

OFFICE OF SPECIAL MASTERS

October 27, 2005

No. 05-1116V

Not for Publication

JORGE ALBERTO CARCAMO, *

*

Petitioner, *

*

v. *

*

SECRETARY OF THE DEPARTMENT OF *

HEALTH AND HUMAN SERVICES, *

*

Respondent. *

Dale K. Galip, Woodland Hills, CA, for petitioner.

Alexis B. Babcock, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition on October 17, 2005, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that he suffered transverse myelitis as an

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

adverse reaction to influenza vaccine which he received on October 1, 2002. In paragraph 32 of his petition, petitioner states he “has a pending civil lawsuit against Freedom Design, Inc., Simi Valley Hospital and Aventis Pasteur [sic], Inc., LASC Case No. SC068744, as a result of his injuries caused by the flu vaccine.”

The Vaccine Act, §300aa-11(a)(5)(B) states:

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.

The undersigned does not have subject matter jurisdiction in this case.

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).

In Flowers v. Secretary of HHS, 49 F.3d 1558 (Fed. Cir. 1995), the Federal Circuit affirmed the dismissal of the petition of a petitioner who filed suit against the administrator of the vaccine in state court and then filed a petition in the Vaccine Program. The Federal Circuit stated, at 1561, “We 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....” The Federal Circuit considered petitioner’s petition to be a nullity. *Id.*

Because the undersigned has no subject matter jurisdiction over this petition, petitioner may not recover either costs or attorney’s fees for filing this petition. Martin v. Secretary of HHS, 62 F.3d 1403 (Fed. Cir. 1995).

Petitioner may file a petition again once he dismisses his state civil suit.

CONCLUSION

This case is dismissed with prejudice for lack of subject matter jurisdiction. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master