

OFFICE OF SPECIAL MASTERS

January 25, 2002

No. 01-105V

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

Petitioner, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

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PUBLISHED

**Millman, Special Master**

**DECISION**

Petitioner filed a petition dated February 28, 2001, under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10 et seq., alleging that her daughter Brittany Nichole Melton (hereinafter “Brittany”) suffered microcephaly and developmental delay after her birth on March 2, 1998 due to the effects of a measles, mumps, rubella (MMR) vaccination that her mother received on June 20, 1997 while Brittany was in utero.

Respondent moved to dismiss on two grounds: (1) that the Vaccine Act was not intended to include individuals in utero as vaccine recipients, and (2) that petitioner filed her petition after the statute of limitations had run since the first manifestation or onset of her alleged injury was before Brittany was born. Petitioner objects to respondent's motion, stating that (1) the fetus received the vaccine just as if she had been directly vaccinated, and (2) no one detected her injury until after she was born.

## **DISCUSSION**

The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S. 310 (1986); Edgar v. Secretary of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Secretary of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Secretary of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Secretary of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of sovereign immunity was beyond the authority of the court). A court may not expand on the waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991).

Petitioner alleges that the MMR vaccination she received when she was eight weeks pregnant with Brittany on June 20, 1997 caused Brittany's neurologic abnormalities by causing brain malformation directly or by causing a mild infection which caused brain malformation. Pet. at 4. Since, petitioner asserts, no one could have seen Brittany's neurologic abnormalities until after she was born March 2, 1998, she should have 36 months after birth to file her petition.

Respondent counters by stating that there were signs of intrauterine growth retardation and other disturbing results of fetal testing before Brittany was born, prompting a suggestion of abortion. Therefore,

respondent asserts, the first onset or manifestation of Brittany’s alleged injury was before she was born, and the petition was filed too late. The question of the statute of limitations, although involving a question of fact as to first onset or manifestation of injury, need not detain us here because the primary question is whether Congress intended to include fetuses in the category of vaccine recipients. I hold that Congress did not.

In a prior suit dealing with the same issue, Rooks v. Secretary of HHS, No. 93-689V, 1995 WL 522769 (Fed. Cl. Aug. 22, 1995), I held that an embryo was not a vaccinee under the Act, and was reversed. 35 Fed. Cl. 1 (1996). (On remand, I held that petitioner failed to prove that measles vaccine had injured her daughter in utero. 2000 WL 816825 (Fed. Cl. Jun. 05, 2000).)

I still believe, however, that Congress, by enacting only one exception to its rule that vaccinees directly receive vaccines, i.e., for those who contract polio through contact with recipients of oral polio vaccine, did not intend that others who did not receive the vaccine from administrators of the vaccine would be able to sue under this Program. The statute specifically provides for recovery of compensation when the injured person did not receive a vaccine directly (a “contact case”) only if the vaccine is oral polio. Section 11(c)(1)(A) and (B)(ii).<sup>1</sup> One could argue that a fetus is just as much a contact recipient of vaccine as someone who contracts polio from a recipient of oral polio vaccine. Apparently, Congress did not see

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<sup>1</sup> See Staples v. Secretary of HHS, No. 90-1205V, 1993 WL 330948 (Fed. Cl. Spec. Mstr. Aug. 16, 1993), aff’d, 30 Fed. Cl. 348 (1944), in which petitioner contracted polio due to contact with her child who received defectively inactivated polio vaccine. Because the Vaccine Act requires that a “contact case” arise from administration of oral polio, even though defectively inactivated polio vaccine admittedly contains the live polio virus (as does oral polio vaccine), the chief special master dismissed because petitioner did not qualify as a vaccine recipient. This dismissal was affirmed on appeal.

fit to include fetuses in its specifically carved exception to direct receipt of vaccine under the Program. I assume the situation of fetuses never occurred to the draftsmen of the legislation. We will never know.

The maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) applies in circumstances of statutory construction. See generally, Albright v. United States, 10 F.3d 790, 793 (Fed. Cir. 1993). Except in the case of oral polio, the Act mandates that a petitioner prove that the injured person "received a vaccine set forth in the Vaccine Injury Table...." If 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.

Other special masters have similarly held that a fetus is not a vaccine recipient when his or her mother received a vaccine while the child was in utero: Burch v. Secretary of HHS, No. 99-946V, 2000 WL 180129 (Fed. Cl. Spec. Mstr. Feb. 8, 2001); DiRoma v. Secretary of HHS, No. 90-3277, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993) .

Even though the Act was passed to enable liberal and generous awards for vaccine injury and death, Congress established certain limitations which the undersigned cannot ignore. These limitations include not only specifically listed vaccines,<sup>2</sup> but also, e.g., the citizenship or employment status of the vaccinee (see §11(c)(1)(B)(I)(II)). To recognize the limitations that Congress created in the statute is not

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<sup>2</sup> In Brausewetter v. Secretary of HHS, No. 99-278V, 1999 WL 562700 (Fed. Cl. Spec. Mstr., July 16, 1999), petitioner had received tetanus antibodies made from the blood plasma of people who had received tetanus toxoid vaccinations, allegedly resulting in his injury. The special master dismissed the petition because petitioner had not received tetanus toxoid vaccine in accordance with the Act. This case was not appealed.

to deny its intended generous application, but only for those cases which the Act covers. Congress made no provision for fetuses and embryos.

This case is dismissed for lack of subject matter jurisdiction. Because the undersigned rules that Brittany is not a vaccine recipient under the Act, the question of the statute of limitations need not be decided at this point and involves a question of fact as to whether Brittany's injury onset or first manifestation was in utero (respondent's position) or after birth (petitioner's position). Evidence in the record suggests that Brittany was abnormal as a fetus, which if confirmed as a vaccine injury during subsequent proceedings, indicates that petitioner's claim would be time-barred. It is ironic that if petitioner were to prevail on one issue (her status as a vaccine recipient in utero), she would not prevail on another (filing her petition within 36 months of her injury if the onset or first manifestation of her injury were in utero).

### **CONCLUSION**

This petition is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC Appendix J, the clerk of the court is directed to enter judgment in accordance herewith.

**IT IS SO ORDERED.**

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DATE

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Laura D. Millman  
Special Master