

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-862V

January 11, 2011

Not to be Published

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MARGARET NUTT,

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Petitioner,

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v.

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Order to Show Cause; Pneumovax  
is not on the Vaccine Injury Table;  
no subject matter jurisdiction

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SECRETARY OF THE DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

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Respondent.

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David E. Marmelstein, Enfield, CT, for petitioner.

Lara Ann Englund, Washington, DC, for respondent.

**MILLMAN, Special Master**

## ORDER TO SHOW CAUSE

On December 15, 2010, petitioner filed a petition on her own behalf for compensation under the National Childhood Vaccine Injury Act of 1986<sup>1</sup> (hereinafter the "Vaccine Act" or the

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

"Act"), alleging that she suffered polymyalgias from Pneumovax or pneumococcal vaccine. Med. recs. at Ex. 2, p. 3; Petition. Pneumovax is not on the Vaccine Injury Table. 42 U.S.C. § 300aa-14(a), as amended, 42 C.F.R. § 100.3(a).

On January 21, 2011, the undersigned, petitioner, and respondent will have a Rule 4(b) conference to discuss this case. The undersigned is issuing this Order to Show Cause before this conference to apprise petitioner's counsel that, unless he can show how the undersigned has subject matter jurisdiction in this case, this case must be dismissed.

### **DISCUSSION**

A general provision at the end of the Vaccine Injury Table in its current form states that other vaccines will be added to the Table in future if the following process occurs:

Any new vaccine recommended by the Centers for Disease Control and Prevention for routine administration to children, after publication by Secretary, HHS of a notice of coverage.

This general provision is derived from the Vaccine Act itself, 42 U.S.C. § 300aa-14(e)(2), discussing vaccines recommended for addition to the Vaccine Injury Table after August 1, 1993:

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, ....

The Vaccine Injury Table lists vaccines recommended for children, although adults may also receive certain of these vaccines, e.g., hepatitis A, hepatitis B, tetanus toxoid, measles, influenza, and pneumococcal conjugate vaccine. Prevnar is a pneumococcal conjugate vaccine.

Pneumovax is a pneumococcal polyvalent vaccine, not recommended for children and not on the Vaccine Injury Table.

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).

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 11(c)(1)(A).

A number of cases have concerned vaccines not listed on the Vaccine Injury Table, all resulting in dismissals: 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, 22010 WL 1753471 (Fed. Cl. Spec. Mstr. Apr. 6, 2010) (shingles vaccine); Evans v. Sec'y of HHS, No. 08-365V, 2008 WL 2683299 (Fed. Cl. Spec. Mstr. June 19, 2008) (Pneumovax vaccine); Gearin v. Sec'y of HHS, No. 07-737V, 2008 WL 2009736 (Fed. Cl. Spec. Mstr. Jan. 31, 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. July 26, 2005) (Pneumovax vaccine); Finley v. Sec'y of HHS, No. 04-874V, 2004

WL 2059490 (Fed. Cl. Spec. Mstr. August 24, 2004) (Pneumovax vaccine); Silet v. Sec'y of HHS, No. 04-1332V, 2004 WL 2677195 (Fed. Cl. Nov. 2, 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. July 16, 1999) (tetanus antitoxin vaccine); Miller v. Sec'y of HHS, No. 90-1123V, 1993 WL 214444 (Fed. Cl. Spec. Mstr. June 4, 1993) (diphtheria toxoid); Dover v. Sec'y of HHS, No. 90-2299, 1991 WL 164496 (Cl. Ct. Spec. Mstr. August 8, 1991) (typhoid-paratyphoid vaccine); Dalton v. Sec'y of HHS, No. 90-2785V, 1991 WL 146245 (Cl. Ct. Spec. Mstr. July 18, 1992) (flu vaccine not on Table at that time). Petitioner in the instant action will note that Evans, Gearin, Morrison, and Finley specifically dealt with Pneumovax vaccine.

The undersigned does not have subject matter jurisdiction in this case because Pneumovax is not a pneumococcal conjugate vaccine and is not included in the Vaccine Injury Table. Therefore, the undersigned must dismiss this petition. In addition, because there is no subject matter jurisdiction, the undersigned does not have jurisdiction to award fees and costs in this case. Brice v. Sec'y of HHS, 358 F.3d 865 (Fed. Cir. 2004); Martin v. Sec'y of HHS, 62 F.3d 1403 (Fed. Cir. 1995).

### CONCLUSION

Petitioner's counsel shall explain at the January 21, 2011 telephonic status conference why this case should not be dismissed.

**IT IS SO ORDERED.**

January 11, 2011  
DATE

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