

In the United States Court of Federal Claims

**No. 01-105V
(Filed: July 3, 2002)**

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**AMY NICOLE MELTON,
on behalf of her daughter,
BRITTANY NICOLE MELTON,
a minor,**

Petitioner,

v.

**SECRETARY OF HEALTH and
HUMAN SERVICES,**

Respondent.

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OPINION

This matter comes before the court on plaintiff Amy Nicole Melton’s motion, on behalf of her daughter Brittany, for review of the Special Master’s January 25, 2002 decision dismissing her petition for compensation under the National Vaccine Injury Compensation Act, 42 U.S.C. § 300 aa-10–aa-23 (“Vaccine Act” or “Act”). Plaintiff argues that the Special Master erred when she held that a child cannot “receive” a vaccine in utero within the meaning of the Vaccine Act. Defendant Secretary of Health and Human Services (“government”) argues in response that, with the single exception of the oral polio vaccine, the Vaccine Act provides compensation only for the person who directly received a vaccine identified on the Vaccine Injury Table (“Table”), and therefore, the Special Master’s decision should be upheld because Brittany Melton was not the

person who “received” the vaccine. According to the government, only Brittany’s mother “received” the vaccine. For the following reasons, this court finds that under the Vaccine Act, persons who can establish that they in fact “received” the vaccine while in utero may seek to establish that they suffered vaccine-related injuries. Therefore the case is hereby **REMANDED** to provide plaintiffs with the opportunity to establish that Brittany did, in fact, receive the MMR vaccination in utero, and if so, that the MMR vaccination was the cause-in-fact of Brittany’s neurological and developmental abnormalities.

Facts

The following facts are not contested. On June 20, 1997, Ms. Melton, Brittany’s mother, was given a measles, mumps, rubella (“MMR”) vaccination, at which time she was unaware of her pregnancy. Immediately after discovering her pregnancy, Ms. Melton revealed to her attending physician, Dr. Tawfik Ramadan, that she had been given an MMR vaccination. At that time, her doctor advised against terminating the pregnancy. A specialist was then consulted, Dr. John Siegle, who also advised against terminating the pregnancy.

On March 2, 1998, Brittany was born at Valley View Regional Hospital in Ada, Oklahoma. Brittany’s birth was induced, due to suspected intrauterine growth retardation. On June 12, 1998, Ms. Melton took Brittany to the Children’s Outreach Center in Ada, Oklahoma to be treated for coughing and congestion. There, a nurse practitioner noticed that Brittany’s arms would bend at the elbows but did not move upward. She also noticed that Brittany suffered from decreased muscle tone, a flaccid right leg, questionable body alignment, abnormal foot alignment, and had a tendency to hold her head to the right. Ms. Melton contends that this is the date when the first medical professional formally recognized Brittany’s abnormalities.

Brittany was the subject of numerous medical examinations over the next couple of years. On February 8, 1999, Dr. Siegler, of the Child Neurology Clinic at the Children's Medical Center in Tulsa, Oklahoma, reported:

Mom's other concern is regarding an MMR that she received during pregnancy. Although Brittany has microcephaly and global developmental delay, she has a report of normal ophthalmologic findings and no evidence of intracranial calcifications on CT; and therefore, it is unlikely that she manifests congenital Rubella syndrome. The literature suggests that MMR is quite safe to receive during pregnancy. There are reports of spontaneous abortion of fetuses in women who have received the immunization, although there are also reports of children having been born without problems to moms who have received the immunization.

In another examination, on May 4, 2000, Dr. Yuval Shafir, child neurologist at Children's Hospital of Oklahoma, reported:

The only obvious prenatal insult that I can find in her history is the administration of MMR vaccine at six weeks of pregnancy. Obviously, Brittany does not have the typical rubella syndrome, but it is still possible that mild infection with recovery caused damage to the early development of the brain, and the continuation of abnormal development after that.

On February 28, 2001, Ms. Melton filed a petition for compensation with the Office of Special Masters, contending that the MMR vaccine that she was given early in her pregnancy was the cause-in-fact of Brittany's neurological and physical injuries. On January 25, 2002, Special Master Millman dismissed the petition, holding that Brittany was not a person who "received" the vaccine under the Vaccine Act and, therefore, Brittany could not pursue a claim under the Act.

On February 22, 2002, Ms. Melton filed a motion for review of the Special Master's decision in this court. The motion was fully briefed, and oral argument was held on May 31, 2002.

Discussion

The sole issue before the court at this juncture is whether, as a matter of law, a child can “receive” a vaccine in utero under the Vaccine Act. Because this is a legal issue of statutory interpretation, this court reviews the Special Master’s decision de novo. See Neher v. Sec’y of Health & Human Servs., 984 F.2d 1195, 1198 (Fed. Cir. 1993) (quoting Munn v. Sec’y of Health & Human Servs., 970 F.2d 863, 870 n.10). This issue has been the subject of extensive analysis by Judge Moody R. Tidwell in Rooks v. Sec’y of Health & Human Servs., 35 Fed. Cl. 1 (1996), and by several Special Masters. See generally Di Roma v. Sec’y of Health & Human Servs., 1993 WL 496981 (Fed. Cl. 1993); Burch v. Sec’y of Health & Human Servs., 2001 WL 180129 (Fed. Cl. 2001). The court has reviewed all of these decisions, and for the reasons that follow, the court finds that Judge Tidwell has the better view, and therefore his reasoning should be followed in this case.¹

The government argues that Brittany did not “receive” the vaccine because it was not administered directly to her. According to the government, except for a special category of polio cases, the only persons who may sue under the Vaccine Act are those to whom the vaccine was administered directly. The government contends that the polio vaccine exception (which allows recovery for secondary exposure) proves that Congress only contemplated that there could be one vaccine recipient for each vaccine administration. The government argues that the polio exception is the only situation where Congress provided recovery to those to whom the vaccine

¹ While the court prefers to apply the analysis of Judge Tidwell’s decision to the facts of this case, the court does not accept plaintiff’s argument that the decisions of the U.S. Court of Federal Claims (“COFC”) are binding precedent on all Special Masters for all of their cases. While the decisions of the COFC judges should be given considerable deference by the Special Masters, they are not binding precedent.

was not administered directly.

Based on Judge Tidwell's reasoning in Rooks, the plaintiff argues that, in the unique circumstance of a pregnancy, it is possible for two persons to be the direct recipients of a vaccine. More specifically, Judge Tidwell held that if the vaccine in fact entered the fetus' system, then both the mother and the fetus were direct vaccine "recipients." Rooks, 35 Fed. Cl. at 6. The court finds this argument convincing and adopts Judge Tidwell's reasoning on this issue as her own. See id. at 5-11.

Because this court has determined that the Vaccine Act provides that a child who actually receives a vaccine in utero may state a claim, the case must be remanded to allow the child the opportunity to establish factually that she, in fact, received the vaccine, and therefore, qualifies for compensation under the Vaccine Act. If she can do so, she must further establish that her non-Table injuries were caused by the MMR vaccine. The plaintiff recognizes that this will be a very difficult task, but at this stage of the proceedings, plaintiff must be given the opportunity to try.

The government argues that it is ambiguous whether a child "receives" a vaccine in utero, and therefore, under the principles of sovereign immunity, the court should only allow a narrow interpretation of the term "receive" and leave it to Congress to decide. The court finds this argument unpersuasive. The Vaccine Act is an express waiver by Congress of the United States' immunity from suit by "any person who has sustained a vaccine-related injury." 42 U.S.C. § 300aa-11(b)(1)(A). The court may not assume the authority to extend or narrow Congress' waiver. Jones v. Brown, 41 F.3d 634, 638

(1994) (citing United States v. Kubrick, 444 U.S. 111, 117-18 (1979)). When interpreting a statute, however, the court first looks to the plain meaning of the language of the Act. See Jones, 41 F.3d at 637. In interpreting the language of this Act, the court finds that allowing a child the opportunity to prove that she “received” a vaccine in utero does not extend the suit beyond the scope of the sovereign immunity waiver. The court is not presented with a situation in which it is completely infeasible that the plaintiff suffers from vaccine-related injuries. Rather, if the plaintiff is successful in proving factually that she “received” the vaccine in utero, and therefore suffers from a vaccine-related injury, she is well within the class of claimants eligible to sue the government for compensation under the Vaccine Act. The court, therefore, is not expanding the waiver of sovereign immunity if Brittany can, in fact, prove that she “received” the MMR vaccine and that her injuries are a direct result of that receipt.

In a similar vein, Special Master Millman relied on the maxim “*expressio unius est exclusio alterius*” (the expression of one thing is the exclusion of another) to suggest that, “[i]f Congress had intended that anyone upon whom a vaccine had an impact was covered under the Program’s requirement that he or she ‘received a vaccine,’ Congress would not have enacted the ‘exception’ for receipt in contact cases of oral polio.” Again, the court finds this logic unpersuasive. The plain language of the Act expresses that “any person that sustains a vaccine-related injury” may file a petition for compensation under the Vaccine Act. 42 U.S.C. § 300aa-11(b)(1)(A). If Brittany can prove that she, in fact,

suffers from vaccine-related injuries, she may pursue a petition for compensation under the Act.

Conclusion

The court **VACATES** the Special Master's January 25, 2002 decision, dismissing the plaintiff's petition for compensation. The case is **REMANDED** to the Special Master for further proceedings consistent with this opinion.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge