Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-480

APRIL TERM, 2003

Brian Batchelor	}	APPEALED FROM:
v.	}	Human Services Board
Department of Social and Rehabilitation Services	}	DOCKET NO.16,424

In the above-entitled cause, the Clerk will enter:

Petitioner appeals an order of the Human Services Board denying his motion to reopen the Board' s previous decision refusing to expunge his name from the child abuse registry. We affirm.

In March 1996, the Department of Social and Rehabilitation Services substantiated a report that petitioner sexually abused his twelve-year-old daughter by fondling her genitals. In September 1996, petitioner requested that the Board expunge his name from the child abuse registry. Following a hearing, the hearing officer recommended to the Board that petitioner' s name be expunged from the registry. At the end of the hearing officer' s proposed findings and recommendation was a paragraph in capital letters stating that the matter would be considered by the Board at a specified time and place. The Board considered the matter as noticed on October 30, 1996, but petitioner did not appear at the Board' s meeting. That same day, petitioner was notified that the Board had decided to remand the matter to the hearing officer to take further evidence regarding the details of the alleged fondling incident. Petitioner was forewarned that the Department was expected to provide additional evidence at the hearing on remand. Later, the Board notified petitioner that the hearing on remand would take place on December 3, 1996.

The hearing took place as notified, but petitioner again did not appear. On January 8, 1997, based on new evidence presented by the Department at the hearing on remand, the hearing officer reversed her position and recommended to the Board that petitioner' s expungement request be denied. Petitioner was notified that the Board would consider the revised recommendation on January 15, 1997. The Board' s meeting took place as notified, but once again petitioner failed to appear. On January 17, 1997, the Board issued an order adopting the hearing officer' s recommendation and denying petitioner' s request to have his name expunged from the child abuse registry. The order advised petitioner that he could appeal the decision to this Court within thirty days of the date of entry of the order. Petitioner did not appeal the Board' s order, however.

More than three years later, on April 5, 2000, petitioner filed a request to reopen the earlier case, contending that a new hearing was warranted because of procedural defects in the prior proceedings and newly discovered evidence. After the hearing officer advised petitioner that his claims did not warrant reopening the case, petitioner alleged further that his daughter had recanted her allegation that he had sexually abused her. Upon learning that petitioner' s daughter denied recanting the allegation, and that petitioner had no witnesses to back up his claim that she had recanted, the hearing

officer recommended denying petitioner' s request to reopen the matter. The Board adopted the recommendation, and petitioner appealed to this Court.

On appeal, petitioner argues that the Board abused its discretion in denying his request to reopen the expungement proceeding, given that (1) the Board provided inadequate notice and failed to follow its own rules in the earlier proceedings, and (2) significant and compelling new evidence cast doubt about the veracity of his daughter' s sexual abuse allegation. We review these arguments under V.R.C.P. 60(b), insofar as (1) the Board has asserted its inherent authority to vacate its own prior orders when justice so requires; (2) it has generally looked to Rule 60(b) for guidance in considering motions to reopen; (3) it relied on Rule 60(b) in this particular case; and (4) the parties do not challenge the Board' s reliance on Rule 60(b) and, in fact, rely on Rule 60(b) themselves in making their arguments. Rule 60(b) motions are addressed to the discretion of the lower tribunal and thus " [are] not subject to appellate review unless it clearly and affirmatively appears from the record that such discretion was withheld or otherwise abused." Zinn v. Tobin Packing Co., 140 Vt. 410, 414 (1981).

Because petitioner' s motion to reopen was filed more than one year after entry of the judgment that he seeks to reopen, subsections (1), (2), and (3) of Rule 60(b) are not available. See V.R.C.P. 60(b). Consequently, petitioner relies upon subsections (5) and (6) of the rule in support of his request to reopen the expungement hearing. Rule 60(b)(5) is not available, however, because the part of that rule petitioner relies upon " " it is no longer equitable that the judgment should have prospective application" " applies only when the challenged judgment " is executory, subject to change in response to changed conditions." Boisselle v. Boisselle, 162 Vt. 240, 245 (1994). Plainly, the challenged order in this case is not executory in nature.

Hence, petitioner' s sole avenue of relief is Rule 60(b)(6), the catchall provision that " is intended to accomplish justice in extraordinary situations that warrant the reopening of final judgments after a substantial period of time." Riehle v. Tudhope, 171 Vt. 626, 627 (2000) (mem.). Because of compelling interests of finality, a motion under Rule 60(b)(6) must be made within a reasonable time given all of the circumstances and " may not substitute for a timely appeal." Id. Further, Rule 60(b)(6) is available only when the grounds alleged to justify relief are not encompassed in any of the first five subsections of the rule. Perrott v. Johnston, 151 Vt. 464, 466 (1989).

Here, the two grounds posited by petitioner as justifying relief are (1) the lack of proper notice and other procedural defects, and (2) newly discovered evidence. The State challenges petitioner' s contention that his proffered " new" evidence " mainly inconsistencies in deposition testimony from petitioner' s criminal trial " was unavailable at the time of the expungement proceedings. In any event, newly discovered evidence is the subject of Rule 60(b)(2), pursuant to which a motion must be made within one year of the challenged judgment. Thus, newly discovered evidence is not available as a ground for justifying relief under Rule 60(b)(6). Further, as the Board noted, the evidence proffered by petitioner is merely impeaching in nature and does not directly refute the evidence of abuse. Cf. Pirdair v. Med. Ctr. Hosp. of Vt., ___ Vt. ___, ___, 800 A.2d 438, 441 (2002) (potentially helpful but cumulative evidence should not operate to allow relief from judgment).

As for petitioner' s claims of lack of notice and other procedural defects, those alleged shortcomings, to the extent that they existed at all, were manifest from the time the original proceedings took place. Thus, the Board did not abuse its discretion in concluding that a reasonable time period for raising those objections had passed. Cf. Martin v. Martin, 154 Vt. 651, 651 (1990) (mem.) (upholding trial court' s determination that husband' s Rule 60(b)(6) motion, which was filed more than two years after parties' divorce and only after service of wife' s motion for contempt, had not been made within reasonable time). Moreover, petitioner' s argument claiming lack of fair notice is not compelling, and the principal case upon which petitioner relies " Town of Randolph v. Estate of White, 166 Vt. 280 (1997) " is easily distinguishable. See Gabriel v. Town of Duxbury, 171 Vt. 610, 611 (2000) (mem.) (noting that Town of Randolph involved failure to inform individual of right to contest decision in first instance, not notice obligations following contested adversarial process). In short, petitioner has failed to demonstrate that allowing the expungement decision to stand was an abuse of discretion or would result in a miscarriage of justice. See Bingham v. Tenney, 154 Vt. 96, 99 (1990) (rule allowing for relief from judgment is invoked to prevent injustice).

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned