In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-1399V

Filed: 22 February 2007

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KIMBERLY WARFLE, a minor, by and through her mother and next friend, MELISSA GUFFEY,	*	
Petitioner,	*	**PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* * * * * * * * * * * * * *	*	

ORDER[1]

A status conference in this case was had on 20 February 2007, during which, the Court notified Petitioner's Counsel that the 240-day statutory time frame had elapsed, in response to which, Petitioner moved to maintain this petition in the Vaccine Program. Hearing no objection from Respondent, such motion is **granted**.

Having received Petitioner's filings from Kimberly's school, including medical records and an affidavit from Kimberly's first grade teacher, the parties agreed that there are no additional medical records yet outstanding of which they are aware. Therefore, the Court considered the record sufficient to rule on Respondent's Motion to Dismiss, which was premised on a lack of discernable proof that Kimberly's condition complained of maintained a duration of six months or more, as required as a necessary element under the Vaccine Act.

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[1] Because this Order contains a reasoned explanation for my action in this case, it may be published or posted to the Court of Federal Claims website. Therefore, Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), Petitioner has 14 days from the date of this Order within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

Respondent's Memorandum in support of the Motion to Dismiss argued (1) that Petitioner failed to plead with substantiating documentary or testimonial evidence the statutory elements set forth in the Vaccine Act; and (2) that even if Petitioner had met the threshold of those statutory requirements, the petition must be dismissed for lack of proof on the merits. Respondent's Memorandum at 11-12. Respondent's filing also raises the specter of a jurisdictional challenge to the Court's authority to hear the case, albeit in an unhesitating "drive-by" challenge buried in a footnote. Id. at 2, note 1.

Respondent's pleadings evidence a misunderstanding of the term 'jurisdiction', which is simply stated the Court's authority to rule on a case. Following Respondent's logic to its natural conclusion, the Court could never dismiss a case with prejudice for failing to meet statutory elements, because it would be without power to rule as soon as one such element was found to be lacking, were such deficiencies truly "jurisdictional matter[s]" as Respondent imagines. Wherefore, the Court expressly states that it does have jurisdiction to rule in this case. This conclusion is reached by reference to the Vaccine Statute and to the principles of federal jurisdiction that attend proceedings in a federal court.

As courts of limited, statutory authority, it is the prerogative of every federal court to consider whether it possesses subject matter jurisdiction over a case, which jurisdiction is typically granted by express statutory language conferring jurisdiction over specific types of claims. See Arbaugh v. Y&H Corp., 546 U.S. 500, 126 S.Ct. 1235, n. 11 (2006). The Supreme Court in Arbaugh held that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." 546 U.S. 500, 126 S.Ct. at 1245. The question of jurisdiction is actually much narrower than is often attributed by those less precise. See, e.g., Da Silva v. Kinsho Intern. Corp., 229 F.3d 358, 361 (2d Cir. 2000) (noting with chagrin that "Court decisions often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim").

This Court will not succumb to such laxity. Accordingly, the Court looks to the statutory provision that provides it with jurisdictional grant of authority: "There is established the [Vaccine Program]...under which compensation may be paid for a vaccine-related injury or death." 42 U.S.C. § 300aa–10(a). Under the authority of that Program, a Special Master has "jurisdiction over proceedings to determine if a petitioner...is entitled to compensation under the Program and the amount of such compensation." 42 U.S.C. § 300aa–12(a). In this case, the petition contains sufficient pleading, in that Petitioner claims compensation for a vaccine-related injury, which is necessary to invoke this Court's jurisdiction. See, e.g., Petition at 1. Wherefore, the Court hereby rules that it possesses subject matter jurisdiction over this case.

As that threshold matter has been resolved, the Court moves to the heart of Respondent's Motion to Dismiss for (1) insufficient pleading and/or (2) insufficient proof. The question for the former is whether the petition states a claim upon which relief may be granted, and the standard determines whether, if all of petitioner's allegations and proofs then-submitted are taken together and accepted as true, petitioner's claim could meet its requirements and prevail. Sutton v. United Air

Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139 (1999). The latter issue anticipates that all pertinent filings are complete, so that the Court may analyze the case as if transfigured into a decision of summary judgment. The standard at that point would require the Court's examination into whether Respondent had demonstrated "the absence of a genuine issue of material fact," drawing every inference concerning disputed facts in Petitioner's favor. See Beard v. Banks, __ U.S. __, 126 S.Ct. 2572 (2006).

First, the Court considers whether the petition must be dismissed for lack of proof on the merits, as is demanded by the second conclusion of Respondent's Motion. Neither one of the above-referenced legal standards resembles the action heeded by the Respondent's conclusion, which instead transmogrifies the decision into one of factual issues, sidestepping the Court's necessary fact-finding role. Such a standard as the one offered by Respondent would obviate hearings before the Court, and would have the Court decide factual issues on the pleadings alone. This is surely not the result contemplated by the Vaccine Act. Accordingly, the relief sought by Respondent's secondary conclusion is **denied**.

Lastly, the Court considers whether Petitioner has failed to plead with substantiating documentary or testimonial evidence the elements set forth in the statute, particularly the requirement that the vaccine-related injury persist for six months or more. This issue, if no other, is properly brought by Respondent's Motion. Since the filing of that Motion, however, Petitioner has added to the petition additional previously-undisclosed school records and fact witness affidavits from Kimberly's mother and first grade teacher, Beverly Reid. Reid's affidavit, which describes her firsthand experience with Kimberly, corroborates the symptoms complained of by Petitioner in her petition at a time beyond the first six months following vaccination. Also, there are no medical records that contradict this position. Taking this evidence at face value, and interpreting its contents in the light most favorable to Petitioner, it combines with the post-vaccinal records of March 2003 to provide a set of circumstances which, if proven in a hearing and connected to a medical or scientific theory of causation, could allow Petitioner to prevail on the merits. This is all that is necessary for Petitioner to clear this relatively low hurdle presented by a motion to dismiss.

The Court is quick to remind Petitioner that future hurdles will require more of her, and that serious matters of fact are yet to be articulated and proven in this case, upon which Petitioner will almost certainly require expert testimony to prevail. However, the fact remains that Respondent's Motion has neither shown (a) that the facts alleged by Petitioner herself do not evince a reading which would support a decision in her favor; nor (b) that there are no material facts remaining, such that summary judgment is warranted. Therefore, the Court **denied** Respondent's Motion to Dismiss in its entirety.

Petitioner had been waiting for the resolution of Respondent's Motion to Dismiss before acquiring a medical expert to render an opinion in this case. As that condition has been satisfied, Petitioner was **ordered** to acquire such an expert as may be appropriate, and to file an expert report, along with a curriculum vitae and medical literature relied upon in composing the report. Petitioner should also understand that, if the existence of additional, heretofore unknown medical records is

discovered, there is a continuing duty to supplement the filings in this case with those records, or at least an affidavit of their nonexistence, if they once existed but are no longer extant.

The Court asked the parties if merely an onset hearing was proper, or if a full hearing on entitlement was in order, based on the specific nature of this case. The parties both agreed that a full entitlement hearing would be most appropriate, in which the Court would hear from fact witnesses in person and from the parties' experts either in person or telephonically. Therefore, the Court expects an entitlement hearing to follow as the next step in this case, and expects from the parties all action necessary in preparation for the same. The Court anticipates that substantial progress will be made to this end by **the next status conference**, which was scheduled for **18 April 2007 at 11:30 AM (EDT)**. Any issues or queries concerning this Order may be directed to my law clerk, Isaiah Kalinowski, Esq., at 202-357-6351.

IT IS SO ORDERED.

Richard B. Abell
Special Master