

ORIGINAL

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JUL 3 2003
U.S. COURT OF
FEDERAL CLAIMS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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|---------------------------------|---|--------------------|
| IN RE: CLAIMS FOR VACCINE |) | |
| INJURIES RESULTING IN AUTISM |) | |
| SPECTRUM DISORDER, OR A SIMILAR |) | |
| NEURODEVELOPMENTAL DISORDER, |) | |
| |) | |
| Various Petitioners, |) | Autism Master File |
| |) | |
| v. |) | |
| |) | |
| SECRETARY OF HEALTH AND |) | |
| HUMAN SERVICES, |) | |
| |) | |
| Respondent. |) | |

**RESPONSE TO SPECIAL MASTER'S QUESTIONS CONCERNING
THE "ISSUE OF 'JUDGMENTS'"**

Respondent provides the following response to the questions concerning when judgment should be entered in Vaccine Act cases. These questions were posed in the Special Master's "Autism Update and Order -- June 27, 2003."

In essence, the Special Master posits seven scenarios terminating a petition and asks whether judgment should issue in any of them. The answer to that question in each scenario is found in the statutory provision regarding the issuance of judgment on petitions brought under the Vaccine Act.

A. Judgment Should Only Issue following a Decision by the Special Master Pursuant to 42 U.S.C. §300aa-12(d)(3).

The Vaccine Act specifically describes the circumstances under which judgment should be entered, with 42 U.S.C. §300aa-12(e) detailing the process through which a case goes to

judgment, and 42 U.S.C. §300aa-12(d)(3) specifying the action that triggers that process. Section 12(e) of the Act provides for a judgment following the "decision" of a special master. The timing of the entry of judgment depends on whether the special master's decision is appealed. Either party may appeal a special master's decision by filing a motion for review within 30 days, in which case judgment is entered following proceedings on review. 42 U.S.C. § 300aa-12(e)(1). In the absence of a motion for review of the special master's decision, the Act requires the clerk to enter judgment immediately. 42 U.S.C. § 300aa-12(e)(3). This subsection contains the only provision that describes the circumstances under which judgment issues in Vaccine Act cases.

The Vaccine Act also describes the "decision" that triggers review under section 12(e) and eventual judgment. It provides that the special master "shall issue a decision . . . with respect to whether compensation is to be provided under the Program and the amount of such compensation." 42 U.S.C. §300aa-12(d)(3). In making that decision, the special master must "include findings of fact and conclusions of law." Id. This decision "may be reviewed . . . in accordance with subsection [12](e)." Id. Thus, judgment is issued only after a decision pursuant to section 12(d)(3) has been entered by the special master. Viewed in light of these provisions of the Act, the answer to each of the questions posed in the Special Master's

June 27, 2003, Order is straightforward. Respondent provides his response to each of the seven questions in turn:

1. *The petitioner files a notice of dismissal prior to the respondent's "Rule 4 report" -- see Vaccine Rule 21(a).*

The clerk is without authority to enter judgment after a voluntary dismissal under Vaccine Rule 21(a). Pursuant to Vaccine Rule 21(a), which governs voluntary dismissal of a claim, a petitioner may terminate proceedings on a petition at any time before service of the respondent's report by simply filing a notice of dismissal. RCFC App. B, R. 21(a). The voluntary dismissal is effective upon filing; such dismissals occur "without order of the special master or the court." RCFC App. B, R. 21(a). Thus, the special master does not enter a decision under section 12(d)(3) addressing whether compensation should be awarded, and containing findings of fact and conclusions of law, following a voluntary dismissal under Vaccine Rule 21(a). As the authority granted the Clerk to issue a judgment under 42 U.S.C. § 300aa-12(e)(3) is conditioned upon the issuance of such a decision by the special master, the Clerk cannot issue judgment based upon a voluntary dismissal under Vaccine Rule 21(a).¹

¹ To the extent that the Clerk has instituted the practice of issuing judgments on voluntary dismissals as a ministerial act to indicate the case is closed, there are other procedures to achieve that result. For example, the Clerk could simply issue a notice, similar to that issued when a transcript has been filed, indicating that pursuant to Vaccine Rule 21(a) petitioner's notice of voluntary dismissal has been filed closing the case.

2. *The parties file a joint stipulation of dismissal -- see Vaccine Rule 21(a).*

Again there would be no authority for the Clerk to issue judgment because no decision complying with section 12(d)(3) would issue. As with unilateral voluntary dismissals discussed above, Vaccine Rule 21(a) provides that the petition is dismissed upon the filing of the joint stipulation "without order of the special master or the court."

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; and*

4. *After the respondent has filed a "Rule 4 report," the petitioner files a unilateral motion for dismissal with prejudice, and the special master grants the motion.*

As an initial matter, neither the Vaccine Act nor the Vaccine Rules promulgated by the Court of Federal Claims specifically authorize a petitioner to dismiss the petition he or she filed by motion. A motion by petitioner to dismiss the petition he or she filed would be tantamount to a voluntary dismissal. Because the Vaccine Rules specifically permit voluntary dismissals only if they occur prior to the filing of the Respondent's Rule 4 Report, the Rules do not permit such dismissals in any other circumstance. Further, respondent notes that whether a case is dismissed with or without prejudice has no

impact on whether judgment should issue.

Assuming arguendo that a motion by a petitioner to dismiss the petition he or she filed is permitted under the Act, no judgment should issue if the special master has done no more than grant the motion. For judgment to issue, the special master would have to decide whether compensation was appropriate, and "include [in that decision] findings of fact and conclusions of law." 42 U.S.C. §300aa-12(d)(3)(i). Such a decision would be a decision on the merits and would inevitably constitute a dismissal with prejudice.

In those instances where petitioner desires dismissal, respondent would, in all probability, jointly stipulate to dismissal of the petition, provided no judgment for purposes of 42 U.S.C. §300-21(a) would issue. The stipulated dismissal would not necessarily be with prejudice. See RCFC App. B, R. 21(a) ("Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . .").

5. *The special master dismisses the petition without prejudice for failure to prosecute -- see Vaccine Rule 21(b) and (c); and*

6. *The special master dismisses the petition with prejudice for failure to prosecute -- see Vaccine Rule 21(b) and (c).*

Again, no judgment should issue if the special master has

simply ordered the case dismissed for failure to prosecute.² In each of these scenarios, judgment should only issue if the special master issues a decision addressing whether compensation should be awarded and containing those elements prescribed in section 12(d)(3). Here too the decision would be on the merits and, thus, a dismissal with prejudice.

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).*

No judgment should issue in this instance. The formal notice is issued pursuant to Section 12(g) when "the special master fails to make a decision on the petition within the 240 days prescribed by section 12(d)(3)(A)(ii)." Accordingly, there would be no Section 12(d)(3) decision upon which to enter judgment under Section 12(e).

B. Judgment Must only be Issued under the Explicit Circumstance Provided in the Vaccine Act As Judgment Governs the Scope of Federal and State Court Jurisdiction over Certain Vaccine Injury Claims.

In Congress's statutory scheme, judgment is not merely a ministerial act signaling the end of the Vaccine Act proceeding, it also determines the jurisdiction of state courts and other federal courts over claims that were initially required to be

² As noted previously, whether a dismissal is deemed with or without prejudice should have no impact on whether judgment should issue.

brought under the Vaccine Act. Congress required that certain claims for vaccine-related injuries be initially brought under the National Vaccine Injury Compensation Program, rather than state or federal district court. Congress also restricted the residual jurisdiction of federal and state courts over those claims. In this regard, Congress enacted a portion of the Act that specifically limits that jurisdiction to instances where there is "Authority to bring actions." 42 U.S.C. § 300aa-21. That section provides only two methods for a petitioner to conclude proceedings under the Act and file a civil action instead. One provides a window of time during which petitioner may withdraw from proceedings after notice that the statutory time for a decision has elapsed. 42 U.S.C. § 300aa-21(b). The other allows petitioner to reject a judgment of the Court of Federal Claims and thereafter file a civil action. 42 U.S.C. § 300aa-21(a).

Because Congress used the entry of judgment on a Vaccine Act claim as one boundary of the jurisdiction of federal and state courts, it is critical that such judgments are only entered under the circumstances specifically provided in the Act. The Clerk is without authority to enter judgment in the absence of a decision meeting the requirements of 42 U.S.C. §300aa-12(d)(3). Further, the Court cannot, through its rule-making authority, expand or otherwise alter the circumstances in which judgment is entered, particularly as judgment under the Act determines the

jurisdiction of other courts.

In Gilbert v. HHS, 31 Fed. Cl. 379 (1994), Judge Andewelt specifically stated that the Court was without authority to use its Rules to extend the jurisdictional bounds contained in 42 U.S.C. §300aa-21(a). In Gilbert, judgment had been entered after a decision on the merits but petitioners had failed to elect to file a civil action within ninety days of judgment. Judge Andewelt dismissed petitioners' claim that, pursuant to RCFC 60(b), they should be deemed to have rejected the judgment.

In any event, even if the instant motion is deemed within the scope of RCFC 60(b), petitioners cannot prevail because Section 21(a) is a jurisdictional statute and courts cannot resort to court rules such as RCFC 60(b) to expand court jurisdiction beyond that specifically provided by statute. Section 21(a) is jurisdictional in nature because it defines the jurisdiction of state and federal courts with respect to civil actions filed against a vaccine administrator or manufacturer for vaccine-related inquiries. In defining that jurisdiction, the wording of Section 21(a) is unambiguous. Where this court issues a judgment denying compensation under the Vaccine Act and petitioner does not timely appeal that judgment or file an election with 90 days, the petitioner is deemed to have filed an election to accept the judgment and may not thereafter bring or maintain a civil action for vaccine-related injuries against the vaccine administrator or manufacturer. Because Section 21(a) specifically bars bringing such a suit, the courts would be without jurisdiction to entertain such a suit.

. . . .

If this court cannot use RCFC 60(b) to expand its own jurisdiction, it certainly cannot use RCFC 60(b) to expand the district court's jurisdiction.

Gilbert, 31 Fed. Cl. at 381-82, aff'd 51 F.3d 254 (Fed. Cir. 1995). Thus, to the extent that the Court has issued rules that

provide for the disposition of Vaccine Act petitions through methods that do not meet the requirements of section 12(d)(3), no judgment should issue in such cases.

The difficulties that follow from issuing judgments in circumstances other than those specifically directed by Congress are apparent. For example, if judgment were to issue after a voluntary dismissal, a petitioner would simply have to file the petition, immediately dismiss it, and then reject the ensuing judgment, thereby entirely circumventing Vaccine Act proceedings and frustrating the Congressional goal of resolving vaccine injury claims through proceedings under the Act. As the Federal Circuit observed, the Act should be interpreted to implement Congress's "strong bias in favor of bypassing the civil litigation route in favor of compensation claims under the Act." Amendola v. HHS, 989 F.2d 1180, 1184 (Fed. Cir. 1993). Thus, the Act should be construed so as not to create additional means to avoid proceedings under the Act beyond those that Congress explicitly identified.

Moreover, to interpret the Act to permit the filing of a civil action following a voluntary dismissal would render section 300aa-21 - the Act's provision on "Authority to Bring Actions" - superfluous. The Act should be interpreted to give effect to its various provisions as a whole. It is a "central tenet of interpretation" that "a statute is to be considered in all its parts when construing any one of them." Lexecon Inc. v. Milberg

Weis Bershad Hynes & Lerach, 523 U.S. 26, 36 (1998). If a petitioner could pursue a civil action following a voluntary dismissal, the two specific "opt-out" provisions - withdrawal after 240 days, or rejecting final judgment - would be meaningless. That is, a petitioner could voluntarily dismiss at virtually any time, rather than await the opportunity to withdraw or reject judgment.

C. Conclusion.

The Vaccine Act specifically provides that the Clerk enter judgment only following review of, or the termination of review rights concerning, a decision by the special master meeting the requirements of 42 U.S.C. §300aa-12(d)(3). Judgment entered in any other circumstance would impermissibly expand the jurisdiction of state and federal court jurisdiction over claims brought under the Vaccine Act.

Respectfully submitted,

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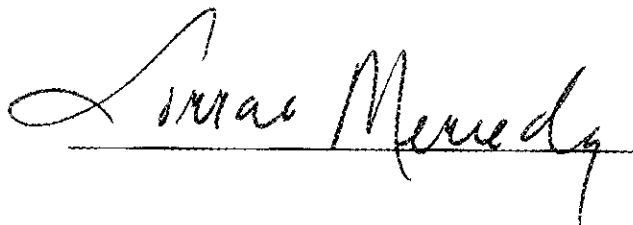
CERTIFICATE OF SERVICE

I certify that on this 30th day of July, 2003, a copy of respondent's **RESPONSE TO SPECIAL MASTER'S QUESTIONS CONCERNING THE "ISSUE OF 'JUDGMENTS'"** was served, by facsimile and by first class mail, postage prepaid, upon:

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