

OFFICE OF SPECIAL MASTERS

No. 05-884V

September 14, 2005

Not for Publication

LYNETTE LEE LOWE, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF *

HEALTH AND HUMAN SERVICES, *

Respondent. *

Lynette Lee Lowe, pro se, Monroe, WA, for petitioner.

Heather Pearlman, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

¹ Because this order contains a reasoned explanation for the special master's action in this case, the special master intends to post this order 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.

Petitioner filed a petition pro se dated August 5, 2005, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that a tetanus vaccination she received on November 8, 1997, nearly eight years ago, caused her an adverse reaction.

FACTS

According to a letter petitioner sent, which is undated, at page 22 attached to her petition, during the months of November and December 1997, she was seen at Geisinger Medical Group to have stitches removed for lacerations to the middle finger of her left hand and a severe rash. She believes that she may have had an adverse reaction to the tetanus vaccine.

A medical record petitioner submitted, dated November 18, 1997, states that her laceration was healing well and the sutures were removed. Page 5 attached to the petition.

A medical record dated December 12, 1997 states that petitioner had a tetanus vaccination and now was having muscle cramps, coating in her mouth, a stuffy nose, and a very painful rash on her hands. She had been working in dish water at a bar. *Id.*

Petitioner wrote a letter dated March 5, 2001 to Richard H. Booth, page 15 attached to the petition, stating that from July through October 2000, she was treated for a health problem “with a reaction.”

Mr. Booth responded in a letter dated March 13, 2001 that petitioner had worked for him as a housekeeper from July through October 2000 and that she had an allergic reaction of undetermined origin. He recommended Benadryl which obtained a good result. Her symptoms included swelling of her extremities, particularly her hands and arms. She had some difficulty breathing because her nasal and sinus areas were swollen and restricted. Her hands were swollen, cracked, and inflamed, and would occasionally bleed. The onset of these symptoms

appeared to occur spontaneously and could not be related to contact or food. Several days of Benadryl orally and by cream subdued her symptoms.

A letter dated May 7, 2005 from Michael R. Carroll, page 24 attached to the petition, states that petitioner has resided with him since November 2004 and, since that time, she was incapacitated three times because of an allergic reaction she had to tetanus vaccine which she received in 1997.

A letter from petitioner dated July 18, 2000 to Dr. Duane T. Starr, page 44 attached to the petition, states that in 1995-96, Dr. Starr did significant refurbishing of major portions of petitioner's mouth with excellent results. In 1998, petitioner returned to Dr. Starr with significant swelling in her gums and facial tissues. At that time, petitioner and Dr. Starr discussed the possible cause of this condition and concluded there was a strong possibility that petitioner had a bad reaction to a tetanus shot she received some days earlier. (Petitioner does not provide evidence that she received a tetanus vaccination both in 1997 and 1998.)

Petitioner filed Dr. Starr's dental records at pages 45-49 attached to the petition. On page 45 is Dr. Starr's note, dated January 24, 1998, stating that the patient had an abnormal reaction to tetanus vaccine consisting of dermatitis and sinusitis with inflamed sinus passages.

According to her VAERS (Vaccine Adverse Event Reporting System) form, page 14 attached to her petition, the onset of her reaction was June 2005. The VAERS form is dated June 8, 2005. Petitioner's assertion that the onset of her reaction was June 2005 directly contradicts all of the other documents she has filed, as described above, that the onset was in late 1997.

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).

The Vaccine Act, 42 U.S.C. § 16(a)(2), states that “no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury....” Although petitioner asserts in her recently-filed VAERS report that the onset of her adverse reaction was June 2005, all of the medical records she submitted, plus her letters to treating doctors and a dentist, show that the onset of her alleged adverse reaction was at the end of 1997. Her dentist’s record early in 1998 discusses this onset. Petitioner has filed her petition almost eight years after the onset of her alleged reaction, which is five years too late under the statute of limitations. The undersigned does not have subject matter jurisdiction over this petition and must dismiss it with prejudice..

The United States Court of Appeals for the Federal Circuit has ruled that equitable tolling is not applicable in Vaccine Act cases. Brice v. Secretary, HHS, 240 F.3d 1367, 1374 (Fed. Cir. 2001).

CONCLUSION

This case is dismissed with prejudice. Because the undersigned lacks subject matter jurisdiction in this case, petitioner is not entitled to recover her costs in this matter. 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.²

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

² 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.