# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
No. 11-625V
November 17, 2011
Not to be Published

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| DWIGHT MUNGER, | * | |
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| Petitioner, | * | |
| | * | |
| v. | * | H1N1 monovalent vaccine |
| | * | administered Oct. 2009; no |
| | * | subject matter jurisdiction |
| SECRETARY OF THE DEPARTMENT | * | |
| OF HEALTH AND HUMAN SERVICES, | * | |
| | * | |
| Respondent. | * | |
| * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * | | |

John W. Kluksdal, Boise, ID, for petitioner.
Chrysovalantis P. Kefalas, Washington, DC, for respondent.

**MILLMAN, Special Master**

## DECISION[1]

On September 29, 2011, petitioner filed two petitions for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa–10-34 (2006), alleging

[1] Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access.

alternatively that seasonal influenza virus vaccine administered on October 5, 2009 and H1N1 mist vaccine on October 28, 2009 caused him allergic reactions. The other petition is No. 11-624V and focuses on the seasonal flu vaccination petitioner received, although petitioner also mentions the H1N1 FluMist vaccine as the cause of petitioner's problems. In this petition, No. 11-625V, petitioner focuses on the H1N1 FluMist vaccine as the cause of his problems.

Vaccination against H1N1 virus is not included in the Vaccine Injury Table in the Vaccine Act. 42 C.F.R. § 100.3. Only trivalent influenza vaccine, which can be a combination of H1N1 and seasonal flu vaccine in the same vaccine, is covered under the Vaccine Act. Those individuals who allege a vaccine injury from H1N1 monovalent vaccine, either injected or nasal spray, have recourse under the Countermeasures Injury Compensation Program (CICP) run by the Health Resources and Services Administration (HRSA). See www.hrsa.gov/gethealthcare/conditions/countermeasurescomp/cicpantivuralinfo.html.

During the flu season from the end of 2009 through the spring of 2010, H1N1 virus was not included in the 2009-10 seasonal flu vaccine "because it was identified after manufacturers had started making the seasonal flu vaccine." Centers for Disease Control and Prevention, "Questions and Answers. Vaccine against 2009 H1N1 Influenza Virus," www.cdc.gov/h1n1flu/vaccination/public/vaccination_qa_pub.htm.

Starting in the 2010-11 flu season, when H1N1 virus was combined with the seasonal flu virus into one influenza vaccine, the Office of Special Masters has had subject matter jurisdiction over H1N1 vaccine, either injected or nasal spray, when combined with seasonal flu vaccine. In 2009, when only monovalent H1N1 virus vaccine was available, HRSA was the only avenue for redress for reactions to H1N1 vaccinations. The undersigned explained the difficulties inherent in this case in an Order issued October 31, 2011, directing petitioner's counsel to explain during

the Rule 4(b) Conference scheduled for November 17, 2011, why this petition should not be dismissed for lack of subject matter jurisdiction.

On November 17, 2011, during the Rule 4(b) Conference, petitioner's counsel stated that he and his client accepted that the undersigned does not have subject matter jurisdiction over this case and that the undersigned will dismiss it, leaving petitioner's other petition, No. 11-624V, as his sole remaining petition.

**DISCUSSION**

The United States is sovereign and 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); Edgar v. Sec'y of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Sec'y of HHS, 31 Fed. Cl. 734, 740 (1994); 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).

On April 12, 2005, HRSA included trivalent influenza vaccine on the Vaccine Injury Table, effective July 1, 2005. 70 Fed. Reg. 19,092. For the most recent version of the Vaccine Injury Table, see 76 Fed. Reg. 120 (June 22, 2011) (codified at 42 C.F.R. § 100(c)(5)). H1N1 vaccine administered as a monovalent vaccine in the 2009-10 flu season was not included in the seasonal trivalent influenza vaccine, and therefore not included within the jurisdiction of the Office of Special Masters until the following flu season, i.e., 2010-11. Congress provided under

the CICP an alternative source of compensation for those alleging vaccine reactions to H1N1 in the flu season of 2009-10.

The undersigned has no subject matter jurisdiction to review this petition and must dismiss it.

**CONCLUSION**

Petitioner's petition is **DISMISSED**. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk of the court is directed to enter judgment herewith.[2]

**IT IS SO ORDERED.**

November 17, 2011
DATE

s/Laura D. Millman
Laura D. Millman
Special Master

[2] 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.