

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
No. [redacted]V
September 10, 2009
Reissued Redacted: September 25, 2009
To be Published

JOHN DOE/47, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Thomas P. Gallagher, Somers Point, NJ, for petitioner.
Althea W. Davis, Washington, DC, for respondent.

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

MILLMAN, Special Master

DECISION¹

On June 25, 2009, petitioner filed a petition on his own behalf for compensation under the National Childhood Vaccine Injury Act of 1986² (hereinafter the "Vaccine Act" or the

¹ 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. Petitioner had 14 days to move to identify and delete such information prior to the document's disclosure. On September 24, 2009, petitioner so moved and the undersigned has granted his motion. Therefore, this decision is being published in redacted form.

² The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C.A. §300aa-1 et seq. (West 1991), as amended by Title II of the Health Information, Health Promotion, and Vaccine Injury Compensation

"Act"), alleging that he suffered cellulitic shingles (herpes zoster) and Bell's Palsy 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). Varicella or chickenpox vaccine is on the Vaccine Injury Table.

On September 9, 2009, the undersigned and counsel had a Rule 4(b) conference to discuss this case. The undersigned advised petitioner's counsel that Zostavax vaccine was not on the Vaccine Injury Table and, therefore, the undersigned had no subject matter jurisdiction in this case. Petitioner's counsel raised the point that Zostavax vaccine contains varicella or chickenpox virus in it. However, the undersigned pointed out that the Vaccine Injury Table does not state "varicella-containing vaccine," but merely "varicella vaccine" unlike other vaccines listed on the Vaccine Injury Table which state: tetanus toxoid-containing vaccines; pertussis antigen-containing vaccines; measles, mumps, rubella virus-containing vaccines; rubella virus-containing vaccines; measles virus-containing vaccines, polio live virus-containing vaccines; polio inactivated-virus containing vaccines; and hepatitis B antigen-containing vaccines.

For those vaccines for which the Vaccine Injury Table includes the word "containing," the reasonable conclusion is that any vaccine that contains the listed virus, toxoid, or antigen qualifies as a vaccine under the Vaccine Injury Table. But for those vaccines for which the Vaccine Injury Table does not include the word "containing," i.e., varicella vaccine, rotovirus vaccine, and pneumococcal conjugate vaccines, the only reasonable conclusion is that someone has to have actually received these listed vaccines (varicella vaccine, rotovirus vaccine, or

Amendments of November 26, 1991 (105 Stat. 1102). For convenience, further references will be to the relevant subsection of 42 U.S.C.A. § 300aa.

pneumococcal conjugate vaccine) and not another vaccine that contains these viruses or bacteria in order to come within the Vaccine Injury Table.

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 obvious purpose of the Vaccine Injury Table is to include vaccines recommended for children. Shingles vaccine is not recommended for children. Only people who get chickenpox could get shingles eventually. The varicella vaccine, which is recommended for children, is intended to prevent children from getting chickenpox. If the children vaccinated with varicella vaccine never get chickenpox, they will also never get shingles. For these reasons, no one would recommend Zostavax or shingles vaccine for routine administration for children. Since Zostavax is not on the Vaccine Injury Table, the undersigned does not have subject matter jurisdiction over this case and must dismiss.

The undersigned explained all of the above to petitioner's counsel during the Rule 4(b) conference and he agreed to the undersigned's dismissal of the petition without further discussion or briefing.

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). Only in the case of contact with a recipient of oral polio vaccine, can someone claiming damages under the Vaccine Act not have received a vaccine set forth in the Vaccine Injury Table. Id. The instant action does not involve a contact polio case.

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).

There is no other conclusion the undersigned can reach but that 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 attorney's 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 herein.

IT IS SO ORDERED.

September 10, 2009
DATE

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