

OFFICE OF SPECIAL MASTERS
No. 04-273V
Originally issued on September 14, 2005
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JANE DOE, *

Petitioner, *

v. * Not for Publication

SECRETARY OF THE DEPARTMENT OF *
HEALTH AND HUMAN SERVICES, *

Respondent. *

Paul S. Dannenberg, Huntington, VT, for petitioner.
James A. Reistrup, III, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION

On March 3, 2004, petitioner brought a petition on her own behalf under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that hepatitis B vaccinations she received on October 14, 2000, December 29, 2000, and June 11, 2001 impaired her memory and mental function, and caused her depression. She claimed that the 36-month statute of limitations in the Vaccine Act, 42 U.S.C. § 30011-16(a)(2)¹ did not run because she

¹ “[I]f a vaccine-related injury occurred as a result of the administration of such vaccine, 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.”

had a “legal disability” under 28 U.S.C. § 2401(b). She has later referred to section 2501 as well in asserting that the 36-month statute of limitations in the Vaccine Act does not apply to her.

Under order from the undersigned, the parties briefed the issue of whether petitioner’s allegations pertaining to the first two hepatitis B vaccinations are beyond the court’s subject matter jurisdiction, whereas the undersigned does have subject matter jurisdiction over the third hepatitis B vaccination. After receipt of the parties’ briefs on June 28, 2004, July 12, 2004, and August 24, 2004, the undersigned concluded that she did not have subject matter jurisdiction over the first two hepatitis B vaccinations, but petitioner could proceed under a theory of significant aggravation pertaining to the third hepatitis B vaccination.

On September 9, 2005, petitioner filed a Motion for Voluntary Dismissal. The undersigned grants petitioner’s motion and dismisses this petition with prejudice.

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 contains only one exception to its statute of limitations: when a petition for compensation is erroneously filed in state or federal district court. 42 U.S.C. § 300aa-11(a)(2)(B). If a petition is filed in state or federal district court, it must be dismissed. Id. “[T]he date such dismissed action was filed shall, for the purposes of the limitations of actions prescribed by section 300aa-16 of this title, shall be considered the date the petition was filed if the petition was filed within one year of the date of the dismissal of the civil action.” Id.

The Federal Circuit stated in Brice v. Secretary of HHS, 240 F.3d 1367, 1370, cert. denied, 534 U.S. 1040 (2001), that “a statute of limitations is a condition on the waiver of sovereign immunity by the United States, and courts should be careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended.” In Brice, the Federal Circuit decided that equitable tolling is inapplicable to petitions filed under the Vaccine Act. Id. at 1368, 1374. The Federal Circuit stated “that the 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.” Id. at 1373.

Tolling provisions arising under the non-tort suits against the United States (28 U.S.C. §§ 2401(a), 2501) and the Federal Tort Claims Act (28 U.S.C. § 2401(b)) do not apply to petitions filed under the Vaccine Act, even if petitioner has a mental disability nor does petitioner benefit from a six-year statute of limitations that applies to statutes that are not the Vaccine Act. Petitioner’s citation to Oklahoma code and case law has no authority over this court.

When petitioner states on page 5 of her initial brief, “There is no specific statute of limitations attached to the act...,” it is difficult to think that petitioner has filed her brief in good faith. When she continues on page 6 of her initial brief to discuss what happens when a statute is

“silent or ambiguous” as to a statute of limitations, the undersigned wonders how petitioner could have read the Vaccine Act. Petitioner thinks that the Vaccine Act is silent as to the statute of limitations because it does not contain a tolling provision for disabled persons. But the Act’s silence means there is no tolling provision for disabled persons, not that the statute is ambiguous. Its silence is expressive of Congress’s intent not to toll the statute of limitations for disability. Instead, as respondent points out on page 4 of his brief, the statute permits a petition to be filed on behalf of someone legally incompetent. 42 U.S.C. § 300aa-11(b)(1).

To satisfy her burden of proving causation in fact for significant aggravation from the third vaccination, petitioner must offer "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 Althen v. Secretary, HHS, ___ F. 3d ____, 2005 WL 1793399 (Fed. Cir. 2005); 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).

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).

Petitioner offered no proof whatsoever in support of her allegations. Instead, she moved to dismiss. This petition is dismissed with prejudice.

CONCLUSION

This case 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 herein.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.