

OFFICE OF SPECIAL MASTERS

No. 01-688V

(Filed: April 22, 2004)

ESTATE OF LAVILLA AILEEN	*	
CAMPBELL, by DANIEL CAMPBELL, as	*	
Executor of the Estate,	*	
	*	
	*	
Petitioners,	*	
	*	To be Published
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF	*	
HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Anita Johnson, Esq., Houston, Texas, for Petitioner,
Melonie J. McCall, Esq., United States Depart of Justice, Washington, D.C., for Respondent.

DISMISSAL DECISION

On 12 December 2001, Mrs. Lavilla Aileen Campbell filed a petition for compensation under the National Childhood Vaccine Act of 1986, as amended (“Vaccine Act”). 42 U.S.C. § 300aa-1 *et seq.* Petition at 1. Mrs. Campbell alleged that she experienced an adverse reaction to a diphtheria-tetanus (hereinafter “DT”) vaccination administered on 13 December 2000. *Id.* On 27 January 2003, before the Court was able to adjudicate the issue of entitlement in this matter, Mrs. Campbell died. Petitioner’s Exhibit (hereinafter “Pet. Ex.”) 43. Mrs. Campbell’s husband, Mr. Daniel Campbell, was appointed executor of his wife’s estate, Pet. Ex. 44, and was substituted as the Petitioner in this action on 27 May 2003. Petitioner’s Third Amended Petition at 1. In pursuit of this claim, Mr. Campbell does not assert that the 13 December 2000 DT vaccination was the proximate cause of his wife’s death and concedes that her death was not vaccine-related.¹ Instead, Mr. Campbell seeks to continue the claim and pursue compensation for alleged vaccine related-injuries Mrs. Campbell suffered before her death.² Specifically, Mr. Campbell claims damages for un-reimbursed medical

¹ Mrs. Campbell’s death was caused by lung cancer. Pet. Ex.’s 43 and 45.

² Petitioner’s counsel made it clear during an 18 June 2003 telephonic status conference that Petitioner is not pursuing a vaccine-related death.

expenses incurred prior to Mrs. Campbell's death, pain and suffering, and loss of earnings. Petitioner's Third Amended Petition at 3.

DISCUSSION

The issue before this Court is whether Mr. Campbell, acting on behalf of his late wife's estate, can continue Mrs. Campbell's claim seeking compensation for alleged vaccine-related injury. Succinctly, is Mr. Campbell a valid petitioner as defined by the Vaccine Act? The Court finds that he is not.

1. The plain text of the Vaccine Act prohibits Mr. Campbell from continuing this claim for compensation for vaccine-related injury on behalf of his late wife's estate.

When interpreting the meaning of a statute, the controlling principle is the "basic and unexceptional rule" that courts must give effect to the clear meaning of the statute as written. *Estate of Cowart*, 505 U.S. 469, 476 (1992). To do so, the court must begin with the text of the statute. The first step "is to determine whether the text at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." The inquiry ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002).

The particular dispute in this case is whether Daniel Campbell is a qualified petitioner. The dispute arises because Mr. Campbell is the husband of the late Lavilla Aileen Campbell, who originally brought the claim on her own behalf. However, before the Court could bring the claim to resolution, Mrs. Campbell died. Thereafter, Mr. Campbell sought to continue the claim in his capacity as the executor of his wife's estate. Specifically, Mr. Campbell seeks compensation for the alleged vaccine-related injuries Mrs. Campbell incurred as a result of the DT vaccination she received on 13 December 2000. Mr. Campbell does not claim that his wife died as a sequela to the vaccination.

The provision of the statute in dispute in this case defines who can bring a claim before this Court. Specifically, the statutory provision states "any person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table may . . . file a petition for compensation under the Program." 42 U.S.C. § 300aa-11(b)(1)(A).

As stated *supra*, the Court must give effect to the clear meaning of the statute as written. First, the relevant provision of the statute provides that "any person who has sustained a vaccine-related injury" may bring a claim. Mrs. Campbell certainly qualified under this provision, however, Mr. Campbell does not. Secondly it provides that "the legal representative of such person if such person is a minor or is disabled" can qualify as a petitioner. Mrs. Campbell was not a minor nor is she disabled, thus, Mr. Campbell does not qualify here. Finally it provides that one may bring a

claim as “the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table.” Mr. Campbell does not claim that his wife died as a result of the DT vaccination she received on 13 December 2000, he claims only vaccine-related injury. Accordingly, since he is not claiming a vaccine-related death, Mr. Campbell is precluded from bringing a claim under this provision.

After giving effect to the plain text of the portion of the statute in dispute, the Court must conclude that Mr. Campbell does not qualify as a petitioner. He is not claiming his own vaccine-related injury. His wife, for whose estate he brings the claim, was not a minor nor is she disabled. Finally, Mr. Campbell does not claim that the vaccine at issue in this case caused his wife’s death.

2. The doctrine of federal sovereign immunity dictates that the Court must narrowly construe any waiver of immunity.

The enactment of the Vaccine Program is the voluntary and express waiver of the Federal Government’s sovereign immunity in cases where a person suffers vaccine-related injury or vaccine-related death. When construing statutes where Congress makes an express waiver of sovereign immunity, a court must strictly construe such waiver in favor of the sovereign and restrict its reach to the provisions and conditions set forth by the text of the statute. *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 652 (1992); *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 685 (1983); *Honda v. Clark*, 386 U.S. 484, 501 (1967). A waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal citations omitted). When confronting any ambiguities concerning a waiver, a court must construe in favor of the sovereign retaining its immunity. *United States v. Williams*, 514 U.S. 527 (1995). A waiver that does not clearly appear in the statutory text cannot be supplied by the legislative history. *United States v. Nordic Village, Inc.*, 530 U.S. 30, 37 (1992).

Here, Petitioner argues that Mrs. Campbell’s claim survives her death and that the intent of the Vaccine Program, in conjunction with Rules of the United States Court of Federal Claims, provides for an estate to continue a claim of vaccine-related injury on behalf of a deceased party. Petitioner’s Response and Objection to Respondent’s Motion to Dismiss (hereinafter “Pet. Response”) at 9. Petitioner argues that the purpose of the Vaccine Act, as evidenced by the text of the statute and the legislative history, was to waive the Federal Government’s sovereign immunity to the extent necessary to allow generous awards for parties injured by vaccines. *Id.* at 10.

The Court finds no survival clause in the statutory text of the Vaccine Act. Accordingly, the Court cannot simply assume that Congress meant to put one there nor can the Court imply one. To the contrary, invoking the maxim *exceptio probat regulam*,³ the Court must conclude that Congress intended no survival of a vaccine-related injury claim. There are federal statutes that expressly permitted survival recovery, the Federal Employers’ Liability Act (FELA), 45 U.S.C. § 59, the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 903(a), the Jones Act, 42 U.S.C.

³ “The exception proves the rule.”

App. § 688(a) (Supp. 1991, the Civil Rights Act, 42 U.S.C. §§ 1983, 1986, and the Federal Torts Claims Act, 28 U.S.C. § 1346(b)). In such statutes, Congress specifically provided for survival of a claim. Congress did no such thing in the Vaccine Act.

Petitioner argues that Rule 17(a)⁴ of the Rules of the U.S. Court of Federal Claims (hereinafter “RCFC”) “reveals an intent to allow an administrator to continue an action upon the death of a Petitioner.” Pet. Response at 5. Petitioner states that courts have interpreted RCFC 17(a) to allow for the “substitution of a real party in order to avoid injustice.” *Id.* Petitioner’s contention may indeed be true concerning cases before the judges of the U.S. Court of Federal Claims, however, it holds no weight with the Office of the Special Masters. “In proceedings before the Office of the Special Masters, the Rules of the United States Court of Federal Claims (RCFC) apply only to the extent referenced by the Vaccine Rules.” Appendix B of the Vaccine Rules of the U.S. Court of Federal Claims (hereinafter “Vaccine Rules”), Rule 1. The Vaccine Rules make no reference to RCFC 17(a).

To accept Petitioner’s argument, in the opinion of the undersigned, would expand the Vaccine Act’s waiver of sovereign immunity beyond that expressed by the text of the statute. Although Petitioner argues that survival of a claim was the intent of Congress, the Court finds no evidence of such in the statutory language. Accordingly, the Court must restrict the reach of the waiver to the provisions and conditions set forth by the text of the Vaccine Act. *See U.S. Dep’t of Energy v. Ohio*, 503 U.S. at 652.

3. The right to bring a claim under the Vaccine Act is not a civil right.

The U.S. Supreme Court has created a uniform rule of survivability in claims brought concerning the alleged deprivation of a civil right by federal officials. *Carlson v. Green*, 446 U.S. 14, 23 (1980). Writing for the majority in *Carlson*, Justice Powell opined that “only a uniform federal rule of survivorship is compatible with the goal of deterring federal officials from infringing [upon] federal constitutional rights . . .” *Id.* Justice Powell further opined that if the Court were to apply state laws of survivorship, then where the person’s civil rights were allegedly violated would determine the survivability of a claim, leading to an untenable variance amongst jurisdictions. *Id.* 23-24. Thus, in *Carlson*, the U.S. Supreme Court created a prophylactic common law rule of survivorship in federal civil rights claims.

⁴ “Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person’s own name without joining the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.” RCFC 17(a).

The Vaccine Act was established by Congress to provide a venue where persons, or their legal representatives, alleging vaccine-related injury or death can bring a claim against the Secretary of the Department of Health and Human Services for compensation. In creating the Vaccine Program, Congress did not codify a means of redress for when one falls victim to the infringement upon an already existing constitutional protection. It created a heretofore nonexistent right to sue the Federal Government, in Federal Court, when one alleges vaccine-related injury or death. Suing the Federal Government for injury caused by a vaccination is not a civil right, it is not grounded in any Constitutional protection⁵ and, therefore, the U.S. Supreme Court's prophylactic common law rule of survivorship in federal civil rights claims does not apply.

4. The undersigned's *Andrews* decision is distinguishable.

In *Andrews v. Sec'y of Health and Human Services*, 1995 WL 262264 (Fed. Cl. Spec. Mstr.), parents filed a petition in this Court on behalf of their daughter claiming vaccine related injury. Prior to the adjudication of entitlement, their daughter died. After their daughter's death, the parents continued their vaccine injury petition, seeking damages for pain and suffering. The undersigned eventually awarded compensation in the case and the decision was affirmed by the U.S. Court of Federal Claims.

Andrews is easily distinguished from the case at hand. In *Andrews*, the petitioners that originally filed the petition remained throughout the proceedings. Here, Mr. Campbell wishes to substitute himself, in his capacity as executor of his late wife's estate, as petitioner for his wife. As stated *supra*, the Vaccine Act only allows for such when the executor or legal representative of the estate claims vaccine-related death. Mr. Campbell claims vaccine-related injury.

CONCLUSION

This Court hereby orders the immediate **DISMISSAL** with prejudice of this case for the reasons contained in this decision. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell
Special Master

⁵ The provisions of the 5th and 14th amendments do not obligate the federal government to pay money damages. See *Greider v. Sec'y of Dept. of Health and Human Services*, 23 Cl.Ct. 348, 350 (1991); *Carruth v. U.S.*, 224 Cl. Ct. 422, 445 (1980).