

OFFICE OF SPECIAL MASTERS

No. 02-1183V

(Filed: November 5, 2003)

DANIEL L. AULL and FRANCES C.	*	
AULL as Co-Administrators of the Estate of	*	
WILLIAM DANIEL BLAKE AULL,	*	
Deceased	*	
	*	
Petitioners,	*	
	*	To be Published
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF	*	
HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

ABELL: Special Master.

On 11 September 2002, Petitioners filed an action seeking an award under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)¹ for the alleged vaccine-related death of William Daniel Blake Aull (Blake). On 26 August 2003, Respondent moved to have the petition dismissed for lack of jurisdiction on the grounds that Petitioners violated the requirements of 11(a)(2), (a)(3) and (a)(5).²

¹ The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-1 *et seq.* (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

² Petitions for Compensation: (a) General Rule

...
(2)(A) No person may bring a civil action for damages in an amount greater than \$1,000 or in an

Respondent’s Motion to Dismiss (hereinafter Res. Mot. Dis.) at 1. Specifically, Respondent asserts that the Court lacks jurisdiction to consider Petitioners’ claim because Petitioners are currently pursuing a civil action for damages for a vaccine-related death against the vaccine-administrator in the Daviess Circuit Court of the Commonwealth of Kentucky.³ *Id.* Respondent concludes that since there was a prior civil action pending when Petitioners filed their petition with this Court, jurisdiction is precluded under the Vaccine Act. *Id.*

Petitioners object to Respondent’s Motion to Dismiss stating that the claim brought in the Daviess Circuit Court “is premised solely on the post administration actions of both the [vaccine administrator] and other health care professionals totally disconnected with the vaccine process.” Petitioners’ Opposition to Respondent’s Motion to Dismiss (hereinafter “Pet. Opp.”) at 27.

I. CONTENT OF THE DAVIESS COUNTY COURT “VERIFIED COMPLAINT”⁴

unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, and no such court may award damages in an amount greater than \$1,000 in a civil action for damages for such a vaccine-related injury or death, unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury or death and— (i)(I) the United States Court of Federal Claims has issued a judgment under section 300aa-12 of this title on such petition, and (II) such person elects under section 300aa-21(a) of this title to file such an action, or (ii) such person elects to withdraw such petition under section 300aa-21(b) of this title or such petition is considered withdrawn under such section. (B) If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action. If a petition is filed under this section with respect to the injury or death for which such civil action was brought, the date such dismissed action was filed shall, for purposes of the limitations of actions prescribed by section 300aa-16 of this title, be considered the date the petition was filed if the petition was filed within one year of the date of the dismissal of the civil action.

(3) No vaccine administrator or manufacturer may be made a party to a civil action (other than a civil action which may be brought under paragraph (2)) for damages for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988.

...

(5)(A) A plaintiff who on October 1, 1988, has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after October 1, 1988, or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section for such injury or death. (B) If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death.

42 U.S.C. §§ 300aa-11(a)(2), (a)(3) and (a)(5).

³ Petitioner’s filed the civil action on 10 September 2001.

⁴ Petitioners provided the Court with a copy of the “Verified Complaint” and hereinafter shall be referenced as “Ver. Comp.”.

As stated *supra*, Petitioners filed their complaint in the Daviess Circuit Court of the Commonwealth of Kentucky on 10 September 2001. Ver. Comp. Seven separate parties were named as defendants in the complaint. *Id.* However, only plaintiff Dr. David E. Danhauer is relevant to this Court in that Dr. Danhauer is the vaccine administrator of the 8 September 2000 DPT vaccination at issue. *Id.*

The Facts section of the Petitioners' Verified Complaint commences with the following statement: "On Friday, September 8, 2000, Dr. Danhauer administered to Blake Aull a series of vaccinations." *Id.* at 3. Petitioners again directly reference vaccinations in the Facts section in the very next paragraph by stating a "[hospital] triage nurse noted . . . that Blake had an increased temperature since receiving his vaccination shots on Friday and noted that he had a racing heartbeat and dusky skin color." *Id.* at 3-4. Such are the only two times that the 8 September 2000 vaccinations are mentioned in the Verified Complaint. The Fact section then goes on to set out Blake's development of pneumonia, the care he received along the way, the medicines prescribed, the complications that arose and, finally, Blake's death. *Id.* 3-5. Finally, the Fact section concludes with the state medical examiner's conclusion that "Blake's death resulted form [sic] pneumonia arising as a consequence of diffuse encephalopathy." *Id.* at 5.

Count I of the Verified Complaint was brought against Dr. Danhauer. *Id.* at 6. Petitioners allege that Dr. Danhauer was "negligent and violated the standard of care in [his] treatment of Blake in the following manner:

- a) failure to recognize or treat his pneumonia and deteriorating state in a timely manner;
- b) failure to diagnose pneumonia and prescribe antibiotics, or other proper medication
- c) failure to admit Blake to the hospital;
- d) failure to act upon blood tests and laboratory results in a timely manner;
- e) failure to inform Mr. and Mrs. Aull of Blake's blood test results and x-ray results in a timely manner;
- f) failure to administer Blake's blood transfusion of September 12, 2000 at the OMHS emergency room in a timely manner;
- g) failure to respond to Blake's special medical needs as a child with diffuse encephalopathy and a tracheotomy."

Id. The Verified Complaint concludes that "[a]s a direct and proximate result of the negligence of Dr. Danhauer . . ., Blake suffered complications from pneumonia and died." *Id.*

II. DISCUSSION

A petitioner shall initiate a claim before this Court by filing a petition. 11(a)(1). If such petitioner has a civil action pending in another court seeking damages for a vaccine-related injury or death, such person's petition may not be filed. 11(a)(5)(B). Accordingly, where a civil action for a vaccine-related injury or death is pending, the Court lacks jurisdiction to consider the petitioner's claim.

Under the Vaccine Act, a vaccine-related injury or death includes any “injury [or death] result[ing] from the administration of [a] vaccine” set forth in the Vaccine Injury Table. *Amendola v. Sec’y, Dept. of Health and Human Services*, 989 F.2d 1180, 1187 (Fed. Cir. 1993) (emphasis in original). Whether the circumstances of the administration of the vaccine indicate such administration was negligent is of no matter. Under such circumstances any resulting injury or death is still considered vaccine-related. *Id.* at 1186. However, where the negligence occurs in the post-vaccinal care of the injured party and further injury or death results, the resulting further injury or death is not vaccine-related. *DeLouis v. Sec’y, Dept. of Health and Human Services*, 1997 WL 631504 at 5 (Fed. Cl. 1997).

In *DeLouis*, the Court found that the specificity of the pleadings in the civil action was crucial when determining whether that action was vaccine-related. *Id.* A “lawsuit based solely on post-vaccinal negligence, without any mention of a causal relationship between the injuries claimed and the administration of a Table vaccine” does not fall under the rubric of “civil action” for the purposes of the Vaccine Act. *Id.* Accordingly, when the civil action is not vaccine-related, the Court has jurisdiction to decide a petition claiming a causal relationship between the administration of a Table vaccine and injury or death.

Here, Petitioners' civil action in the Daviess Circuit Court is facially for the alleged negligence of Dr. Danhauer's post-vaccinal care of Blake. Petitioners' Verified Complaint alleges the following failures: failure to recognize or treat his pneumonia and deteriorating state in a timely manner; failure to diagnose pneumonia and prescribe antibiotics, or other proper medication; failure to admit Blake to the hospital; failure to act upon blood tests and laboratory results in a timely manner; failure to inform Mr. Mrs. Aull of Blake's blood test results and x-ray results in a timely manner; failure to administer Blake's blood transfusion of September 12, 2000 at the OMHS emergency room in a timely manner; and, failure to respond to Blake's special medical needs as a child with diffuse encephalopathy and a tracheotomy. Ver. Comp. at 6. The complaint does not allege that Dr. Danhauer was negligent in administering the DPT vaccination at issue nor does it allege that Blake's resulting death was a sequela of the vaccine. It states that Blake died as a result of Dr. Danhauer's failures to provide adequate care in recognizing that Blake contracted pneumonia and treating it once recognized.

III. CONCLUSION

Petitioners' lawsuit in the Daviess Circuit Court is not a civil action for the purpose of the Vaccine

Act.⁵ For this and the reasons stated *supra*, Respondent's Motion to Dismiss IS DENIED. Petitioners are to contact my law clerk, David P. McGinley, Esq., at (202)504-2343, *poste haste* to set up a status conference in this matter.

IT IS SO ORDERED.

Richard B. Abell
Special Master

⁵ All records that were submitted by the parties to assist the Court in making this determination are also admissible for the ultimate disposition of this case.