

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

No. 03-1291V

Filed: January 12, 2012

(Not to be Published)

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ANGELA M. JOHNSON, parent of
Jeffrey W. Johnson, Jr., a minor,

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Petitioner,

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v.

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

Autism; Statute of Limitations;
Speech and Language Delay;
First Symptom or Manifestation of
Onset; Equitable Tolling; Dismissal

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Respondent.

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DECISION DISMISSING PETITION¹

VOWELL, Special Master:

On June 2, 2003, Angela Johnson ["Ms. Johnson" or "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"], on behalf of her minor son, Jeffrey W. Johnson, Jr. ["Jeffrey"]. Petitioner initially filed the "short form" petition authorized by Autism General Order # 1.³

In essence, by filing a short form petition, petitioner asserted that (1) Jeffrey had a disorder on the autism spectrum and (2) that one or more vaccines listed on the

¹ Because this decision contains a reasoned explanation for the action in this case, I intend to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

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 (2006).

³ The text of Autism General Order #1 can be found at <http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf> ["Autism Gen. Order #1"], 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002).

Vaccine Injury Table⁴ were causal of this condition.⁵ No medical records were filed with the petition.

Respondent has moved to dismiss the petition on the basis that the claim was untimely filed. See Motion to Dismiss and Respondent's Rule 4(c) Report, filed September 23, 2011. Petitioner did not respond to the motion.

Petitioner has the burden to demonstrate that her case was properly and timely filed. Based on my analysis of the evidence, petitioner has not met her burden, and thus **this case is dismissed.**⁶

I. Procedural History

The petition was filed by counsel acting on petitioner's behalf on June 2, 2003. Like most other cases in the Omnibus Autism Proceeding ["OAP"],⁷ the case remained on hold until discovery in the OAP was concluded, causation hearings in the test cases were held, and entitlement decisions were issued in the test cases.⁸

On February 29, 2008, a letter from Ms. Johnson was filed by leave of court. The letter expressed Ms. Johnson's dissatisfaction with her attorney and requested that he be dismissed. I granted her request on March 19, 2008, and she has been representing herself since then.

⁴ 42 C.F.R. § 100.3 (2010).

⁵ The two theories of causation specifically addressed in Autism Gen. Order # 1 were that the measles, mumps, and rubella ["MMR"] vaccine was causal [the "MMR theory" or "Theory 1"] or that vaccines containing a mercury-based preservative called thimerosal [the "TCV theory" or "Theory 2"] were causal, or that a combination of the MMR vaccine and TCVs were causal.

⁶ I note that Ms. Johnson, although originally represented by counsel, is now proceeding pro se.

⁷ A detailed discussion of the OAP can be found at *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250, at *3 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

⁸ The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 89 Fed. Cl. 158 (2009), aff'd, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 88 Fed. Cl. 473 (2009), aff'd, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 88 Fed. Cl. 706 (2009). Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims. The Theory 2 cases are *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The petitioners in each of the three Theory 2 cases chose not to appeal.

During the period between the test case hearings and the final appellate action on the test case decisions, petitioner, like others in the OAP, was ordered to file some medical records. Petitioner filed Petitioner's Exhibits ["Pet. Exs."] 1-7 in 2009.

After the final test case appeal was decided, I ordered petitioner to inform the court if she wished to pursue her claim. Order, filed Sept. 15, 2010. Ms. Johnson responded with a letter indicating that she wished to continue with the claim. I then ordered petitioner to file a statement identifying her theory concerning how Jeffrey's vaccines had caused his autism spectrum disorder. Order, filed Oct. 19, 2010.

The causation statement, filed November 15, 2010, noted that Jeffrey had received routine childhood vaccines, some of which contained thimerosal. Additionally, the statement noted that Jeffrey had received an MMR vaccination on March 11, 1999,⁹ and was hospitalized the next day with a temperature of 105. After his stay at the hospital, Ms. Johnson and her husband noticed that their son was "talking lesser and seemed abnormal." Causation Statement at 1. Thus, the causation statement appeared to put forth the same causation theories which were considered and rejected in the OAP test cases.

I held a telephonic status conference on December 9, 2010, to discuss the next steps in this case. During the call, petitioner informed the court she was having difficulties obtaining medical records from Dr. Martelli and from Emory University. Ms. Johnson was instructed to provide the court with their addresses. Upon receipt of their contact information, I authorized respondent to subpoena the medical records. On March 24, 2011, respondent filed a response from Emory University indicating they were unable to locate any records for Jeffrey. Respondent's Exhibit ["Res. Ex."] A. On April 27, 2011, respondent filed a status report noting that per conversations with petitioner, Jeffrey may have been seen at Emory only once and that records of that visit were previously filed as part of Petitioner's Exhibit 7. The subpoenaed medical records of Dr. Martelli were filed on July 27, 2011. Res. Ex. B.

With all of the previously missing medical records of Jeffrey now filed in this case, on July 28, 2011, I ordered respondent to file her Rule 4(c) report by September 26, 2011. Respondent complied and in that report moved to dismiss petitioner's case, asserting that the petition was filed outside the Vaccine Act's 36 month statute of limitations. Respondent's Rule 4(c) Report and Motion to Dismiss ["Res. Mot."] at 12. Petitioner has not responded to this motion.

⁹ There is no mention in the records of Jeffrey receiving a MMR shot on this date in the medical records. See Pet. Exs. 3, p. 1; 8, p. 1.

II. Evidence Concerning Vaccinations, Symptoms, and Diagnosis.

The evidence filed to date in this case consists of eight¹⁰ exhibits comprising approximately 200 pages of medical records filed by petitioner, and two exhibits filed by respondent, containing the subpoenaed records of Emory University and Dr. Martelli.

The evidence establishes that Jeffrey was born on May 17, 1997. Pet. Ex. 1, p. 1. No pregnancy or delivery records of petitioner were filed, but based on the history conveyed in records of Jeffrey, it was a relatively uneventful pregnancy. Petitioner had an upper respiratory infection during the second trimester and she reported that Jeffrey had “spasms” in utero. Pet. Ex. 4, p. 2. Petitioner also reported that a fall, which occurred around six months of gestation, caused low back pain. Pet. Ex. 4, p. 12. No birth or perinatal difficulties were reported, and Jeffrey was generally a healthy baby. See Pet. Exs. 4, p. 2; 6, p. 2.

Routine childhood immunizations were administered to Jeffrey between his birth and July 13, 2001.¹¹ Pet. Exs. 3, p. 1; 8, p. 1. Although petitioner alleged Jeffrey was hospitalized a day after receiving an MMR vaccination in March 1999 (see Causation Statement, filed Nov. 15, 2010), according to the medical records, no vaccinations were administered in either February or March, 1999. The medical records indicate that Jeffrey received his first MMR vaccine on May 22, 1998 (at age 1) and his second MMR vaccine on July 13, 2001 (at age 4). Pet. Exs. 3, p. 1; 8, p. 1. This timing comports with the standard timetable for childhood vaccinations.¹²

On November 3, 1997, Jeffrey’s pediatrician, Dr. Newell Hamilton, recorded that Jeffrey had experienced “eyes jerking at times” and “eyes rolled back.”¹³ Doctor. Hamilton referred Jeffrey for a neurological evaluation, which occurred on November 19, 1997, when Jeffrey was evaluated by pediatric neurologist Dr. Daniel Shanks. An EEG¹⁴ was performed to rule out seizures, and the results were normal. No epileptiform or focal abnormalities were identified. Pet. Exs. 2, p. 2; 4, p. 1.

¹⁰ Petitioner filed exhibits 1 -7 as a set on June 11, 2009. Petitioner filed an Immunization Certificate on February 15, 2011, which I will refer to as Pet. Ex. 8.

¹¹ Jeffrey has more recently received a second chicken pox (varicella) vaccination on September 11, 2008 and another polio vaccination on January 31, 2011. Pet. Ex. 8.

¹² The Centers for Disease Control [“CDC”] recommends the MMR vaccine first be administered to a child between ages 12 months to 15 months, and the second dose when the child is between 4 and 6 years old. <http://www.cdc.gov/vaccines/recs/schedules/downloads/child/0-6yrs-schedule-bw.pdf>.

¹³ I note that Dr. Hamilton’s records are handwritten and difficult to read.

¹⁴ An EEG is a medical test which records the activity of brain cells and is commonly used as a diagnostic tool. See DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (32nd ed. 2012) [“DORLAND’S”], at 600.

Jeffrey was seen by another neurologist, Dr. William Turk, on January 19, 1998. He concluded that the behavior associated with possible seizure activity was more likely tremors. Pet. Ex. 4, p. 4. He also noted that Jeffrey has “evidence suggestive of a hyperkinetic movement disorder increased tone, particularly in his lower extremities.” *Id.* Doctor Turk’s impression was that Jeffrey had a motor system dysfunction and probable evolving extra-pyramidal cerebral palsy. *Id.* Jeffrey’s parents were encouraged by Dr. Turk to contact Children’s Medical Services of Georgia and the Coastal Developmental Program for an assessment and ongoing therapy. *Id.*

On February 19, 1998, Jeffrey was evaluated by a physical therapist with the Speech, Hearing and Rehabilitation Enterprises of Coastal Georgia [“SHARE”]. Pet. Ex. 6, pp. 2-3. During the evaluation, Jeffrey was observed to have symmetric hand and foot flapping, particularly when excited or focused on a task. Pet. Ex. 6, p. 2. He also became upset when faced with challenging situations. *Id.* The therapist tested Jeffrey according to the Peabody Development Gross Motor Scale, and concluded that Jeffrey (aged 9 months) “functions at an age equivalent of 4 months in his gross motor skills.” *Id.* The therapist also noted that Jeffrey’s expressive and receptive communication skills were somewhat delayed and recommend a speech/language evaluation. *Id.*, p. 3. Jeffrey began to receive weekly occupational and physical therapy from SHARE, which continued for several months. See Pet. Ex. 6.

On August 18, 1998, Jeffrey had a follow-up evaluation with Dr. Turk. Jeffrey was noted to be making excellent developmental progress with regard to his mild hypertonia and mild spastic quadriplegia. Pet. Ex. 4, p. 8. Jeffrey’s parents indicated that he ate and swallowed well, and was able to hold his own cup. *Id.* Jeffrey was described as crawling, pulling to stand, and cruising but not walking independently. *Id.* Doctor Turk also reported that Jeffrey’s speech was “predominantly limited to dada type sounds and nonsensical babbling.” *Id.*

In October 1998, petitioner reported to therapists with SHARE that Jeffrey had been misdiagnosed with cerebral palsy and that the diagnosis was changed due to Jeffrey’s progression. Pet. Ex. 6, pp. 4-5.

Doctor Turk saw Jeffrey again on January 18, 1999, when he was 20 months old. His parents reported that Jeffrey used three words purposely: “mama,” “dada,” and “stop.” They also reported that Jeffrey began walking at 14 months. Pet. Ex. 4, p. 10. At the time of the visit, Jeffrey was still receiving physical and occupational therapy, but only once a month. Doctor Turk recommended that Jeffrey continue with the therapy and suggested his parents seek a speech therapy evaluation, as he was concerned about the pace of Jeffrey’s speech development. *Id.*, p. 11.

On March 12, 1999, Jeffrey was admitted to the hospital for acute gastroenteritis, dehydration, ear infections, and croup. Pet. Ex. 5, p. 25. He was treated with intravenous fluids and antibiotics, and was discharged on March 19, 1999. *Id.* Per petitioner’s causation statement, this hospitalization occurred the day after Jeffrey

received an MMR vaccination. Causation Statement at 1. However, there is no mention of the vaccine in the hospital records. See Pet. Ex. 5. Additionally, there is no indication in the records of his pediatrician or in his vaccine record of an MMR vaccination on March 11, 1999. See Pet. Exs. 2; 3, p. 1; 8, p. 1. According to petitioner, after his stay in the hospital, Jeffrey was “talking lesser and he seemed abnormal.” Causation Statement at 1.

On December 17, 1999, Jeffrey was seen by Dr. Turk for a follow-up consultation. Doctor Turk noted that as “an infant there had been concern about prior hypokinetic movement disorder and possible cerebral palsy although these symptoms overall have significantly improved.” Pet. Ex. 4, p. 13. Jeffrey’s speech was reported as several single words and excessive babbling, and a fascination with lights and ceiling fans was noted. *Id.* Jeffrey would follow some simple commands, but had no intelligible vocalizations. *Id.*, p. 14. Doctor Turk described Jeffrey as having a “developmental delay and a static encephalopathy of unclear etiology.” *Id.* He noted that in the majority of children the exact etiology of developmental delay cannot be identified, but that sometimes etiologies emerge in time. *Id.*

Jeffrey had a re-evaluation for occupational therapy on February 17, 2000. The SHARE therapist reported that “[h]e continues to demonstrate awkward hand movements, decreased attention, and impaired vocabulary.” Pet. Ex. 6, p. 10. She also indicated that Jeffrey’s daycare instructors noted that he “does not interact with the other children, likes to play by himself, and often stares at the lights.” *Id.*

Jeffrey was also re-evaluated for speech delay in February 2000. He was noncompliant to formal testing, but his language was assessed informally via play. Pet. Ex. 6, p. 20. He “used a lot of jargon with varying intonation patterns,” and “followed simple 1 step commands with 40% accuracy when provided with visual and gestural cues.” *Id.* The therapist noted Jeffrey had poor eye contact, would often look up at the ceiling, and hummed when not attending to the therapist. *Id.*, pp. 20-21.

The last follow-up visit with Dr. Turk included in the records, is from May 10, 2000. In his report, Dr. Turk noted that “as [Jeffrey] has grown older his developmental delays become more concentrated in areas of speech language development.” Pet. Ex. 4, p. 15. His gross and fine motor functions continued to show signs of improvement, while his speech remained limited to single words. *Id.*

Jeffrey’s language and speech evaluation on February 15, 2002 reflected a severe articulation disorder and severe language delay. Pet. Ex. 6, p. 32. “He did not show receptive understanding of spatial concepts, descriptive concepts, quantity concepts or pronouns.” *Id.*, p. 31. Jeffrey would imitate three to four word phrases after the therapist, but would not combine words in spontaneous speech. Additionally, Jeffrey was noted to use one word with gestures to communicate. *Id.*

On June 18, 2002, a diagnostic evaluation was conducted at the Emory Autism Resource Center. Jeffrey had been referred for the evaluation due to concerns of his pre-school teachers and parents. Their concerns “centered on his language development, social interactions with other children and adults, and with unusual and inappropriate behaviors.” Pet. Ex. 7, p. 3. Based on the evaluation, Jeffrey was diagnosed with autistic disorder. The diagnostic report highlighted Jeffrey’s language delays, poor eye contact, flicking of his hands, and fascination with lights, among other behavioral traits, in reaching the autism diagnosis. Pet. Ex. 7, pp. 4 - 5.

III. Arguments and Analysis.

Respondent asserts that this claim was untimely filed. Petitioner has not made any arguments to counter respondent’s assertion. Based on the evidence filed thus far, I conclude that Jeffrey’s claim was untimely.

A. Untimely Filing.

1. The Statutory Requirements.

The Vaccine Act’s statute of limitations provides in pertinent part that, in the case of:

a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if 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. . . .”

§ 300aa-16(a)(2).

2. Interpreting the Statute of Limitations.

The date of occurrence “is a statutory date that does not depend on when a petitioner knew or reasonably should have known anything adverse about her condition.” *Cloer v. Sec’y, HHS*, 654 F.3d 1322, 1339 (Fed. Cir. 2011) (en banc). Additionally, the date “does not depend on the knowledge of a petitioner as to the cause of an injury.” *Id.* at 1338. When drafting the Vaccine Act, Congress rejected a discovery rule-based statute of limitations, in favor of one that does not consider knowledge and runs solely from the date of an event, the first symptom or manifestation of onset. *Id.*

In *Markovich*, the court explained the differences between “symptom” and “manifestation of onset,” as those words are used in the Vaccine Act. *Markovich v. Sec’y, HHS*, 477 F.3d 1353, 1357 (Fed. Cir. 2007). A symptom may be associated with

more than one condition, and it can be difficult for a lay person to connect a symptom with a particular injury. *Id.* Manifestation of onset, on the other hand, is something more clearly associated with an injury. *Id.* Neither requires a doctor making a definitive diagnosis of the injury. *Id.* at 1358 (quoting *Brice v. Sec'y, HHS*, 36 Fed. Cl. 474, 477 (1996)).

3. Applying the Facts to the Law

To determine if this case was timely filed, I must determine when the first symptom or manifestation of onset of the alleged vaccine injury occurred. Once that date is ascertained, I then compare it to the filing date of Jeffrey's petition to determine if the petition was filed within the Vaccine Act's 36 month statute of limitations.

Because petitioner filed her petition on behalf of Jeffrey on June 2, 2003, the first symptom or manifestation of onset of Jeffrey's autism must have occurred on or after June 2, 2000, in order for the petition to be considered timely. See *Markovich*, 477 F.3d at 1357 (holding that "either a 'symptom' or a 'manifestation of onset' can trigger the running of the statute [of limitations], whichever is first"); *Cloer*, 654 F.3d at 1335 (holding that the "analysis and conclusion in *Markovich* is correct. The statute of limitations in the Vaccine Act begins to run on the date of occurrence of the first symptom or manifestation of onset.").

Although the date of Jeffrey's autism diagnosis (June 18, 2002) occurred after the critical date of June 2, 2000, he exhibited numerous symptoms associated with autism prior to June 2, 2000. To be diagnosed with autism, a child must display abnormal development in three different domains: (1) language and communication; (2) social interaction; and (3) repetitive patterns of play, behavior, or interests. *Snyder*, 2009 WL 332044 at *36.

With regard to the first domain, language and communication, several references to speech delay are found in the records. On February 19, 1998, the SHARE therapist observed that Jeffrey's expressive and receptive communications skills were delayed, and recommended a speech language evaluation. Pet. Ex. 6, p. 3. On January 18, 1999, Dr. Turk also recommended a speech therapy evaluation for Jeffrey because he was concerned about the pace of Jeffrey's speech development. Pet. Ex. 4, p. 11. In February, 2000, Jeffrey's occupational therapy re-evaluation described his vocabulary as impaired, and his speech delay re-evaluation reflected that he "used a lot of jargon with varying intonation patterns," and "followed simple 1 step commands with 40% accuracy when provided with visual and gestural cues." Pet. Ex. 6, pp. 10, 20. On May 10, 2000, Dr. Turk noted that "as [Jeffrey] has grown older his developmental delays become more concentrated in areas of speech language development." Pet. Ex. 4, p. 15. Additionally, petitioner's recollection is that Jeffrey started talking less after March 1999. Causation Statement at 1.

Behaviors associated with the second domain, social interaction, include poor eye contact, lack of initiating social interaction with adults and other children, and being oblivious to their surroundings. *Snyder*, 2009 WL 332044 at *37. The records indicate that Jeffrey had such behaviors prior to June 2, 2000. For example, in his February 2000 speech re-evaluation, the therapist noted that Jeffrey had poor eye contact, would often look up at the ceiling, and hummed when not attending the therapist. Pet. Ex. 6, pp. 20-21. Additionally in February 2000, Jeffrey's daycare instructors indicated that he did not interact with the other children, liked to play by himself, and often stared at lights. *Id.* at 10.

The third domain, repetitive patterns of play, behavior, or interests, includes a preoccupation with narrow, restricted subjects, such as watching fan blades turn. *Snyder*, 2009 WL 332044 at *38. Other behaviors linked to the domain are an adherence to specific daily routines, repetitive motor mannerism, such as hand flapping, and focusing on components of an object rather than the object as a whole. *Id.* Jeffrey demonstrated traits connected with this domain prior to June 2, 2000. During his February 19, 1998 SHARE evaluation, the therapist observed symmetric hand and foot flapping. Pet. Ex. 6, p. 2. Doctor Turk also noted that Jeffrey has a fascination with lights and ceiling fans. Pet. Ex. 4, p. 13.

Additionally, petitioner herself points to an onset of Jeffrey's symptoms that places this case outside the statute of limitations. If I accepted her assertion that Jeffrey deteriorated after his March 1999 hospitalization, the symptoms of reduced use of language she described would mean that this case was untimely filed.

The statute of limitations considers both the first symptoms and the manifestation of onset. Since Jeffrey experienced symptomatic behaviors associated with autism prior to June 2, 2000, his petition was untimely filed and must be dismissed unless the doctrine of equitable tolling applies.

B. Equitable Tolling.

The doctrine of equitable tolling is a legal principle that acts to overcome a statute of limitations problem in certain situations. If a case is untimely filed and the doctrine of equitable tolling applies, then the case will be permitted to continue.

In *Cloer*, the Federal Circuit acknowledged that equitable tolling applies in Vaccine Act cases, but under very limited circumstances, such as when a petitioner was the victim of fraud or duress, or when a procedurally deficient pleading was timely filed. *Cloer*, 654 F.3d at 1344-45. It squarely rejected the applicability of equitable tolling "due to unawareness of a causal link between an injury and administration of a vaccine." *Id.* at 1345.

Petitioner has not presented any arguments that would support the application of equitable tolling to this claim, and my examination of the record does not disclose any basis for applying equitable tolling to this case.

V. Conclusion.

Petitioner has the burden to show timely filing. She has failed to establish that this case was filed within “36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury” as required by the Vaccine Act. § 300aa-16(a)(2).

For the reasons set forth above, **this case is dismissed as untimely filed. The clerk is directed to enter judgment accordingly.**

IT IS SO ORDERED.

Denise K. Vowell
Special Master