matter.

Order at 2. As to petitioners argument that the Petition was never docketed due to misplacement by the clerk’s office, the undersigned notes that there is absolutely **no evidence** of the clerk’s office’s receipt of the document or misplacement of the Petition. Petitioners allege “there exists at least a 50/50 chance that the clerk’s office misplaced the package or otherwise erred in failing to docket it rather than the postal service, which distinguishes this case from that of Mojica . . .” Motion for Reconsideration at 3. Petitioners statement is pure speculation, there is not a scintilla of evidence supporting petitioners’ position. Petitioners rely upon the timely placement in the

² For the purposes of this Order, the words “docket” and “file” are used synonymously.

³ The undersigned notes this case is reported as Acevedo in the decision issued by the special master, but is reported as Mojica in the decisions issued by the Court of Federal Claims and the Federal Circuit. The undersigned will utilize the name Mojica when referring to this case.

mail of the Petition in as support for their position the Petition should be filed *nunc pro tunc*. However, as noted above, this argument was clearly rejected in Mojica.

Petitioners' Motion for Reconsideration amounts to asking the undersigned to reconsider the Federal Circuit's binding precedent. This the undersigned cannot do. Petitioners' Motion for Reconsideration is hereby **denied**.

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master