

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 11-494V

Filed: August 12, 2011

* * * * *

NEVELYN MCINTOSH *

Petitioner, *

v. *

SECRETARY OF HEALTH AND HUMAN SERVICES, *

Respondent. *

* * * * *

UNPUBLISHED

Dismissal Decision; RabAvert Not Listed on the Vaccine Injury Table; No Subject Matter Jurisdiction

DECISION¹

On July 29, 2011, Nevelyn McIntosh (“petitioner”), filed a petition for compensation alleging that she suffered certain injuries as a result of receiving a RabAvert vaccination. She sought an award under the National Vaccine Injury Compensation Program, National Vaccine Injury Compensation Program² (the Act or the

¹ Because this decision contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. Id.

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-1 to -34 (2006) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

Program). 42 U.S.C. §§ 300aa-1 to -34 (2006).

On August 9, 2011, the undersigned conducted a status conference with petitioner to inform her that the vaccine-related injury that she was alleging was not compensable under the Vaccine Program because the vaccine of concern to petitioner, RabAvert, is not listed on the Vaccine Injury Table. In other words, as the undersigned explained to petitioner, the unlisted vaccine falls outside of the scope of the Vaccine Program.

The Vaccine Act states that, in order to be eligible to file a petition, the vaccinee must have “received a vaccine set forth in the Vaccine Injury Table.” Section 1(c)(1)(A). The Vaccine Injury Table can be found online at <http://www.hrsa.gov/vaccinecompensation/table.htm>. United States Department of Health and Human Services, Health Resources and Services Administration, Vaccine Injury Table, <http://www.hrsa.gov/vaccinecompensation/table.htm> (last visited August 10, 2011).³

As set forth in Section 14(e) of the Vaccine Act, additional vaccines may be added to the Vaccine Injury Table in the future if the vaccine “is recommended by the Centers for Disease Control and Prevention for routine administration to children,” and the Secretary of Health and Human Services has published a notice of the vaccine’s coverage under the Vaccine Program. Within two years of receiving a recommendation from the Centers for Disease Control that children should receive a new vaccine, the Secretary of Health and Human Services must amend the Vaccine Injury Table to include the newly recommended vaccine.⁴

³ The Vaccine Injury Table is included in the Vaccine Act at § 14(a), as amended by 42 C.F.R. § 100.3(a).

⁴ The procedure for adding new vaccines to the Vaccine Injury Table after August 1, 1993, is set forth in Section 14(e)(2):

When after August 1, 1993, the Centers for Disease Control and Prevention recommends a vaccine to the Secretary for routine administration to children, the Secretary shall, within 2 years of such recommendation, amend the Vaccine Injury Table included in subsection (a) of this section to include—
(A) vaccines which were recommended for routine administration to children

Section 14(e)(2).

Consistent with the mandate of the Vaccine Act, the Vaccine Injury Table includes those vaccines that are routinely recommended for children. But compensation for covered vaccines is not limited only to children who are found to be entitled to a Program award. Adults who receive certain of these vaccines, such as hepatitis A, hepatitis B, tetanus toxoid, measles, influenza, and pneumococcal conjugate vaccine, may also file a petition seeking Program compensation.

Petitions filed under the Vaccine Program are filed against the Department of Health and Human Services, an agent of the United States. See 5 U.S.C. §§ 101, 105; see also Exchange National Bank v. Daniel Hale Williams University, 473 F. Supp. 656 (1979) (Health and Human Services is an executive agency). Because the United States is sovereign, 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); McGowan v. Sec'y of HHS, 31 Fed. Cl. 734, 740 (1994); Edgar v. Sec'y of HHS, 29 Fed. Cl. 339, 345 (1993); 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).

The Vaccine Act “constitutes a waiver of sovereign immunity, limited to the extent that the petitioners’ circumstances satisfy the requirements of the Act.” Holihan v. Sec'y of HHS, 45 Fed. Cl. 201, 207 (1999). As “a limited waiver of sovereign immunity, [the Vaccine Act] must be given a strict and narrow construction.” Id. at 207. Thus a claim for an injury that is not listed on the Vaccine Injury Table cannot be maintained because the sovereign has not waived immunity to suit. Such claims must be dismissed.

All cases filed in the Vaccine Program that have involved vaccines not listed on the Vaccine Injury Table have resulted in dismissals. See Charette v. Sec'y of HHS, No. 94-492V, 33 Fed. Cl. 488 (1995) (typhoid vaccine); Nilsen v. Sec'y of HHS, No. 10-110V, 2010 WL 1753471 (Fed. Cl. Spec. Mstr. 2010) (shingles vaccine); Evans v. Sec'y of HHS, No. 08-365V, 2008 WL 2683299 (Fed. Cl. Spec. Mstr. 2008) (Pneumovax vaccine); Gearin v. Sec'y of HHS, No. 07-737V, 2008 WL 2009736 (Fed. Cl. Spec. Mstr. 2008) (since no way to determine which of two vaccines, either flu or Pneumovax, triggered reactive arthritis, case dismissed since Pneumovax not on Vaccine Table); Morrison v. Sec'y of HHS, No. 04-1683, 2005 WL 2008245 (Fed. Cl. Spec. Mstr. 2005) (Pneumovax vaccine); Finley v. Sec'y of HHS, No. 04-874V, 2004 WL 2059490 (Fed. Cl. Spec. Mstr. 2004) (Pneumovax vaccine); Silet v. Sec'y of HHS, No. 04-1332V, 2004 WL 2677195 (Fed. Cl. 2004) (hepatitis A vaccine not on Table at that time); Brausewetter v. Sec'y of HHS, No. 99-278V, 1999 WL 562700 (Fed. Cl. Spec. Mstr.

1999) (tetanus antitoxin vaccine); Miller v. Sec'y of HHS, No. 90-1123V, 1993 WL 214444 (Fed. Cl. Spec. Mstr. 1993) (diphtheria toxoid); Dalton v. Sec'y of HHS, No. 90-2785V, 1991 WL 146245 (Cl. Ct. Spec. Mstr. 1992) (flu vaccine not on Table at that time); Dover v. Sec'y of HHS, No. 90-2299, 1991 WL 164496 (Cl. Ct. Spec. Mstr. 1991) (typhoid-paratyphoid vaccine).

The vaccine alleged to have injured Ms. McIntosh is RabAvert. That vaccine is not listed on the Vaccine Injury Table. Therefore, the undersigned must dismiss this petition. Petitioner's vaccine-related injury claim is dismissed for lack of subject matter jurisdiction.⁵

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Chief Special Master

⁵ 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.