OFFICE OF SPECIAL MASTERS
No. 05-701V
July 15, 2005
Not for Publication

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MARTA E. PAGAN, *
*
Petitioner, *
*
v. *
*
SECRETARY OF THE DEPARTMENT OF *
HEALTH AND HUMAN SERVICES, *
*
Respondent. *
* *

Francisco R. Gonzalez-Colon, San Juan, PR, for petitioner.
Ann K. Donohue, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION[1]

Petitioner filed a petition dated June 27, 2005, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that tetanus, pneumococcal, and influenza

[1] Because this unpublished decision) contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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

vaccinations administered to her on November 5, 1998 caused her bilateral carpal tunnel syndrome, optical neuritis, osteoporosis, L5-S1 disc protrusion, discogenic disease of the lumbar spine, thoracic myelopathy, lumbar radiculoneuropathy, and major depression. Petition, at ¶ 4.

The vaccination record, Ex. 5, lists only pneumoccocal and influenza vaccinations administered on November 5, 1998. Therefore, there is some doubt whether petitioner received tetanus vaccine. But even if she had, the 36-month statute of limitations of § 16(a)(2) requires that petitioner file her petition within 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

In addition, it is extremely unlikely that petitioner received Prevnar, the childhood pneumococcal vaccination, on November 5, 1998.[2] But even if petitioner had received childhood pneumococcal vaccine, rather than adult pneumococcal vaccine, on November 5, 1998, her claim as to that vaccination would also be time-barred. Pneumococcal conjugate vaccines were added to the Vaccine Injury Table as of December 18, 1999. Petitioner would have had until December 18, 2001 to file a petition relating to damages from childhood pneumococcal vaccine, according to § 16(b)(2) of the Vaccine Act.

The only vaccination that is not time-barred for petitioner is influenza vaccine. But influenza vaccine was not put on the Vaccine Injury Table until July 1, 2005, and petitioner filed her petition three days before that (June 27, 2005). National Vaccine Injury Compensation Program: Addition of Trivalent Influenza Vaccines to the Vaccine Injury Table, 70 Fed. Reg.

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[2] Pneumococcal vaccine is listed on the Vaccine Injury Table for administration to children up to 23 months of age. 42 C.F.R. § 100.3; 66 Fed. Reg. 36735, *36737.

19092 (April 12, 2005) (to be codified at 42 C.F.R. pt. 100). Petitioner filed her petition too early for compensation for damages from influenza vaccine.

The undersigned has no subject matter jurisdiction over any of the three vaccines alleged to have caused petitioner injury in this case. The first two (tetanus and pneumococcal) are time-barred. The third was not yet on the Vaccine Injury Table when petitioner filed her claim. The petition is dismissed without prejudice. Petition may not receive attorney's fees and costs for this petition since the undersigned has no subject matter jurisdiction in this case. Martin v. Secretary of HHS, 62 F.3d 1403 (Fed. Cir. 1995).

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 Federal Circuit has ruled that equitable tolling is not applicable in Vaccine Act cases. Brice v. Secretary of HHS, 240 F.3d 1367, 1368, 1374 (Fed. Cir. 2001). In Brice, the Federal Circuit stated, at 1373:

> [T]he statute of limitations here begins to run upon the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not have known at the time that the vaccine had caused an injury.

Petitioner may refile her petition up until July 1, 2007, under § 16(b)(2).

Other Points for Petitioner to keep in mind

If petitioner refiles her petition, she should keep in mind that her expert medical doctors need to provide reports expressing their opinions that the influenza vaccine probably caused a condition or conditions. Petitioner must not only show that but for the vaccine, she would not have had the injury, but also that the vaccine was a substantial factor in bringing about her injury. Shyface v. Secretary, HHS, 165 F.3d 1344 (Fed. Cir. 1999). In this case, there are at least two, possibly three, vaccines at issue. How will petitioner's expert medical doctor(s) be able to figure out which vaccine is a substantial factor in causing her injury?

To satisfy her burden of proving causation in fact, petitioner must offer through expert medical testimony "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury. A reputable medical or scientific explanation must support this logical sequence of cause and effect." Grant v. Secretary, HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992). Agarwsal v. Secretary, HHS, 33 Fed. Cl. 482, 487 (1995); see also Knudsen v. Secretary, HHS, 35 F.3d 543, 548 (Fed. Cir. 1994); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Without more, "evidence showing an absence of other causes does not meet petitioners' affirmative duty to show actual or legal causation." Grant, supra, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. Hasler v. US, 718 F.2d 202, 205 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984).

If petitioner refiles her petition, she shall number the pages of her medical records.

CONCLUSION

This case is dismissed without 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 herein.

IT IS SO ORDERED.

_____ _____

DATE Laura D. Millman
Special Master