In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

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TIMOTHY BASS,	*	
	*	No. 12-135V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: June 22, 2012
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SECRETARY OF HEALTH	*	Six Months of Injury; Motion to
AND HUMAN SERVICES,	*	Dismiss for Lack of Subject Matter
	*	Jurisdiction; Motion to Dismiss for
Respondent.	*	Failure to State a Claim; Motion for
* *		Leave to File Amended Petition

Anne Toale, Maglio, Christopher, and Toale, P.C., Sarasota, FL, for petitioner; Jennifer Reynaud, United States Dep't of Justice, Washington, DC, for respondent.

RULING ADDRESSING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM,
AND MOTION FOR LEAVE TO FILE AN AMENDED PETITION[1]

The Secretary presents an unusual reason to dismiss Mr. Bass's petition. The Secretary argues that Mr. Bass filed his case too soon. Mr. Bass's petition alleges that a flu vaccine caused him to suffer an injury (Guillain-Barré syndrome) for more than six months. The problem, according to the Secretary, is that this allegation was demonstrably false when Mr. Bass filed his petition because he filed his petition less than six months after his vaccination.

[1] The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this ruling on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

Invoking the principle of subject matter jurisdiction, the Secretary argues that the only remedy for the problem Mr. Bass's pleading has created is to dismiss the case. Mr. Bass disagrees. Mr. Bass states that the six-month rule does not implicate this tribunal's subject matter jurisdiction. Mr. Bass asserts that when six months have passed, he will still be suffering from GBS. Mr. Bass expects he will be able to prove that he satisfies this element of compensation. To Mr. Bass, the issue is one of evidence, not jurisdiction.

Mr. Bass's argument is in accord with the Federal Circuit case most closely on point, Black v. Sec'y of Health & Human Servs., 93 F.3d 781 (Fed. Cir. 1996). Because in Black, the Federal Circuit interpreted a similar statutory provision as permitting the introduction of post-petition evidence, the same result occurs here. The Secretary's motion to dismiss for lack of subject matter jurisdiction is DENIED.

The Secretary alternatively argues that Mr. Bass's petition should be dismissed for failure to state a claim because, again, Mr. Bass could not truthfully allege that he suffered six months of injury when he filed his petition. This motion remains pending because Mr. Bass will be afforded a chance to file an amended petition after more time has elapsed. A full explanation follows.

Vaccine Act

The relevant statutory provision explains how a petitioner starts a case in the Vaccine Program. "A proceeding for compensation under the [Vaccine] Program … shall be initiated by … the filing of a petition containing the material prescribed by subsection (c) of this section." 42 U.S.C. § 300aa--11(a)(1). For reasons that will be discussed below, it is notable that paragraph 11(a) contains various provisions stating that certain people "may not file" petitions in the Vaccine Program.

The content of petitions is set forth in paragraph 11(c). Here, the Vaccine Act specifies the petition "shall contain . . . an affidavit, and supporting documentation" showing five elements. These elements are presented in paragraphs labeled (A) through (E). In the vast majority of Vaccine Program cases, the controversy concerns paragraph (C), which relates to causation. This case, however, implicates a different paragraph, paragraph (D). Paragraph (D) requires a showing that the injury was severe by specifying three criteria of which the petitioner must satisfy one. For Mr. Bass's case, the only potentially applicable one is the first, stating that the injured person "suffered the residual effects . . . of

such illness . . . for more than 6 months after the administration of the vaccine." 42 U.S.C. § 300aa--11(c)(1)(D)(i).

Mr. Bass's Petition and Proceedings on It

The facts are straightforward. According to the petition, Mr. Bass received an influenza ("flu") vaccination on October 18, 2011. On approximately November 21, 2011, he started having numbness in his lower extremities. On December 8, 2011, a doctor suspected that he had GBS and admitted him to a hospital where he was, in fact, diagnosed with GBS. Pet. ¶¶ 1-3.

On February 24, 2012, Mr. Bass filed his petition, setting forth the allegations above. The petition also alleges that he "continues to suffer from Guillain-Barre syndrome." Id. ¶ 4. The petition also alleges "Petitioner's vaccine related injuries have lasted more than six months." Id. ¶ 6.

It is the sixth paragraph that is the focus of the parties' dispute. As alluded to earlier, this allegation could not be accurate. The earliest date that Mr. Bass's GBS could have started appears to be approximately November 21, 2011, when he felt numbness in his lower extremities. He filed his petition on February 24, 2012. Between November 21, 2011 and February 24, 2012 is only three months. Mr. Bass could not have been suffering from GBS for six months as he alleged.

The Secretary responded to the petition by quickly filing a motion to dismiss on March 8, 2012. Relying, in part, upon a passage from the Federal Circuit's en banc decision in Cloer v. Sec'y of Health & Human Servs., 654 F.3d 1322 (Fed. Cir. 2011) (en banc), the Secretary argues that Mr. Bass's "petition was barred ab initio and subject to immediate dismissal." Resp't Mot. to Dism. at 3.

After Mr. Bass filed an opposition brief, the Secretary filed a reply, developing an argument that Mr. Bass's petition should be dismissed for failure to state a claim. Since Mr. Bass had not responded to this argument, he was given an opportunity to file a supplemental response. As part of this response, Mr. Bass filed a motion for leave to file an amended petition. The proposed amended petition alleges that on April 23, 2012, a neurologist stated that Mr. Bass still had "some weakness" and the neurologist continued the dosage of prednisone. Amended Petition, dated May 9, 2012, ¶ 5.

The Secretary filed a supplemental reply on June 6, 2012. The submission of this reply makes the following issues ready for adjudication: (A) the Secretary's

motion to dismiss for lack of subject matter jurisdiction, (B) the Secretary's motion to dismiss for failure to state a claim upon which relief may be granted, and (C) Mr. Bass's motion for leave to file an amended petition.

Analysis

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Jurisdiction can be difficult to decipher. See Engage Learning, Inc. v. Salazar, 660 F.3d 1346, 1353 (Fed. Cir. 2011) (discussing Contract Disputes Act); Litecubes, LLC v. Northern Light Products, Inc., 523 F.3d 1353, 1362 (Fed. Cir. 2008) (patent and copyright). Fortunately, for this case, the jurisdictional puzzle is much easier to solve because of Black.

The Federal Circuit's opinion issued under the name of Black actually resolved three different cases (Black, May and Rodriguez). When the petition in those three cases was filed, the Vaccine Act differed from the current statute. Subsection 11(c)(1)(D) required that a person suffer an injury for more than six months and have "incurred unreimbursable expenses due in whole or in part in an amount greater than $1,000."[2] 42 U.S.C. § 300aa--11(c)(1)(D) (1994).

In Black, May and Rodriguez, special masters had dismissed petitions because the petitioners did not satisfy the $1,000 unreimbursed expense requirement before filing the petitions. The Court of Federal Claims affirmed the dismissal in three separate adjudications. See Black, 93 F.3d at 784-85 (setting forth procedural history with citations).

The Federal Circuit considered whether those dismissals were proper. The outcome of the appeals depended upon whether and when the petitioners incurred $1,000 of unreimbursed expenses. For Rodriguez, the dismissal was affirmed because the petitioners never incurred the necessary expenses. Id. at 787-89. For Black, the dismissal was affirmed because Mr. and Ms. Black incurred the $1,000 in expenses only after the statute of limitations expired. Id. at 787 & 792.

The result, however, for Ms. May was different. The Federal Circuit vacated the dismissal because she established that after she filed her petition and before the expiration of the statute of limitations, she incurred the $1,000 in expenses. Id. at 787 & 791-92.

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[2] Congress struck this provision in 1998. Pub. L. 105-277, § 1502.

The Federal Circuit's explanation why Ms. May's case could proceed provides the basis for analyzing the issues in Mr. Bass's case. The Federal Circuit recognized that some statutes contain "an express prohibition against filing a complaint before the expiration of a statutory waiting period." For those statutes, a premature filing could not be cured with a supplemental pleading because allowing a supplemental pleading would "defeat the purpose of statutory prohibition." As examples of cases involving statutorily required waiting periods, Black cited two Supreme Court cases, McNeil v. United States, 508 U.S. 106 (1993), and Hallstrom v. Tillamook County, 493 U.S. 20 (1989). In this context, Black distinguished an earlier Federal Circuit opinion that had interpreted a different part of the Vaccine Act, Weddel v. Sec'y of Health & Human Servs., 23 F.3d 388 (Fed. Cir. 1994). Black, 93 F.3d at 790.

The Federal Circuit held that the provision in the Vaccine Act requiring $1,000 in expenses was not the type of statute that forbade supplemental pleading. Instead, Black favorably compared this part of the Vaccine Act to a statute construed in Matthews v. Diaz, 426 U.S. 67, 75 (1976). In Matthews, although the plaintiffs exhausted their administrative remedies after filing the lawsuit, their lawsuit was still allowed to proceed. Black, 93 F.3d at 790.

In respect to the Vaccine Act, the Federal Circuit stated "there is no indication that Congress intended that compensation would be barred simply because the petition was filed too early in the limitations period or because a technical defect in the petition was not noticed and corrected at the time of filing." Id. at 791. With this reasoning, the Federal Circuit held that Ms. May could file a supplemental petition alleging that she had incurred $1,000 in unreimbursed expenses even though Ms. May could not have made this allegation when the petition was filed. Id. at 792.

The step from Ms. May's case to Mr. Bass's case is very short. Both cases involve the same statutory provision, 42 U.S.C. § 300aa--11(c)(1)(D)(i). Although Congress removed the particular phrase at issue in Black in 1998, nothing in Black indicates that the Federal Circuit's analysis turned on those particular words. Because the same statutory section is in issue, the outcome should be the same.

The result for provisions found in 42 U.S.C. § 300aa--11(c) may be contrasted with a result for a provision in 42 U.S.C. § 300aa--11(a). Section 11(a), as mentioned earlier, explains the process for starting a case and, importantly, lists some circumstances in which a petition may not be filed. One example is the

situation in which a person already had an action for a vaccine-related injury pending when the Vaccine Act became effective. The Vaccine Act allowed the plaintiff to dismiss that earlier action. Section 11(a)(5)(A). But, if the other action remained pending, the plaintiff in that action "may not file a petition" in the Vaccine Program.

In Weddel, the Federal Circuit reviewed a case in which the petition was filed while another case was pending in Texas due, in part, to an unanticipated delay in dismissing the Texas case. Emphasizing the "may not file" language, the Federal Circuit held that the entire Vaccine Act "create[s] a jurisdictional window bounded by a statute of limitations on one side and an anti-copendency provision on the other." Weddel, 23 F.3d at 393. Thus, the Federal Circuit affirmed the dismissal. Other cases have followed the reasoning in Weddel and ruled that the "may not file" language in other provisions is jurisdictional. E.g., Martin v. Sec'y of Health & Human Servs., 62 F.3d 1403, 1406 (Fed. Cir. 1995) (stating that sections 11(a)(5) through 11(a)(7) are jurisdictional); Brown v. Sec'y of Health & Human Servs., 34 Fed. Cl. 663 (1995) (section 11(a)(6) is jurisdictional).

However, the specific phrase ("may not file") does not appear in 42 U.S.C. § 300aa--11(c)(1)(D). This difference in language suggests a different outcome is needed. A petition's failure to meet a provision in section 11(c)(1)(D) may be cured by a supplemental pleading, despite the section's jurisdictional status. In contrast, a lack of compliance with section 11(a) may not be cured.

Against this analysis, the Secretary argues that Cloer controls and requires dismissal of Mr. Bass's case. In Cloer, the en banc Federal Circuit stated "In order to file a petition, a claimant must attest, inter alia, that she 'suffered the residual effects or complications of such illness, disability, injury, or condition for more than 6 months after the administration of the vaccine." 654 F.3d at 1335. The en banc Court stated that this six-month requirement is "a condition precedent to filing a petition for compensation." Id. According to the Secretary, because Mr. Bass did not fulfill this condition before he filed his petition, "he has not evoked the subject matter jurisdiction of this Court and his claim must be dismissed." Resp't Mot. at 2.

The Secretary's argument is not persuasive. Although the Secretary presents a reasonable argument that the Federal Circuit's use of the term "condition precedent" suggests that the six-month requirement is a part of the Court's subject matter jurisdiction, it does not follow that Mr. Bass's "claim must be dismissed" as the Secretary argues. In Black, as described above, the Federal Circuit held that a

now repealed portion of section 11(c)(1)(D)(i) was a "threshold criterion for seeking entry into the compensation program." 93 F.3d at 787. For Ms. May, her failure to incur the required expenses was not fatal to her case because "even a jurisdictional defect can be cured by a supplemental pleading under Rule 15(d) in appropriate circumstances." Id. at 790. Thus, the dismissal of Mr. Bass's petition is not required until he has an opportunity to present a supplemental pleading as permitted in Black.[3]

Because the Federal Circuit was acting en banc when it decided Cloer, it is conceivable that Cloer overruled Black. See Metz v. United States, 466 F.3d 991, 997-98 (Fed. Cir. 2006) (recognizing that an earlier panel's decision was not reconcilable with a later en banc determination). Although possible, this conclusion appears unlikely because Cloer and Black concerned different parts of the Vaccine Act. More importantly, Black remains valid precedent until the Federal Circuit recognizes that the case was overruled. See Coltec Industries, Inc. v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006); Strickland v. United States, 423 F.3d 1335, 1338 & n. 3 (Fed. Cir. 2005).

For these reasons, the Secretary's motion to dismiss for lack of subject matter jurisdiction is DENIED.

B. Motion to Dismiss for Failure to State a Claim

Citing Rule 12(b)(6) of the Rules of the Court of Federal Claims, the Secretary's alternative argument requests a dismissal for failure to state a claim on which relief can be granted. Resp't Mot. at 3; Resp't Reply at 7-8. Although the Vaccine Rules do not directly include Rule 12(b)(6), special masters have entertained motions based upon Rule 12(b)(6) because the standards for pleadings in the Vaccine Program are similar to the standards for pleadings in traditional civil litigation. See Guilliams v. Sec'y of Health & Human Servs., No. 11-716V, 2012 WL 1145003, at *5 & at *10 (Fed. Cl. Spec. Mstr. March 14, 2012); Richard v. Sec'y of Health & Human Servs., No. 02-877V, 2010 WL 2766742, at *4 (Fed. Cl. Spec. Mstr. May 3, 2010).

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[3] In reply, the Secretary analogizes to cases in which special masters have found that the Court lacks subject matter jurisdiction for cases in which a petitioner did not receive a covered vaccine. In those cases, the special master dismissed the action. See Resp't Reply at 5-6. A difference between those cases and Mr. Bass's case is that it is conceivable that the passage of time may allow him to cure the jurisdictional defect.

The United States Supreme Court has interpreted Rule 12(b)(6) as requiring a plaintiff to present "[f]actual allegations . . . [that] raise a right to relief above the speculative level." In emphasizing the need to plead "facts," the Supreme Court has rejected a "formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

Here, Mr. Bass's initial petition is vulnerable to a motion to dismiss for failure to state a claim because it lacks adequate factual allegations. The February 24, 2012 petition states that Mr. Bass's "vaccine related injuries have lasted more than six months." Petition ¶ 6. This statement is an element of Mr. Bass's case, a legal conclusion. Under Twombly, Mr. Bass must plead more than just legal conclusions. His original petition did not and, thus, could be dismissed.

To cure a pleading defect identified in a motion to dismiss for failure to state a claim, courts have typically allowed a plaintiff an opportunity to file a supplemental complaint. See 2 James Wm. Moore et al., Moore's Federal Practice § 12.34[5] (3d ed.). The Court of Federal Claims has followed this procedure. E.g. Martin v. United States, 96 Fed. Cl. 627, 632 (2011); Todd Const., L.P. v. United States, 88 Fed. Cl. 235, 249-50 (2009).

In accord with these authorities, Mr. Bass will be extended the opportunity to file a motion for leave to file another petition. Consequently, resolution of the Secretary's motion to dismiss for failure to state a claim is temporally delayed. If Mr. Bass does not file a motion for leave to file an amended petition by July 16, 2012, then the Secretary's motion will be resolved based upon the original petition. If Mr. Bass does file a motion for leave to file an amended petition by July 16, 2012, then Mr. Bass's motion will be resolved before the Secretary's motion.

C. Motion for Leave to File an Amended Petition

As part of his May 9, 2012 supplemental response, Mr. Bass requested leave to file an amended petition. Quoting Rule 15(a)(2) of the Rules of the Court of Federal Claims, Mr. Bass argues that "'The court should freely give leave when justice so requires.'" Supp'l Resp. at 4.

On the other hand, courts are justified in denying leave to file an amended petition when the amendment would be futile. Foman v. Davis, 371 U.S. 178, 182 (1962); Cultor Corp. v. A.E. Staley Mfg. Co., 224 F.3d 1328, 1333 (Fed. Cir. 2000) (affirming district court's denial of leave to amend because of futility).

Here, the proposed amended petition does not cure the problem with the February 24, 2012 petition and, thus, would be a futile amendment.

The proposed amended petition extends Mr. Bass's allegation that he suffers from GBS only until April 23, 2012. Yet, this date still means that Mr. Bass suffered from GBS for less than six months. Mr. Bass was diagnosed with GBS on December 8, 2011. For purposes of a conservative estimate, it can be assumed that he began suffering from GBS on that date. If so, the operative date for filing a petition would be June 8, 2012, which is six months after diagnosis.[4] Consequently, Mr. Bass's May 9, 2012 motion for leave to file an amended petition is denied without prejudice to being renewed.

Mr. Bass may file a motion for leave to file an amended petition by **July 16, 2012.** The amended petition should contain sufficient allegations of fact to determine whether the injury for which Mr. Bass seeks compensation lasted six months.

Conclusion

The Secretary's motion to dismiss for lack of subject matter jurisdiction is DENIED. The Secretary's motion to dismiss for failure to state a claim remains pending. Mr. Bass's May 9, 2012 motion for leave to file an amended petition is DENIED WITHOUT PREJUDICE. Mr. Bass may file a second motion for leave to file an amended petition by July 16, 2012.

IT IS SO ORDERED.

s/Christian J. Moran
Christian J. Moran
Special Master

[4] Mr. Bass could assert that the operative date is May 21, 2012, which is six months after the date (November 21, 2011) on which he started having tingling. But even under this interpretation of events, Mr. Bass's proposed amended petition remains insufficient because it contains factual allegations through April 23, 2012.