

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

STEPHANIE V. FIGUEROA *
as personal representative of the *
estate of MANNY FIGUEROA *
deceased, *

Petitioner, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

No. 10-750V
Special Master Christian J. Moran

Filed: June 22, 2011

motion to dismiss petition due
to status of petitioner, lack of
jurisdiction

Michael B. Feiler, Feiler & Leach, P.L., Coral Gables, FL, for petitioner;
Melonie J. McCall, United States Dep't of Justice, Washington, DC, for
respondent.

DECISION GRANTING MOTION TO DISMISS*

* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it 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).

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 clearly be an unwarranted invasion of privacy. When such a decision is filed, a party has 14 days to identify and to move to delete such information before 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 delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

Stephanie Figueroa, as personal representative of the estate of Manny Figueroa, seeks compensation for neurological injuries that she alleges were caused by the flu vaccine. Ms. Figueroa does not claim that the flu vaccine caused Mr. Figueroa's death.

Respondent filed a motion to dismiss this case. Respondent argues that Ms. Figueroa does not qualify as a petitioner eligible to seek compensation pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa–10 et seq. (2006).

As explained below, Ms. Figueroa does not satisfy any of the definitions of “petitioner” in the Act. Consequently, respondent's motion to dismiss is GRANTED.

Background

The basic outline of facts is not in dispute. At age 58, Mr. Figueroa received a flu vaccine in October 2008. Within about 20 days of receiving the vaccine, Mr. Figueroa developed numbness in his face, impaired speech, and weakness. Mr. Figueroa was hospitalized and diagnosed with the Miller-Fischer variant of Guillain-Barré syndrome. Ms. Figueroa's petition alleges that the flu vaccine caused the Guillain-Barré syndrome.

In February 2010, Mr. Figueroa was diagnosed with pancreatic cancer. He died in April 2010. Petition ¶ 14.

In June 2010, Ms. Figueroa obtained letters of administration from the local probate court appointing her the personal representative of Mr. Figueroa's estate. Exhibit 9. In November 2010, Ms. Figueroa filed the petition in this matter. As mentioned, she seeks compensation for Mr. Figueroa's illness, not his death.

The Secretary filed a motion to dismiss, arguing that Ms. Figueroa "is not a proper petitioner under 42 U.S.C. § 300aa—11(b)(1)(A) of the Act. Therefore, the court does not have jurisdiction and the petition must be dismissed." Mot. to Dismiss, at 1-2.

After receiving several enlargements of time, Ms. Figueroa filed an opposition. She argues that based upon Zatuchni v. Sec'y of Health & Human Servs., 516 F.3d 1312 (Fed. Cir. 2008), and Sanders v. Sec'y of Health & Human Servs., No. 99-430V, 2009 WL 1759452 (Fed. Cl. Spec. Mstr. May 27, 2009), she

should be recognized as a person capable of acting as a petitioner in the Vaccine Program. Thus, she argues that the motion to dismiss should be denied.

Respondent informally communicated that she did not intend to file a reply. Thus, the issue is ready for adjudication.

Analysis

The analysis begins with a review of the plain language of the statute. Flowers v. Sec’y of Health & Human Servs., 49 F.3d 1558, 1560 (Fed. Cir. 1995). Here, the relevant section states:

§ 300aa-11. Petitions for compensation

* * *

(b) Petitioners

(1)(A) Except as provided in subparagraph (B), any person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table may, . . . file a petition for compensation under the Program.

This section sets forth three categories of people who “may . . . file a petition.” These are (1) a person who sustained a vaccine-related injury, (2) the legal representative of a minor or disabled person who sustained a vaccine-related injury, and (3) the legal representative of a person who died as a result of the administration of a covered vaccine. See Buxhemper v. Sec’y of Health & Human Servs., 32 Fed. Cl. 213, 225 (1994) (reversing award of pain and suffering associated with a vaccine-related injury to the estate of a child who died of a cause not related to a vaccine).

Ms. Figueroa does not fit within any of the three categories. She is not the person who suffered a vaccine-related injury. Therefore, she does not meet the first category. The second category is for people who suffered a vaccine-related injury but who cannot file a petition for themselves due to disability or age. The pending case does not fit this situation because Mr. Figueroa is prevented from filing his own petition due to his death, not a disability. The third category addresses “legal representatives” of people who have died “as the result of the administration of a vaccine.” The pending case does not fit this situation because

Mr. Figueroa did not die as a result of the administration of a vaccine. He died because of cancer.

Ms. Figueroa argues that she "fits into a gray area under the statute." Pet'r Opp'n at 2. However, Ms. Figueroa does not present any authorities for the special master to create another category of petitioners, one whose claims are in a "gray area."

Expanding the categories of people who may file a petition would constitute a broadening of the jurisdiction set forth by Congress. But, jurisdiction of the Vaccine Program is construed narrowly. Martin v. Sec'y of Health & Human Servs., 62 F.3d 1403, 1405 (Fed. Cir. 1995); Schumacher v. Sec'y of Health & Human Servs., 2 F.3d 1128, 1135 n.12 (Fed. Cir. 1993) (stating "a waiver of sovereign immunity must be 'unequivocally expressed' and not merely implied by a court"); Kay v. Sec'y of Health & Human Servs., 80 Fed. Cl. 601, 605 (2008), aff'd, 298 Fed. Appx. 985 (Fed. Cir. 2008). Consequently, Ms. Figueroa's implicit request that the statute be interpreted to allow someone who does not meet the literal terms of section 11(b)(1)(A) to proceed with a case in the Vaccine Program must be rejected.

Ms. Figueroa's citation to the policy concerns expressed in Zatuchni is not persuasive for two reasons. First, the majority opinion explicitly limited its holding. It stated that the court's decision "need not decide whether § 300aa-11(b)(1)(A) would permit the estate of a person who suffered vaccine-related injuries but died of a non-vaccine-related cause to file a petition for vaccine-related compensation." Zatuchni, 516 F.3d at 1320-21. This statement, by itself, means that Zatuchni is not dispositive because Ms. Figueroa's case presents the exact question that was not answered by the majority opinion in Zatuchni.

Second, the issue of sovereign immunity in Zatuchni arose in a slightly different factual context. In Zatuchni, Barbara Snyder filed, in 1994, a petition seeking compensation for a vaccine-related injury. While the case was pending in 2005, Ms. Snyder died. Dory Zatuchni became the legal representative of the estate of Ms. Snyder. Eventually, it was found that Ms. Snyder suffered an injury because of the vaccine and Ms. Snyder died of the administration of the vaccine. The question before the Federal Circuit was whether Ms. Zatuchni, as the legal representative of Ms. Snyder's estate, could recover compensation for Ms. Snyder's injuries and compensation for Ms. Snyder's death. Zatuchni, 516 F.3d at 1314-15.

The situation presented in Ms. Figueroa's pending case does not raise the same question about the meaning of section 11(b)(1)(A). When Ms. Snyder filed her petition in 1994, she satisfied the first category of this paragraph because she sought compensation for a vaccine-related injury. After Ms. Snyder died in 2005, her estate fulfilled the criteria of the third category because the estate also sought compensation for a death caused by the administration of a vaccine. Consequently, the jurisdictional criteria of section 11(b)(1)(A) were met. The question in Zatuchni was the amount of relief to which that person was entitled.

In contrast, here, Ms. Figueroa fails to meet any of the categories of section 11(b)(1)(A) at any time during the litigation. Ms. Figueroa's case, therefore, is also distinguishable from other cases in which representatives of estates attempted to substitute themselves for their decedents who were claiming a vaccine-related injury. See, e.g., Campbell v. Sec'y of Health & Human Servs., 01-688V, 2004 WL 1047393 (Spec. Mstr. April 22, 2004); Cohn v. Sec'y of Health & Human Servs., 44 Fed. Cl. 658 (1999); Andrews v. Sec'y of Health & Human Servs., 33 Fed. Cl. 767 (1995). In Andrews, the original petitioners were parents of a disabled person and, thus, fulfilled the second category of this paragraph. In Campbell and Cohn, the original petitioner satisfied section 11(b)(1)(A) by claiming compensation for an injury which he or she suffered.

Campbell and Cohn are similar to Sanders, another case on which Ms. Figueroa relies. There, in 1999, Mr. Sanders filed a petition alleging that vaccinations given to him in 1994 caused him to suffer from rheumatoid arthritis. In 2006, when the case was still pending, Mr. Sanders's attorney reported that he had died. Mr. Sanders's wife was appointed administrator of his estate and the question was whether she could continue to prosecute the case started by her deceased husband. Sanders, 2009 WL 1759452, at *1-3. The special master held that the claim for a vaccine-caused injury survived Mr. Sanders's death and denied respondent's motion to dismiss.

Those cases are different from Ms. Figueroa's case. Ms. Figueroa has initiated a lawsuit, but Ms. Figueroa does not belong to a class of petitioners who may file a claim in the Vaccine Program as defined in section 11(b)(1)(A). "The proper focus in determining jurisdiction [is] 'the facts existing at the time the complaint under consideration was filed.'" Prasco, LLC v. Medicis Pharmaceutical Corp., 537 F.3d 1329, 1337 (Fed. Cir. 2008) (quoting GAF Bldg. Materials Corp. v. Elk Corp., 90 F.3d 479, 483 (Fed. Cir. 1996) (emphasis removed and further citations omitted)). This method of analysis flows from the statement that "subject-matter jurisdiction 'depends on the state of things at the time of the action

brought.'" Rockwell Intern. Corp. v. United States, 549 U.S. 457, 473 (2007) (quoting Mullan v. Torrance, 9 Wheat 537, 539 (1824)). When Ms. Figueroa brought her action, she did not qualify as a petitioner.

Dismissing this action means that Mr. Figueroa's estate will not receive any compensation through the Vaccine Program even though if Mr. Figueroa had filed his own action when he was alive, his estate may have received some amount of compensation. This result may appear to be arbitrary in the sense of using the vaccine recipient's death to distinguish valid from invalid claims for vaccine injuries. But, the limitations on a person's right to sue the government are choices made by Congress. See Kavanaugh v. Noble, 332 U.S. 535, 539 (1947); Beck ex rel. Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029, 1034 (Fed. Cir. 1991); Hart v. United States, 910 F.2d 815 819 (Fed. Cir. 1990).

Conclusion

Congress authorized three classes of petitioners in the Vaccine Program and Ms. Figueroa does not satisfy any of them. Thus, her petition is dismissed for lack of subject matter jurisdiction. The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

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