OFFICE OF SPECIAL MASTERS

No. 97-156V

(Filed: November 13, 1997)

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SUSAN G. GORSKI,	*	
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Petitioner,	*	**TO BE PUBLISHED**
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *		

Petitioner appeared *pro se.*

Mark Rogers, Department of Justice, Washington, D.C., appeared for respondent.

DECISION

HASTINGS, Special Master.

This is an action seeking an award under the National Vaccine Injury Compensation Program[(1)] (hereinafter "the Program") . Respondent filed a "Motion to Dismiss" on May 22, 1997. For the reasons set forth below, that motion is granted.

I

FACTS

On April 26, 1990, petitioner received a measles-mumps-rubella ("MMR") vaccination at her local health department. (Ex. 3, p. 1.[2]) Petitioner alleges that she developed symptoms of arthritis in several joints "in the weeks following" the vaccination. (Pet., p. 1.) However, she did not seek medical treatment for arthritic symptoms at any time soon thereafter. Instead, medical records indicate that the first time thereafter that petitioner reported any joint pain was when she injured her left shoulder in May of 1991 (Ex. 5), and the first time that petitioner reported arthritic symptoms in multiple joints was in August of 1992 (Ex. 2, p. 8). The records also indicate that since 1992, petitioner has been diagnosed to be suffering from "rheumatoid arthritis." (Ex. 2, p. 8; Ex. 8, pp. 1-2.)

II

STATUTORY BACKGROUND

Under the Program, compensation awards are made to individuals who have suffered injuries after receiving certain vaccines listed in the statute. There are two separate means of establishing entitlement to compensation. First, if an injury specified in the "Vaccine Injury Table," originally established by statute at § 300aa-14(a) and since modified administratively (as will be discussed *infra*), occurred within the time period from vaccination prescribed in that Table, then that injury may be *presumed* to qualify for compensation. § 300aa-13(a)(1)(A); § 300aa-11(c)(1)(C)(i); § 300aa-14(a). If a person qualifies under this presumption, he or she is said to have suffered a "Table Injury." Alternatively, compensation may also be awarded for injuries not listed in the Table, but entitlement in such cases is dependent upon proof that the vaccine *actually caused* the injury. § 300aa-13(a)(1); § 300aa-11(c)(1)(C)(ii).

One of the vaccinations covered under the Program is the MMR vaccination. § 300aa-14(a)(II). In the Vaccine Injury Table as originally enacted, however, arthritis was *not* listed as a Table Injury for any vaccination. Therefore, an individual seeking compensation for arthritis had to demonstrate by evidence that his or her arthritis was *vaccine-caused*. However, the Table was administratively modified, effective as of March 10, 1995. Under that modification, "chronic arthritis," if incurred under certain specified circumstances, was established as a "Table Injury" for the MMR vaccination. *See* 60 Fed. Reg. 7678 (1995); 42 C.F.R. § 100.3(a)(II.b)(A) and § 100.3(b)(6).[3]

The statutory deadlines for filing Program petitions are provided at § 300aa-16. With respect to vaccinations administered after October 1, 1988, as was the vaccination at issue here, § 300aa-16(a)(2) provides that a Program petition must be filed within 36 months of the onset of the symptoms of the injury. An exception to that rule, however, is provided in § 300aa-16(b), with respect to situations in which the Vaccine Injury Table is revised. That exception, as will be discussed in detail, allows an extended filing deadline in certain situations in which a revision in the Table changed the eligibility requirements.

III

PROCEDURAL BACKGROUND

Petitioner filed her petition for vaccine compensation on March 10, 1997. Respondent filed a "Motion to

Dismiss" on May 22, 1997, claiming that petitioner was barred from compensation by § 300aa-16(a)(2), because her claim was not filed within three years of the onset of the alleged injury. The basis for respondent's motion was discussed at an unrecorded telephonic status conference held on June 24, 1997, at which petitioner appeared *pro se* and respondent was represented by her counsel of record. Although petitioner stated that she had suffered from arthritic symptoms since shortly after her vaccination, she confirmed that, as the medical records indicated, she was never seen by a physician for such symptoms until more than a year after the vaccination. At that time, I explained to petitioner that, under those facts, my preliminary analysis of respondent's dismissal motion was that the argument appeared to be sound. Petitioner was given 45 days from the date of that status conference in which to file additional argument or information in support of her claim or in opposition to the dismissal motion. Petitioner has filed nothing since then.

IV

DISCUSSION

As noted above, § 300aa-16(a)(2) requires that a Program petition with respect to a vaccination that was administered after October 1, 1988, be filed with 36 months after the date of the first symptom of the injury in question. In this case, the petitioner was vaccinated on April 26, 1990, and she alleges that her symptoms began "in the weeks following the shot." (Pet., p. 1.) Her petition for Program compensation, however, was filed almost seven years later, on March 10, 1997. Thus, under the straightforward application § 300aa-16(a)(2), this petition obviously would be time- barred. Calculation of the deadline here, however, is complicated by the possible application of the exception set forth at § 300aa-16(b), which states as follows:

If at any time the Vaccine Injury Table is revised and the effect of such revision is to permit an individual who was not, before such revision, eligible to seek compensation under the Program, [sic[(4)]] or to significantly increase the likelihood of obtaining compensation, such person may * * * file a petition for such compensation not later than 2 years after the effective date of the revision * * *.

§300aa-16(b). In fact, the Vaccine Injury Table, the original version of which is contained at § 300aa-14 (a), was revised, effective March 10, 1995, to include "chronic arthritis" as a new "Table Injury" with respect to the MMR vaccination. *See* 60 Fed. Reg. 7678 (1995); 42 C.F.R. § 100.3(a)(II.b)(A). Accordingly, the petitioner here would be eligible for the extended statute of limitations *if* she qualifies under § 300aa-16(b).

Close examination of the petition and its accompanying documentation, along with the Table revision in question, however, reveals that the savings provision of § 300aa-16(b) does *not* apply here. That is, even if I accept, *arguendo*, all of the basic facts alleged by petitioner, her claim does not qualify under § 300aa-16(b) for the extended deadline. Ultimately, I find that the question of the application of § 300aa-16(b) to this case is not a close one. However, I note that the provision itself is somewhat confusing on its face, and has apparently never been the subject of a published Program opinion. Therefore, I will begin with a general discussion of § 300aa-16(b).

A. General discussion of § 300aa-16(b)

Initially, it is fair to say that the exact meaning of every part of § 300aa-16(b) is far from clear. To understand the provision, however, it may be helpful to examine its history. As originally enacted, the

relevant portion of § 300aa-16(b) read as follows:

[I]f at any time the Vaccine Injury Table is revised and the effect of such revision is to permit an individual who was not, before such revision, eligible to seek compensation under the Program, such person may file a petition for compensation not later than 2 years after the effective date of the revision * * *.

As I understand that sentence, it appears to me that some wording was inadvertently left out of that sentence, between the words "Program" and "such." That is, the clause consisting of "who was not, before such revision, eligible to seek compensation under the Program" seems to me to be simply a subordinate clause that modifies the word "individual." Therefore, the sentence as it stands really never completes the clause which reads "if * * * the effect of the revision is to permit an individual * * *." The sentence leaves the reader wondering, "permit an individual *to do what*?" The sentence simply does not state exactly *what* the revision must "permit" the individual to do.

Nevertheless, I think that the *general* intent of the original § 300aa-16(b) can be discerned. The intent seems to be to indicate that if the effect of the Table revision was to *make an individual eligible for compensation*, in a situation where prior to the revision that individual would *not* have been eligible, then such individual will have a fresh two-year period, from the effective date of the revision, in which to file a Program petition. That intent, indeed, is confirmed by the legislative history accompanying the original text of § 300aa-16(b). The relevant Committee report reads as follows:

Subsection (b)--Effect of Revised Table.--If the Table is revised (as described above in Section 2114) *and the effect of the revision is to make an individual eligible for compensation*, that individual must file a petition within two years of the effective date of the revision.

H.R. Rept. No. 99-660 (1986), at 23 (*reprinted* in 1986 U.S.C.C.A. N. 6344, 6364), emphasis added.[(5)]

Then, in 1993, Congress modified the language of § 300aa-16(b). In that modification, Congress added, after the word "Program," the words "or to significantly increase the likelihood of obtaining compensation."[(6)] Therefore, assuming that my interpretation of the *original* language of § 300aa-16(b) is correct, that subsection as now modified since 1993 allows an individual to file a Program petition within the extended filing period if a revision of the Vaccine Injury Table affected that individual's potential Program claim in *either* of two ways: (1) if it made that individual eligible for compensation, when previously that individual had not been eligible; or (2) if it "significantly increased" that individual's "likelihood" of obtaining compensation.

Assuming that this correctly interprets the statute as now modified, the provision is still far from clear. That is, it is not wholly clear to me exactly what the difference is between (1) making a previously "ineligible" person "eligible" for compensation, and (2) merely "substantially increasing" a person's "likelihood" of obtaining compensation. Respondent seems to suggest that the former situation occurs only when a Table revision adds an *entirely new vaccination* to the Table, while the latter situation occurs when a vaccination was already on the Table, but the revision adds a new "Table Injury" for that vaccination or expands the scope of an already-existing "Table Injury." (See respondent's "Motion to Dismiss" at p. 3.) Perhaps respondent is correct, but that is a theoretical question that I need not address here. The questions to be resolved in this case are narrower.

B. The issues here

In light of this general understanding of § 300aa-16(b), set forth above, the questions in this case come

into focus. In this case, because the Vaccine Injury Table was in fact revised to include a new "Table Injury" for the MMR vaccination, the possibility is raised that petitioner could benefit from the added filing period provided in § 300aa-16(b). The issues are (1) whether petitioner's injury fits within that new Table Injury category; and (2) if it does not, is petitioner nevertheless eligible under § 300aa-16(b) to raise at this time the separate argument that her condition was "actually caused" by her MMR vaccination. The first issue involves essentially a factual determination; the second is basically a legal issue. I will discuss both points, in turn, below.

1. Petitioner's condition does not fit within the new

Table Injury category

As noted above, the 1995 regulatory changes to the Vaccine Injury Table created a new Table Injury, known as "chronic arthritis," with respect to the MMR vaccination and other vaccinations containing the rubella vaccine. One of the requirements for demonstrating that new Table Injury is as follows:

Medical documentation, recorded within 30 days after the onset, of objective signs of acute arthritis (joint swelling) that occurred within 42 days after a rubella vaccination * * *.

42 C.F.R. § 100.3(b)(6)(A). But petitioner acknowledges that in her case no such medical documentation was recorded within the applicable time period, since she never sought any medical attention for the condition for at least a year after the vaccination. Therefore, it is clear that petitioner's injury does *not* fit within the new Table Injury category.

2. May petitioner nevertheless raise her " actual causation"

argument at this time?

Despite the fact that her injury does not fit within the new Table Injury category, petitioner nevertheless firmly believes that her condition was caused by her MMR vaccination. But the legal question here is whether she is entitled to raise such an "actual causation" contention at this time in this proceeding. My interpretation of § 300aa-16(b) is that she is not.

As I explained above, § 300aa-16(b), as amended in 1993, seems to allow an individual to file a Program petition within the extended filing period if a revision of the Vaccine Injury Table affected that individual's potential Program claim in *either* of two ways: (1) if it made that individual eligible for compensation, when previously that individual had not been eligible; or (2) if it "significantly increased" that individual's "likelihood" of obtaining compensation. In this case, it seems to me that the revision of the Table in question did *not* affect the potential Program claim of the petitioner here in either of those ways.

First, the revision in question--*i.e.*, the addition to the Table of "chronic arthritis" as a Table Injury--certainly does not seem to have "made petitioner eligible" for Program compensation, whatever the exact meaning of that phrase. As noted above, respondent interprets that phrase to come into play only when a Table revision *adds an entirely new vaccination* to the Table. That is not the case here. Rather, there is no question that since prior to 1990, when petitioner was vaccinated, the MMR vaccination has

been a vaccination listed in the Vaccine Injury Table (see § 300aa-14(a)(II)), so that petitioner obviously was already "eligible" to *file* a petition, within the original three-year statutory period after the onset of her symptoms, and to attempt to prove under § 300aa-11(c)(1)(C)(ii) that the vaccination *actually caused* her arthritis. Therefore, if respondent is correctly interpreting the phrase "make eligible," the statutory revision here at issue obviously did not do that for the petitioner here. But even if respondent is interpreting the "make eligible" phrase too narrowly, I would still see no potential way in which the Table revision in question can be said to have "made petitioner eligible" for Program compensation. All that the revision did was add to the Table a new "Table Injury" category, a category into which petitioner plainly *does not fit*. I thus conclude that the Table revision in question did *not* affect the petitioner's potential Program claim in the first of the two possible ways described in § 300aa-16(b).

The second question, then, is whether the Table revision "significantly increased" petitioner's "likelihood" of obtaining Program compensation. I conclude that it did not. To be sure, one could argue that merely by adding "chronic arthritis" as a Table Injury, the Secretary of Health and Human Services was somehow *adding credence* to the *general theory* that the rubella vaccine can cause chronic arthritis, thereby perhaps adding weight to the "actual causation" argument of *any* person who developed chronic arthritis after a rubella vaccination, even if such person did *not* meet the newly-established Table Injury criteria. But I simply cannot accept such an elastic interpretation of the phrase "significantly increase the likelihood." When the question in a Program case is "actual causation," it is irrelevant whether the injury in question is similar to a "Table Injury." In every case, the evidence as to "actual causation" must be evaluated on its own scientific merit. Therefore, the Table revision in question would *not* in a practical sense affect in any way an allegation that an MMR vaccination *actually caused* an injury. That revision did not really in the slightest "increase the likelihood" that petitioner could prevail under an *actual causation* theory.

In sum, because the revision of the Table did not affect in any practical way the petitioner's *actual causation* allegation, I conclude that § 300aa-16(b) does *not* permit her to raise an "actual causation" argument in a petition filed within the extended limitations period. In other words, in my view, the benefit of the extended limitations period would be available only if petitioner could show that her injury fits within the new "Table Injury" category.

IV

CONCLUSION

It is, of course, very unfortunate that the petitioner suffers from a debilitating arthritic condition. She is certainly deserving of sympathy for that condition. As the above discussion indicates, however, I must conclude that petitioner does *not* qualify under the "savings provision" of § 300aa-16(b), and thus I must dismiss her petition at this time. Absent a timely motion for review of this Decision, the clerk shall enter judgment accordingly.

George L. Hastings, Jr.

Special Master

1. The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (1994 ed.). Hereinafter, all "§" references will be to 42 U.S.C. (1994 ed.).

2. Petitioner filed records divided into exhibits 1 through 9 with her petition. "Ex. __" references will be to those exhibits.

3. "C.F.R." references in this opinion are to the 1996 edition of the C.F.R.

4. As will be discussed, it may be that some words were inadvertently left out of the statute at this point. Nevertheless, the quotation above correctly sets forth the relevant portion of § 300aa-16(b) as it currently stands.

5. I note that other than the paragraph quoted above, I have found no legislative history explaining § 300aa-16(b). I found no explanatory legislative history at all concerning the *amendment* to § 300aa-16 (b) enacted in 1993.

6. See Omnibus Budget Reconciliation Act of 1993, P. L. No. 103-66, 1993 U.S.C.A.N.N. (107 Stat. 645). Actually, the 1993 amendment struck out the words "such person may file," and substituted the words "or to significantly increase the likelihood of obtaining compensation, such person may, notwithstanding section § 300aa-11(b)(2) of this title, file." But, in effect, the change was merely to *add* the words "or to significantly increase the likelihood of obtaining compensation." The "such person may file" language was technically deleted, but was at the same time added back interspersed with the phrase "notwithstanding section 300aa-11(b)(2) of this title." The reference to § 300aa-11(b)(2) was necessary because that subsection forbids the filing of *more than one petition* with respect to a single vaccination. The "notwithstanding" phrase, therefore, simply clarified, quite logically, that the "one petition rule" of § 300aa-11(b)(2) would be waived when a Table revision came into play, so that an injured person who had unsuccessfully sought Program compensation under the earlier version of the Table could file a new petition to take advantage of the modification.