

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

Filed: July 29, 2013

*****		UNPUBLISHED
SAURABH V. AMIN and ARCHANA	*	
AMIN, natural parents and guardians of	*	No. 13-300V
██████████, a minor,	*	
	*	Special Master Dorsey
Petitioners,	*	
	*	Dismissal; Pneumococcal
v.	*	polysaccharide vaccine;
	*	Failure to state a claim for
SECRETARY OF HEALTH	*	which relief may be granted
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

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Carol L. Gallagher, Carol L. Gallagher, Esquire, LLC, Linwood, NJ, for petitioners.  
Lynn E. Ricciardella, U.S. Department of Justice, Washington, DC, for respondent.

### DECISION<sup>1</sup>

#### **I. Introduction**

On April 29, 2013, petitioners filed a petition under the National Vaccine Injury Compensation Program (“Vaccine Act”)<sup>2</sup> alleging that their daughter ██████████ at nine years of age, suffered an adverse reaction after receiving the pneumococcal polysaccharide vaccine called Pneumovax 23.<sup>3</sup> Petition (“Pet.”) at 1.

<sup>1</sup> This Decision was originally filed on July 29, 2013. On July 30, 2013, petitioners requested redactions. This motion was granted in an Order, filed on July 31, 2013. In the reissued version, the minor child’s name is redacted to initials and this footnote is changed to reflect the redaction. The remainder of the Decision is unchanged.

<sup>2</sup> 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”). All citations in this order to individual sections of the Act are to 42 U.S.C. § 300aa.

<sup>3</sup> Pneumovax is a polysaccharide-type pneumococcal vaccine indicated for the prevention of pneumococcal disease caused by 23 serotypes. HIGHLIGHTS OF PRESCRIBING INFORMATION, PNEUMOVAX 23 1 (2013)  
[http://www.merck.com/product/usa/pi\\_circulars/p/pneumovax\\_23/pneumovax\\_pi.pdf](http://www.merck.com/product/usa/pi_circulars/p/pneumovax_23/pneumovax_pi.pdf).

Petitioners allege that on March 22, 2011, [REDACTED] was “administered the Pneumovax 23 vaccine to her right deltoid muscle.” Pet. at 1; Pet’rs’ Ex. 4B at 103. Following her vaccination, [REDACTED] experienced “an allergic reaction [with] tongue swelling and episodes of hot flashes accompanied by vertiginous sensations of spinning, bifrontal headache, and seeing ‘double or triple.’” *Id.*

On June 13, 2013, the undersigned held an initial status conference with the parties and discussed whether the Pneumovax 23 vaccine was covered by the Vaccine Act. The undersigned issued a Scheduling Order for respondent to file a Motion to Dismiss by July 15, 2013, and for petitioners to respond within 14 days of respondent’s filing.

On July 1, 2013, respondent filed a Motion to Dismiss because “petitioners were unable to show [REDACTED] ‘received a vaccine set forth in the Vaccine Injury Table.’” Motion to Dismiss (“Mot. to Dismiss”) at 2. Petitioners did not file a response. For the reasons set forth below, respondent’s motion to dismiss is **GRANTED**.

## **II. Applicable Legal Standards**

The Vaccine Act provides 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 11(c)(1)(A). Cases concerning vaccines not included in the Vaccine Injury Table result in dismissals. *See, e.g. Charette v. Sec’y of Health & Human Servs.*, No. 94-492V, 33 Fed. Cl. 488 (1995) (typhoid vaccine); *Schmidt v. Sec’y of Health & Human Servs.*, No. 11-401V, 2011 WL 6148590 (Fed. Cl. Spec. Mstr. Nov. 21, 2011) (Pneumovax 23); *Nilsen v. Sec’y of Health & Human Servs.*, No. 10-110V, 2010 WL 1753471 (Fed. Cl. Spec. Mstr. Apr. 6, 2010) (shingles vaccine); *Silet v. Sec’y of Health & Human Servs.*, No. 04-1332V, 2004 WL 2677195 (Fed. Cl. Nov. 2, 2004) (hepatitis A vaccine not on Vaccine Injury Table at that time).

The Vaccine Injury Table provides that additions to the Table will include: “[a]ny new vaccine recommended by the Centers for Disease Control and Prevention for routine administration to children, after publication by the Secretary of a notice of coverage.” 42 U.S.C. § 300aa-14(a), as amended, 42 C.F.R. § 100.3(a). This provision derives from the Vaccine Act, 42 U.S.C. § 300aa-14(e)(2), which provides:

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.

## **III. Discussion**

The Vaccine Injury Table lists vaccines recommended for children, although adults may receive certain listed vaccines, e.g., hepatitis A, hepatitis B, tetanus toxoid, measles, influenza, and pneumococcal conjugate vaccines. A pneumococcal conjugate vaccine recommended for children, Prevnar, is expressly covered under Category XII of the Vaccine Injury Table. 42

C.F.R. § 100.3(a)(XII) (2011); see also 66 Fed. Reg. 28166 (May 22, 2001) (“Through this notice, pneumococcal conjugate vaccines are now included as covered vaccines . . . [on] 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 Act] or included on the Table.”). Pneumovax 23, however, is a polysaccharide-type vaccine, and it is not on the Vaccine Injury Table. 42 C.F.R. § 100.3(a).

Here, petitioners seek compensation under the Vaccine Act for an alleged injury stemming from a vaccine that is not included on the Vaccine Injury Table. Although Pneumovax 23 is a vaccine against pneumococcal infection, the only pneumococcal vaccine on the Vaccine Injury Table is a conjugate vaccine, such as Prevnar, not a polysaccharide vaccine, such as Pneumovax 23. Thus, petitioners cannot receive compensation on a claim based on the Pneumovax 23 vaccine through the Vaccine Program, and the petition must be dismissed. See e.g., Schmidt, 2011 WL 6148590 (dismissing petition that involves Pneumovax 23 vaccine); Nutt v. Sec’y of Health & Human Servs., No. 10-862V, 2011 WL 976675 (Fed. Cl. Spec. Mstr. Feb. 23, 2011) (same); Morrison v. Sec’y of Health & Human Servs., No. 04-1683, 2005 WL 2008245 (Fed. Cl. Spec. Mstr. July 26, 2005) (same).

#### **IV. Conclusion**

Because Pneumovax 23 is not included on the Vaccine Injury Table, petitioners have failed to state a claim for which relief may be granted. Therefore, the undersigned must dismiss this petition. The petition is **DISMISSED**.

**IT IS SO ORDERED.**

/s/Nora Beth Dorsey  
Nora Beth Dorsey  
Special Master