

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: June 19, 2008)

DO NOT PUBLISH

ALBERT CARL EVANS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 08-0365V
	)	Pneumococcal Polysaccharide
SECRETARY OF	)	Vaccine (PPV); Jurisdiction
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	

DECISION<sup>1</sup>

Petitioner, Albert Carl Evans (Mr. Evans), seeks compensation under the National Vaccine Injury Compensation Program (Program).<sup>2</sup> Mr. Evans filed a Program petition on May 21, 2008. *See* Petition (Pet.). He attributes a number of medical complaints that he has suffered—including cellulitis, numbness of the right arm, memory loss and speech problems—to a pneumonia vaccination that he received on June 24, 2006. *See* Pet. at 1.

The special master reviewed the petition. On June 5, 2008, the special master directed Mr. Evans to file by no later than June 13, 2008, all of the documents required by § 300aa-11(c)(1) & (2) and by Vaccine Rule 2(e). *See Evans v. Secretary of HHS*, No. 08-0365V, Order of the Special Master (Fed. Cl. Spec. Mstr. June 5, 2008). In particular, the special master commanded Mr. Evans

<sup>1</sup> 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.*

<sup>2</sup> 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.

***“to produce evidence establishing that he received a pneumococcal conjugate vaccine—a vaccine listed on the Vaccine Injury Table (Table), see 42 C.F.R. § 100.3(a)(XIII)—rather than a pneumococcal polysaccharide vaccine—a vaccine that is not listed on the Table.”*** *Evans v. Secretary of HHS*, No. 08-0365V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. June 5, 2008) (emphasis in original). The special master cited *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), Program cases addressing critical distinctions between pneumococcal conjugate vaccine (PCV) and pneumococcal polysaccharide vaccine (PPV). *See id.*

On June 16, 2008, Mr. Evans proffered medical records. *See* Petitioner’s Notice of Filing Medical Records on Compact Disk, filed June 16, 2008. Mr. Evans did not provide specific evidence that he received PCV instead of PPV. Rather, Mr. Evans lodged a motion, requesting that “the Special Masters and Secretary recognize” PPV “as covered under the Vaccine Injury Compensation Program pursuant to 42 U.S.C. § 300aa-14(e)(2).” Petitioner’s Motion to Recognize Pneumococcal Polysaccharide Vaccines Pursuant to 42 U.S.C. § 300aa-14(e)(2) (Motion), filed June 13, 2008, at 1.

## BACKGROUND

Mr. Evans was born on April 28, 1957. *See, e.g.*, Petitioner’s exhibit (Pet. ex.) 1 at 13 (Parkland Health & Hospital System Admission/Registration Facesheet, dated June 23, 2006). On June 24, 2006—at age 49 years—he received a pneumococcal vaccination, *see* Pet. ex. 1 at 55; *see also* Pet. ex. 1 at 61, 70; Pet. ex. 2 at 66; Pet. ex. 3 at 5, 9, 20, 31, during a brief hospitalization for “acute, but ill-defined, cerebrovascular disease.” Pet. ex. 1 at 12. On June 26, 2006, he presented to the Medical Center of Las Colinas Emergency Department, complaining of “rash,” pain, tenderness and swelling in his right “upper extremity” for two days following “an I[ntra]M[uscular] injection of pneumovax.” Pet. ex. 3 at 5; *see also* Pet. ex. 3 at 9, 20, 31. Medical personnel diagnosed “cellulitis.” Pet. ex. 3 at 21; *see also* Pet. ex. 3 at 31.

## DISCUSSION

The United States is sovereign, and no one may sue the United States without the sovereign’s waiver of immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The Program represents a waiver of sovereign immunity. *See, e.g.*, *Markovich v. Secretary of HHS*, 477 F.3d 1353, 1360 (Fed. Cir. 2007), citing *Brice v. Secretary of HHS*, 240 F.3d 1367, 1370 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1040 (2001). Therefore, the special master must construe “strictly and narrowly” Program provisions. *Markovich*, 477 F.3d at 1360.

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). The current

iteration of the Table does not include PPV. *See* 42 C.F.R. § 100.3(a) (Oct. 1, 2007), *as augmented by* 72 Fed. Reg. 19937. Mr. Evans has not adduced any documentation showing that he received PCV, a vaccine listed on the Table. Indeed, by imploring the special master to recognize PPV as a Table vaccine, Mr. Evans concedes implicitly that he received PPV. *See generally* Motion. Moreover, information that Mr. Evans appended to his Motion confirms that it is more likely than not that Mr. Evans received PPV. *See* Motion, Exhibit A, 57 MMWR No. 1, Recommended Immunization Schedules for Persons Aged 0 - 18 Year–United States, 2008, (Jan. 11, 2008), p. Q2, n.5 (noting use of PCV in children between age six weeks and age 59 months and use of PPV in children older than age two years).

Mr. Evans suggests that the special master “*should*” deem that the Table includes PPV, Motion at 2 (emphasis added), because the Centers for Disease Control (CDC) “recommends the PPV for certain high-risk children.” *Id.* at 1. Mr. Evans misunderstands apparently the limits of a special master’s powers. Congress delegated to the Secretary of the United States Department of Health and Human Services the sole authority to “amend the Vaccine Injury Table” after CDC “recommends a vaccine to the Secretary for routine administration to children.” § 300aa-14(e)(2). *The Secretary of the United States Department of Health and Human Services has two years from the date of CDC’s recommendation within which to amend the Table. See id.* In addition, Congress must approve an excise tax providing funds for the payment of compensation related to any vaccine that the Secretary of the United States Department of Health and Human Services adds to the Table before an amended Table becomes effective. *See* 42 C.F.R. § 100.3(c)(5) (Oct. 1, 2007). The Secretary of the United States Department of Health and Human Services has not amended the Table to include PPV. Congress has not enacted an excise tax regarding PPV. The special master obviously cannot compel the Secretary of the United States Department of Health and Human Services and Congress to act.

As Mr. Evans was 49 years old when he received a “pneumonia vaccination,” *see* Pet. at 1; Pet. ex. 1 at 55, the special master finds as a matter of fact that it is more likely than not that Mr. Evans received PPV, not PCV. The special master determines as a matter of law that PPV is not a vaccine listed on the Table. Therefore, the special master rules as a matter of law that he does not possess jurisdiction to adjudicate Mr. Evans’s claim.

### CONCLUSION

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

s/John F. Edwards  
John F. Edwards  
Special Master