

OFFICE OF SPECIAL MASTERS

No. 01-390V

(Filed: December 4, 2002)

Kienan Freeman, by his Mother and *
Next Friend, REBEKAH SMOTHERS, *

Petitioner, *

v. * **TO BE PUBLISHED**

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

Ronald Homer, Boston, Massachusetts, appeared for petitioner.

Ann Donohue, U.S. Department of Justice, Washington, D.C., appeared for respondent.

ORDER GRANTING “MOTION TO RELEASE TRANSCRIPT”

HASTINGS, Special Master

This is an action in which the petitioner, Rebekah Smothers, seeks an award under the National Vaccine Injury Compensation Program¹ (hereinafter the “Vaccine Program” or “Program”), on account of an injury suffered by her son, Kienan Freeman. In this Order, I grant petitioner’s motion seeking release of the transcript of a hearing held in this case.

I

PETITIONER’S MOTION AND ARGUMENTS

An evidentiary hearing in this case took place in Boston, on June 20, 2002, to receive the testimony of expert witnesses for both petitioner and respondent. Both parties noted at the

¹The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2000 ed.). Hereinafter, for ease of citation, all “§” references will be to 42 U.S.C. (2000 ed.).

conclusion of the hearing that they would like to submit post-hearing briefs concerning the factual issues addressed at the hearing.

Petitioner filed a “Motion to Release Transcript” on August 28, 2002, requesting that the Clerk of this Court mail the court’s transcript of the hearing to petitioner’s counsel, so that counsel could use the transcript in preparing a post-hearing brief, and then return it. This motion noted that prior to the recent revisions of the Rules of the Court of Federal Claims (RCFC), petitioners’ counsel had regularly obtained access to hearing transcripts in this manner, for use in proceedings under the Vaccine Program. However, according to the newly revised rules:

No papers or exhibits filed with the court shall be temporarily or permanently withdrawn from the office of the clerk except by order of the court. No such order will be entered except in extraordinary circumstances. In the event of such withdrawal, a record of the filing and the order of withdrawal shall be preserved.

RCFC 77.3(b). Since the effective date of the rules revisions, May 1, 2002, therefore, it is no longer routinely permissible for parties to temporarily withdraw hearing transcripts. To obtain access to a transcript, since that rule change, a petitioner is now required to either purchase a copy from the court reporting service, visit the clerk’s office in person to review the transcript, or obtain an order finding “extraordinary circumstances” under RCFC 77.3(b). Petitioner, therefore, seeks an order finding “extraordinary circumstances” in this case, permitting petitioner’s counsel to borrow the transcript.

Petitioner has argued that the circumstances of this case are extraordinary because of (1) the long distance between the office of petitioner’s counsel in Boston and the clerk’s office in Washington, D.C. (see Motion filed on August 28, 2002), and (2) “substantial financial hardship” imposed on petitioner by the new rule (see petitioner’s “Supplemental Motion to Release Transcript” filed on September 24, 2002). In regards to the financial hardship allegation, the Supplemental Motion stated that petitioner had attempted to obtain a copy of the transcript from the reporting service by promising payment at the conclusion of the case, but that service declined to furnish a copy to petitioner without pre-payment in full.

To clarify the issue of “financial hardship,” I filed an Order on October 21, 2002, asking petitioner’s counsel to respond to the question, “Is counsel representing that due to financial circumstances, counsel will be unable to obtain access to the transcript unless I grant the motion?” Petitioner responded, “Yes,” in a filing dated November 12, 2002. This response cited a supplemental affidavit of petitioner Rebekah Smothers, who asserts that she cannot afford to purchase a copy of the transcript from Heritage at the reported cost of \$246.20. *See* Pet. Ex. 17.

II

RESPONDENT'S POSITION

Respondent has not filed any opposition to petitioner's request for release of the transcript. Moreover, petitioner represented at paragraph 7 of her motion filed on August 28, 2002, that "[r]espondent has reviewed petitioner's motion and has no objections."

III

ANALYSIS AND RULING

A. Applicability of Rule 77.3(b)

First, I note that it is not perfectly clear how RCFC 77.3(b) applies to this proceeding under the Vaccine Program. I conclude that the rule does not *directly* apply to Program proceedings, but that special masters of this Court and the Clerk of this Court should apply the policy of Rule 77.3(b) to Program cases, pursuant to Vaccine Rule 1.

The "Vaccine Rules," which appear as Appendix B to the Rules of the United States Court of Federal Claims (hereinafter "the RCFC"), generally govern proceedings in Program cases. (Vaccine Rule 1 (first sentence).) In Program proceedings before a special master, the main body of rules of the RCFC--*i.e.*, Rules 1 through 86--"apply only to the extent referenced in the Vaccine Rules." (Vaccine Rule 1 (fifth sentence).) Further, "[i]n all matters not specifically provided for by the Vaccine Rules, the special master * * * may regulate the applicable practice." (Vaccine Rule 1 (fourth sentence).)

Accordingly, RCFC 77.3 does not *directly* apply to Program proceeding before a special master, because that rule is not specifically referenced in the Vaccine Rules. However, the Vaccine Rules contain no provision concerning the subject matter of RCFC 77.3--*i.e.*, "Withdrawal of Papers, Exhibits," so that, pursuant to Vaccine Rule 1, the special master must "regulate the applicable practice" in the Program proceeding. And it seems to me that, with respect to such matters, the most logical course is that special masters should apply the *policy* stated in RCFC 77.3 to Program proceedings, even though that rule does not directly apply. Therefore, I conclude that when a petitioner seeks permission to withdraw papers from the Clerk's office in a Program proceeding before a special master, the master should, following the policy of RCFC 77.3(b), allow such a withdrawal only if the petitioner can show "extraordinary circumstances."

B. Presence of "extraordinary circumstances" in this case

I conclude that the overall circumstances of this case constitute "extraordinary circumstances" justifying an Order instructing the Clerk of this Court to loan the transcript to petitioner's counsel for use in post-trial briefing in this case. The "extraordinary" factor in this case

is that absent such an Order, the petitioner will be unable to effectively brief the case. The record indicates that neither the petitioner nor her counsel are able to supply the funds necessary to purchase a copy of the transcript.

It is significant, in this regard, to note that this case involves a proceeding under the Vaccine Program. One of the major goals of the Program is to provide compensation to individuals injured by vaccinations. The evidence that I have heard in this proceeding indicates that petitioner has at least a substantial chance of persuading me that her son's injury was vaccine-caused. And petitioner's counsel needs access to the transcript in order to present the best possible argument in support of petitioner's claim. I believe that it is appropriate for officials of this court to interpret our rules, wherever discretion is permitted, in a fashion that will maximize a Program petitioner's opportunity to prove his or her case.

Also relevant is the system of compensation for attorneys' fees and costs in Program cases. The Program will reimburse a petitioner's reasonable costs and fees incurred in a Program proceeding, whether or not the petitioner is successful in demonstrating a vaccine-caused injury, so long as the petition was filed in good faith and with a reasonable basis in fact. § 300aa-15(e). But the practice has been that such an award for fees and costs is made only at the *conclusion* of the case. Vaccine Rule 13. Further, the reality is that at this time only a relatively few counsel around the country have been willing to represent Program petitioners. Petitioners' counsel in this case is one of those few, and currently represents Program petitioners in hundreds of cases. Many petitioners in Program cases, struggling to support children with grievous injuries, are unable to supply funds for costs such as transcript purchases. Therefore, it is not surprising to me that petitioners' counsel is not able to advance funds himself for costs in all such petitioners' cases. Accordingly, given this system in which Congress intended to ensure Program petitioners' access to counsel by reimbursing attorneys' fees and costs, but the reimbursement is not available until the end of the case, it seems appropriate to me that this court should assist in carrying out the Congressional policy of aiding petitioners in obtaining effective assistance of counsel, by ensuring that access to transcripts is not blocked by economic constraints.

In short, I find that it would be an unconscionable outcome if I, as the special master presiding over this case, failed to take any reasonable measures available to permit the petitioner in this Program proceeding to have a chance to make the best possible argument for an award for her injured son. I find that, in this case, "extraordinary circumstances" exist that justify an order permitting withdrawal of the transcript.

ACCORDINGLY, I hereby instruct the Clerk of this Court, pursuant to Vaccine Rule 1 and to the policy set forth in RCFC 77.3(b), to furnish the transcript in this case to petitioner's counsel, by mail, for use in the post-hearing briefing process.

George L. Hastings, Jr.
Special Master