In the United States Court of Federal Claims

No. 05-10V
(Filed Aug. 8, 2005)
UNPUBLISHED

* *

LAWRENCE JAMES-BEY, ***pro se*****,** *

Petitioner, *

v. *

THE SECRETARY OF HEALTH AND HUMAN RESOURCES, *

Respondent. *

* *

National Childhood Vaccine Act of 1986, 42 U.S.C. §§ 300aa-1 - 34 (2000); statute of limitations; review of special master's decision, 300aa-12(e)(2).

Lawrence James-Bey, Hyattsville, MD, petitioner, *pro se.*

Alexis B. Babcock, Washington, DC, with whom was Assistant Attorney General Peter D. Keisler, for respondent.

ORDER DISMISSING MOTION FOR REVIEW

Before the court is respondent's motion to dismiss a *pro se* petitioner's motion for review for lack of subject matter jurisdiction. The petition for compensation sought relief for what appeared to be an allegation of the transmission of the hepatitis B virus to petitioner during procedural vaccinations while on active duty in the U.S. Army. From this court's understanding of the petition, it was alleged that the virus infection was not caused by the vaccine itself, but by the method used to deliver the vaccine – specifically by a jet gun injector, or "needleless" injector – that had not been sterilized or cleaned between use on each soldier. Respondent argues this court does not have jurisdiction to rule on the matter because (1) the petition for recovery under the National Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1 - 34 (2000) (the "Vaccine Act"), is untimely; and (2) petitioner's claim fails to show an injury caused by any vaccine covered by the Vaccine Act.

PROCEDURAL BACKGROUND

Before seeking redress in this court, Lawrence James-Bey ("petitioner") filed a complaint against the U.S. Army in United States District Court for the District of Columbia on April 16, 2003. He complained of suffering from hepatitis B due to vaccinations administered to him by the Army in 1968. His complaint was dismissed for lack of subject matter jurisdiction under the Feres doctrine ("[T]he Government is not liable . . . for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Feres v. United States, 340 U.S. 135 (1950)). The dismissal was affirmed by the United States Court of Appeals on April 29, 2003.

On January 5, 2005, petitioner filed his complaint with the United States Court of Federal Claims, Office of Special Masters, accompanied by an Application To Proceed *In Forma Pauperis*, alleging the same facts. Petitioner also submitted a second Application To Proceed *In Forma Pauperis* with his Motion for Review, which was filed by leave on June 23, 2005. Petitioner's application is granted solely for the purpose of his Motion for Review.

Petitioner's Motion for Review was received by the Clerk's Office on June 23, 2005, and forwarded to chambers under cover of a Memorandum noting that pursuant to RCFC 7.2, the motion was untimely (due to be filed by May 27, 2005); no copies were attached (RCFC 5.3(d)); the certificate of service asked the Clerk's Office to serve it on respondent (RCFC 5.1); and it refers to an order of May 27, 2005, which is the judgment. The court filed the motion by leave on June 23, 2005, and forwarded a copy to respondent.

Chief Special Master Golkiewicz had dismissed the petition on April 15, 2005 as untimely. The deadline for filing a claim under Section 16(a)(1) of the Vaccine Act for vaccinations received prior to the Act's effective date of October 1, 1988, was February 1, 1991. See Lawrence James-Bey v. Sec'y HHS, No. 05-10V (Fed. Cl. Spec. Mstr. Apr. 15, 2005) (unpubl.) (order dismissing petition for compensation as untimely). The Clerk of the Court entered judgment on May 27, 2005. The Vaccine Act dictates the filing of motions for review with the Court of Federal Claims of a special master's decision no later than thirty days after its issuance. Section 300aa-12(e)(2). Thus, as of the date of filing, petitioner's motion for review was untimely by over thirty days.

DISCUSSION

1. Standard of review

In reviewing Chief Special Master Golkiewicz's order, the Vaccine Act permits the Court of Federal Claims to

> (A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision,
> (B) set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or
> (C) remand the petition to the special master for further action in accordance with the court's direction.

42 U.S.C. § 300aa-12(e)(2) (2004).

Papers filed in court by *pro se* litigants should be treated with leniency. Hughes v. Rowe, 449 U.S. 5, 9 (1980). Courts have "strained our proper role in adversary proceedings to the limit, searching [the record] to see if plaintiff has a cause of action somewhere displayed." Ruderer v. United States, 188 412 F.2d 1285, 1292 (Cl. Ct. 1969). As in this case, *pro se* petitioners mainly benefit upon defense to motions to dismiss for failure to state a claim upon which relief may be granted. However, *pro se* petitioners are not excused from jurisdictional requirements. Kelley v. Sec'y Dep't of Labor, 812 F.2d 1378, 1380 (Fed. Cir. 1987). The party seeking to invoke a court's jurisdiction carries the burden of proof, and is not altered by the failure to procure counsel. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936). The jurisdictional statement must be well-pleaded in the complaint, and "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983). The rules of procedure of the court must be adhered to by litigants regardless of their *pro se* status. See, e.g., Constant v. United States, 929 F.2d 654 (Fed. Cir. 1991). "[T]he fact that [a plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, . . . it does not excuse its failures, if such there be." Henke v. United States, 60 F.3d 795, 799 (Fed. Cir. 1995).

2. Jurisdiction

The Court of Federal Claims derives its power to adjudicate claims from its statutory grant of authority. See Massie v. United States, 226 F.3d 1318, 1321 (Fed. Cir. 2000). Accordingly, proclamations of the court in excess of its jurisdiction are null and void. See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982). In addition, courts must construe jurisdictional statutes narrowly, "with precision and with fidelity to the terms by which Congress has expressed its wishes." Bailey v. West, 160 F.3d 1360, 1363 (Fed. Cir. 1998) (quoting Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968)). The Government is only vulnerable to suit through express waivers of sovereign immunity by legislation, and the "waiver of immunity and creation of jurisdiction must be qualified by

any conditions that Congress has placed on them." Bailey, 160 F.3d at 1363. Moreover, even "[w]hen a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe." Hobbs v. McLean, 117 U.S. 567, 579 (1886).

1) Thirty-day rule

The Federal Circuit ruled in Widdoss v. Sec'y of HHS, 989 F.2d 1170 (Fed. Cir. 1998) that (1) an issuance of the special master's decision unequivocally triggers the thirty-day period in which to file a motion for review in the Court of Federal Claims; 1/ (2) the thirty-day period is jurisdictional; and (3) the Court of Federal Claims has no authority to waive compliance with the thirty-day period through its rules of procedure. The Federal Circuit came to its conclusions through careful study of the text and legislative history behind the Vaccine Act, denying relief to a petitioner who filed her motion for review the special master's decision one day late. Widdoss, 989 F.2d at 1174. Without the filing of a timely motion for review, the Clerk of the Court of Federal Claims is required by statute to enter judgment forthwith. 42 U.S.C. § 300aa-12(e)(3). "If a party does not comply with the thirty-day limit, the clerk's entry of judgment ends the matter." Grimes v. Sec'y of HHS, 988 F.2d 1196, 1198 (Fed. Cir. 1993). The Widdoss court found any delays beyond the statutory limitations would be contrary to the Act's spirit of "speed and reliability[.]" Id. at 1172 (quoting H.R. Rep. No. 908, 99th Cong., 2d Sess. 17 (1986), reprinted in 1986 U.S.C.C.A.N. 6287, 6344, 6358). "No extensions of time under [the thirty-day] rule will be permitted, and failure of a party to timely file such a motion shall constitute a waiver of the right to obtain review." 42 U.S.C. § 300aa-23.

An exception to the thirty-day rule has been recognized "where the movant does not seek review of the merits of the special master's decision, but rather requests correction of an error of the court." Patton v. Sec'y of HHS, 25 F.3d 1021, 1029 (Fed. Cir. 1994). Although a dismissal for lack of subject matter jurisdiction is not adjudication upon the merits, see Scott Aviation v. United States, 953 F.2d 1377 (Fed. Cir. 1992), it is not tantamount to an error (or an amendment of the judgment) within the contemplation of RCFC 60. Petitioner's motion for review is subject to being dismissed as time barred.

1/ The Federal Circuit later reaffirmed the thirty-day period starts to accrue upon the special master's issuance of a decision (as opposed to the date petitioner receives it), and that thirty days is more than sufficient for filing a motion for review. Mahaffey v. Sec'y of HHS, 368 F.3d 1378, 1380 (Fed. Cir. 2004).

2) Statute of repose/equitable tolling

The court offers the following discussion in order to provide a full explication of the jurisdictional impediments to further consideration of petitioner's claim. Petitioner was required to file his petition no later than February 1, 1991. As the Vaccine Act states,

> [N]o petition may be filed under the Program for . . . injury or death after the expiration of 28 months after October 1, 1988, and no such petition may be filed if the first symptom or manifestation of onset of the significant aggravation of . . . injury occurred more than 36 months after the date of administration of the vaccine.

42 U.S.C. § 300aa-16(a)(1). Although the Federal Circuit has been stringent in ruling section 16(a) a statute of repose barring equitable tolling, Brice v. Sec'y of HHS, 240 F.3d 1367 (Fed. Cir. 2001); Weddel v. Sec'y of HHS, 100 F.3d 929 (Fed. Cir. 1996), doing so "provides claimants with certainty and in no way reduces the generosity of the program or speed with which the claims are adjudicated." Id. at 932.

As compelling as the personal circumstances that lead to cases filed under the Vaccine Act may be, "the federal courts must 'assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual pleas of litigants.'" Iacono v. OPM, 974 F.2d1326, 1328 (Fed. Cir. 1992) (quoting OPM v. Richmond, 496 U.S. 414, 428 (1990)). "Congress noted that 'much of the equity in limiting compensation and limiting other remedies arises from the speed and reliability with which the petitioner can expect judgment.' H.R. Rep No. 99-908, at 17, reprinted in 1986 U.S.C.C.A.N. at 6358. To allow equitable tolling would conflict with these principles." Brice, 240 F.3d at 1373. Time bars are "condition[s] of waiver of sovereign immunity[,]" Caguas Cent. Fed. Savings Bank v. United States, 215 F.3d 1304, 1310 (Fed. Cir. 2000), and we only have jurisdiction to "the extent to which the United States has waived its sovereign immunity." Inter-Coastal Xpress, Inc. v. United States, 296 F.3d 1357, 1365-66 (Fed. Cir. 2002) (internal citation omitted).

Recently, the Court of Federal Claims has found a distinction between the "first symptom" and the "manifestation of onset" language in section 16(a), construing the phrases as two separate standards in determining the date of accrual to justify their finding of jurisdiction in cases where the petitions would otherwise be deemed untimely filed. Setnes v. United States, 57 Fed. Cl. 175 (2003); Lemire v. Sec'y of HHS, 60 Fed. Cl. 75 (2004) (applying and following Setnes). Specifically, "[w]here there is no clear start to the injury, such as in cases involving autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on the 'occurrence of the first symptom.'" Setnes, 57 Fed.

Cl. at 179. The court need not address whether it should adhere to the new "manifestation of onset" standard, 2/ nor whether petitioner's situation falls under it, because jurisdiction is lacking for yet another reason.

3) Civil action election

In addition to time bars, the Vaccine Act also prohibits a petitioner from entering the statutory compensation Program if he "brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988[.]" 42 U.S.C. § 300aa-11(a)(6). The Federal Circuit has held that a petitioner, by filing a civil action after November 15, 1988, "is deemed to have elected the civil action as her remedy[.]" Salceda v. Sec'y of HHS, 70 F.3d 608, 609 (Fed. Cir. 1995). Therefore, petitioner's previous action filed in federal district court forecloses a petition under the Vaccine Act.

3. Failure to state a claim

Notwithstanding the jurisdictional impediments, respondent also contends that petitioner fails to carry his burden to demonstrate subject matter jurisdiction under the Vaccine Act. Because compensation is only available for injuries caused by specific vaccines under the Act, 42 U.S.C. § 300aa-11(b)(1)(A), petitioner was required to allege one of the vaccines itself, rather than the method used to vaccinate, that caused the contraction of hepatitis. "Among the vaccines administered to him in December 1968, petitioner failed to specify a particular vaccine as the alleged cause of his injury. Some of the vaccines that appear to have been administered at that time are not covered by the Vaccine Act." Resp.'s Br. filed July 14, 2005, at 3. Because Congress did not waive sovereign immunity under the Vaccine Act to claims such as petitioner's, the Office of Special Masters could not have entertained plaintiff's claim, had it been timely.

Petitioner has also alleged that his rights under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution have been violated. In order to bring a cause of action to the Court of Federal Claims, a petitioner must "identify a . . . source of substantive law that creates the right to money damages." Fisher v. United States, 364 F.3d 1372, 1376 (Fed. Cir. 2004). The court cannot discern how the petitioner's implicated Eighth Amendment rights apply, and as the "due process clause does not obligate the government to pay money

---

2/ The Court of Federal Claims is presently awaiting the resolution of an omnibus proceeding involving a number of autism cases where the Federal Circuit will ultimately rule on the acceptability of the Setnes standard.

damages[,]" Collins v. United States, 67 F.3d 284, 288 (Fed. Cir. 1995), jurisdiction is lacking over violations of Fifth and Fourteenth Amendment rights except for allegations of illegal extractions. Casa de Cambigo Comdiv S.A., de C.V. v. United States, 291 F.3d 1356, 1363 (Fed. Cir. 2002). Moreover, "where the court has no jurisdiction, it has no power to do anything but strike the case from its docket." Johns-Manville Corp. v. United States, 893 F.2d 324, 327 (Fed. Cir. 1989).

CONCLUSION

Accordingly, based on the foregoing, the Clerk of the Court shall dismiss petitioner's motion for review as time barred. The judgment entered dismissing the complaint pursuant to Vaccine Rule 11(a) shall stand.

IT IS SO ORDERED.

No costs on review.

s/ Christine O.C. Miller

____

Christine Odell Cook Miller
Judge