

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-398V

August 9, 2007

Not to be Published

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RODNEY ALLEN TRAYLOR, \*

Petitioner, \*

v. \*

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

Respondent. \*

\*\*\*\*\*

Elaine Whitfield Sharp, Marblehead, MA, for petitioner.  
Mark Curtis Raby, Washington, DC, for respondent.

Motion for Reconsideration based on grammatical reconstruction of pertussis-diphtheria-tetanus Table vaccine as inclusive of smallpox vaccine invalid

**MILLMAN, Special Master**

## **ORDER DENYING MOTION FOR RECONSIDERATION**<sup>1</sup>

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<sup>1</sup> Because this unpublished Order contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished Order on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 clearly be an unwarranted invasion of privacy. When such a decision or 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.

Petitioner filed a petition on June 19, 2007, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that smallpox vaccine caused him injury, to wit, pericarditis/myocarditis.

On July 13, 2007, respondent filed a Motion to Dismiss because smallpox vaccine is not one of the listed vaccines on the Vaccine Injury Table concerning which petitions may be brought. 42 C.F.R. §100.3(a). Therefore, the undersigned has no subject matter jurisdiction over this case. On July 13, 2007, the undersigned issued an unpublished decision dismissing this case for lack of subject matter jurisdiction.

On August 8, 2007, petitioner filed a Motion for Reconsideration, stating that the portion of the Vaccine Table dealing with diphtheria-pertussis-tetanus vaccine also lists extracted or partial cell bacteria and therefore smallpox vaccine is included in the Vaccine Table because it is made from the stomachs of animals which have bacteria in them. Because judgment will issue in this case on August 13, 2007, the undersigned will not have time to have respondent respond before issuing an Order on petitioner's Motion for Reconsideration. The undersigned has jurisdiction of this case only to determine that she does not have subject matter jurisdiction. Petitioner has not provided a valid reason for granting petitioner's Motion for Reconsideration.

## **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).

The Vaccine Program permits suits for listed vaccines and smallpox is not one of those listed vaccines. The undersigned must dismiss this case for lack of subject matter jurisdiction.

The Secretary of Health and Human Services has authority under the Vaccine Act to modify the Vaccine Injury Table. Terran v. Secretary of HHS, 195 F.3d 1302 (Fed. Cir. 1999); 42 U.S.C. §300aa-14(e). The Secretary has not chosen to add smallpox vaccine to the Vaccine Injury Table.

Moreover, a requirement for the Secretary of Health and Human Service to revise the Vaccine Injury Table is for a vaccine to be recommended for routine administration to children. 42 U.S.C. §300aa-14(1)(A) and (2)(A). Smallpox vaccine has never been recommended for routine administration to children. Petitioner herein is a serviceman in the military.

The section listing DTP or diphtheria-tetanus-pertussis vaccine (§3300aa-14(a)(I)) lists permutations of DTP after it, including “Extracted or Partial Cell Bacteria, or Specific Pertussis Antigen(s).” This is the terminology of the original Vaccine Injury Table as Congress enacted it in 1986. In this case, the Secretary did not promulgate changes to the Table. It was Congress’s passage of the Act that included these words in the Table. Petitioner in the Motion for Reconsideration emphasizes semi-colons in this subsection as if the “Extracted or Partial Cell Bacteria” stood alone and therefore encompassed smallpox vaccine which conceivably might pick up extracted or partial cell bacteria from the stomachs of animals.

Petitioner ignores the commas that surround this phrase, to wit: “or Any Other Vaccine Containing Whole Cell Pertussis Bacteria, Extracted or Partial Cell Bacteria, or Specific Pertussis Antigen(s):”

I. DTP; P; DTP/Polio Combination; or Any Other Vaccine Containing Whole Cell Pertussis Bacteria, Extracted or Partial Cell Bacteria, or Specific Pertussis Antigen(s).

Statutes are to be read by their plain meanings, not by an extraordinary leap from logic to try to wedge into the statute a meaning that is not there. No one reading this part of the Vaccine Injury Table could ever assume that “Extracted or Partial Cell Bacteria” refers to anything other than pertussis vaccine. As the Federal Circuit stated in Amendola v. Secretary of HHS, 989 F.2d 1180, 1182 (Fed. Cir. 1993) (parents contested that a prior civil suit barred them from filing a petition under the Vaccine Act):

Drafting of statutes is an art. ... But the range of artistic expression here is constrained by the fundamental obligation of the judicial branch to implement, not rethink, the purpose of the legislative branch.

When a statute expresses its purpose in short, clear terms, the duty of the court is to apply the statute as written. ... When the legislative purpose is incorporated in a complex piece of legislation, such as those establishing a major regulatory or entitlement program, the meaning of any particular phrase or provision cannot be securely known simply by taking the words out of context and treating them as self-evident.

The Vaccine Act was passed in 1986, with the above language that petitioner now asserts includes smallpox vaccine. In 1986, no one was receiving smallpox vaccine. It would be impossible to read the first subsection of the Vaccine Injury Table to include a vaccine that had never been recommended for administration to children in 1986 and is not recommended for administration to children now.

On the Centers for Disease Control website, the CDC explains that smallpox vaccine was not administered to anyone after 1972 because the populace was deemed immune. Only after the tragic events of September 11, 2001 did smallpox vaccine get administered to first responders and the military:

Routine smallpox vaccination among the American public stopped in 1972 after the disease was eradicated in the United States. Until recently, the U.S. government provided the vaccine only to a few hundred scientists and medical professionals working with smallpox and similar viruses in a research setting.

After the events of September and October, 2001, however, the U.S. government took further actions to improve its level of preparedness against terrorism. One of many such measures—designed specifically to prepare for an intentional release of the smallpox virus—included updating and releasing a [smallpox response plan](#). In addition, the U.S. government has enough vaccine to vaccinate every person in the United States in the event of a smallpox emergency.

<http://www.bt.cdc.gov/agent/smallpox/vaccination/facts.asp>

Congress could not have intended in 1986 when it enacted the Vaccine Act that the provision including DTP and/or pertussis vaccine on the Vaccine Injury Table also included smallpox vaccine when: (1) smallpox vaccine was not administered to anyone after 1972, and (2) smallpox vaccine was not recommended for routine administration to children (a requirement for inclusion in the Vaccine Act). Petitioner's highly imaginative thesis has no validity in law or science and is counter to the intent of Congress and the statutory language of the Vaccine Injury Table.

Strangely, at the end of petitioner's Motion for Reconsideration, petitioner cites two cases, Charette v. Secretary of HHS, 33 Fed. Cl. 488 (Fed. Cl. 1995), and Dover v. Secretary of HHS, No. 90-2299V, 1991 WL 164496 (Cl. Ct. Spec. Mstr. 1991), as if they supported

petitioner's argument to include smallpox vaccine under the subsection dealing with DTP and pertussis vaccine. In both Charette and Dover, petitioners sued for reactions to typhoid vaccine (Charette) and typhoid-paratyphoid vaccine (Dover), stating that the very paragraph referring to pertussis vaccine and extracted or partial cell bacteria should be interpreted as including typhoid vaccine or typhoid-paratyphoid vaccine. Both petitioners failed to persuade the special masters and the U.S. Court of Federal Claims judge (in Charette) that their interpretation of the Vaccine Injury Table was valid. The undersigned would think in the light of three failures (Dover before a special master, and Charette before a special master and, on appeal, before a judge) to persuade the court to include a vaccine not listed on the Vaccine Injury Table that petitioner herein would not make the same invalid argument to include smallpox vaccine.

Since the undersigned does not have subject matter jurisdiction over the case, petitioner may not receive attorney's fees and costs. Martin v. Secretary of HHS, 62 F.3d 1403, 1405 (Fed. Cir. 1995) (denial of attorneys' fees and costs in vaccine case dismissed because of pending civil action; Vaccine Act did not create an independent grant of jurisdiction for the awarding of fees in vaccine cases).

### CONCLUSION

Petitioner's Motion for Reconsideration is denied. The dismissal of this petition still stands.

**IT IS SO ORDERED.**

August 9, 2007  
DATE

s/Laura D. Millman  
Laura D. Millman  
Special Master