



Influenza vaccine was not put on the Vaccine Injury Table until July 1, 2005. National Vaccine Injury Compensation Program: Addition of Trivalent Influenza Vaccines to the Vaccine Injury Table, 70 Fed. Reg. 19092 (April 12, 2005) (to be codified at 42 C.F.R. pt. 100), putting influenza vaccine on the Vaccine Injury Table as of July 1, 2005 (see page 3).

The addition of a vaccine to the Vaccine Injury Table has a look-back provision of eight years prior to the effective date of the addition, meaning that injuries associated with influenza vaccine from July 1, 1997 to July 1, 2005 were now actionable under the Vaccine Act. *Id.*

If someone had a reaction to influenza vaccine between July 1, 1997 and July 1, 2005, as Catherine Corder alleges she did, then she is subject to a two-year statute of limitations after July 1, 2005 within which she must file her petition. *Id.* See also 42 U.S.C. §300aa-16(b): “[petitioner] may file a petition for such compensation not later than 2 years after the effective date of the revision . . . .”

The statute of limitations ran on July 2, 2007 for influenza vaccine reactions occurring before July 1, 2005 and after July 1, 1997. July 2, 2007 was the end of the two-year window for those who received influenza vaccinations up to eight years before the vaccine was added to the Vaccine Table. Since July 1, 2007 was a Sunday, two years after the effective date of revision of the Vaccine Injury Table to include influenza vaccine became Monday, July 2, 2007. Petitioners herein are nine months too late in filing their petition alleging injury from influenza vaccine.

It appears that the undersigned has no subject matter jurisdiction over this petition. Petitioners are ORDERED TO SHOW CAUSE at the first status telephonic conference in this case why this petition should not be dismissed 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 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.), cert. denied, 534 U.S. 1040 (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.

In addition, petitioner's husband cannot sue as a petitioner because he is not a vaccinee and Catherine Corder has not been shown to be either incompetent or dead. 42 U.S.C. §300aa-11(b)(1)(A). George Corder must be dismissed even if this were a viable petition.

Because it appears that the undersigned has no subject matter jurisdiction in this case, petitioners may not receive attorney’s fees and costs for this petition. Brice v. Secretary of HHS, 358 F.3d 865, 868 (Fed. Cir. 2004) (“The jurisdiction of the Court of Federal Claims to award attorneys’ fees under the Vaccine Act is not unlimited. The court must have jurisdiction over a petitioner’s claim for compensation before it can award attorneys’ fees.”); Martin v. Secretary of HHS, 62 F.3d 1403, 1406-07 (Fed. Cir. 1995) (special master without “jurisdiction to award attorneys’ fees and costs under the Vaccine Act if [special master] does not have jurisdiction to reach the merits of a claim for compensation.”).

**IT IS SO ORDERED.**

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DATE

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Laura D. Millman  
Special Master