

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 20-1391V

Filed: November 18, 2020

BEN D. SHIRIAK,
Petitioner,
v.
SECRETARY OF HEALTH AND
HUMAN SERVICES,
Respondent.

TO BE PUBLISHED
Motion to Dismiss; Pneumococcal
Polysaccharide vaccine (PPSV-23)

Ben D. Shiriak, pro se, Tappahannock, VA, for Petitioner.
Heather L. Pearlman, U.S. Department of Justice, Washington, DC, for Respondent.

DECISION GRANTING MOTION TO DISMISS1

Oler, Special Master:

On October 9, 2020, Ben D. Shiriak ("Petitioner") filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, et seq.2 (the "Vaccine Act" or "Program"). The petition alleges that Petitioner suffered from atrial fibrillation, extreme body chills, and chronic arthritis as a result of the pneumococcal polysaccharide vaccine he received on October 12, 2017. Pet. at 1, ECF No. 1.

1 This Decision will be posted on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, 44 U.S.C. § 3501 (2012). This means the Decision will be available to anyone with access to the internet. As provided in 42 U.S.C. § 300aa-12(d)(4)(B), however, the parties may object to the Decision's inclusion of certain kinds of confidential information. To do so, each party may, within 14 days, request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, this Decision will be available to the public in its present form. Id.

2 National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2012).

For the reasons discussed below, Petitioner is unable to demonstrate that he received a vaccine set forth in the Vaccine Injury Table. 42 U.S.C. § 300aa-11(c)(1)(a). Consequently, his petition is **DISMISSED**.

I. Procedural and Factual History

Petitioner was born in 1939. Pet. at 1. He received the pneumococcal polysaccharide (PPSV-23) vaccine at the office of Dr. Allen Tsui on October 12, 2017, in Tappahannock, Virginia. Ex. 1 at 1. Immediately following the vaccination, Petitioner alleges that he experienced elevated pulse rate and blood pressure. Pet. at 2. He was admitted to the hospital on the same day and diagnosed with atrial fibrillation. *Id.* Following his hospital discharge, Petitioner began to suffer from chills throughout his body, notably in his joints. *Id.* Petitioner claims that these chills continue to this day.

On October 15, 2020, this case was assigned to my docket. ECF No. 8. On October 20, 2020, I held a status conference during which I explained to Petitioner that the PPSV-23 vaccine is not a covered vaccine, and that consequently, this Court lacked jurisdiction to adjudicate his claim. *See* Scheduling Order dated October 22, 2020, ECF No 9. I directed Respondent to file a motion to dismiss by November 5, 2020. *Id.* Petitioner requested seven days to respond. *Id.*

On November 5, 2020, Respondent filed the instant Motion to Dismiss, arguing that the Petition “must be dismissed for failure to state a claim upon which relief may be granted, pursuant to RCFC 12(b)(6).” Mot. at 1, ECF No. 13. Petitioner did not file a response.

II. Analysis

To be entitled to compensation under the Vaccine Act, a petitioner must demonstrate that he “received a vaccine set forth in the Vaccine Injury Table.” § 300aa-11(c)(1)(a).

There are two different types of pneumococcal vaccines, the pneumococcal conjugate vaccine and the polysaccharide vaccine. *Cielencki v. Sec’y of Health & Hum. Servs.*, No. 15-632V, 2015 WL 10767150, at *3 (Fed. Cl. Spec. Mstr. Dec. 22, 2015). The Vaccine Program only covers pneumococcal conjugate vaccines, which are routinely administered to children. The Pneumovax 23 vaccine is a polysaccharide vaccine and thus is not a vaccine set forth in the Vaccine Injury Table. 42 U.S.C. § 300aa-11(c)(1)(a).

Because Petitioner has alleged that he was injured by the PPSV-23 vaccine, he cannot demonstrate that he “received a vaccine set forth in the Vaccine Injury Table.” 42 U.S.C. § 300aa-11(c)(1)(a). Therefore, his petition must be dismissed for failure to state a claim upon which relief may be granted.

III. Conclusion

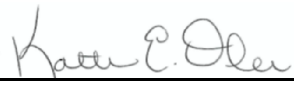
For the reasons explained above, Respondent’s motion to dismiss is **GRANTED** and Mr.

Shiriak's petition is **DISMISSED**. **The clerk shall enter judgment accordingly.**³

A copy of this decision shall be mailed via USPS to Petitioner at:

BEN D. SHIRIAK
P.O. Box 862
Tappahannock, VA 22560

IT IS SO ORDERED.



Katherine E. Oler
Special Master

³ Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by each filing (either jointly or separately) a notice renouncing their right to seek review.