

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-1052V

December 9, 2008

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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. \*

\*\*\*\*\*

Motion to Dismiss based on statute  
of limitations denied; question  
of polio sequelae or post-polio  
syndrome and whether PPS is  
separate medical entity

## ORDER<sup>1</sup>

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, September

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<sup>1</sup> 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.

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 December 8, 2008, the undersigned had her law clerk contact respondent's counsel to see if he wanted to reply to petitioners' response and, his answer being in the negative, the issue is now ripe for determination.

## **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 the instant action, respondent's motion to dismiss is premature because there are medical issues which the undersigned is not in a position to determine:

(1) Does Alejandra have post-polio syndrome as petitioners allege and respondent denies?

(2) If Alejandra has post-polio syndrome, was its onset before the diagnosis of May 22, 2003? If so, was the onset more than 36 months before petitioners filed their original petition?

Further investigation into the medical aspects of this case is necessary. Moreover, as this case goes forward, if it appears that petitioners have a viable claim for post-polio syndrome, there will arise the question of what, if any, symptoms Alejandra currently has that are sequelae of her polio and what are due to post-polio syndrome separate from her polio.

Respondent's motion to dismiss is hereby DENIED.

**IT IS SO ORDERED.**

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DATE

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Laura D. Millman  
Special Master