OFFICE OF SPECIAL MASTERS

No. 99-278V

(Filed: July 16, 1999)

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MARTIN BRAUSEWETTER,	*	
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Petitioners,	*	**TO BE PUBLISHED**
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	
Respondent.	*	
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* *		

Brad Horn, Esq., Vienna, Virginia, for petitioner.

Andres Quintana, Esq., United States Department of Justice, Washington, DC, for respondent.

DECISION

This is a case of first impression. On 5 May 1999, Martin Brausewetter filed a claim for compensation under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)[(1)] for his alleged vaccine related injuries. Petitioner alleged that as a result of a 20 October 1997 injection of Hyper-Tet, he developed Guillian-Barré Syndrome. The dispositive issue in this case is whether Hyper-Tet is a vaccine set forth in the Vaccine Injury Table. Petitioner filed a memorandum on 10 May 1999. Respondent filed a reply on 25 May 1999 and petitioner filed a response on 16 June 1999. For the reasons discussed *infra*, this case is hereby dismissed with prejudice.

BACKGROUND

Martin Brausewetter, the petitioner, is allergic to the tetanus toxoid found in a tetanus vaccine. So, in order to be inoculated for tetanus, he undergoes "passive" vaccination instead of "active" vaccination. Active vaccination occurs when a person is administered a tetanus vaccine which contains the tetanus toxoid, and the person's natural immune system creates antitoxins (antibodies) to destroy the tetanus toxins. Passive vaccination occurs when a person is administered tetanus antitoxins (antibodies) instead of the tetanus toxoid. In this case, Mr. Brausewetter was given a substance called Hyper-Tet. Hyper -Tet is created from the blood plasma of people whom have been immunized with the tetanus toxoid. The *Physicians' Desk Reference* 621-22 (1997) says Hyper-Tet:

is a sterile solution of tetanus hyperimmune immunoglobulin, primarily immunoglobulin G (IgG) .... This product has been prepared from large pools of plasma obtained from individuals immunized with tetanus toxoid.... The product is standardized against the U.S. Standard Antitoxin and the U.S. Control Tetanus Toxin and contains not less than 250 tetanus antitoxin units per container. Hyper-Tet must be administered intramuscularly. CLINICAL PHARMACOLOGY[:] Hyper-Tet supplies passive immunity to those individuals who have low or no immunity to the toxin produced by the tetanus organism, *Clostridium tetani*. The antibodies act to neutralize the free form of the powerful exotoxin produced by this bacterium.... Several studies suggest the value of human tetanus antitoxin in the treatment of active tetanus.... Passive immunization with Hyper-Tet may be undertaken concomitantly with active immunization using tetanus toxoid in those persons who must receive an immediate injection of tetanus antitoxin and in whom it is desirable to begin the process of active immunization.... [T]he physician may thus supply immediate passive protection against tetanus, and at the same time begin formation of active immunization in the injured individual which upon completion of a full toxoid series will preclude future need for antitoxin. Peak blood levels of IgG are obtained approximately 2 days after intramuscular injection. The half-life of IgG in the circulation of individuals with normal IgG levels is approximately 23 days.

Id. (footnotes omitted). The issue before the court is whether Hyper-Tet is a vaccine set forth in the Vaccine Injury Table. The answer to this issue is very unequivocal inasmuch as the petitioner conceded that Hyper-Tet does not contain tetanus toxoid. Pet's. Response at 1.

DISCUSSION

"[I]n determining the scope of a statute, one is to look first at its language." *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 110 (1983). The applicable regulation in this case lists eleven (11) types of vaccines covered by the Vaccine Act. The first vaccines listed are "[v]accines containing tetanus *toxoid* (e.g., DTaP, DTP, DT, Td, or TT)." 42 C.F.R. § 100.3(a)(1997) (emphasis added). Since Hyper-Tet does not contain tetanus toxoid (only tetanus antitoxins), petitioner did not receive a vaccine set forth in the Vaccine Injury Table.

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); *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).

Petitioner raised a second, novel issue in this case. The second issue is whether the petitioner is covered by the Vaccine Act for a vaccine administered directly to a third-party and indirectly to the petitioner. In this case, whether Mr. Brausewetter is covered by the Vaccine Act for the tetanus vaccines administered to the IgG plasma donors who indirectly immunized Mr.

Brausewetter. The issue revolves around the use of the word "received" in the Vaccine Act.

Section 11(c)(1)(A) states: "A petition for compensation under the Program for a vaccine-related injury ... shall contain ... an affidavit, and supporting documentation, demonstrating that the person who suffered such injury ... *received* a vaccine set forth in the Vaccine Injury Table or, if such person *did not receive* such a vaccine, contracted polio, directly or indirectly, from another person who *received* an oral polio vaccine." *Id.* (emphasis added).

The Act requires that 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). The Vaccine Act is a limited waiver of the federal government's power of sovereign immunity. In such cases, the statutory language must be strictly construed. *U.S. v. Sherwood*, 312 U.S. 584, 590 (1940). This case involves a person who was injured by a vaccine given to a third-party. The Act addresses the issue of third-party vaccinees. A petitioner is covered by the Act if the petitioner contracted polio from a third-party who received an oral polio vaccine. § 11(c)(1)(A). Congress obviously ruminated about the issue, but chose to include only those people who contract polio through community contact with recipients of an oral polio vaccine (OPV). In statutory construction, "*expressio unius est exclusio alterius*" (the expression of one thing is the exclusion of another). Congress could have included other occurrences of indirect vaccine exposure in the Act, but it chose not to include other occurrences.

In *Van Houter v. Secretary of HHS*, No. 90-1444V, 1991 WL 239056 (Fed. Cl. Spec. Mstr. Oct. 30, 1991), the court held that a child was not covered by the Vaccine Act because he did not receive a vaccine as required by the Act. In *Van Houter*, a woman was administered a rubella vaccine in 1969. The vaccine was defective and did not immunize the woman. In 1983, fourteen (14) years after the vaccination, the woman became pregnant and contracted the wild rubella virus during her pregnancy. Her child developed congenital rubella syndrome *in utero* because of the wild rubella virus. The court held that because the child did not receive the vaccine, (and because the vaccine was given to the mother fourteen (14) years before the child was born), the child was not covered by the Vaccine Act. The court finds this case persuasive.

The petitioner cites *Rooks v. Secretary of HHS*, 35 Fed. Cl. 1 (1996) for the proposition that the word "received" should be given a broad interpretation. In *Rooks*, the vaccine-injured child was *in utero* when his mother received a MMR vaccine for a college enrollment requirement. The mother did not know she was one month pregnant at the time of the vaccination. The child was born with cerebral dysgenesis including agenesis of the corpus callosum. The Special Master dismissed the claim and held that the child did not "receive" a vaccine because the mother received the vaccine. The Court of Federal Claims reversed the dismissal and held that an *in utero* child "receives" a vaccine when his mother is vaccinated.

The court agrees with the decision in the *Rooks* case, but the facts and legal impact of *Rooks* are distinguishable from the facts in the case at bar. First and foremost, the *in utero* child in *Rooks* received a vaccine *listed in the Vaccine Injury Table* (MMR), but in the case at bar, Hyper-Tet is not a vaccine listed in the Vaccine Injury Table. Second, in *Rooks*, the chemical/biological components of the MMR vaccine allegedly entered the body of the petitioner/child through his mother, thus establishing a direct exposure to the vaccine, but in this case, the chemical/biological components of the tetanus vaccine did not enter into the body of Mr. Brausewetter. Instead, the components were injected into a third-party. The third-party's body produced tetanus antibodies. Those antibodies were removed from the third-party and placed into a syringe/vial. Finally, the substance was injected into Mr. Brausewetter. Unlike the child in *Rooks*, the petitioner did not have a direct exposure to the vaccine components.

The *Rooks* decision specifically limits its holding to *in utero* children. The court found "that the Act provides for only two ways to be compensated: (1) receipt of a table vaccine or (2) contact with one who has received an oral polio vaccine [OPV]." *Id.* at 9. The court noted that the language *cannot* be expanded, for example, to compensate an injured person who

had contact with one who was injected with the *inactivated* polio vaccine (IPV). *See Staples v. Secretary of HHS*, 30 Fed. Cl. 348 (1994)(mother contracted polio from her child who received a defective Cutter IPV). The court views the *Staples* decision as dispositive. This court does not have the authority to expand the language of the Act. The court views the *Rooks* decision as academic because in the final analysis petitioner's hurdle is the same: he received a vaccine which is not listed in the Vaccine Injury Table.

It is unfortunate that this case must be dismissed. However, this court is obligated to fulfill its congressionally mandated duty. This court is not the apposite forum to include petitioner's vaccine in the Vaccine Injury Table. 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.* Petitioner's only recourse is to file a claim in state court. Accordingly, this petition is DISMISSED with prejudice pursuant to Vaccine Rule 21.[(2)]

In the absence of a motion for review filed pursuant to RCFC, Appendix J, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell

Special Master

1. [1] The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. §§ 300aa-1 *et seq*. (West 1991 & Supp. 1998). Reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

2. The court notes that since this is not a case concerning jurisdiction, as a violation of § 11(a) would be, petitioner's counsel is not barred from receiving attorney's fees and costs.