

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-1052V

May 15, 2009

RENE and MARIA ELENA ORTIZ, *
as Parents of a Minor Child, *
ALEJANDRA ORTIZ, *

Petitioners, *

v. *

SECRETARY OF THE DEPARTMENT OF *
HEALTH AND HUMAN SERVICES, *

Respondent. *

Where genuine issue of material fact exists, summary judgment is inappropriate: post-polio syndrome as separate from polio so that 36-month statute of limitations runs anew when syndrome begins

ORDER¹

On September 30, 2005, petitioners filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that their daughter Alejandra Ortiz (hereinafter, “Alejandra”) sustained polio from oral polio vaccines she received on July 8, 1996,

¹ Because this order contains a reasoned explanation for the special master's action in this case, the special master intends to post this order 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 designated substantive order 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.

September 20, 1996, November 6, 1996, and May 21, 1997. According to petitioner's medical expert Dr. Terry Struck, Alejandra's onset of poliomyelitis was at least in September 2001 when she was noted to have right-sided weakness. P. Ex. 30, ¶ 6. That would make petitioners' petition untimely since more than 36 months elapsed after September 2001 before petitioners filed their petition. 42 U.S.C. 300aa-16(a)(2).

On July 19, 2006, petitioners filed an amended petition, alleging that Alejandra had post-polio syndrome diagnosed on May 22, 2003.

On August 1, 2008, respondent filed a motion to dismiss based on the running of the statute of limitations and, based on the opinion of respondent's expert Dr. Lauro S. Halstead, stating that Alejandra's current problems are a sequela of her polio and not post-polio syndrome.

On December 1, 2008, petitioners filed a Response in Opposition to respondent's motion to dismiss together with an expert report from Dr. Paul Walsky, stating that post-polio syndrome is a distinct and separate medical entity from polio and that Alejandra has post-polio syndrome. P. Ex. 33.

On March 3, 2009, the undersigned issued a Prehearing Order, setting May 28 and 29, 2009 for a hearing in this case. with a prehearing conference set for May 20, 2009.

On May 14, 2009, two weeks before trial, petitioners filed a Motion for Summary Judgment asserting, inter alia, that there was no genuine issue of material fact that post-polio syndrome is a distinct clinical entity from poliomyelitis.

The undersigned denies petitioners' motion on the ground that whether post-polio syndrome is a distinct clinical entity so that its onset starts the 36-month statute of limitations is the issue before the undersigned in the hearing.

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. Secretary of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Secretary of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Secretary of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Secretary 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).

Petitioners have asserted there is no genuine issue of material fact that Alejandra Ortiz contracted poliomyelitis from oral polio vaccine which she received in 1996 and 1997. According to petitioners' Motion for Summary Judgment, the first time petitioners knew Alejandra had polio was in 2001. See P. Motion for Summary Judgment, page 6, paragraph 15: "Alejandra was first documented to have the residual of polio on September 22, 2001 when a doctor from Shriner's Hospital found she had atrophy of the right leg and an abnormal gait."

It was not until May 22, 2003, that petitioner was diagnosed with both post-polio syndrome and polio. See P. Motion for Summary Judgment, page 6, paragraph 17.

Respondent's position in this case is that Alejandra's post-polio syndrome is a mere sequela of her polio whose first manifestation of onset was four years before petitioners filed their petition. Petitioners' position in this case is that Alejandra's post-polio syndrome is a

separate medical entity and, therefore, the statute of limitations did not begin to run until May 22, 2003 when she was first diagnosed with post-polio syndrome.

This difference requires the undersigned to hear expert medical testimony to determine if there is one vaccine injury in this case, i.e., polio vaccine caused polio which resulted as well in post-polio syndrome, or if there are two vaccine injuries in this case, i.e., polio vaccine caused polio and a separate illness, post-polio syndrome. Petitioners should be aware that everyone who has post-polio syndrome also has or had polio. The question of sequelae versus independent entity is thus a genuine issue of material fact, making the granting of petitioners' Motion for Summary Judgment inappropriate.

The other two facts that petitioners assert have no genuine issue of material fact (that (1) Alejandra's polio was due to her oral polio vaccines, and (2) her post-polio syndrome was also due to the oral polio vaccines) can be the subject of a stipulation between the parties during the prehearing conference set for Wednesday, May 20, 2009, at 2:00 p.m. (EDT) if respondent agrees to both of them.

Petitioners' Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master