OFFICE OF SPECIAL MASTERS

No. 04-1683V

(Filed: July 26, 2005)

SARAH J. MORRISON,	
Petitioner,	
v.	**TO BE PUBLISHED**
SECRETARY OF HEALTH AND HUMAN SERVICES,	
Respondent.	

Brian Wilson, Canton, Ohio, appeared for petitioner.

Ann Donohue, U.S. Department of Justice, Washington, D.C., appeared for respondent.

DECISION[1]

HASTINGS, ***Special Master***.

[1]This document constitutes my final "decision" in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of this Court shall enter judgment in accord with this decision.

Because this document contains a reasoned explanation for my action in this case, I intend to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, 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, this entire document will be available to the public. *Id.*

This is an action in which the petitioner seeks an award under the National Vaccine Injury Compensation Program (hereinafter "the Program--see 42 U.S.C. § 300aa-10 *et seq.*[2]). On February 8, 2005, the respondent filed a motion to dismiss this petition (hereinafter "Mot."). Because I conclude that the vaccination in question is one that is not found in the Vaccine Injury Table, I grant the respondent's motion, and dismiss the petition.

II

BACKGROUND

A. The petitioner's claim

On November 11, 2004, the petitioner filed this petition (hereinafter "Pet.") seeking an award under the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act" or "Act"). Specifically, Ms. Morrison alleges that she suffered injuries as the result of receiving a "pneumococcal conjugate vaccine" administered on December 19, 2002. (Pet. at 1, 2.) On February 8, 2005, the respondent moved to dismiss the petition, arguing that the vaccine that petitioner alleges to have injured her is not covered by the Vaccine Injury Table ("the Table"), and that, therefore, this court lacks jurisdiction over this petition. See § 300aa-11(c)(1)(A). The petitioner filed no response.

B. Applicable statutory provision

Under the Program, compensation awards are made to individuals who have suffered injuries after receiving certain vaccines listed in the Table. The Table was originally established by statute in § 300aa-14(a), and has since been modified administratively, as provided by § 300aa-14(c) and (e)(2). These administrative modifications appear in the Federal Register.

"Pneumococcal conjugate vaccines" were added to the Table in a notice promulgated on May 22, 2001. 66 Fed. Reg. 28,166-01, 2001 WL 535250 (May 22, 2001). That notice stated, in relevant part:

> * * * Through this notice, pneumococcal conjugate vaccines are now included as covered vaccines under Category XIII of the Table. Because the CDC only recommended pneumococcal conjugate vaccines to the Secretary for routine administration to children, **polysaccharide-type pneumococcal vaccines** are not covered under the VICP or included on the Table. * * *

(emphasis added).

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[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2000 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2000 ed.). I will also sometimes refer to the Act of Congress that created the Program as the "Vaccine Act."

Therefore, the relevant factual issue in this case is whether the petitioner was vaccinated with a "pneumococcal conjugate vaccine," which was included on the Table by the notice set forth above, or one of the polysaccharide-type pneumococcal vaccines, which, as the notice also indicates, are not found in the Table.

III

DISCUSSION

The petition claims that Ms. Morrison was injured by a "pneumococcal conjugate vaccine," administered on December 19, 2002, (Pet. at 1.) However, as respondent argues, the record of this case indicates that the vaccine that petitioner received on that day was not a "pneumococcal conjugate vaccine, as that term is used in the relevant regulation, and thus was not a vaccine covered by the Program.

Exhibit 2, filed with the petition, at page 39, contains a notation by the petitioner's treating physician, Dr. Jin Chae. Dr. Chae appears to have written that he administered to petitioner a "Pneumo vac" vaccination on December 19, 2002. Also, on January 4, 2005, Dr. Chae wrote a letter to petitioner's counsel stating "I am confirming that Sarah Morrison received a dose of pneumonia vaccine (Pneumovac, Vendor: MSD) on Dec. 19, 2002. We have never had any pneumonia vaccine for pediatric use." (Mot. Ex. C.)

It is not clear exactly what Dr. Chae meant by a "Pneumovac" or "Pneumo vac" vaccine. Was the vaccine given to petitioner a "pneumococcal conjugate vaccine," or, instead, a "polysaccharide-type" pneumococcal vaccine? Respondent's motion was accompanied by documents indicating that while a "pneumococcal conjugate vaccine" is distributed under the brand name "Prevnar," a polysaccharide-type pneumoccal vaccine, on the other hand, is distributed under the brand name "Pneumovax." (Mot. Exs. A, B.) Therefore, when Dr. Chae in his letter referred to the "Pneumovac" vaccine, he likely was referring to the "Pneumovax" vaccine, a polysaccharide-type vaccine, rather than the pneumococcal conjugate vaccine known as "Prevnar." See specifically the excerpt from the Physician's Desk Reference submitted by respondent, which describes each dose of the "Pneumovax 23" vaccine as containing "25 µg of each *polysaccharide type* dissolved in isotonic saline solution containing .25% phenol as preservative." (Mot. Ex. B., p. 1, emphasis added.)

Therefore, the evidence filed in this case indicates that the vaccination that petitioner received was a "Pneumovax" vaccine, which is a polysaccharide-type vaccine, and therefore is *specifically excluded* from the Vaccine Injury Table by the regulation cited above.

Further, in order to make sure that the vaccine received by petitioner was indeed a "Pneumovax" vaccine, on May 24, 2005, I issued an Order stating that --

> * * * unless the petitioner files a response by June 24, 2005, I will assume that she received a Pneumovax vaccine. Further, if I determine that, as the respondent contends, the Pneumovax vaccine is a polysaccharide-type pneumococcal vaccine not listed on the Vaccine Injury Table, I will have no choice but to grant the respondent's motion and dismiss the petition.

The petitioner did not file a response, apparently conceding that the vaccine in question was a "Pneumovax" vaccine.

Accordingly, for the reasons set forth above, I conclude that petitioner received a Pneumovax vaccine, which is a polysaccharide-type pneumococcal vaccine, and, thus, is not covered by the Vaccine Injury Table.[3]

IV

CONCLUSION

For the foregoing reasons, the respondent's motion is hereby GRANTED, and this petition is DISMISSED.

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George L. Hastings, Jr.
Special Master

[3]See also *Finley v. HHS*, No. 04-874V, 2004 WL 2059490 (Fed. Cl. Spec. Mstr. Aug. 24, 2004) (dismissing case because the petitioner received a "Pneumovax 23" vaccine, a polysaccharide pneumococcal vaccine not covered under the Vaccine Injury Compensation Program).