

OFFICE OF SPECIAL MASTERS

No. 05-1240V

January 9, 2006

Not to be Published

TINA L. GOODLOCK, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF *

HEALTH AND HUMAN SERVICES, *

Respondent. *

Paul S. Dannenberg, Huntington, VT, for petitioner.

Lynn Ricciardella, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

Petitioner filed a petition on November 29, 2005 under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that she suffered post-polio syndrome

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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.

occurring approximately one year before she filed her petition as an adverse reaction to oral polio vaccine that she received on August 9, 1972, June 1, 1973, February 23, 1976, and November 27, 1976.

Under the Vaccine Act, 42 U.S.C. § 300aa-16(a)(1), the undersigned does not have subject matter jurisdiction over this case. This case concerns pre-Act vaccinations for which Congress stated that no petition may be filed if the first symptom or manifestation of onset occurred more than 36 months after the date of administration of the vaccine, as in this case. Since the onset of petitioner's post-polio syndrome occurred 28 years after her last polio vaccination, she may not file a petition under the Vaccine Act.

Since the undersigned has no subject matter jurisdiction over this case, petitioner is not entitled to receive attorney's fees or costs.

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).

Because petitioner's oral polio vaccine administrations occurred before the effective date of the Vaccine Act (October 1, 1988), this is a "pre-Act" case. Lombardo v. Secretary of HHS, 34 Fed. Cl. 21, 24 (1995)

Section 16(a)(1) of the Vaccine Act states:

In the case of—

(1) a vaccine set forth in the Vaccine Injury Table which is administered before October 1, 1988, if a vaccine-related injury or death occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury or death after the expiration of 28 months after October 1, 1988, and **no such petition may be filed if the first symptom or manifestation of onset or of the significant aggravation of such injury occurred more than 36 months after the date of administration of the vaccine,....** [emphasis added].

The Federal Circuit stated in Weddel v. Secretary of HHS, 100 F.3d 929, 932 (Fed. Cir. 1996):

The doctrine of equitable tolling does not apply to statutes of repose. A statute of repose cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action. ... The [language of § 16(a)] clearly sets out a date certain which cuts off entitlement to benefits under the Act. [S]ection 16(a) of the Vaccine Act "served as the endpoint of the definite time period in which Congress would permit a specific class of potential [claimants] to file [petitions]" [citing *Iacono v. Office of Personnel Management*, 974 F.2d 1326 (Fed. Cir. 1992).] The deadline created a condition that defined and closed the class. The deadline was set on the day the statute went into effect and bore no relation to the date on which the vaccination occurred or on which [petitioners'] claim accrued. Because the clear language of the statute indicates Congress's express intent to prevent filings after a specific date, the provision must be read as a statute of repose rather than a statute of limitations, and the Vaccine Act is not subject to equitable tolling.

The petitioners in Weddel protested that this interpretation of §16(a) contravenes Congress's clear intent of providing generous, quick recovery under the Vaccine Act, particularly as it was conceived to establish a "no-fault" compensation program to make awards quickly, easily, and with certainty and generosity. The Federal Circuit rejected the Weddels' argument, stating its

interpretation was consistent with congressional intent because section 16(a) provides claimants with certainty and does not reduce the generosity of the Program or the speed with which claims are decided as long as petitioners file their petition by the statutory cut-off date. *Id.* The Federal Circuit affirmed the lower court's dismissals. *Id.*

Dismissals for failure to file within the cut-off date of §16(a)(1) have a long history with the U.S. Court of Federal Claims: Lombardo, *supra*; Smith v. Secretary of HHS, 26 Cl. Ct. 116, *aff'd*, 983 F.2d 1088 (Fed. Cir. 1992); Massard v. Secretary of HHS, 25 Cl. Ct. 421 (1992).

Petitioner may complain that it is unfair to dismiss her petition when, without it being her fault, her injury did not arise until almost three decades after vaccination. Moreover, how could she have filed her suit by February 1, 1991 (28 months after October 1, 1988), as §16(a)(1) also requires, when her injury did not arise until 2004? But Congress, by enacting §16(a)(1), did not create an alternative to a suit in civil court for individuals whose diseases, such as subacute sclerosing panencephalitis (SSPE), typically occur more than 36 months after exposure to an antigen. Thus, the Chief Special Master issued a dismissal in Robles v. Secretary of HHS, No. 90-3001V (Mar. 28, 1997), *aff'd*, 1997 WL 178016 (Fed. Cl. July 16, 1997), *rev'd*, No. 97-5144 (unpub) (Fed. Cir. May 7, 1998),² in which the vaccinee's SSPE occurred more than 36 months after vaccination (petitioners alleged measles vaccine caused the SSPE).

² The Federal Circuit reversed the special master's dismissal and remanded because it interpreted petitioners' first letter to the Court to be a petition rather than just a request for information, and petitioners had sent this letter before the amendments to the Vaccine Act created the requirement that injury in pre-Act cases must occur within 36 months. Therefore, the 36-month requirement did not bar their case. The Chief Special Master thereafter tried the case on the merits and dismissed. No. 90-3001V, 2000 WL 748169 (Spec. Mstr. Fed. Cl. 2000).

Because the undersigned does not have subject matter jurisdiction in this case, petitioner is not entitled to recover attorney's fees and costs. Martin v. Secretary of HHS, 62 F.3d 1403 (Fed. Cir. 1995).

This petition is dismissed for failure to follow the requirements enunciated under §16(a)(1). Petitioner may not avail herself of the Vaccine Act remedies. Her recourse is in civil court.

CONCLUSION

This petition is dismissed with prejudice. 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.³

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

³ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.