

OFFICE OF SPECIAL MASTERS

No. 90-2611V

(Filed: May 24, 1999)

SADIE ANN COHN and MALCOLM COHN, Individually and as Friends of NINA ANN COHN, a Minor,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

TO BE PUBLISHED

Peter Meyers, Esq., Washington, D.C., for petitioners.

Eleanor Barry, Esq., United States Department of Justice, Washington, D.C., for respondent.

DECISION

ABELL, Special Master:

On 1 October 1990, petitioners filed an action seeking an award under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)(1) for the alleged vaccine-related death of Nina Cohn. Petitioners alleged that Nina suffered seizures and blindness as a result of a 23 February 1960 DPT vaccination. Nina began to suffer from lupus in 1986 and she died on 10 May 1986.

On 28 March 1996, a hearing was held in Houston, Texas. The hearing was limited to the issue of when the onset of Nina's injuries occurred. At the close of the hearing the court issued a bench ruling. The

court found there was a preponderance of the evidence indicating that the onset of Nina's injuries occurred within 72 hours of her 23 February 1960 vaccination. The court did not make findings regarding the cause of Nina's death because further medical testimony was necessary to make a decision because Nina's death may have been due to intervening factors such as lupus.

The petitioners then went through three different attorneys and respondent went through several attorneys. During this time, petitioners were given the opportunity to obtain a medical expert who would opine that Nina's death was caused by the DPT vaccination. Eventually, petitioners conceded that Nina's death was due to idiopathic lupus. The petitioners then filed a Memorandum in Support of Compensation which made two arguments. First, petitioners argued that they are entitled to compensation for Nina's death. Second, petitioners argued that they are entitled to compensation for Nina's pain and suffering. Respondent filed a response arguing that petitioners are not entitled to compensation for Nina's death because Nina's death was caused by lupus, and not a vaccination. Also, respondent argued that the court no longer has jurisdiction over this case because petitioners no longer have a statutory cause of action since they filed their petition for a vaccine related injury after Nina died. For the reasons stated *infra*, the court holds that the petitioners are not entitled to compensation for Nina's death since she died from a non-vaccine-related condition, and this court does not have jurisdiction to hear petitioners' claim.

ANALYSIS

I. Whether petitioners are entitled to compensation for Nina's death?

The first issue for the court to address is whether petitioners are entitled to compensation for Nina's death. The court answers in the negative. Originally, the petitioners hypothesized that Nina developed lupus because she was taking the drug Dilantin to treat her seizures. However, the petitioners were not able to find an expert who was willing to opine that Nina's Dilantin more likely than not caused her lupus. Respondent's expert, Dr. Alan I. Brenner, stated that Nina died from lupus and her lupus was not caused by the Dilantin. The petitioners then conceded that Nina died from a non-vaccine-related condition -- lupus. Section 13(a) of the Vaccine Act states:

(1) Compensation shall be awarded under the Program to a petitioner if the special master or court finds on the record as a whole --

(A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section [11(c)(1)] of this title...

The special master or court may not make such a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.

Petitioners in this case cannot substantiate their claim that Nina's death was a sequela of a Table injury or was caused-in-fact by her DPT vaccination. The medical records alone simply do not allow for a finding of sequela from the 23 February 1960 DPT vaccination. Without the opinion of a qualified medical expert on the issue of causation or sequela, petitioners cannot prove a *prima facie* case. The petitioners argue that lupus cannot defeat a Table injury because lupus is idiopathic and cannot constitute a "factor unrelated" under §13(a)(2)(A). The court believes the petitioners have misstated the

law and their burden in a death case. In *Hellebrand v. Secretary of HHS*, 999 F.2d 1565 (Fed.Cir. 1993), the court stated that:

In order for a petitioner to recover for a death which follows a DPT vaccination, based on a Table claim, two things must be established by a preponderance of the evidence. *First*, the petitioner must show that one of the four injuries or conditions listed in the Table occurred within the time period specified in the Table for that injury or condition. *Second*, the petitioner must show that death occurred as a sequela of that injury or condition.

Id. at 1569. *See also Hodges v. Secretary of HHS*, 9 F.3d 958 (Fed.Cir. 1993). Regardless of whether the petitioners satisfied the first prong of the test, the petitioners failed the second prong of the test because they did not prove by a preponderance of the evidence that Nina's death occurred as a sequela of her alleged Table injury. Since petitioners do not have a *prima facie* case, the burden does not shift to the respondent to prove Nina's death was caused by a factor unrelated to the administration of the vaccine. Therefore, it is irrelevant that lupus is an idiopathic condition. Since petitioners did not prove Nina's death occurred as a sequela of her alleged Table injury, they are not entitled to compensation for Nina's death.

II. Whether petitioners are entitled to compensation for Nina's pain and suffering; Whether the court has jurisdiction to hear petitioners' claim?

The second issue before the court is whether the court has jurisdiction to hear petitioners' claim that they are entitled to compensation for Nina's pain and suffering. The Vaccine Act clearly delineates who may file a petition for compensation for an alleged vaccine related injury or death. According to §11(b)(1) (A), a proper petitioner includes any of the following:

. . . any person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table

In construing statutory provisions, the court must be careful not to alter the plain meaning or effect of the applicable statutes as enacted by Congress. *Saldana v. Merit Systems Protection Board*, 766 F.2d 514, 516 (Fed. Cir. 1985). This is particularly true when applying statutes that waive sovereign immunity, as this Act does. *Brookfield Const. Co. v. United States*, 661 F.2d 159, 165 (Ct. Cl. 1981), citing *Soriano v. United States*, 352 U.S. 270, 276 (1957). I am compelled to follow the plain meaning of the statute.

The court has dealt with the issue of who is a proper petitioner on two previous occasions. *Buxkemper v. Secretary of HHS*, 32 Fed. Cl. 213, 225 (1994)(Horn, J.); *Andrews v. Secretary of HHS*, 33 Fed. Cl. 767, 772 (1995)(Tidwell, J.). The court agrees with the reasoning in those two cases and believes it should not stray from the holding in *Buxkemper* and the *dicta* in *Andrews*. A petitioner is a proper petitioner only if they fit into one of the following three categories: (1) the petitioner sustained an alleged vaccine-related injury; (2) the petitioner is the legal representative of a minor/disabled adult (who is alive at the time of the filing of the petition) who sustained an alleged vaccine-related injury; or (3) the petitioner is the legal representative of a minor/disabled adult (who is alive or dead at the time of the filing of the petition) who died as the result of an alleged vaccine-related injury. *Buxkemper*, 32 Fed. Cl. at 225; *Andrews*, 33 Fed. Cl. at 772.

If a child suffers a vaccine-related injury, but dies from a non-vaccine-related injury prior to the filing of the petition, the parents are not proper petitioners because "[t]here is no provision under section 300aa-

11(b)(1)(A) for the estate of a vaccine injured person to file a petition for compensation." *Andrews*, 33 Fed. Cl. at 769. If a child suffers a vaccine-related injury, and the parents file a petition with the court, but the child dies from a non-vaccine-related injury prior to entry of judgment, the cause of action survives the death of the child. *Id.* at 770. In this type of case, the court's jurisdiction is determined by what comes first: death or the filing of the petition. If death precedes the filing, the court does not have jurisdiction. If the filing precedes the death of the child, the court continues to have jurisdiction. The court in *Andrews* recognized that "[w]hile this may appear to be unfair, the court notes that the unfairness is not created by this decision, but by the Act, which prohibits an estate of an injured person from filing the claim as an initial matter." *Id.* at 772. The only recourse a parent has in this case is to file a cause of action in state court. Apparently, Congress wanted to "limit[] the class of persons who could file an injury claim to those living when the claim is filed." *Id.* at 772.

In the case at bar, Nina was administered a DPT vaccine on 23 February 1960. She allegedly suffered a Table injury within 72 hours of the vaccination. She died from lupus on 10 May 1986. Her parents filed a petition with the court on 1 October 1990. Even if Nina suffered from a Table injury, she died from a non-vaccine-related condition, *to wit*, lupus, prior to her parents filing a petition with the court. Therefore, her parents are not proper petitioners and the court does not have jurisdiction to hear their claim.

CONCLUSION

Petitioners did not prove that Nina suffered a vaccine-related death as a sequela of her DPT vaccination of 23 February 1960. In addition, petitioners are no longer proper petitioners since Nina suffered a non-vaccine-related death prior to the filing of the petition. Accordingly, this petition is dismissed with prejudice pursuant to Vaccine Rule 21.

In the absence of a motion for review filed pursuant to RCFC, Appendix J, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell

Special Master

1. ¹ The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-1 *et seq.* (West 1991 & Supp. 1998). Hereinafter, reference will be to the relevant subsection of 42 U.S.C. §300aa.