IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: January 31, 2008)

DO NOT PUBLISH

NEIL GEARIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 07-0737V
	)	Pneumonia Vaccine; Jurisdiction
SECRETARY OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

DECISION[1]

Petitioner, Neil Gearin (Mr. Gearin), seeks compensation under the National Vaccine Injury Compensation Program (Program).[2] On November 8, 2003, Mr. Gearin received an influenza vaccination. *See* Petitioner's exhibit (Pet. ex.) 2 at 1. In addition, on November 8, 2003, Mr. Gearin received a pneumonia vaccination. *See* Pet. ex. 1 at 1. Mr. Gearin states: "I do not know which vaccine went in which arm, but the nurse giving the injections said she gave the flu in the left *and the pneumonia in the right*." Pet. ex. 7 at 2 (emphasis added). Mr. Gearin asserts that he developed a number of ailments following "the vaccine injection in [his] *right* arm," beginning with a "cellulitis" that appeared "within just a few hours" after vaccination. Pet. ex. 7 at 3 (emphasis added); *see also* Pet. ex. 9 at 1 (Todd Winter, M.D.: Mr. Gearin suffered "cellulitis at the needle injection site on his *right* arm.")(emphasis added); Pet. ex. 10 at 1 (David Dryland, M.D.: Mr.

[1] As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

[2] The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

Gearin's cellulitis in the right arm "triggered Reiter's syndrome," a "reactive arthritis" characterized by "joint and eye pain and vision difficulties.").

The special master convened an informal, yet substantive, early status conference on December 6, 2007. The special master discussed particularly *Finley v. Secretary of HHS*, No. 04-0874V, 2004 WL 2059490 (Fed. Cl. Spec. Mstr. Aug. 24, 2004), and *Morrison v. Secretary of HHS*, No. 04-1683V, 2005 WL 2008245 (Fed. Cl. Spec. Mstr. July 26, 2005). The special master noted that *Finley* and *Morrison* address critical distinctions between pneumococcal conjugate vaccine and pneumococcal polysaccharide vaccine. In addition, the special master noted that *Finley* and *Morrison* hold that while pneumococcal conjugate vaccine is included in Program coverage, pneumococcal polysaccharide vaccine is excluded specifically from Program coverage. Therefore, the special master expressed that he lacked potentially jurisdiction to consider Mr. Gearin's claim related to Mr. Gearin's pneumonia vaccination. Mr. Gearin sought the opportunity to pursue additional investigation regarding the type of pneumonia vaccination that he received.

On January 17, 2008, respondent proffered Physician's Desk Reference (PDR) entries for pneumococcal 7-valent conjugate vaccine (Prevnar), manufactured by Wyeth Pharmaceuticals, *see* Respondent's exhibit (R. ex.) A, filed January 17, 2008; for pneumococcal vaccine polyvalent (Pneumovax 23), manufactured by Merck & Co., *see* R. ex. B at 1-10; and for pneumococcal vaccine polyvalent (Pnu-Immune® 23), manufactured by Wyeth Pharmaceuticals. *See* R. ex. B at 11-30. According to the PDR, "Prevnar is indicated for active immunization of infants and toddlers," R. ex. A at 5, as well as "unvaccinated older infants and children," up "through 9 years of age." R. ex. A at 48. According to the PDR, Pneumovax 23 and Pnu-Immune® 23 are recommended for routine use in the adult population, particularly for those people over age 50. *See, e.g.*, R. ex. B at 4-5, 18-19.

Also, on January 17, 2008, Mr. Gearin informed the special master that despite diligent effort, Mr. Gearin could not obtain from the "supplier" of his "pneumonia vaccine" evidence "showing that the vaccine was the type covered under the Vaccine Act." *Gearin v. Secretary of HHS*, No. 07-0737V, Order of the Special Master (Fed. Cl. Spec. Mstr. Jan. 23, 2008), Attachment at 1. Mr. Gearin conceded that he is "unable to prove that the vaccine used is covered under the Act." *Id.*

The special master has canvassed thoroughly the record. Based upon the record as a whole, he enters now findings of fact and conclusions of law.

1. Born on March 15, 1939, *see, e.g.*, Pet. ex. 11 at 1, Mr. Gearin was over 64 years old when he received a pneumonia vaccination on November 8, 2003. *See* Pet. ex. 1 at 1.

2. It is more likely than not that Mr. Gearin received a pneumococcal polysaccharide vaccine. *See generally* R. ex. B.

3. It is more likely than not that Mr. Gearin received his pneumonia vaccination in his right arm. *See* Pet. ex. 7 at 2.

4. Mr. Gearin sustained cellulitis in his right arm where it is more likely than not that he received his pneumonia vaccination. *See* Pet. ex. 9 at 1; *see also* Pet. ex. 7 at 2.

5. One of Mr. Gearin's treating physicians attributes Mr. Gearin's Reiter's Syndrome to the cellulitis that Mr. Gearin sustained in his right arm where it is more likely than not that he received his pneumonia vaccination. *See* Pet. ex. 10 at 1; *see also* Pet. ex. 7 at 2.

6. Pneumococcal polysaccharide vaccines are not listed on the Vaccine Injury Table (Table). *See* 42 C.F.R. § 100.3(a); *see also Finley*, No. 04-0874V, 2004 WL 2059490; *Morrison*, No. 04-1683V, 2005 WL 2008245.

7. The special master lacks jurisdiction to consider claims arising from vaccines that are not listed on the Table. *See, e.g.*, *Charette v. Secretary of HHS*, 33 Fed. Cl. 488 (1995). Therefore, the special master possesses no authority to adjudicate the merits of Mr. Gearin's case involving injury from Mr. Gearin's pneumonia vaccine.

8. Mr. Gearin bases his entire case upon the administration of a vaccine in his right arm where it is more likely than not that he received his pneumonia vaccination. *See, e.g.*, Petition (Pet.); Pet. ex. 7 at 2. As a consequence, there is not a preponderance of the evidence that (1) "but for" the administration of a November 8, 2003 influenza vaccination, Mr. Gearin would not have suffered cellulitis leading to Reiter's Syndrome, and (2) Mr. Gearin's November 8, 2003 influenza vaccination was "a 'substantial factor' in bringing about" Mr. Gearin's cellulitis leading to Reiter's Syndrome. *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1351 (Fed. Cir. 1999), citing Restatement (Second) of Torts § 431.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Mr. Gearin's copy of this decision to Mr. Gearin by overnight express delivery.

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John F. Edwards
Special Master