

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 12-433V

July 27, 2012

Not to be Published

LAWRENCE TODD KAROL, *

*

Petitioner, *

*

v. * H₁N₁ monovalent vaccine

*

administered Oct. 2009; no

*

subject matter jurisdiction

SECRETARY OF THE DEPARTMENT *

OF HEALTH AND HUMAN SERVICES, *

*

Respondent. *

*

Lawrence Todd Karol, Encino, CA, for petitioner (pro se).

Julia Wernett McInerny, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

On July 2, 2012, petitioner filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10-34 (2006), alleging that H₁N₁

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access.

monovalent influenza virus vaccine administered in his right arm on October 23, 2009 caused him pain and ultimately a fatty cyst (lipoma) for which he underwent surgery on July 6, 2011.

H₁N₁ monovalent influenza vaccine is not included in the Vaccine Injury Table in the Vaccine Act. 42 C.F.R. § 100.3. “Monovalent” means one strain of influenza virus. The H₁N₁ monovalent influenza virus vaccine was administered solely during the 2009-10 flu season.

“Trivalent” means three strains of flu virus. Trivalent influenza vaccine can include H₁N₁ and other influenza viruses in the same vaccine, and, if it does, any reaction to it is covered under the Vaccine Act.

During the flu season from the end of 2009 through the spring of 2010, H₁N₁ virus was not included in the 2009-10 seasonal flu vaccine “because it was identified after manufacturers had started making the seasonal flu vaccine.” Centers for Disease Control and Prevention, “Questions and Answers. Vaccine against 2009 H₁N₁ Influenza Virus,” www.cdc.gov/h1n1flu/vaccination/public/vaccination_qa_pub.htm. After the 2009-10 flu season, seasonal influenza vaccine did include the H₁N₁ viral strain.

Those individuals who allege a vaccine injury from H₁N₁ monovalent influenza vaccine administered during the 2009-10 flu season have recourse for compensation under the Countermeasures Injury Compensation Program (CICP) run by the Health Resources and Services Administration (HRSA). See: www.hrsa.gov/getthehealthcare/conditions/countermeasurescomp/cicpantivuralinfo.html.

Starting in the 2010-11 flu season, when H₁N₁ virus was combined with the seasonal flu virus into one trivalent influenza vaccine, the Office of Special Masters has had subject matter jurisdiction over allegations of adverse reaction to seasonal trivalent influenza vaccine which includes H₁N₁ virus strain. For allegations of adverse reaction to H₁N₁ monovalent virus vaccine

administered in 2009, HRSA is the only avenue for compensation for adverse reactions to H₁N₁ monovalent influenza vaccine.

On July 26, 2012, the undersigned held a Rule 4(b) Conference with petitioner and respondent's counsel. During this recorded telephonic conference, the undersigned explained the difficulty inherent in this case, i.e., the undersigned has no subject matter jurisdiction.

FACTS

Petitioner was born on June 15, 1950. Filing with petition, at 11.

On October 18, 2009, petitioner received seasonal trivalent flu vaccine in his left deltoid. Filing with petition, at 10.

On October 23, 2009, petitioner received H₁N₁ monovalent flu vaccine in his right deltoid. Filing with petition, at 11, 12.

On November 25, 2010, petitioner went to Olive View – UCLA Medical Center, stating that he had swelling in his right proximal arm for about one year which he first noticed after he received H₁N₁ flu vaccine one year earlier. Filing with petition, at 12. He did not have pain or erythema. Id. Flexing his forearm made the mass larger. Id. The mass was 5-6 cm., palpable, and mobile. Id. There was no drainage involved. Id.

On July 6, 2011, petitioner had a surgical excision of the lipoma in his right arm. Filing with petition, at 20,

DISCUSSION

The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S.

310 (1986); Edgar v. Sec’y of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Sec’y of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Sec’y of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Sec’y of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of sovereign immunity was beyond the authority of the court). A court may not expand on the waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991).

On April 12, 2005, HRSA included trivalent influenza vaccine on the Vaccine Injury Table, effective July 1, 2005. 70 Fed. Reg. 19,092. For the most recent version of the Vaccine Injury Table, see 76 Fed. Reg. 36367 (June 22, 2011) (codified at 42 C.F.R. § 100.3(a)). H₁N₁ vaccine administered as a monovalent vaccine in the 2009-10 flu season was not included in the seasonal trivalent influenza vaccine, and therefore not included within the jurisdiction of the Office of Special Masters until the following flu season, i.e., 2010-11. Congress enacted the CICP to compensate adverse reactions to H₁N₁ vaccine in the flu season of 2009-10.

The undersigned has no subject matter jurisdiction in this case. This petition is **DISMISSED**.

CONCLUSION

Petitioner’s petition is **DISMISSED**. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party’s filing a notice renouncing the right to seek review.