

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-110V

April 6, 2010

Not to be Published

GLENN NILSEN,

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Petitioner,

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v.

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SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

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Respondent.

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Glenn Nilsen, East Islip, NY, for petitioner (pro se).

Glenn A. MacLeod, Washington, DC, for respondent.

Dismissal; Zostavax or shingles vaccine is not on the Vaccine Injury Table; no subject matter jurisdiction

MILLMAN, Special Master

DECISION

On February 18, 2010, petitioner filed a petition on his own behalf for compensation under the National Childhood Vaccine Injury Act of 1986¹ (hereinafter the "Vaccine Act" or the

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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). 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 delete 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 delete such material from public access.

"Act"), alleging that he suffered migraine headache, Bell's Palsy, and a stroke from Zostavax or shingles vaccine. Zostavax or shingles vaccine is not on the Vaccine Injury Table. 42 U.S.C. § 300aa-14(a), as amended, 42 C.F.R. § 100.3(a).

On April 6, 2010, the undersigned, petitioner, and respondent's counsel had a Rule 4(b) conference to discuss this case. The undersigned advised petitioner that Zostavax vaccine was not on the Vaccine Injury Table and, therefore, the undersigned has no subject matter jurisdiction in this case.

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, and influenza. Shingles or Zostavax vaccine is not recommended for children. Therefore, it is not on the Vaccine Injury Table. Even though adults can and do receive Zostavax, since Zostavax is

not on the Vaccine Injury Table, the undersigned does not have subject matter jurisdiction to award damages for injury due to the receipt of Zostavax, or even costs to those who mistakenly bring a petition under the Vaccine Program seeking compensation for injuries due to Zostavax. The undersigned does not have subject matter jurisdiction over this case and must dismiss.

The undersigned explained all of the above to petitioner during the Rule 4(b) conference and also alerted him to the necessity to file an Election to Sue Civilly within 90 days of the date of the entry of judgment in order to preserve his right to sue in the civil courts. See 42. U.S.C. § 300aa-21(a)(2).

DISCUSSION

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); Edgar v. Sec'y of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Sec'y of HHS, 31 Fed. Cl. 734, 740 (1994); 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, 33 Fed. Cl. 488 (1995) (typhoid vaccine);

Morrison v. Sec'y of HHS, No. 04-1683, 2005 WL 2008245 (Fed. Cl. Spec. Mstr. July 26, 1995) (Pneumovax vaccine); Finley v. Sec'y of HHS, No. 04-874V, 2004 WL 2059490 (Fed. Cl. Spec. Mstr. August 24, 2004) (Pneumovax vaccine); 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); and Dover v. Sec'y of HHS, No. 90-2299, 1991 WL 164496 (Cl. Ct. Spec. Mstr. August 8, 1991) (typhoid-paratyphoid vaccine).

The undersigned does not have subject matter jurisdiction in this case because Zostavax vaccine is not included in 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 fees and costs in this case. Brice v. Sec'y of HHS, 358 F.3d 865 (Fed. Cir. 2004); Martin v. Sec'y of HHS, 62 F.3d 1403 (Fed. Cir. 1995).

CONCLUSION

This case is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master