

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

VALERIE SCHMIDT,	*	No. 11-401V
	*	Special Master Christian J. Moran
Petitioner,	*	
	*	
v.	*	Filed: November 21, 2011
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	Motion to dismiss petition;
	*	Pneumococcal vaccine
	*	
Respondent.	*	
	*	

Carol L. Gallagher, Gallagher & Gallagher, Somers Point, NJ, for petitioner;
Ann Donohue Martin, United States Dep't of Justice, Washington, DC, for
respondent.

PUBLISHED DECISION GRANTING MOTION TO DISMISS¹

¹ 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).

On June 17, 2011, Valerie Schmidt (“petitioner”) 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. Schmidt alleges that she received the Pneumovax vaccine on October 12, 2010, and was injured as a consequence. Pet. at 1.

For the reasons explained below, Ms. Schmidt 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. Schmidt was born in 1950. At age 60, Ms. Schmidt was administered a pneumococcal vaccine to her left arm in October 2010. Pet. at 2-4. Ms. Schmidt’s medical records establish that the type of pneumococcal vaccine she received was the Pneumovax vaccine.² Exhibit 6 at 4. After the vaccination, Ms. Schmidt experienced pain near the injection site and suffered a decreased range of motion in her left arm. Pet. at 2, 4.

² Pneumovax is the brand name for a polysaccharide-type vaccine used to vaccinate against pneumococcus. The Pneumovax vaccine consists of a “mixture of highly purified capsular polysaccharides from the 23 most prevalent or invasive pneumococcal types of *Streptococcus pneumoniae*, including the six serotypes that most frequently cause invasive drug resistant pneumococcal infections among children and adults in the United States.” Physicians’ Desk Reference, 1994 (55th ed. 2001).

A number of cases have concerned the Pneumovax vaccine; all have resulted in dismissals. See Evans v. Sec’y of Health & Human Servs., No. 08-365V, 2008 WL 2683299 (Fed. Cl. Spec. Mstr. June 19, 2008); Morrison v. Sec’y of Health & Human Servs., No. 04-1683, 2005 WL 2008245 (Fed. Cl. Spec. Mstr. July 26, 2005); Finley v. Sec’y of Health & Human Servs., No. 04-874V, 2004 WL 2059490 (Fed. Cl. Spec. Mstr. August 24, 2004).

The alternative type of vaccine used to vaccinate against pneumococcus is the conjugate-type vaccine. The conjugate-type of pneumococcal vaccine is 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).

On June 17, 2011, Ms. Schmidt filed a petition seeking compensation for her injuries. Pet. at 4. She filed medical records over the next few months.

Respondent filed a motion to dismiss the petition on August 17, 2011. Respondent asserts that the petition must be dismissed due to lack of subject matter jurisdiction because the petition concerns a vaccine that is not included on the Vaccine Injury Table. Resp't Mot. at 1-2.

On August 30, 2011, Ms. Schmidt filed her opposition to respondent's motion to dismiss. She argues that the court should allow her petition to remain in the Program because Pneumovax "falls within the rubric of Category XIII of the [Vaccine Injury] Table." Ms. Schmidt also asserts that denying her from seeking compensation would be contrary to the intent of the Vaccine Act and disparate treatment. Pet'r Opp'n at 2-4.

II. Standards for Adjudication

When ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), the petitioner bears the burden of establishing subject matter jurisdiction, Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing McNutt v. Gen. Motors, 298 U.S. 178, 189 (1936)), and must do so by a preponderance of the evidence, Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1998). When the court considers a motion to dismiss, it may look beyond the pleadings and "inquire into jurisdictional facts" to determine whether jurisdiction exists. Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991). Because jurisdiction is a threshold matter, the court must dismiss the complaint where it concludes that subject-matter jurisdiction does not exist. See Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject matter jurisdiction, the court must dismiss the complaint in its entirety.").

The court may also 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 (Fed. Cir. 2010), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint does not need detailed factual allegations, but "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).” Bell Atl. Corp. v. Twombly, 550 U.S. at 555.

III. Analysis

Respondent argues that the court lacks subject matter jurisdiction over Ms. Schmidt’s petition because the petition concerns a vaccine that is not covered under the Vaccine Act. Ms. Schmidt primarily argues that jurisdiction exists because Pneumovax “falls within the rubric of Category XIII of the [Vaccine Injury] Table.” See Pet’r Opp’n at 2.

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.” § 300aa-11(c)(1)(a). Category XIII of the Vaccine Injury Table includes “Any new vaccine recommended by the Centers for Disease Control and Prevention for routine administration to children, after publication by the Secretary of a notice of coverage.” 42 C.F.R. § 100.3(a)(XIII) (2010).

The Vaccine Act expressly authorizes the United States Department of Health and Human Services to revise the Vaccine Injury Table. See 42 U.S.C. § 300aa-14(c)(1). When adding vaccines to the Vaccine Injury Table after August 1, 1993, the Act states that the Secretary of the United States Department of Health and Human Services shall “amend the Vaccine Injury Table,” only after the Centers for Disease Control and Prevention “recommends a vaccine to the Secretary for routine administration to children.” The Secretary of the United States Department of Health and Human Services has two years from the date of the Centers for Disease Control and Prevention’s recommendation within which to amend the Table. § 300aa-14(e)(2). In addition, Congress must approve an excise tax providing funds for the payment of compensation related to any vaccine that the Secretary of the United States Department of Health and Human Services adds to the Table. See 26 U.S.C. § 4131(a); see also Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §13632(a)(3), 107 Stat. 312 (1993) (stating that a revision by the Secretary shall take effect upon the effective date of a tax enacted to provide funds for compensation paid with respect to the vaccine to be added to the Vaccine Injury Table).

The Secretary of the United States Department of Health and Human Services has not published a notice of coverage related to Pneumovax, and

Congress has not enacted an excise tax related to Pneumovax. Therefore, Pneumovax is not included under Category XIII of the Vaccine Injury Table.

Ms. Schmidt alternatively asserts that she should be permitted to seek compensation for her injuries because dismissing her claim would be contrary to the intent of the Act and disparate treatment. See Opp'n at 4-6.

Congress has restricted compensation to only those people who “received a vaccine set forth in the Vaccine Injury Table.” 42 U.S.C. § 300aa-11(c)(1)(a). As explained above, Ms. Schmidt has not established that she meets this criterion for compensation. Any suggestion that a special master overlook this requirement would exceed the authority given to special masters. See 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”); Jessup v. Sec’y of Health & Human Servs., 26 Cl. Ct. 350, 352-53 (1992) (“limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied”).

Ms. Schmidt cannot demonstrate that she “received a vaccine set forth in the Vaccine Injury Table.” 42 U.S.C. § 300aa-11(c)(1)(a). 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). Therefore, her petition is DISMISSED. This decision does not resolve whether the petition is dismissed for lack of subject matter jurisdiction or dismissed for failure to state a claim on which relief can be granted. At this stage, the difference appears academic.³

³ If Ms. Schmidt were to request attorneys’ fees and costs, she would have the burden of establishing subject matter jurisdiction. See Brice v. Sec’y of Health & Human Servs., 240 F.3d 1367, 1370 (Fed. Cir. 2001), overruled in part by Cloer v. Sec’y of Health & Human Servs., 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc).

Any briefs addressing subject matter jurisdiction should address recent Supreme Court decisions explaining subject matter jurisdiction. The parties may wish to consider Bledsoe v. Merit Systems Protection Bd., No. 2011-3054, 2011 WL 4537804 (Fed. Cir. Oct. 3, 2011), and Engage Learning, Inc. v. Salazar, No. 2011-1007, 2011 WL 4618001 (Fed. Cir. Oct. 5, 2011).

IV. Conclusion

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

IT IS SO ORDERED.

s/Christian Moran
Christian Moran
Special Master