

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 12-585V

Filed: November 6, 2012

To be Published

NICOLE SPAANS, as Next Friend of *
JAYCELIN JOY SPAANS, *

Petitioner, *

v. * Dismissal; Pneumococcal

SECRETARY OF THE DEPARTMENT OF *
HEALTH AND HUMAN SERVICES, *

polysaccharide vaccine (PPV23);
no subject matter jurisdiction

Respondent. *

Scott W. Rooney, Farmington Hills, MI, for petitioner.
Jennifer L. Reynaud, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

On September 10, 2012, petitioner filed a petition under the National Childhood Vaccine Injury Act of 1986 (hereinafter the "Vaccine Act" or the "Act"), alleging that her daughter Jaycelin, at almost eight years of age, suffered an adverse reaction after receiving pneumococcal polysaccharide vaccine called PPV23. Med. recs. Ex. 1, at 1 and 2 ("pneumococcal

¹ 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 banned categories listed above, the special master shall redact such material from public access.

polysaccharide adult vaccine” [pp. 1 and 2]; “Dr. Mogle is aware that she has already had a Pneumovax, however he wants her to get another one.” [p. 2]). See also Med. recs. Ex. 6, at 4 (“pneumococcal vaccine adult”); Ex. 7, at 3 (“Pneumovax”).

PPV23 is not on the Vaccine Injury Table. 42 U.S.C. § 300aa-14(a), as amended, 42 C.F.R. § 100.3(a). Although PPV23 (as well as Pneumovax) 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 PPV23 and Pneumovax.

On October 31, 2012, the undersigned issued an Order to Show Cause why this case should not be dismissed for lack of subject matter jurisdiction.

On November 1, 2012, the undersigned held a first status conference with the parties and discussed the Order to Show Cause. Petitioner’s counsel said he would confer with his client to whom he had sent the Order to Show Cause. Later on the same day, petitioner’s counsel telephoned to say that his client moved to dismiss the petition. Petitioner’s motion to dismiss is **GRANTED** and this case is **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. It is recommended for children. Prevnar is a conjugate-type of pneumococcal vaccine expressly covered under Category XII of the Vaccine Injury Table. 42 C.F.R. § 100.3(a)(XII) (2010); see also 66 Fed. Reg. 28,166 (May 22, 2001) (placing conjugate-type pneumococcal vaccine on the Vaccine Injury Table). However, PPV23 is a pneumococcal polyvalent vaccine, which is not recommended for children and not on the Vaccine Injury Table.

Although the medical records alternately describe the polysaccharide vaccine Jaycelin received as Pneumovax and PPV23, there is no difference between PPV23 and Pneumovax in that both are pneumococcal polysaccharide vaccines recommended for adults. Although Jaycelin was nearly eight years old when she received PPV23/Pneumovax, she did not receive a vaccine recommended for children under two years of age on January 27, 2012. The vaccine recommended for children under two years of age would be Prevnar. “Prevnar vaccine is given in a series of shots. The first shot is usually given when the child is 2 months old. The booster shots are then given at 4 months, 6 months, and 12 to 15 months of age.” Prevnar, Drugs.com, www.drugs.com/prevnar.html (last visited Oct. 31, 2012).

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); McGowan v. Sec’y of HHS, 31 Fed. Cl. 734, 740 (1994); Edgar v. Sec’y of HHS, 29 Fed. Cl. 339, 345 (1993); 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); Schmidt v. Sec’y of HHS, No. 11-401V, 2011 WL 6148590 (Fed. Cl. Spec. Mstr. Nov. 21, 2011) (Pneumovax); Nutt v. Sec’y of HHS, No. 10-862V, 2011 WL 976675 (Fed. Cl. Spec. Mstr. Feb. 23, 2011) (Pneumovax); Nilsen v. Sec’y of HHS, No. 10-110V, 2010 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); 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); Finley v. Sec’y of HHS, No. 04-874V, 2004 WL 2059490 (Fed. Cl. Spec. Mstr. Aug. 24, 2004) (Pneumovax); 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. Aug. 8, 1991) (typhoid-paratyphoid vaccine); Dalton v. Sec’y of HHS, No. 90-2785V, 1991 WL 146245 (Cl. Ct. Spec. Mstr. July 18, 1991) (flu vaccine not on Table at that time). Schmidt, Nutt, Evans, Gearin, Morrison, and Finley specifically dealt with pneumococcal polysaccharide vaccine, i.e., PPV23.

The undersigned does not have subject matter jurisdiction in this case because PPV23 is a pneumococcal polysaccharide vaccine, not included on the Vaccine Injury Table, and is not a pneumococcal conjugate vaccine which is included on 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 attorneys’ fees and costs in this case. Martin v. Sec’y of HHS, 62 F.3d 1403 (Fed. Cir. 1995).

This case is **DISMISSED**.

CONCLUSION

Petitioner’s petition is dismissed for lack of jurisdiction.²

IT IS SO ORDERED.

November 6, 2012
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.