

**In the United States Court of Federal Claims**

**OFFICE OF SPECIAL MASTERS**

Filed: January 7, 2013

* * * * *	UNPUBLISHED
LORI SIMPSON,	*
	*
Petitioner,	*
	*
v.	*
	Chief Special Master
	Campbell-Smith
	*
SECRETARY OF HEALTH	*
AND HUMAN SERVICES,	*
	Trivalent Influenza (Flu) Vaccine;
	Shoulder Injuries; Dismissal for Lack
Respondent	of Jurisdiction; Pending Civil Action
	*

\* \* \* \* \*  
John C. Theisen, Fort Wayne, IN, for petitioner

Tara J. Kilfoyle, Washington, DC, for respondent.

**DISMISSAL DECISION<sup>1</sup>**

On October 31, 2012, Lori Simpson (petitioner) filed a petition for compensation under the National Vaccine Injury Compensation Act (“Vaccine Act”).<sup>2</sup> Petitioner alleged that she suffered a serious injury to her right shoulder as a result of an influenza vaccination she received on December 18, 2010.

---

<sup>1</sup> 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.

<sup>2</sup>The National Vaccine Injury Compensation Act 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 “Act”). All citations in this decision to individual sections of the Act are to 42 U.S.C.A. § 300aa.

On November 29, 2012, respondent filed a motion to dismiss this claim for lack of subject matter jurisdiction. For the reasons discussed more fully below, respondent's motion to dismiss (without prejudice) is GRANTED.

## **I. Background**

On October 31, 2012, petitioner filed a petition for compensation under the Vaccine Act, alleging that as a result of a trivalent influenza (flu) vaccine she received at a CVS pharmacy on December 18, 2010, she suffered a severe shoulder injury. See Petition (Pet.) at 1-2. Petitioner alleged that as of the date of the filing of her petition, she continues to suffer shoulder pain and has many limitations including a limited range of motion in her right shoulder and arm. Id. at 1-2.

Prior to filing her petition in the Vaccine Program, petitioner and her husband, John Simpson ("Mr. Simpson"), filed a complaint against Hook-Superx, LLC, d/b/a CVS and CVS Pharmacy, Inc. ("CVS"), in the United States District Court for the Northern District of Indiana (the "District Court"). See Exhibit A (Ex. A) to Respondent's Motion to Dismiss (Resp't's Mot). In this complaint, petitioner and Mr. Simpson alleged that CVS negligently administered the influenza vaccine to petitioner on December 18, 2010. Id. at 6-7. Petitioner sought an award of damages to compensate her for medical expenses, lost wages, emotional distress, and pain and suffering. Id.

On November 29, 2012, respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. Resp't's Mot. at 1. Respondent argues that because petitioner had a separate pending civil action for a vaccine-related injury at the time her Vaccine Act claim was filed, the filing of her petition in this case is prohibited by § 11(a)(5)(B) of the Vaccine Act. Id.

On December 18, 2012, petitioner filed a response to respondent's motion. See Petitioner's Response (Pet'r's Resp.) at 1. Petitioner states that her counsel and counsel for respondent discussed the pending civil action and concluded that under the facts of this case, the injury for which petitioner seeks damages in her pending civil action is "vaccine-related" as defined by the Vaccine Act. Id.; see 42 U.S.C. §§300aa – 1 to 34. Petitioner states in her response that she moved the United States District Court for the Northern District of Indiana to dismiss her pending civil action without prejudice. The court granted petitioner's motion on December 5, 2012. See Notice of Filing, filed Jan. 3, 2013, ECF No. 13 (Attachment to Pet'r's Resp., (Order dismissing petition)).

Petitioner states that she does not oppose respondent's motion to dismiss in this case for lack of subject matter jurisdiction, and requests that the petition be dismissed without prejudice. Pet'r's Resp. at 2.

## II. Discussion

The Vaccine Act provides that:

no person may bring a civil action . . . against a vaccine administrator or manufacturer in a State or Federal Court for damages arising from a vaccine-related injury or death . . . unless a petition had been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury or death...

42 U.S.C. §§ 300aa-11(a)(2)(A).

If a petitioner:

has a pending civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death.

42 U.S.C. §§300aa-11(a)(5)(B).

The Vaccine Act does, however, provide a remedy for petitioners who mistakenly file a civil action prior to filing a claim and receiving judgment under the Vaccine Act:

If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action. If a petition is filed under this section with respect to the injury or death for which such civil action was brought, the date such dismissed action was filed shall, for purposes of the limitations of actions prescribed by section 300aa-16 of this title be considered the date the petition was filed if the petition was filed within one year of the date of dismissal of the civil action.

42 U.S.C. §§300-11(a)(2)(B).

Thus, if a petitioner files a civil suit prior to filing a claim under the Vaccine Act, as petitioner did in this case, she may still file a Vaccine Act claim, provided that the civil action has been dismissed at the time she files her petition. Furthermore, the Vaccine Act permits the petitioner to use the filing date of the original civil action as the filing date of the Vaccine Act petition for purposes of the Vaccine Act's statute of limitations.

In the present case, petitioner does not dispute that she filed a civil action in the United States District Court for the Northern District of Indiana for vaccine-related

injuries, and that this claim was pending at the time she filed her Vaccine-Act petition. See Pet'r's Resp. at 1. Petitioner has since moved the District Court to dismiss the complaint in her pending civil action. That complaint was dismissed on December 5, 2012. See Notice of Filing, filed Jan. 3, 2013, ECF No. 13 (Attachment to Pet'r's Resp., (Order dismissing petition)).

Petitioner now acquiesces to having the undersigned dismiss her petition without prejudice to allow for re-filing of the petition in compliance with the Vaccine Act's statutory requirements. Pet'r's Resp. at 1-2. Accordingly, the undersigned is persuaded that granting respondent's motion to dismiss is appropriate in this instance. See Flowers v. Sec'y of Health & Human Servs., 49 F.3d 1558, 1559 (Fed. Cir. 1995) (petitioner's claim for compensation under the Vaccine Act was dismissed for lack of jurisdiction because it was filed while a civil action for the same alleged injury was pending); see also Aull v. Sec'y of Health & Human Servs., 462 F.3d 1338, 1344 (Fed. Cir. 2006).

### **III. Conclusion**

Respondent's motion to dismiss the petition for lack of subject matter jurisdiction is **GRANTED**. The petition is hereby **DISMISSED WITHOUT PREJUDICE**, subject to re-filing.

**IT IS SO ORDERED.**

s/Patricia E. Campbell-Smith  
Patricia E. Campbell-Smith  
Chief Special Master