

OFFICE OF SPECIAL MASTERS

No. 03-1337V

Filed: January 18, 2006

\*\*\*\*\*

REINALDO ZAVALA \*
and VELEZ CARAZO, \*
legal representatives of a minor child \*
KARINA NAHOMI ZAVALA VELEZ, \*

Petitioners, \*

UNPUBLISHED

v. \*

SECRETARY OF THE DEPARTMENT \*
OF HEALTH AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

DECISION<sup>1</sup>

On June 4, 2003, petitioners, Reinaldo Zavala and Sonia Velez Carazo, as legal representatives of their minor child, Karina Nahomi Zavala Velez ("Karina"), filed a petition pursuant to the National Vaccine Injury Compensation Program<sup>2</sup> ("the Act" or "the Program"). The petition alleges that Karina suffered "hiptonic [sic] reaction[s]" following the acellular

<sup>1</sup>Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days 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 will be available to the public. Id.

<sup>2</sup> The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. §§ 300aa-10 et seq. (West 1991 & Supp. 2002) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

diphtheria-pertussis-tetanus [sic]" ("DPT") vaccines she received on December 9, 1999, February 5, 2000, and April 8, 2000. Petition ("Pet.") at 1-3.<sup>3</sup> The petition also states that "[p]etitioners had filed a prior civil action for Karina's injuries, but such action was voluntary [sic] [dismissed]." *Id.* at 5. On June 24, 2005, petitioners filed the state court of Puerto Rico judgment regarding the dismissal of their civil action. *See* Motion to Comply With Order, filed June 24, 2005. The state court judgment dismissed petitioners' civil case due to lack of jurisdiction on "11 de junio de 2003" (June 11, 2003), which was seven days after the filing of the Vaccine petition. *Id.* at 2. On July 5, 2005, respondent filed a Rule 4(b) Report contesting the sufficiency of the evidence and recommending that compensation be denied. Respondent's Report ("R. Report"), filed July 5, 2005.<sup>4</sup>

On July 18, 2005, respondent filed a Supplemental Rule 4(b) Report and Motion to Dismiss. *See* Respondent's Supplemental Rule 4(b) Report and Motion to Dismiss ("Supp. Report"), filed July 18, 2005. The supplemental report addressed the information filed by petitioners' counsel on June 24, 2005, regarding petitioners' prior civil action. *See id.* at 3-5. Based on this new information and previously filed documents, respondent moved the undersigned for an order dismissing the petition because petitioners had a pending civil action when they filed their petition, which is prohibited under the Act. *Id.* at 5; *see also* § 300aa-11(a)(5)(B).

On August 9, 2005, the undersigned issued an Order requesting that petitioners' counsel contact the court to schedule a status conference to discuss the matter. *See* Order, filed Aug. 9, 2005. Petitioners' counsel did not respond to this Order. Accordingly, on August 25, 2005, the undersigned issued an Order to Show Cause why this case should not be dismissed. *See* Order, filed Aug. 25, 2005. On October 3, 2005, petitioners' counsel filed a response to the Order to Show Cause. *See* Motion Showing Cause ("P. Response"), filed Oct. 3, 2005. On October 14, 2005, respondent filed a response to petitioners' Motion Showing Cause. *See* Respondent's

---

<sup>3</sup>In respondent's Rule 4(b) Report, respondent notes that, contrary to the petition, two of Karina's vaccination records suggest that she received the DTaP vaccine, as an "a" is written next to "DTP." Further, subsequent exhibits specifically state that Karina received the DTaP vaccine. Thus, respondent assumes that Karina received the DTaP vaccine, as the acellular pertussis vaccine was recommended for use at the time Karina received the vaccinations. R. Report at 2 n.4. This factual discrepancy is not relevant to the jurisdictional issue at hand.

<sup>4</sup>Respondent's Rule 4(b) Report notes that the petition and subsequently filed exhibits state that petitioners had previously filed a civil action that was dismissed. Respondent states that he requested confirmation of this dismissal, and specifically requested the state court order dismissing the case in a letter, dated October 31, 2003; at status conferences on January 18, 2005 and June 3, 2005; and in a status report filed on March 4, 2005. However, the state court order dismissing petitioners civil action was not received by respondent until "too late to be comprehensively reviewed and addressed" in the July 5, 2005 Rule 4(b) Report. R. Report at 1 n.1.

Response to Petitioners' Motion Showing Cause ("R. Reply"), filed Oct. 14, 2005.

In petitioners' response to the Show Cause Order, petitioners argue that "[a]ccording to state law, when there is no jurisdiction, the local courts cannot proceed with the case. Therefore the local action cannot be considered as a 'pending' claim under the [Vaccine Act]." P. Response at 1-2. Thus, as their claim was dismissed from the Superior Court of the Commonwealth of Puerto Rico "because of lack of jurisdiction" on June 11, 2003, petitioners contend that their civil action was not "pending" at the time they filed their Vaccine Act petition on June 4, 2003. *Id.* at 1-2. To the contrary, respondent maintains that petitioners had a pending civil action when they filed their Vaccine Act petition, and thus the petition must be dismissed as it contravenes § 300aa-11(a)(5)(B) of the Act. R. Reply at 1. Accordingly, the issue to be resolved is whether petitioners had a "pending civil action" as defined by the Act at the time they filed their petition in the Vaccine Program.

To resolve this issue requires a quick overview of the relevant statutory provisions. Section 11(a)(2)(A) of the Vaccine Act establishes that no "civil action for damages in an amount greater than \$1,000 or in an unspecified amount against a vaccine administrator or manufacturer" may be brought in a State or Federal court for a vaccine-related injury or death unless and until the moving party complies with the Vaccine Act. *Id.* If a case is improperly filed in violation of § 11(a)(2)(A), section 11(a)(2)(B) provides a remedy. Specifically, it states in relevant part that: "If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action." 42 U.S.C. § 300aa-11(a)(2)(B). The dismissed petitioner is then given the benefit of the dismissed action's filing date for statute of limitations purposes and, further, given one year from the date of the dismissal to file a petition under the Vaccine Act. *Id.* Also relevant to the inquiry are sections 11(a)(5)(A) and (B). While under the original version of the Act, as enacted in 1986, sections 11(a)(5)(A) and (B) applied to cases filed before the effective date of the Act, so-called "pre-Act" cases, the Court of Appeals for the Federal Circuit has found that under the amended version of the statute, *see* Budget Reconciliation Act of 1989, Pub.L. No. 101-239, § 6601 (c)(3)(B), 103 Stat. 2106, 2285, these sections apply equally to cases administered after the effective date of the Act, post-October 1, 1988, or so called "post-Act," cases.

The Federal Circuit dealt with the pendency of a claim issue in Flowers v. Secretary of HHS, 49 F.3d 1558, 1560 (Fed. Cir. 1995). In Flowers, petitioner filed her Vaccine Act petition on April 2, 1992, while she had a civil action for damages pending in state court for the same vaccine-related death. The Special Master held that § 300aa-11(a)(5)(B) precluded the court's jurisdiction over petitioner's petition. Flowers, No. 92-239V, slip op. at 4 (Fed. Cl. Spec. Mstr. Feb. 7, 1994). The Court of Federal Claims denied petitioner's motion for review of the Special Master's order and affirmed the dismissal of her Vaccine Act petition.

On appeal before the Federal Circuit, the Court looked at the amended version of § 11(a)(5) of the Vaccine Act. It reads:

(A) A plaintiff who on October 1, 1988, has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after October 1, 1988, or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section for such injury or death.

(B) If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death.

Flowers, 49 F.3d at 1560, citing 42 U.S.C. § 300aa-11(a)(5)(B) (Supp. V 1993). The Federal Circuit determined that “[p]lainly read,” § 300aa-11(a)(5)(B) precluded petitioner from filing a Vaccine Act petition. Flowers, 49 F.3d 1558, 1560 (Fed. Cir. 1995). Petitioner, however, argued that “the Court of Federal Claims failed to act in accordance with the law by basing its holding on the plain meaning of the statute to the exclusion of a consideration of its legislative history.” Id. Accordingly, while recognizing that looking behind the plain language of a statute in search of a possible contrary congressional intent is a “‘step to be taken cautiously even under the best of circumstances’,” the Federal Circuit looked at the legislative history behind § 11(a)(5)(B). Id. at 1561, quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982).

The Federal Circuit explained that in the original, 1986 version of the Vaccine Act, sections 11(a)(5)(A) and (B) applied to a distinct class of pre-Act cases. Flowers, 49 F.3d at 1560. In pertinent part, the original version of the Act stated:

(A) A plaintiff who on the effective date of the this subtitle has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after the effective date of this title or before judgment, whichever occurs first, elect to withdraw such action without prejudice and file a petition under subsection (b) for such injury or death.

(B) If a plaintiff **who on the effective date of this subtitle** had pending a civil action for damages for a vaccine-related injury or death **does not withdraw the action under subparagraph (A)**, such person may not file a petition under subsection (b) for such injury or death.

Id., citing Pub.L. No. 99-660, tit. III, § 2111(a)(5), 100 Stat. 3755, 3759 (codified at 42 U.S.C. § 300aa-11(a)(5) (1988) (effective Oct. 1, 1988)) (emphasis added). In reading these two paragraphs, the Federal Circuit had instructed in a prior case that:

One way to make sense of these two paragraphs is to read them in reverse – (a)(5)(B) states a general rule barring compensation under the Act if a civil suit has been earlier initiated and is pending **on the effective date of the Act** (this is the way the Court of Federal Claims reads it); (a)(5)(A) states an exception if the suit is promptly terminated (within two years of the effective date of the Act)

before judgment.

Amendola v. Secretary of HHS, 989 F.2d 1180, 1183 (Fed. Cir. 1993) (emphasis in original). However, when Congress amended 11(a)(5) in 1989, it deleted the language from 11(a)(5)(B), which required that the civil action be pending on the effective date of the Act. Flowers, 49 F.3d at 1560-61, citing Budget Reconciliation Act of 1989, Pub.L. No. 101-239, § 6601 (c)(3)(B), 103 Stat. 2106, 2285. The Court explained that Congress expressed that its primary intent for this amendment was “to ‘provide [ ] technical clarification of the ability of a petitioner with a civil court action pending to enter the compensation system.’” Flowers, 49 F.3d at 1561, quoting H.R. Rep. No. 247, 101st Cong., 1st Sess. 511 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2237. Specifically, Congress sought “to ‘clarif[y] that a plaintiff in such an action whose action is still pending may **not** enter the compensation system.’” Id. (emphasis added). Thus, Congress expanded the exclusionary scope of 11(a)(5)(B) to include all case involving a co-pending civil action, not merely those with a civil action pending on October 1, 1988. Flowers, 49 F.3d at 1561.

The Flowers Court found that the legislative history surrounding the 1989 amendment of 11(a)(5)(B) revealed no evidence that Congress intended the amended statute to include only cases involving a civil action pending on October 1, 1988 that had not been withdrawn before filing a Vaccine Act petition. Id. at 1561. The Court stated:

The amended statute excluded not only language concerning the time specified for the civil action, but also language concerning withdrawal of such action pursuant to paragraph (A). In view of the unrestricted language of amended paragraph (B), one could reasonably conclude that Congress ultimately thought it necessary to address co-pendency concerns beyond the single class of pre-enactment cases.

Id. The Court went on to note that by expanding § 300aa-11(a)(5)(B) to include post-Act cases, the 1989 amendment disturbed the “logic of [the] structure” of the original statute in which § 300aa-11(a)(2)-(5) applied to only pre-Act cases. Id. The Court acknowledged that this “structural anomaly might have provided persuasive support for an interpretation limiting the reach of § 300aa-11(a)(5)(B) in spite of the breadth of the statutory language.” Id. However, the Court concluded that it found “no such evidence” and thus determined that it “must construe § 300aa-11(a)(5)(B) according to its plain meaning to prohibit the filing of **any Vaccine Act petition in which the petitioner has a co-pending civil action**, irrespective of the date of that co-pendency.” Id. (emphasis added). Thus, holding that § 300aa-11(a)(5)(B) applies to both pre- and post-Act cases, the Court dismissed petitioner’s petition due to lack of jurisdiction. Id. at 1562.

Under the Vaccine Act, “the jurisdiction of the Court of Federal Claims is determined at the time of filing” the petition. Matos v. Secretary of HHS, 35 F.3d 1549, 1553 (Fed. Cir. 1994). In the case before us, petitioners filed a civil action in the Superior Court of the Commonwealth of Puerto Rico on September 21, 2001, alleging a vaccine-related injury against the doctors who administered Karina’s vaccinations. P. Ex. 6-7 at 12. On June 4, 2003, petitioners filed a

petition for compensation in the Court of Federal Claims for compensation under the Vaccine Act. Subsequently, petitioners' civil action was dismissed on June 11, 2003. Petitioners argue that their civil action was not "pending" at the time they filed their Vaccine Act petition, because "when there is no jurisdiction, the local courts cannot proceed with the case." P. Response at 2.

The word "pending" is commonly defined as "not yet decided or settled; awaiting conclusion or confirmation." THE AMERICAN HERITAGE DICTIONARY 917 (2nd College ed. 1985). The United States Court of Federal Claims has held that "The term 'pending' means awaiting action, and any action that has not been formally dismissed is awaiting action." Hamilton v. Secretary of HHS, 28 Fed. Cl. 315, 318 (1993), citing Carlson v. Secretary of HHS, 23 Cl. Ct. 788, 791 (1991). Petitioners acknowledge that the Superior Court of Puerto Rico dismissed their case without prejudice because of lack of jurisdiction on June 11, 2003. See P. Response at 1. Accordingly, prior to the dismissal on June 11, the civil action was "awaiting action," and thus was pending, before the Superior Court. The very fact that the Superior Court issued a dismissal, or acted on the case, is proof that the case was awaiting action or a concluding event and thus, prior to that concluding event, was pending before the Superior Court.

Moreover, respondent notes that, "petitioners cite no law, either statutory or jurisprudential, for the proposition that a civil action that is ultimately deemed to lack a jurisdictional basis is not pending in the court where it is filed prior to its final disposition by the court." R. Reply at 2. Similarly, the undersigned is unable to find practical or legal support for petitioners' argument. In addition, there is no language in the statute or legislative history indicating that "pending" means anything other than the common dictionary definition of "awaiting conclusion or confirmation." Here, this conclusion or confirmation came in the form of a dismissal order from the state court; unfortunately, however, this dismissal did not occur until after petitioners had filed their Vaccine Act petition. As such, the undersigned finds that petitioners' civil action was in fact "pending" as prohibited by the Act at the time they filed their petition in the Vaccine Program.

Thus, in accordance with binding Federal Circuit precedent, the undersigned has no choice but to dismiss this case for lack of jurisdiction, as petitioners had a civil case pending in the Superior Court of Puerto Rico when they filed a petition for compensation under the Vaccine Act on June 4, 2003. The Clerk is directed to enter judgment accordingly.

**IT IS SO ORDERED.**

---

Gary J. Golkiewicz  
Chief Special Master