

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**

**No. 08-0638V**

**Filed: 25 June 2009**

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RUTH BROWN,  
  
          Petitioner,  
  
          v.  
  
SECRETARY OF HEALTH  
AND HUMAN SERVICES,  
  
          Respondent.  
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**UNPUBLISHED**

**DECISION AND ORDER GRANTING MOTION TO DISMISS  
PURSUANT TO VACCINE RULE 8(d) AND RCFC 12<sup>1</sup>**

Petitioner filed this Petition on 9 September 2008, alleging vaccine-related injuries to her right arm resulting from a the administration of the Pneumovax vaccine on 28 September 2005. *See* Petition at 1-2. On 27 October 2008, Respondent filed a Motion to Dismiss for lack of subject matter jurisdiction, pursuant to RCFC 12(a), arguing that, because the Pneumovax vaccine (a polysaccharide vaccine) is not included on the Vaccine Injury Table.<sup>2</sup> *See* 42 C.F.R. § 100.3(c). An open question remained, however, because Petitioner had not filed the vaccination record to ascertain definitively which type of pneumococcal vaccine was administered to Petitioner. The Court convened a series of status conferences to resolve that open question *via* acquisition and filing of the elusive vaccination record.

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<sup>1</sup> Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of this ruling within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

<sup>2</sup> There is listed on the Vaccine Injury Table, at category XII “pneumococcal conjugate vaccines.”

Petitioner discovered one putative record of vaccination that contained the ambiguous notation that the Pneumovax vaccine was administered alongside another notation that Petitioner is allergic to Pneumovax. However, with the vaccine lot number in hand, Petitioner also pursued identification of the vaccine administered through the vaccine administrator and manufacturer. From that endeavor, Petitioner learned that the lot number indicates the vaccine administered to Petitioner was indeed a Pneumovax vaccine.

In reviewing this case, the Undersigned Special Master reminds the parties that he “may decide a case on the basis of written filings without an evidentiary hearing.” Vaccine Rule 8(d), first part.<sup>3</sup> In ruling on a motion to dismiss based on the Petition and accompanying exhibits (*see* Vaccine Rule 2(e)(1)), brought pursuant to Vaccine Rule 8(d) and RCFC 12 (as with FRCP 12), the deciding court “must accept as true the allegations in the [petition] and must construe such facts in the light most favorable to the nonmoving party.” *Nelson Const. Co. v. United States*, 79 Fed. Cl. 81 (2007), citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F. 2d 746, 747 (Fed. Cir.1988). Therefore, in ruling on this Motion without the taking of evidence, the Court will rely on medical records so as to construe the facts therein in the light most favorable to Petitioner.

The Vaccine Act requires as an element of a petition filed in the Vaccine Program that the injury sought to be compensated be related to a vaccine contained upon the Vaccine Injury Table:

A petition for compensation under the Program for a vaccine-related injury or death shall contain ... supporting documentation, demonstrating that the person who suffered such injury ... received a vaccine set forth in the Vaccine Injury Table.

§ 11(c)(1)(A).

Pneumococcal conjugate vaccines were added to the Vaccine Injury Table on 22 May 2001:

Through this notice, pneumococcal conjugate vaccines are now included as covered vaccines under Category XIII of the Table. Because the CDC only recommended pneumococcal conjugate vaccines to the Secretary for routine administration to children, *polysaccharide-type pneumococcal vaccines are not covered* under the [Vaccine Injury Compensation Program] or included on the [Vaccine Injury] Table.

66 Fed. Reg. 28, 166-01, 2001 WL 535250 (emphasis added).

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<sup>3</sup> The first part of Vaccine Rule 8(d) reads:

The special master may decide a case on the basis of written filings without an evidentiary hearing.

The language of the Rule continues as follows:

In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RCFC 56 modified to the needs of the case.

Here, the facts seem clearly to indicate that Petitioner received a polysaccharide-type pneumococcal vaccine, the type that is not included on the Vaccine Injury Table. On matters such as this, deep contemplation is unnecessary. The Court only possesses authority to rule on petitions alleging injury related to covered vaccines, and thus lacks such authority in the instant matter.

Accordingly, there is no reasonable alternative but to **DISMISS** this Petition. In the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 within 30 days of this date, **the clerk shall forthwith enter judgment** in accordance herewith.

**IT IS SO ORDERED.**

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**Richard B. Abell**  
Special Master