

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-553V

November 23, 2009

Not to be Published

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CATHERINE KELSEY, \*

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Petitioner, \*

\*

v. \* Entitlement; Gardasil vaccine

\*

and shingles; injury did not last

SECRETARY OF THE DEPARTMENT OF \* more than six months; not

\*

inpatient in hospital

HEALTH AND HUMAN SERVICES, \*

\*

Respondent. \*

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Mark T. Sadaka, New York, NY, for petitioner.

Debra A. Filteau Begley, Washington, DC, for respondent.

**MILLMAN, Special Master**

## DECISION<sup>1</sup>

On August 21, 2009, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10, et seq., alleging that Gardasil vaccine administered on January 14, 2009 caused her shingles (varicella zoster virus or VSV reactivation).

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 Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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

During a status conference held on September 24, 2009, petitioner's counsel said he would obtain medical records or a statement from a doctor showing that petitioner had symptoms or sequelae of her vaccine reaction lasting more than six months.

The undersigned issued an Order dated September 24, 2009 reflecting that petitioner shall obtain and file either medical records or a note from petitioner's doctor to demonstrate that petitioner had sequelae lasting more than six months related to shingles.

During a status conference held on October 22, 2009, petitioner's counsel stated that petitioner's shingles did resolve. A discussion was held on the meaning of the statutory exception to the more-than-six-months rule in 42 U.S.C. §300aa-11(c)(1)(D)(iii) which requires, inter alia, that petitioner had to have inpatient hospitalization. Petitioner went to the emergency room of a hospital, but she was not an inpatient.

During a status conference held on October 29, 2009, counsel stated they wanted to discuss the six-month problem over the next two weeks and petitioner's counsel made a demand on respondent for settlement outside the conference.

During the final status conference in this case on November 20, 2009, respondent's counsel stated respondent refused settlement. Petitioner's counsel admitted he could not prove that petitioner had more than six months of sequelae of her vaccine injury although the undersigned gave him the opportunity to do so.

## **FACTS**

Petitioner was born on January 31, 1986.

On January 14, 2009, she received Gardasil vaccine to prevent human papilloma virus.  
Med. recs. at Ex. 1, p. 1.

On January 14, 2009, at 12:30 p.m., Dr. William J. Hendricks received a phone call that petitioner received Gardasil that morning and, within hours, developed severe stomach pain. She was hot and flushed and the back of her throat felt tight. Med. recs. at Ex. 1, p. 2.

On January 14, 2009, petitioner went to Shawnee Mission Medical Center. Dr. Lester E. Richardson wrote that she had an allergic reaction and should not receive any more Gardasil. Med. recs. at Ex. 2, pp. 4, 6, and 10.

Petitioner filed an expert report from Dr. Larry W. Rumans, dated August 3, 2009, stating petitioner had an anaphylactoid reaction to Gardasil with a satisfactory recovery. Med. recs. at Ex. 3, p. 1.

## **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).

In order to prevail under the Vaccine Act, Congress requires persons suing (petitioners) to file a petition. As stated in subsection c of §300aa-11, a “petition shall” contain supporting documentation demonstrating that the vaccinee:

(D)(i) suffered the residual effects or complications of such illness, disability, injury, or condition for more than 6 months after the administration of the vaccine, ... or (iii) suffered such illness, disability, injury or condition from the vaccine which resulted in inpatient hospitalization and surgical intervention. . . .

Petitioner has not fulfilled the statutory requirement that a “petition shall” contain supporting documentation that she suffered the residual effects or complications of shingles for more than six months after she received Gardasil vaccine or that she was hospitalized as an inpatient and had surgical intervention.

Unless a petitioner fulfills the statutory requirement of having more than six months of injury or sequelae, or satisfies the exemption to this requirement by being an inpatient in a hospital undergoing surgical intervention, petitioner has not made out a prima facie case. Song v. Sec’y of HHS, 41 F.3d 1520 (Fed. Cir. 1994) (affirming dismissal of petition where residual effects or complications of Table seizures did not last more than six months); Boley v. Sec’y of HHS, 86 Fed. Cl. 294 (2009) (affirming dismissal of petition where vaccine injury did not last more than six months).

Petitioner has failed to prove a prima facie case because her vaccine injury or its sequelae did not last more than six months and she was not an inpatient of a hospital undergoing surgical intervention.

## **CONCLUSION**

Petitioner's petition 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.<sup>2</sup>

**IT IS SO ORDERED.**

November 23, 2009  
DATE

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

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<sup>2</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.