

OFFICE OF SPECIAL MASTERS

No. 04-874V

(Filed: August 24, 2004)

John and Irene FINLEY,

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Petitioners,

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PUBLISHED

v.

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SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

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Respondent.

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John E. Morton, Esq., Alexandria, Louisiana, for Petitioners.

Lisa Watts, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DISMISSAL ORDER

ABELL, Special Master:

BACKGROUND

On 18 May 2004, 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 injuries of Irene Finley. Specifically, Petitioners allege that Irene suffered grave injuries as the result of receiving a Pneumovax 23 vaccination on 27 August 2002. Petition at 1-2. The dispositive issue in this case is whether the Pneumovax 23 vaccine is set forth in the Vaccine Injury Table (“Table”). Respondent filed a Report and Motion to Dismiss on 18 June 2004 (“Resp’t Motion”). Petitioners filed their Opposition to Defendant’s Motion to Dismiss on 26 July 2004 (“Pet. Response”). Respondent foreswore an opportunity to reply to Petitioners’ Response. For the reasons discussed *infra*, this case is hereby dismissed without prejudice.

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.

DISCUSSION

The Act requires that, in order to bring a petition, the person who suffered the alleged vaccine-related injury must have “received a vaccine set forth in the Vaccine Injury Table.” § 11(c)(1)(A). It also requires the Secretary of Health and Human Services to include vaccines on the Table that are recommended by the CDC to the Secretary for “routine administration to children.” § 14(e)(2).

In accordance with § 14(e)(2), pneumococcal conjugate vaccines were added to the Vaccine Injury Table (“Table”) with an effective date of 18 December 1999 at the recommendation of the Center for Disease Control and Prevention (“CDC”). National Vaccine Injury Compensation Program: Addition of Pneumococcal Conjugate Vaccines to the Vaccine Injury Table, 66 Fed. Reg. 28166 (May 22, 2001) (codified at 42 C.F.R. § 100.3(a)(XIII)). However, polysaccharide pneumococcal vaccines, such as Pneumovax 23, were expressly excluded from the Table.² *Id.* According to the pertinent notice, “Because the CDC *only* recommended pneumococcal conjugate vaccines to the Secretary for routine administration to children, polysaccharide-type pneumococcal vaccines are not covered under the VICP [Vaccine Injury Compensation Program] or included on the Table.” *Id.* (emphasis added).

Petitioners do not argue that polysaccharide pneumococcal vaccines are on the Table. Rather, Petitioners urge this Court to find that such vaccines are implicitly included on the table as they *were* recommended by the CDC for routine administration to children and, therefore, must be added to the Table. *See* § 14(e)(2). Petitioners point to a 1997 recommendation report from the Advisory Committee in Immunization Practices (“AVIP”) for the Center for Disease Control. According to Petitioners, that report “recommends the use of pneumococcal polysaccharide vaccines, like Pneumovax 23, to persons aged 2-64 who are immunocompetent, including those who suffer from chronic illness.” Pet. Response at 5. Petitioners aver that this report constitutes a recommendation by the CDC of Pneumovax 23 and its ilk for routine administration to children; and, as such, Pneumovax 23 should be considered on the Table.

Concerning the AVIP report, Petitioners gloss over the fact that the report never explicitly recommends polysaccharide pneumococcal vaccines for “routine administration to children.” Rather, the report lists varying and multifarious groups to whom pneumococcal polysaccharide vaccinations should be given including:

- a) persons aged greater than or equal to 65 years,
- b) immunocompetent persons aged greater than or equal to 2 years who are at increased risk for illness and death associated with pneumococcal disease because of chronic illness,
- c) persons aged greater than or equal to 2 years with functional or anatomic asplenia,
- d) persons aged greater than or equal to 2 years

² Respondent notes that there are several variants of pneumococcal vaccines including the 7-valent version routinely administered to children under 2 years of age and a 23-valent version often given to older children and adults. Resp’t Motion at 2, citing PHYSICIANS’ DESK REFERENCE (57th ed. 2003). The present case concerns the latter, Pneumovax 23, a polysaccharide-type pneumococcal vaccine.

living in environments in which the risk for disease is high, and e) immunocompromised persons aged greater than or equal to 2 years who are at high risk for infection.

Prevention of Pneumococcal Disease: Recommendations of the Advisory Committee on Immunization Practices (ACIP), MORBIDITY AND MORTALITY WEEKLY REPORT, (Center for Disease Control) April 4, 1997, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00047135.htm> (last reviewed May 2, 2001).

From the breadth and complexity of this list, it appears that pneumococcal polysaccharide vaccines are anything but recommended for routine administration to children. In fact, as aforementioned, the Department of Health and Human Services (“HHS”) specifically excluded polysaccharide pneumococcal vaccines noting that the CDC “only recommended pneumococcal conjugate vaccines . . . for routine administration to children.” National Vaccine Injury Compensation Program: Addition of Pneumococcal Conjugate Vaccines to the Vaccine Injury Table, 66 Fed. Reg. 28166 (May 22, 2001) (codified at 42 C.F.R. § 100.3(a)(XIII) (2004)).

Regardless, this Court is only authorized to hear cases involving vaccines listed on the Table. § 11(c)(1)(A). Although this list may include “[a]ny new vaccine recommended by the Centers for Disease Control and Prevention for routine administration to children, after publication by the Secretary of a notice of coverage,” 42 C.F.R. § 100.3(a)(XIV) (2004), Pneumovax 23 and other polysaccharide pneumococcal vaccinations were specifically excluded from publication and, therefore, are not included on the Table. This Court has no power to add additional vaccines to the Table or to hear cases involving vaccines that are not covered by the Table. Simply stated, this Court is the wrong venue for Petitioners’ claim. As the Supreme Court has cautioned on several occasions, “the ‘proper theater’ *** ‘is the halls of Congress.’” *Keene Corp. v. United States*, 113 S.Ct. 2035, 2045 (1993) (citing *Smoot’s Case*, 15 Wall 36, 45 (1873)). The court enjoys no “liberty to add an exception ... [or] to remove apparent hardship.” *Id.*

Today’s decision is consistent with past decisions: *Charette v. Secretary of HHS*, 33 Fed. Cl. 488 (1995) (typhoid vaccine is not covered by the Vaccine Act); *Brausewetter v. Secretary of HHS*, No. 99-278V, 1999 WL 562700 (Fed. Cl. Spec. Mstr. July 16, 1999) (tetanus antitoxin vaccine not covered under the table); *Miller v. Secretary of HHS*, No. 90-1123V, 1993 WL 214444 (Fed. Cl. Spec. Mstr. June 4, 1993) (diphtheria toxoid not covered under the Program); *Dover v. Secretary of HHS*, No. 90-2299V, 1991 WL 164496 (Fed. Cl. Spec. Mstr. Aug. 8, 1991) (typhoid-paratyphoid vaccine); *Dalton v. Secretary of HHS*, No. 90-2785V, 1991 WL 146245 (Fed. Cl. Spec. Mstr. July 18, 1991) (influenza vaccine not set forth in Vaccine Injury Table).

CONCLUSION

Accordingly, this petition is **DISMISSED** *without prejudice*.³ 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

³ The Court is aware that the CDC may recommend the influenza vaccine for the routine administration to children. *See, e.g.*, Advisory Commission on Childhood Vaccines Meeting Notice, 69 Fed. Reg. 30673 (May 28, 2004). Further, it has come to the Court's attention that Congress may well be considering an excise tax on the administration of the influenza vaccine. Hence, Petitioners may soon be able to file another petition, § 16 (b), provided that the Secretary of Health and Human Services first publishes a "notice of coverage." 42 C.F.R. § 100.3(a)(XIV) (2004). Therefore, this petition is dismissed without prejudice in the event that there is a subsequent change to the Table.

Regardless, as this Court currently lacks jurisdiction over Petitioners' claim, Petitioners' counsel is barred from receiving attorney's fees and costs. *See Brice v. Secretary of HHS*, 358 F.3d 865, 868 (Fed. Cir. 2004), *citing Martin v. Secretary of HHS*, 62 F.3d 1403, 1406 (Fed. Cir. 1995).