

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

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TERRI MICHELLE FITZGERALD \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH AND HUMAN SERVICES, \*

Respondent. \*

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No. 12-493V

Special Master Christian J. Moran

Filed: December 19, 2012

H1N1 monovalent influenza;  
vaccine not included on Vaccine  
Injury Table

Travis Thorne Bennington, Fremont, NE, for Petitioner;

Lynn Elizabeth Ricciardella, U.S. Dep't of Justice, Washington, D.C., for Respondent.

### **PUBLISHED DECISION GRANTING MOTION TO DISMISS<sup>1</sup>**

On August 6, 2012, Terri Michelle Fitzgerald filed a petition seeking compensation under the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"). 42 U.S.C. § 300aa-1 to 34. Ms. Fitzgerald alleges that she received the H1N1 monovalent influenza vaccine on December 28, 2009, and was injured as a consequence. Pet. at 1.

For the reasons explained below, Ms. Fitzgerald is unable to demonstrate that she "received a vaccine set forth in the Vaccine Injury Table." 42 U.S.C. § 300aa-11(c)(1)(a). Consequently, her petition is DISMISSED.

#### **I. Factual and Procedural History**

Ms. Fitzgerald was born in 1969. At age 40, Ms. Fitzgerald was administered a H1N1 monovalent influenza vaccine. Pet. at 1; Exhibit 1 at 2. After the vaccination, Ms. Fitzgerald began suffering from numbness in her upper extremities. Pet. at 1. Ms. Fitzgerald alleges her vaccination caused her to suffer a bilateral brachial plexopathy. Pet. at 1-2.

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<sup>1</sup> The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision 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.

On August 6, 2012, Ms. Fitzgerald filed a petition seeking compensation for her injuries. Pet. at 4. She filed her medical records on September 24, 2012.

Respondent filed a motion to dismiss the petition on November 30, 2012. Respondent asserts that the petition must be dismissed because it fails to state a claim upon which relief may be granted because Ms. Fitzgerald received a vaccine not included on the Vaccine Injury Table. Resp't Mot. at 1. Ms. Fitzgerald did not file an opposition within the time permitted under the rules.

## **II. Standards for Adjudication**

The court may dismiss a petition for failure to state a claim, pursuant to RCFC 12(b)(6). To properly state a claim, the petitioner must provide “a short and plain statement of the claim, which shows that the petitioner is entitled to relief.” Totes-Isotoner Corp. v. United States, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted)). A complaint does not need detailed factual allegations, but the “factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” Twombly, 550 U.S. at 555.

## **III. Analysis**

Respondent argues that the court must dismiss Ms. Fitzgerald’s petition because the petition concerns a vaccine that is not covered under the Vaccine Act. Therefore, respondent argues Ms. Fitzgerald has failed to state a claim upon which relief may be granted, as required under RCFC 12(b)(6).

To be entitled to compensation under the Vaccine Act, a petitioner must demonstrate that the vaccinee “received a vaccine set forth in the Vaccine Injury Table.” 42 § 300aa-11(c)(1)(a). Ms. Fitzgerald does not dispute that the vaccine she received, the H1N1 monovalent influenza vaccine, is not included in the Vaccine Injury Table. See 42 C.F.R. § 100.3. When a person seeking compensation from the government does not comply with the exact terms of the statute, the court may not grant relief. See Inter-Coastal Xpress, Inc. v. United States, 296 F.3d 1357, 1373 (Fed. Cir. 2002). Because Ms. Fitzgerald did not receive a vaccine covered under the Vaccine Act, her petition fails to state a claim upon which relief may be granted. Accordingly, her petition is DISMISSED.

**IV. Conclusion**

For the reasons explained above, respondent's motion to dismiss is GRANTED and Ms. Fitzgerald's petition is DISMISSED. The clerk shall enter judgment in accord with this decision if a motion for review is not filed.<sup>2</sup>

**IT IS SO ORDERED.**

s/ Christian Moran  
Christian Moran  
Special Master

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<sup>2</sup> Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.