No. 22-1854

United States Court of Appeals for the Federal Circuit

STEPHANIE DIMASI,
Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

Appeal from the United States Court of Federal Claims in 1:15-vv-01455-AOB, Judge Armando O. Bonilla

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PRINCIPAL BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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March 6, 2023

Certificate of Interest[1]

Amicus Curiae Counsel certifies the following:

1. The full name of every entity represented by me is:

   N/A

2. The names of the real parties in interest represented by me are:

   N/A

3. All parent corporations and any publicly held companies that own 10% or more of stock in the entities represented by me are:

   N/A

4. The names of all law firms and the partners or associates that appeared for the entities now represented by me before the originating court or that are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

   N/A

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal is:

   None.

6. Organizational Victims and Bankruptcy Cases: Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees) are not applicable because this is not a criminal or bankruptcy case. See Fed. Cir. R. 47.4(a)(6).

DATED: March 6, 2023 By: /s/ *J. Kain Day*
J. Kain Day

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae counsel confirms that no party or counsel for any party authored this brief in whole or in part, and that no person other than amicus counsel and their firm made any monetary contribution intended to fund the preparation or submission of this brief.

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Statement of Related Cases

Amicus curiae counsel is not aware of any other appeal in or from this civil action. Nor is amicus aware of any case to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

Jurisdictional Statement

Ms. DiMasi appeals from an opinion of the United States Court of Federal Claims denying review of a special master's order. Appx15–20. The Claims Court had jurisdiction under 42 U.S.C § 300aa-12(a) and entered judgment on December 11, 2019. Appx10. Ms. DiMasi filed a motion for relief from that judgment on September 15, 2020, Appx31–32, which a special master denied on November 10, 2021, Appx178–203. Ms. DiMasi timely sought Claims Court review on December 10, 2021, *see* Appx13, and the Claims Court denied review on April 4, 2022, Appx15–20. Ms. DiMasi timely appealed on June 1, 2022. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

Statement of the Issues

1. Whether the special master abused his discretion by denying relief from judgment under Rule 60(b)(1) when a mistake of fact infected the special master's decision denying compensation.

2. Whether the special master abused his discretion by denying relief under Rule 60(b)(6) given that Counsel lacked actual authority to compromise Ms. DiMasi's significant-aggravation claim.

3. Whether the special master abused his discretion by denying Ms. DiMasi's Rule 60 motion without an evidentiary hearing.

4. Whether the special master abused his discretion by relying on the presumption this Court rejected in *Kirby v. Sec'y of Health & Human Servs.*, 997 F.3d 1378 (Fed. Cir. 2021).

Introduction

On December 4, 2012, Stephanie DiMasi received a dose of the flu vaccine. In the months and years that followed, she suffered from unrelenting cardiac and neurological symptoms. Eventually, in late 2016, Ms. DiMasi was diagnosed with small fiber neuropathy, a nerve condition, and related postural orthostatic tachycardia syndrome (POTS), a heart condition.

Through her counsel, Howard S. Gold ("Counsel"), Ms. DiMasi filed a petition in the Claims Court under the Vaccine Act (42 U.S.C. § 300aa-11 to -34), seeking compensation for her vaccine-related injuries. Thereafter, Counsel litigated Ms. DiMasi's petition before a special master. In doing so, he failed to follow Ms. DiMasi's clear instructions and abandoned Ms. DiMasi's substantial rights without permission. As a result, Ms. DiMasi never received a compensation decision based on the true medical facts.

Counsel ignored Ms. DiMasi's instructions to correct an error in her medical records. Throughout the litigation, Ms. DiMasi reminded Counsel that her neurological symptoms started days—not minutes—after her vaccine. Medical records to the contrary, Ms. DiMasi explained,

were the result of physician errors. She even marked up a set of records, indicating precise mistakes in the physician's notes. Despite all of this, Counsel crafted a causation theory that centered on the immediate onset of neurological symptoms, relying on the very mistake of fact that Ms. DiMasi had identified. Thus, Counsel ensured that Ms. DiMasi's petition would not be adjudicated based on her view of the true facts.

Worse still, Counsel surrendered Ms. DiMasi's substantial rights without her permission. The special master issued a detailed order to "guide the parties in discussing the elements of Ms. DiMasi's case." SAppx041. Every aspect of that order suggested that Ms. DiMasi should bring a significant-aggravation claim, yet Counsel affirmatively abandoned that claim without consulting Ms. DiMasi. Thus, Ms. DiMasi never had an opportunity to decide whether she wanted to pursue a significant-aggravation claim.

In the end, the special master denied Ms. DiMasi's petition for compensation. He concluded that Ms. DiMasi's conditions predated her 2012 vaccine, and he declined to address any significant-aggravation claim given Counsel's concession. The special master's causation narrative relied on the immediate onset of neurological symptoms—

citing the very records Ms. DiMasi had identified as mistaken. A month later, when Counsel failed to seek review of the decision denying compensation, that decision became final.

Nine months later, after delays caused by Counsel's unresponsiveness and Ms. DiMasi's illness, Ms. DiMasi sought relief from judgment. The special master denied her motion, and in doing so, he committed four independent errors:

First, the special master applied the wrong standard for relief from judgment based on a mistake—ignoring the plain language of Rule 60[2] and misunderstanding the relevance of Counsel's conduct. Under the correct standard, Ms. DiMasi is entitled to relief. There can be no dispute that Ms. DiMasi identified a mistake in her timely Rule 60 motion. Nor can there be any dispute that the equities favor reopening. Thus, there is no need for a remand to assess Ms. DiMasi's entitlement to relief from judgment. Instead, the Court should reverse and remand so the special master can reopen Ms. DiMasi's proceedings.

[2] The Court interprets Rule of the Court of Federal Claims 60 and Federal Rule of Civil Procedure 60 consistently. *Dobyns v. United States*, 915 F.3d 733, 737 n.1 (Fed. Cir. 2019). Thus, amicus does not distinguish between those Rules.

Second, the special master failed to recognize that when lawyers surrender their clients' substantial rights without authority, relief may be warranted under Rule 60(b)(6). There is no dispute that Counsel lacked authority to compromise Ms. DiMasi's significant-aggravation claim, and on balance, the equities favor reopening. Thus, the Court should reverse the special master's Rule 60(b)(6) decision as to the significant-aggravation claim and remand for further proceedings on that claim.

Third, the Court requested briefing on the adequacy of the special master's fact-finding procedures. Those procedures were inadequate. The special master could not deny relief here without conducting an evidentiary hearing. Thus, if this Court disagrees with amicus that the current record establishes that Ms. DiMasi is entitled to relief, it should remand for the special master to hold a hearing.

Fourth, the special master's Rule 60 decision relied on a presumption that medical records are complete and accurate. This Court has soundly rejected any such presumption, so a remand is necessary irrespective of the other errors in that decision.

Statement of the Case

I. Legal Background

In 1986, Congress enacted the National Childhood Vaccine Injury Act, Pub. L. No. 99-660 tit. III, 100 Stat. 3743, 3755–84. Much of that act was devoted to creating the National Vaccine Injury Compensation Program, *see* 42 U.S.C. §§ 300aa-10 to -34, a no-fault system for providing compensation to individuals who are harmed by vaccines. The core object of this program was "to stabilize the vaccine market and expedite compensation to injured parties." *Sebelius v. Cloer*, 569 U.S. 369, 372 (2013).

To that end, Congress crafted a program to compensate "vaccine-injured persons quickly, easily, and with certainty and generosity." *Andreu ex rel. Andreu v. Sec'y of Dep't of Health & Human Servs.*, 569 F.3d 1367, 1383 (Fed. Cir. 2009) (citation omitted). In most circumstances, injured individuals must petition for compensation in the Claims Court. 42 U.S.C. § 300aa-11. The petition is then assigned to a special master, who collects evidence and makes a decision on whether compensation will be provided. *See id.* §§ 300aa-12(d)(3)(A)–(B). The special master's compensation decision is subject to review by the Claims

Court, 42 U.S.C. § 300aa-12(e)(1), but only under a deferential standard, *id.* § 300aa-11(e)(2).

To be entitled to compensation, a petitioner must meet several statutory criteria. *Id.* § 300aa-13(a)(1); *see also id.* § 300aa-11(c)(1). Chiefly, she must prove that she "sustained, or had significantly aggravated" a vaccine-related "illness, disability, injury, or condition." *Id.* § 300aa-11(c)(1)(C). This can be shown in either of two ways. *Id.* For "on table" claims, the petitioner need only show that she received a listed vaccine and that she suffered a listed injury within the prescribed time. *Id.* § 300aa-11(c)(1)(C)(i); *see also id.* § 300aa-13(a)(1); 42 C.F.R. § 100.3. Then, unless the Secretary disproves causation, the petitioner is entitled to relief. *See* 42 U.S.C. § 300aa-13(a)(1)(B). For "off table" claims, petitioners bear the burden of proving causation. *Id.* § 300aa-11(c)(1)(C)(ii). Upon meeting the statutory criteria, the petitioner may recover medical costs and other damages. *Id.* § 300aa-15(a).

II. Factual Background

On December 4, 2012, Ms. DiMasi received an influenza vaccine that forms the basis of her compensation petition. Appx16. After dozens of doctors' visits, Ms. DiMasi was diagnosed with small fiber neuropathy

and POTS in October 2016. Appx25. Neither of these conditions are listed in the vaccine injury table entry for trivalent flu vaccines, *see* 42 C.F.R. § 100.3(a) (2015), so Ms. DiMasi was required to show causation to be entitled to compensation. Accordingly, much of the litigation below focused on comparing Ms. DiMasi's pre-vaccination medical history to her post-vaccination medical history. *E.g.*, Appx22–25.

A. Pre-Vaccine Medical History

Before the 2012 vaccine, Ms. DiMasi had minor bouts with cardiac and neurological symptoms:

- In March 2008, Ms. DiMasi was admitted to the hospital for syncope and premature ventricular contractions—both of which are cardiac conditions. Appx22. After receiving medication, she was released. *Id.* Follow-up tests returned no abnormal results. *Id.*
- During much of 2009, Ms. DiMasi went to physical therapy for upper (cervical and thoracic) spine issues. SAppx028. Thereafter, she continued to experience sporadic neck discomfort. *Id.* The records for this neck-pain treatment include a reference to her prior heart conditions and peripheral neuropathy. Appx22.
- In August 2009, Ms. DiMasi saw a neurologist, Dr. Fischer, for recalcitrant myofasciitis syndrome—a muscle pain condition. SAppx028; Appx22. This improved with massage therapy. SAppx028.
- In November 2009, Ms. DiMasi was again admitted to the hospital for syncope. Appx22.

- ❖ In 2011, Ms. DiMasi had a reaction to the flu vaccine. She experienced tachycardia, lightheadedness, and dizziness for thirty minutes. Appx22–23. Those symptoms "receded after a few days." *See* SAppx029.

- ❖ In mid-2012, Ms. DiMasi visited Dr. Fischer and reported a syncopal event as well as tingling behind her knees when she sat down for too long. Appx23. The record of that visit also includes a note about fibromyalgia—a pain condition. *Id.*

Over this four year period, Ms. DiMasi's symptoms were transitory, and by late 2012, those symptoms had stabilized.

B. Post-Vaccine Medical History

After the 2012 vaccine, however, Ms. DiMasi's cardiac and neurological symptoms changed dramatically. For the next four years (and to date), she suffered from unrelenting cardiac and neurological distress:

- ❖ On December 5, 2012, the day after the vaccine was administered, Ms. DiMasi saw her primary-care provider. Appx23. She reported tachycardia and a "weird" sense of throat tightening. *Id.* She was admitted to the hospital overnight and then discharged with a diagnosis of tachycardia. *Id.* A vaccine adverse event reporting system (VAERS) record from December 5 recounts several additional symptoms, none of which are neurological. ECF No. 31-2 at 3.[3] Other records from this day also report only non-neurological symptoms. *See* SAppx028–029.

- ❖ Then, on December 8, 2012, Ms. DiMasi returned to the hospital. Appx23. For the first time since receiving the vaccine, she began

[3] The Court took judicial notice of this record.

reporting neurological symptoms, which started behind her left knee and affected her left arm. Appx029.

- ❖ Another VAERS form completed on December 10, 2012, recounts Ms. DiMasi's reaction to the vaccine. SAppx014–016. That report notes the "[i]mmediate[]" onset of "adverse events," and it explains how Ms. DiMasi "developed" neurological symptoms like "numbness and tingling of the left leg" after her vaccine. SAppx016.

- ❖ On December 19, 2012, Ms. DiMasi saw Dr. Chen, a neurologist. Dr. Chen recorded Ms. DiMasi as saying that, "immediately after [her] flu shot," Ms. DiMasi "had a sensation of dizziness, tachycardia, shakiness, generalized weakness and tingling behind the right knee." Appx24. He expressed confusion about the cause of those symptoms. *Id.*

- ❖ More than a week later, on December 27, 2012, Ms. DiMasi visited Dr. Fischer again. Appx24. Dr. Fischer's notes also report that Ms. DiMasi experienced neurological symptoms immediately after her vaccine. *Id.* Like Dr. Chen, Dr. Fischer expressed confusion about what caused such rapid onset of symptoms.

- ❖ For the next two months, Ms. DiMasi had a string of doctors' visits to address ongoing cardiac and neurological symptoms. SAppx030. She reported, for example, suffering from palpitations, hypersensitivity of her legs, sciatica, tingling sensations, and tachycardia. *Id.*

- ❖ This pattern continued from 2013 through 2016. *See* SAppx030–034 (summarizing records); *see also* Appx24. By Ms. DiMasi's tally, she went to the doctor 72 times in the eighteen months following her vaccine. SAppx216.

Ultimately, Ms. DiMasi's struggle with cardiac and neurological distress culminated in a diagnosis of small fiber neuropathy and two

other conditions caused by that neuropathy—POTS and mild autonomic failure. Appx24–25. Now, Ms. DiMasi believes she may be permanently disabled. *See* SAppx161.

III. Procedural History

In early 2013, while she was suffering constant cardiac and neurological distress, Ms. DiMasi approached Counsel about seeking compensation under the Vaccine Act. Appx155 (Counsel Affidavit). After at least two reminders from Ms. DiMasi and just before the statute of limitations expired, *see* SAppx193–196 (Emails between DiMasi and Counsel), Counsel filed a two-page petition seeking Vaccine Act compensation. *See* SAppx001–002. This petition launched a series of proceedings, which culminated in a judgment denying compensation.

A. Pre-Judgment Proceedings

Counsel filed a collection of Ms. DiMasi's medical records, and in September 2016, the Secretary responded with his Vaccine Rule 4(c) report. *See* SAppx005–013. In that report, the Secretary argued that Ms. DiMasi had not proven causation. *Id.* Among other things, he pointed out how Ms. DiMasi had "reported" "tingling and pain in her left leg" that "began within minutes of her receipt of the flu vaccine,"

asserting that this was "far too soon to support a finding of an immunological response to the vaccine." SAppx012. He supported this argument by citing medical records from Dr. Chen ("Chen Records") and from Dr. Fischer ("Fischer Records"), which recounted immediate onset of neurological symptoms. *Id.*

As Ms. DiMasi later explained in an affidavit, Counsel provided her with a copy of the Secretary's Rule 4(c) report. *See* SAppx140 (DiMasi Affidavit).[4] The affidavit recounts how Ms. DiMasi found the report "very disappointing" based on its "inaccurate description of [her] symptom onset," explaining how "neuropathy onset was not immediate." *Id.* It also explains that Ms. DiMasi shared her concerns with Counsel, who said those concerns "did not matter because the Courts base the facts on medical records, not on oral testimony." *Id.* In Counsel's responsive affidavit, Counsel characterized Ms. DiMasi input on the Rule 4(c) report as "unsolicited" feedback. Appx154 (Counsel Affidavit).

The next stage in the Vaccine Act process was expert discovery. Counsel engaged an expert witness—Dr. Marcel Kinsbourne—to testify

[4] The document is entitled "Motion for Leave to File," but it is styled as an affidavit.

on Ms. DiMasi's behalf, apparently without consulting Ms. DiMasi. *See* SAppx197 (Email from DiMasi to Counsel) (questioning Dr. Kinsbourne's qualifications after he was engaged). Counsel also filed an expert report, which Ms. DiMasi claims to never have received. *See* SAppx188 (DiMasi Affidavit) ("The only court document I received a copy of during my case was my affidavit and the Rule 4 report."). When Ms. DiMasi objected to Counsel's unresponsiveness and to the qualifications of Dr. Kinsbourne, Counsel suggested she could seek new counsel. *See* SAppx198–200 (Email from Counsel to Ms. DiMasi) ("Should you wish to find other Counsel, please let me know.").

In his expert report, Dr. Kinsbourne opined that Ms. DiMasi's 2012 vaccination caused her small fiber neuropathy. SAppx021; SAppx024. Counsel claims to have discussed Ms. DiMasi's corrections regarding ***where*** her symptoms occurred (i.e., right v. left leg) with Dr. Kinsbourne. *See* Appx155 (Counsel Affidavit). But he offers no examples of informing Dr. Kinsbourne about Ms. DiMasi's corrections to ***when*** her symptoms started (i.e., immediately or days later). *See* SAppx017–024. Ultimately, Dr. Kinsbourne's causation opinion turned on the immediate onset of Ms. DiMasi's neurological condition. SAppx024 (describing onset "within

a day" of the vaccine); *see also* SAppx039 (Supplemental Report) (Neuropathy "began one day after" the vaccine.). He even relied on the erroneous Chen and Fischer records to support his opinion. SAppx018–019.

The Secretary responded with an expert report from Dr. Thomas Leist. SAppx027–035; *see also* SAppx036–037 (supplemental report). Dr. Leist opined that Ms. DiMasi "did not incur an injury, or aggravation of a preexisting condition including small fiber neuropathy, due to the" 2012 vaccination. SAppx035; SAppx037. Instead, in his opinion, her only injuries from the vaccine were "self-limiting, transient, allergy-like symptoms immediately following vaccination." SAppx035. Dr. Leist relied on the Chen and Fischer records to support that opinion. *See* SAppx029; SAppx034. He also considered, and dismissed, the possibility that Ms. DiMasi's small fiber neuropathy had been aggravated by the vaccine, injecting that issue into the case for the first time. SAppx035.

Counsel replied to Dr. Leist's report with a supplemental report from Dr. Kinsbourne. *See* SAppx038–040. As Ms. DiMasi explains in her affidavit, shortly before filing this report, Counsel asked her to describe how her conditions changed after the vaccine. SAppx140 (DiMasi

Affidavit). Ms. DiMasi claims she was "did not understand" the request, and thus, provided a statement describing her "vaccine reaction and the symptoms that followed just as [she] had in [her] two prior statements." *Id.*[5] As Ms. DiMasi explained in an affidavit, Counsel did not, at any point, explain the possibility of a significant-aggravation claim. SAppx188.

After expert discovery ended, the special master held a status conference. *See* SAppx041. During that conference, Counsel "indicated that Ms. Di[M]asi wanted an adjudication based upon the record without any oral testimony." *Id.* In a later-filed affidavit, Ms. DiMasi claims that Counsel told her a hearing was not available. SAppx188. Based on Counsel's representation, the special master issued an order directing briefing on Ms. DiMasi's claim for compensation in lieu of a hearing. SAppx041–048. His order provided detailed instructions to "guide the parties" in preparing their filings. SAppx041. He instructed both parties to address "all the elements of a significant[-]aggravation case,"

[5] This statement seems to be reproduced at SAppx184–185. It explains that Ms. DiMasi's "life" "changed since" her vaccine.

SAppx043, and provided specific guidance on how each element should be addressed. SAppx043–048.

Counsel then moved for judgment on the record. *See* SAppx049–064; SAppx084–106 (amended motion). He argued that Ms. DiMasi's neurological condition started immediately after her vaccine, relying on the Chen and Fischer records. SAppx085–086; SAppx100–101 (not contesting "immediate onset" characterization); SAppx102 (discussing "one-day" onset). The motion did, in passing, mention that Ms. DiMasi's neurological symptoms did not start until four days after the vaccine, but this was not the basis for his causation theory. *See* SAppx102. Notably, contrary to the special master's orders, Counsel did not address any significant-aggravation claim in his first motion. SAppx049–064. He did, however, affirmatively abandon such a claim in his amended motion. SAppx104.

Ultimately, the special master denied Ms. DiMasi's petition for compensation. He found that Ms. DiMasi's small fiber neuropathy predated the vaccine. Appx28. In doing so, he detailed the uncontested narrative of how Ms. DiMasi's neurological symptoms developed—in particular how the Chen and Fischer records indicated immediate onset

of neurological symptoms. Appx24, 28. He also credited Dr. Leist's opinions, which were based on immediate onset of symptoms. *See* Appx28–29.

Soon after the decision denying compensation was entered, Counsel shared the result with Ms. DiMasi. SAppx151 (Email from Counsel to DiMasi). He gave a short summary of the decision, *id.*, but did not share a copy of the full reasoning, *see* SAppx157 (Email from Counsel to DiMasi) (providing a copy in February 2020). Then, Counsel and Ms. DiMasi had a short phone call during which they discussed the possibility of Claims Court review. Appx153 (Counsel Affidavit). After that, as email traffic shows, Counsel and Ms. DiMasi did not speak for almost a month. SAppx151–153 (Emails between DiMasi and Counsel). On December 11, 2019, the same day that Ms. DiMasi and Counsel reconnected, the special master's decision became the final judgment of the Claims Court.

B. Post-Judgment Proceedings

Nine months later, Ms. DiMasi sought relief from the judgment under Rule 60. Appx31–32. The crux of her argument was that Counsel "did not present pertinent facts accurately." Appx31. She explained that

she had "advised [Counsel] on several occasions that [her] neurological symptoms did not begin until 3-4 days after the vaccine." *Id.* Moreover, Ms. DiMasi argued that Counsel "never informed [her] of the option to submit a significant[-]aggravation claim had [Counsel] thought [she] would not be successful in proving" causation in fact. Appx32.

Ms. DiMasi further explained that, in prosecuting her claims, Counsel had essentially ceased to function as her agent. Appx31–32. She identified Counsel's lack of communication, Appx32 (noting lack of discussion about important matters); disregard for her clear instructions, Appx31 (discussing mistake in records); and failure to inform her of (or obtain authority to forgo) any claim of significant aggravation, Appx32 (explaining Counsel never raised the possibility of such a claim). In addition, Ms. DiMasi provided a fulsome discussion of her medical history and attached several key records. *See* Appx33–34 (listing evidence).

Soon thereafter, Counsel responded with an affidavit of his own. Appx153–156. Counsel explained his choice not seek review of the compensation decision, Appx153–154; his choice to seek a decision on the papers, Appx154–155; and his abandonment of a significant-aggravation

claim, Appx155. He also stated that Ms. DiMasi's comments concerning her pre- and post-vaccination medical histories were "inconsistent." Appx154–155. In particular, Counsel identified two statements from Ms. DiMasi. First, he claimed that Ms. DiMasi corrected the Chen records by handwriting in a short note: "immediately after the shot . . . there was mild tingling behind the left knee instead of the right knee." Appx155 (quotation marks omitted). Second, Counsel claimed that Ms. DiMasi wrote to him saying that "neuropathy did not occur within minutes," but that she did experience a "slight tingle among several other symptoms." Appx155. Separately, Counsel asserted that Ms. DiMasi's "denial of pre-existing symptoms negated the ethical and practical possibility of filing a significant[-]aggravation claim." Appx155.

Ms. DiMasi responded to Counsel, reiterating her arguments and providing further evidentiary support. *E.g.*, SAppx139–141; SAppx150–164; *see also* Appx172–176. She provided emails reminding Counsel to respond to her requests, *see* SAppx153 ("Did you receive my email?"); SAppx156 ("You were go[i]ng to send me the complete first and second rulings which I have not yet received . . ."), and emails showing Ms. DiMasi informed Counsel about when her neurological symptoms

started, SAppx184 (explaining how "nerve pain" developed "a few days" after the vaccine); SAppx202 (similar). She also submitted two affidavits supporting her allegations, SAppx139–141; SAppx188, and she sought leave to supplement the record with additional evidence of her vaccine injury. SAppx211–224. In one affidavit, Ms. DiMasi explains how Counsel "failed to mention" important corrections to the Chen records: she "crossed out" language saying that "[s]he has had these symptoms chronically since the injection" and replaced it with "since 4 days after the injection." SAppx140 (cleaned up).

After briefing concluded, the special master denied Ms. DiMasi's motion to supplement the record. Appx182–190. In part, he analyzed that motion under Rule 60(b)(1), explaining that Ms. DiMasi sought to avail herself of that Rule's "mistake" prong. In doing so, he applied a three-part balancing test that considers: (1) whether the movant has a meritorious claim, (2) any prejudice to the nonmovant, and (3) whether the movant's culpable conduct caused judgment to be entered. Appx187. That standard, articulated in *Information Systems,* was crafted to assess whether "excusable neglect" warrants relief from judgment. *See Information Systems & Networks Corp. v. United States*, 994 F.2d 792,

795–96 (Fed. Cir. 1993). Because Ms. DiMasi was culpable, the special master reasoned, she was not entitled to relief. Appx189.

The special master also considered Ms. DiMasi's motion to supplement under Rule 60(b)(6). He recognized that "extraordinary circumstances" are required to warrant relief under this provision, *see* Appx184, and he concluded that "attorney negligence does not constitute an extraordinary circumstance," Appx184. Instead, the special master reasoned, complete attorney abandonment is required. Appx184. The special master found no such abandonment. Appx190.

The special master then denied Ms. DiMasi's motion to reopen her case without expressly distinguishing between Rules 60(b)(1) and 60(b)(6). Appx190–203. He interpreted the motion as challenging Counsel's conduct in six respects, each of which he concluded did not warrant relief. Appx192–199; *see also* Appx202 (noting evidence filed on reconsideration did not alter these conclusions). Throughout this discussion, the special master held Ms. DiMasi accountable for Counsel's conduct, concluding the facts did not show abandonment because "attorney negligence" is insufficient to establish abandonment. *See* Appx192–203. He also concluded that "[p]reponderant evidence"

established that Ms. DiMasi's symptoms had in fact begun "prior to" vaccination. Appx194. That conclusion rested on the special master's own review of the mistaken medical records, supported by a presumption those records are accurate. Appx192; Appx194.

Still acting *pro se*, Ms. DiMasi petitioned for review of the special master's decision denying her Rule 60 motion. The Claims Court denied review, and Ms. DiMasi appealed. Amicus was appointed to file a brief in support of that appeal.

Summary of Argument

The special master's Rule 60 decision applied the wrong legal standards. Under the correct standards, the current record establishes that Ms. DiMasi is entitled to relief from judgment.

1. By relying on *Information Systems*' standard for "excusable neglect," the special master applied the wrong standard for assessing whether a "mistake" warrants relief from judgment. That standard is inconsistent with the plain text of Rule 60, which requires a court to consider three questions before awarding relief based on a "mistake." First, a court must determine whether a "mistake" occurred. Second, it must assess whether the motion seeking relief was timely. And third,

provided the first two points are satisfied, the court must exercise its discretion in determining whether relief is warranted.

The special master also applied the wrong standard for attributing Counsel's conduct to Ms. DiMasi. His articulation of that standard does not match the general agency principles that define when a client is bound by her attorney's conduct. Nor does that articulation recognize that attorney conduct may be relevant to the Rule 60 analysis even if it does not constitute complete abandonment.

Applying the correct legal standards here, the undisputed facts establish that Ms. DiMasi is entitled to relief from judgment based on a "mistake." Thus, a remand for the special master to reconsider Ms. DiMasi's Rule 60 motion is unnecessary, and the Court should reverse and remand for the special master to reopen Ms. DiMasi's claim for relief.

2. Ms. DiMasi is also entitled to relief from judgment under Rule 60(b)(6) because the special master abused his discretion by denying Ms. DiMasi's request for relief with respect to her significant-aggravation claim. An attorney cannot surrender the "substantial rights" of her client without express permission. Yet it is undisputed that Counsel

abandoned Ms. DiMasi's significant-aggravation claim without even consulting her—despite the special master's clear instructions that Counsel should brief such a claim.

3. At a minimum, the special master abused his discretion by denying relief without conducting a hearing. Even if the Court concludes that reversal is not warranted for the reasons explained above, there are genuine disputes of credibility that cannot be resolved without a hearing.

4. In all events, the special master's decision was built upon a presumption of accuracy in medical records. This Court definitively rejected such a presumption in *Kirby*, so irrespective of other errors in the special master's decision, a remand is still necessary for the special master to reconsider the Rule 60 decision without this presumption.

Argument

I. Standard of Review

This Court reviews special masters' decisions "under the same standard as the [Claims Court]." *Rodriguez v. Sec'y of Health & Human Servs.*, 632 F.3d 1381, 1383–84 (Fed. Cir. 2011). Those decisions must be set aside when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* A decision denying Rule 60 relief is reviewed "for abuse of discretion," and an error of law amounts to an abuse of discretion. *Patton v. Sec'y of Dep't of Health & Human Servs.*, 25 F.3d 1021, 1029 (Fed. Cir. 1994).

II. The Special Master Abused His Discretion by Denying Relief Based on a "Mistake"

In rejecting Ms. DiMasi's argument a "mistake" justified reopening, the special master applied the wrong legal standards (1) for determining whether a "mistake" warranting relief from judgment had occurred and (2) for determining how Counsel's conduct impacts the Rule 60(b)(1) analysis. Under the correct standards, the special master's denial of relief from judgment cannot be sustained.

A. Courts Have Discretion To Grant Relief From Judgment Based on Errors of Fact Raised in a Timely Rule 60 Motion

Under Rule 60(b)(1), the Claims Court "may relieve a party or its legal representative from a final judgment" for "mistake, inadvertence, surprise, or excusable neglect." A court may grant such relief only "[o]n [a] motion," Rule 60(b), that is filed "within a reasonable time" and "no more than a year after the entry of the judgment," Rule 60(c)(1).

This case concerns relief from judgment based on an asserted "mistake." Rule 60(b)(1)'s language establishes that a court must consider three questions before granting such relief. First, it must determine whether a "mistake" occurred. Second, it must assess whether the motion seeking relief was timely. And third, provided the first two requirements are satisfied, the court must exercise its discretion in determining whether relief is warranted. That discretion arises from Rule 60(b)'s permissive language: that rule allows, but does not require, courts to grant relief. *See* RCFC 60(b) ("[T]he court may relieve a party . . . from a final judgment[.]"). Each of these elements is discussed further below.

(1) To be entitled to relief based on a "mistake," the movant must identify something that qualifies as a mistake. By virtue of its ordinary meaning, a "mistake" includes any error of fact or law, whether by the parties or the court. *Kemp v. United States*, 142 S. Ct. 1858, 1862 (2022).

Indeed, even errors that are not excusable—that is, errors for which a party may be at fault—fall within the ambit of Rule 60(b)(1). Had the authors of Rule 60 wished to prevent relief based on inexcusable mistakes, they could have easily drafted language to that effect. In fact, they limited relief based on neglect to cases of "***excusable*** neglect" just a few words later in Rule 60(b)(1). It would be inconsistent, then, to interpret "mistake" as limited to only excusable mistakes of law or fact.

Still, "mistake" cannot be read so broadly as to include a party's well-informed tactical decisions. A reasoned choice—one not infected by some misapprehension or misunderstanding—is not a "mistake." After all, a "mistake" requires some level of inadvertence. *See Kemp*, 142 S. Ct. at 1862 (recounting ordinary and legal meaning of mistake). Clear-eyed litigation choices cannot justify relief under Rule 60(b)(1). *See, e.g.*, *Qiang Wang v. Palo Alto Networks, Inc.*, 686 F. App'x 890, 894 (Fed. Cir.

2017) (applying Ninth Circuit law); *United States v. 8 Gilcrease Lane*, *Quincy, Fla. 32351*, 638 F.3d 297, 301 (D.C. Cir. 2011).

This is not to say, however, that a litigation decision cannot lead to a "mistake" ***by the court***. A party's arguments (or failure to raise an issue) may lead the court to misapprehend the facts or misinterpret the law, and there is no reason to believe such an error by the court would not meet the ordinary meaning of a "mistake." The court has still committed an error of fact or law, even if the error was precipitated by a party's litigation choice. Moreover, nothing in the structure or history of Rule 60 prevents such mistakes from meeting the plain language of that Rule.

To be sure, encouraging or failing to correct a mistake may prevent relief from judgment under waiver, forfeiture, or other equitable principles. But those considerations are best taken into account in the equitable balancing analysis. *See infra,* pp. 31–33.

(2) To be timely, a motion for relief from judgment must have been filed "within a reasonable time" and "no more than a year after the entry of the judgment." Rule 60(c)(1). These are separate requirements, each of which must be satisfied to allow for relief. *See Venture Indus.*

Corp. v. Autoliv ASP, Inc., 457 F.3d 1322, 1328 (Fed. Cir. 2006) (applying Sixth Circuit law); 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2866 (3d ed. 2022) (Wright & Miller). Assessing whether a motion was filed within a year of judgment will, in most cases, be straightforward. But the reasonableness inquiry is often more nuanced.

"What constitutes reasonable time necessarily depends on the facts in each individual case." Wright & Miller § 2866. Courts consider a variety of factors including "the [moving] party's ability to learn earlier of the grounds relied upon, the reason for the delay, the parties' interests in the finality of the judgment, and any prejudice caused to parties by the delay." *E.g.*, *Bynoe v. Baca*, 966 F.3d 972, 980 (9th Cir. 2020). In addition, courts have interpreted the reasonableness requirement as barring Rule 60 relief for issues that could have been raised on direct appeal. *See Kemp*, 142 S. Ct. at 1863.

In general, courts consider only post-judgment conduct when analyzing reasonableness. *E.g.*, *Bouret-Echevarría v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37, 43–44 (1st Cir. 2015); *Bynoe*, 966 F.3d at 980. This follows from the fact that Rule 60 "affords relief within a reasonable time ***after*** a final judgment is entered and cannot be invoked

before the entry of judgment." *Patton*, 25 F.3d at 1030 (emphasis added). Put simply, Rule 60 does not require pre-judgment exhaustion. *Id.*

(3) Even when a party identifies a mistake in a timely motion, the Claims Court is not required to grant relief. *See* RCFC 60(b) (using permissive language). Granting relief from judgment is, at bottom, an equitable determination. *Lafferty v. District of Columbia*, 277 F.2d 348, 351 n.6 (D.C. Cir. 1960) (explaining how Rule 60 replaced equitable practice). The court must exercise its discretion "in light of the balance that is struck by Rule 60(b) between" the need for "finality" of judgments and a desire to see that "justice" is done. *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 788 F.3d 1329, 1343 (11th Cir. 2015); *see also Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006) (similar). So trial courts should consider "all relevant circumstances" when assessing whether a mistake warrants reopening. *Cf. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (interpreting "excusable neglect" under Rule 60(b)(1)).

That said, courts have identified a few factors that guide the analysis. Some factors are aimed at assessing whether reopening a judgment will undermine finality. *Fackelman v. Bell*, 564 F.2d 734, 736

(5th Cir. 1977) (considering prejudice to nonmovant and "orderliness and predictability" of judgments); *Talasila, Inc. v. United States*, 524 F. App'x 671, 673 (Fed. Cir. 2013) (non-precedential) (noting "do-over[]" can divert resources from fresh cases to previously-final cases). Other factors bear on whether reopening a judgment will serve the interests of justice. *Dobyns v. United States*, 915 F.3d 733, 738 (Fed. Cir. 2019) (addressing whether reopening would be futile).

In particular, it would not be in the interests of justice to allow parties to invite the trial court to make a "mistake" and then claim that mistake justifies reopening the judgment. Courts have long held that it would be "unfair to the orderly administration of justice" to allow parties to challenge on appeal an error they invited. *Atlantic Brewing Co. v. William J. Brennan Grocery Co.*, 79 F.2d 45, 47 (8th Cir. 1935); *see also Johnson v. United States*, 318 U.S. 189, 201 (1943). And the principles animating other equitable considerations—like estoppel and waiver—are similar. *See Key Pharms. v. Hercon Lab'ys Corp.*, 161 F.3d 709, 715 (Fed. Cir. 1998) (discussing changed claim construction on appeal).

In the end, the court must assess whether reopening is justified by considering and weighing all relevant facts. The court need not, however,

identify any "extraordinary circumstances" before granting relief. *See Information Systems*, 994 F.2d at 796. That requirement was crafted to limit the scope of the catchall language in Rule 60(b)(6), which provides relief based on "any other reason justifying relief." *See id.* at 795 (citation omitted). It does not apply to a motion based on Rule 60(b)(1).

* * *

In sum, under the text of Rule 60, a party may be entitled to relief from judgment based on a "mistake" if she can show (1) an error of fact or law (2) in a motion that is filed within a reasonable time after judgment. Then, provided both these prongs are satisfied, the trial court should grant relief when (3) the balance between finality and the interests of justice supports such reopening.

B. The Special Master Failed to Apply the Correct Standard for Relief Based on a Mistake

The special master applied the wrong standard for "mistake" under Rule 60(b)(1). He required Ms. DiMasi to show "exceptional circumstances," Appx163, contrary to this Court's clear precedent. *See supra*, p. 32-33. Also, the special master relied on the standard for assessing whether a party's "excusable neglect" justifies relief, often from a default judgment entered as a result of a party's failure to appear:

> (1) whether the movant has a meritorious claim or defense; (2) whether the nonmovant would be prejudiced by the granting of relief; and (3) whether the matter sought to be relieved was caused by the movant's own culpable conduct.

Appx187 (applying factors announced in *Information Systems*). But "excusable neglect" is an independent ground for relief under Rule 60(b)(1), and therefore, the tests for "excusable neglect" and "mistake" must be distinct.

Indeed, the factors announced in *Information Systems* do not map onto the "mistake" inquiry outlined in Rule 60. No factor in that analysis considers whether a party or the court committed an "error of law or fact" or any other "mistake." Instead, those factors focus on whether the movant's neglect was "excusable" and whether relief is warranted in light of that neglect. *See Info. Sys.*, 994 F.2d at 796 (relying on *Pioneer*, 507 U.S. at 395, for its discussion of when neglect is "excusable").

To be sure, the test for assessing whether neglect is "excusable" may depend on many of the same facts that bear on parts of the "mistake" inquiry. Assessing "excusable neglect" is an "equitable" analysis that considers "all relevant circumstances." *Pioneer*, 507 U.S. at 395. Those circumstances include "the danger of prejudice to the [parties], the length of the delay and its potential impact on judicial proceedings, the reason

for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* Similar factors bear on the equitable question of whether relief is warranted based on a mistake—i.e., the ultimately equitable balancing analysis. *See supra*, pp. 31-32 (discussing prejudice), 32 (discussing invited error).

But these totality-of-the-circumstances standards are directed at answering distinct questions. A mistake does not need to be "excusable" to warrant relief from judgment. *See supra*, p. 28. Instead, the equitable analysis for a "mistake" focuses on balancing finality interests against substantial justice. *See supra*, pp. 31–33. By contrast, under the plain text of Rule 60(b)(1), neglect ***must*** be excusable to warrant relief from judgment.

In *Information Systems*, the "excusable" requirement is captured in the culpability factor. *See* 994 F.2d at 795. Neglect is not "excusable" when it was a product of the party's culpable conduct. Indeed, this explains why special masters often deny relief based "primarily on the third factor" in the *Information Systems* test. *See* Appx189 (citing *Mora v. Sec'y of Health & Human Servs.*, No. 1:13-vv-421, 2015 WL 1275389 (Fed. Cl. Spec. Mstr. Feb. 27, 2015)). Effectively, those decisions found

that the movant's neglect was not "excusable" based on clear culpable conduct.[6] *See* Appx189 (finding failure to file records constituted "culpable conduct" and, accordingly, not "an excusable mistake").

Thus, the special master erred by invoking the *Information Systems* standard. In applying that standard, he never considered whether there was an "error of fact or law" or any other "mistake" in the record. Moreover, he treated an absence of "culpable conduct" as a requirement for relief based on a "mistake." *See* Appx189. In each case, the special master departed from the plain text of Rule 60. As detailed below (*see infra*, pp. 42–59), Ms. DiMasi is entitled to relief under the correct standard.

C. The Special Master Misunderstood the Relevance of Ms. DiMasi's Counsel-Related Allegations

Before applying the correct "mistake" standard to the facts, it is necessary to consider how Counsel's actions factor into the Rule 60 analysis. Ms. DiMasi's Rule 60 motion alleged that her Counsel's conduct

[6] These decisions are not inconsistent with the Court's adoption of a "balancing approach" in *Information Systems*, 994 F.2d at 796. That approach applies to the ultimate equitable analysis, which is a separate question from whether the predicate showing of "excusable" neglect has been satisfied.

struck at the heart of her attorney-client relationship, leaving her without an attorney who served as her agent. These counsel-related considerations affect (1) whether Ms. DiMasi is bound by the actions of her lawyer in the Rule 60 analysis, and (2) even if she is bound, whether Ms. DiMasi is entitled to relief.

(1) General agency principles explain when a client-principal is bound by her attorney-agent's conduct, including in the Rule 60 context. *E.g.*, *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962); *Pioneer*, 507 U.S. at 396–97 (interpreting Rule 60(b)(1)). In most circumstances, a "party is deemed bound by the acts of his lawyer-agent." *Link*, 370 U.S. at 634. After all, principals are responsible for the conduct of their agents, provided the agent's conduct falls within the scope of her actual or apparent authority. *See, e.g.*, Restatement (Third) of Agency §§ 2.01–2.03 (2006).

But this rule is not universally true. "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Maples v. Thomas*, 565 U.S. 266, 282 (2012) (citation omitted). In such a circumstance, the attorney has essentially abandoned

their client, "reduc[ing]" the client "to *pro se* status." *Id.* at 289. And "under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him." *Id.* at 283.

Courts have found abandonment when an attorney engages in neglect that "vitiat[es] the agency relationship that underlies [the] general policy of attributing to the client the acts of his attorney." *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1169–71 (9th Cir. 2002). This includes when attorneys "fail[] to proceed" with litigating their client's case "despite court orders to do so." *Id.*; *see Mackey v. Hoffman*, 682 F.3d 1247, 1251 (9th Cir. 2012). Moreover, it is especially problematic when an attorney "misled the client," covering up the lawyer's failures or omissions. *See Jackson v. Washington Monthly Co.*, 569 F.2d 119, 122 (D.C. Cir. 1977); *see also Tani*, 282 F.3d at 1171; *Mackey*, 682 F.3d at 1251. After all, misleading a client in this way deprives the client of "the opportunity to take action to preserve his rights." *See Tani*, 282 F.3d at 1171.

(2) Still, even when an attorney's failures do not amount to abandonment, those failures may be relevant to the Rule 60 analysis. At two points in that analysis—timeliness and equitable balancing—courts

must consider the totality of the circumstances. Attorney misconduct bears on both of those questions.

First, attorney conduct may be relevant to whether a party has filed her Rule 60 motion "within a reasonable time." The reasonableness inquiry takes into account "the facts in each individual case." *See* Wright & Miller § 2866. And when a party's attorney commits improper actions or omissions that delay the party's request for relief from judgment, the attorney-related reason for the delay is part of the "facts" that bear on whether a Rule 60 motion is filed within a reasonable time.

Second, attorney failures may be relevant to the equitable assessment as to whether relief is ultimately warranted. An attorney who, for instance, ignores her client's clear directions to the detriment of the client's interests may well have contributed to an inequitable result, and that fact may make relief from judgment the equitable course.

Moreover, the structure of Rule 60 also supports considering attorney conduct in the equitable balancing analysis—even without a showing of abandonment. Complete abandonment may justify relief under Rule 60(b)(6)'s "extraordinary circumstances" test. *Mackey*, 682 F.3d at 1251; *cf. Maples*, 565 U.S. at 280–81 (holding abandonment is an

"exceptional circumstance" that warrants equitable tolling). But a party need not show extraordinary circumstances to seek relief under Rule 60(b)(1). *See Info. Sys.*, 994 F.2d at 795. Thus, it is appropriate to consider attorney conduct in the equitable balancing analysis under Rule 60(b)(1) even if that conduct does not amount to abandonment.

More generally, the fact that a party is responsible for her attorney's conduct does not prevent that conduct from impacting the Rule 60(b)(1) analysis. Much of that analysis is aimed at assessing whether there were understandable ***reasons*** why a party took some action—even when they are unquestionably ***responsible*** for that action. *See, e.g.*, *Bynoe*, 966 F.3d at 980 (under timeliness, considering the reason behind any delay). There is no justification for automatically excluding attorney actions from the list of reasons that can be used to explain a party's conduct. When considering timeliness and balancing the equities, courts should consider ***all*** circumstances that bear on those questions. This includes attorney conduct.

All told, attorney conduct can bear on the Rule 60 analysis in two ways. If an attorney has taken actions that vitiate the attorney-client relationship, the attorney's conduct will not bind their client in the Rule

60 analysis. But separately, even if bound by their attorney's conduct, a client can point to attorney misconduct to explain why their motion was filed within a reasonable time and why relief is warranted under the circumstances.

* * *

As this discussion makes clear, the special master did not apply the correct legal standard when assessing the impact of Counsel's actions on Ms. DiMasi's motion. His analysis, which was always cast in terms of Rule 60(b)(6), does not match the general principles of agency detailed above. That was legal error.

First, where the special master did consider abandonment, he applied the wrong standard. The special master did suggest that attorney neglect can result in abandonment, Appx184 (describing some of the abandonment cases as involving neglect), but he did not separately analyze abandonment, instead conflating the inquiry with Rule 60(b)(6)'s requirement of extraordinary circumstances, and repeatedly concluding that Ms. DiMasi's allegations of abandonment did not rise to the level of extraordinary circumstances justifying relief. He dismissed claims of "gross negligence" as insufficient to warrant relief without considering

whether that neglect vitiated the attorney-client relationship. Appx193; Appx202.

Second, the special master never considered how Counsel's misconduct affected Ms. DiMasi's request for relief even if she was not abandoned. The entirety of his analysis was focused on whether Ms. DiMasi was abandoned and whether "exceptional circumstances" warranted relief. Appx185–203.

D. Under the Correct Standards, Ms. DiMasi Is Entitled to Relief from Judgment

The special master evaluated Ms. DiMasi's Rule 60(b)(1) motion using the wrong legal standards—both for when a "mistake" warrants relief and for how Ms. DiMasi's counsel-related allegations impact the mistake analysis. This Court, therefore, could remand to the special master to consider Ms. DiMasi's motion under the correct standards. But the record also permits this Court to conclude that Ms. DiMasi is entitled to relief from judgment. The undisputed facts reveal that Ms. DiMasi has identified (1) a mistake (2) in her timely Rule 60 motion (3) that warrants relief from judgment, and it would be an abuse of discretion to conclude otherwise. Thus, the Court should reverse and remand with instructions to reopen Ms. DiMasi's case.

(1) Ms. DiMasi's motion for relief from judgment identified a "mistake"—an error of fact in the special master's compensation decision. Her neurological symptoms did not start until days, not minutes, after the 2012 vaccine. To reach a contrary finding, Ms. DiMasi explained, the special master relied on mistakes in the Chen and Fischer records that entered the record essentially unchallenged. *See* SAppx139. But the special master did not analyze this timing issue as a potential "mistake." Instead, he reiterated his mistaken reasoning, concluding that Ms. DiMasi's symptoms began immediately after her vaccination (Appx187–203) based on the very mistaken records Ms. DiMasi identified (Appx193–194). Ordinarily, that would justify a remand for the special master engage with Ms. DiMasi's argument. But no such remand is necessary. On this record, it would be clear error to find that Ms. DiMasi suffered immediate onset of neurological symptoms.

Ms. DiMasi's medical records evidence delayed onset of neurological symptoms. Every medical record created immediately after the vaccine recites only non-neurological symptoms, like tachycardia and throat swelling. *E.g.*, ECF No. 31-2 at 3 (December 5 VAERS Record); *see also* SAppx028 (Dr. Leist Report) (summarizing December 5 records).

Ms. DiMasi's neurological symptoms did not appear in her records until ***four days*** later. SAppx027 (Dr. Leist Report) (summarizing December 8 records). Thereafter, Ms. DiMasi's medical records continued to report delayed onset of neurological symptoms. A December 10 VAERS record, for example, notes that Ms. DiMasi "immediately" "experienced onset of adverse events." SAppx029. By contrast, that record never says Ms. DiMasi immediately suffered neurological symptoms, only indicating those symptoms "developed" after the vaccine in a separate sentence. *Id.* More generally, that record collects all the symptoms that had developed by December 10—almost a week after the vaccine and well after neurological symptoms had "developed." *See id.*

To be sure, the Chen and Fischer records did report immediate onset of neurological symptoms. The Chen records noted that "[i]mmediately after the shot, [Ms. DiMasi] had a sensation of dizziness, shakiness, generalized weakness and tingling behind the right knee," Appx193–194, and the Fischer records report "immediate left jaw and throat tightness, and tingling sensation in the left lower leg, all happening within a few minutes of [the] shot." *See* Appx194. But those isolated records were created weeks after the vaccine, much later than

the December 5 and December 8 records. So the weight of the medical-record evidence suggests delayed onset.

Moreover, Ms. DiMasi has consistently stated that her neurological symptoms did not begin immediately. Ms. DiMasi's affidavits echo her argument that the Chen and Fischer records are "incorrect" and that "neuropathy was not one of" her immediate symptoms. SAppx139 (DiMasi Affidavit); *see also* SAppx189 (DiMasi Affidavit). Indeed, she explained in her motions below that "Dr. Chen made several mistakes in recounting the events post-vaccine." SAppx218. There is no testimony to the contrary from anyone with personal knowledge.

Nor is there any basis to discredit Ms. DiMasi's testimony. Ms. DiMasi repeatedly told Counsel her medical records contained an error. *E.g.*, Appx154–155 (Counsel Affidavit); *see also* SAppx158, SAppx160, SAppx184, SAppx202 (Emails between Counsel and DiMasi). She even provided Counsel with a redlined version of the Chen records, noting her neurological symptoms did not arise until four days after the vaccine. SAppx139–140 (DiMasi Affidavit); *see also* Appx154–155 (Counsel Affidavit). While she corrected the Chen records to note "mild tingling behind [her] left knee," *see* Appx155 (Counsel Affidavit); Docket

SAppx206 (Email from Counsel to DiMasi), she states that she also corrected the records to explain that those symptoms occurred "4 days after the injection." SAppx140 (DiMasi Affidavit); *see also* SAppx207. Though Counsel claims that, in one isolated comment, Ms. DiMasi said a "slight tingle" occurred immediately after vaccination, she was always clear this was not the neuropathy that started days later. *See* Appx155 (Counsel Affidavit); *see also* SAppx209 (Email from DiMasi to Counsel); ECF No. 5 at 5–6 (Informal Opening Br.).

On this record, the Court need not remand for the special master to determine the existence of a mistake: it would be clear error to reach a contrary finding. When Ms. DiMasi sought medical attention in the hours and days after receiving the vaccine, she had a "strong motivation to be truthful," *see* Fed. R. Evid. 803 advisory committee's note, and the contemporaneous records (i.e., December 5 and 8 records) do not record any neurological symptoms. In addition, Ms. DiMasi's statements have been consistent throughout: she has always denied any immediate onset of neurological symptoms. Against that backdrop, the only reasonable conclusion is that the later-in-time Chen and Fischer records contained errors. And by relying on those records, which report immediate onset of

Ms. DiMasi's symptoms, the special master incorporated an "error of fact" into his decision denying compensation.

Certainly, the special master's reliance on those records followed from Counsel's failure to challenge their veracity. Counsel crafted a theory of "one-day onset," quoting the error contained in the Chen records. SAppx085–086 (Motion for Judgement); SAppx102 (noting "one-day onset"). He also filed an expert report that relied on the same quote and that offered the same one-day onset narrative. *See* SAppx017–024. After Ms. DiMasi was denied compensation, Counsel suggested that his entire view of the case was built around these records. *See* SAppx157 (Emails from Counsel to DiMasi) (noting the Chen and Fischer records were "why [he] said causation itself would be unsuccessful").

But this does not make the special master's reliance on those records less of a "mistake" under Rule 60(b)(1). Quite the contrary. Because the accuracy of those medical records was not challenged,[7] the special master's adoption of the facts described in those records did not

[7] That counsel argued, in passing, that Ms. DiMasi's neurological symptoms did not start until December 8 (*see* SAppx102), but he never challenged the veracity of the Chen or Fischer medical records.

reflect any reasoned decision to prefer one version of the facts over another. The special master simply adopted the uncontroverted facts. Of course, the fact that Ms. DiMasi's counsel invited the error is relevant to the equitable component of the Rule 60(b)(1) analysis—at least if Ms. DiMasi is responsible for her attorney's actions.

(2) The special master's decision did not address whether Ms. DiMasi's Rule 60 motion was timely. But there is no need for a remand for the special master to consider this question. Based on the undisputed facts, Ms. DiMasi filed her motion no more than a year after entry of judgment, *see* Appx10–11 (noting motion was docketed nine months after judgment), and "within a reasonable time."

Ms. DiMasi has offered good reasons for her nine-month delay in seeking to reopen the final judgment—regardless of whether she is bound by Counsel's conduct. It is undisputed that Ms. DiMasi did not have access to the decision denying compensation until late February 2020, more than two months after judgment was entered. SAppx158 (Email from Counsel to DiMasi) (attaching decision). And Ms. DiMasi has explained that, when she first received the decision, severe illness prevented her from reviewing that decision for months. *See* Appx31 (Rule

60 motion). Finally, Ms. DiMasi claims Counsel never provided her with the medical records filed in her case. SAppx225–226 (DiMasi's Reply ISO Motion to Supplement) ("I do not have access to the 'Petitioner's exhibits[.]' . . . I am no longer sure that all of my medical records are actually in the court record."). Thus, as Ms. DiMasi explained in her affidavit, she was "completely unaware of any details on why my conditions was determined to be pre-existing." SAppx189 (DiMasi Affidavit). This required her to reconsider her entire claim for relief, collecting and reviewing scores of medical records. *See* Appx31–152 (attaching records to motion to reopen). This effort, alone, explains Ms. DiMasi's delay in filing.

No evidence suggests the Secretary was prejudiced by Ms. DiMasi's nine-month delay. Below, the Secretary did not suggest that any prejudice justified denying relief. *See* SAppx142–145 (Response to Motion to Reopen). Moreover, the special master himself did "not foresee any substantial prejudice against respondent if the motion were granted." Appx187.

(3) Finally, the special master did not balance the equities in assessing whether the "mistake" Ms. DiMasi identified warrants relief

from judgment. *See* Appx187–203. Although a remand might ordinarily be appropriate to permit the special master to balance the equities, no such remand is necessary here. On this record, it would be an abuse of discretion for the special master to deny reopening.

First, reopening the case would serve the ends of justice. Ms. DiMasi has not received an adjudication of her vaccine claim based on the correct facts, and she is entitled to that opportunity. To be sure, the Secretary might argue that Ms. DiMasi should be held responsible for Counsel's decision to argue affirmatively that Ms. DiMasi's condition onset immediately and that the equities, therefore, do not favor relief. But Ms. DiMasi cannot be held responsible for Counsel's choice to allow a mistake of fact into the record essentially uncontested. Throughout the litigation, Ms. DiMasi highlighted how her neurological symptoms did not start immediately after she received the vaccine. Yet Counsel nonetheless crafted a litigation strategy around ***immediate*** onset of symptoms. Counsel took steps that were fundamentally inconsistent with Ms. DiMasi's objectives and direction, thereby ceasing to function as her agent in the litigation.

Ms. DiMasi often reminded Counsel that her medical records contained errors. In 2014, before her petition was even filed, she provided Counsel with redline instructions to correct the Chen records, noting her neurological symptoms did not start until four days after her vaccine. SAppx139–140 (DiMasi Affidavit); *see also* Appx154–155 (Counsel Affidavit). Months later, she reiterated her onset narrative in an email to Counsel. SAppx202 ("The intense nerve pain in my left leg started on day 4 after the vaccine."). Later, as described in post-judgment emails, Ms. DiMasi provided Counsel with corrections to the medical-record evidence in the Secretary's Rule 4(c) report. *See* SAppx206–210 (Emails between Ms. DiMasi and Counsel). At this point in the litigation, before expert discovery, Counsel still had ample opportunity to correct the record.

Indeed, as email traffic shows, one of Ms. DiMasi's key litigation objectives was receiving a compensation decision based on the true medical facts. At times, she offered to construct an "accurate" timeline to ensure "nothing [was] left out on the history of [her] illness." Appx202. In particular, she was concerned about misinterpretations or omissions in physicians' records. *Id.* This concern continued throughout the

litigation, and Ms. DiMasi's post-judgment statements confirm her focus on providing an accurate presentation of her medical records. *E.g.*, Appx148 (Reply ISO Rule 60 motion) ("I hope [certain medical records] will shed some light on my true story as it was told."); *see also* SAppx155, SAppx158, SAppx204, SAppx207 (Emails from DiMasi to Counsel).

Counsel, however, crafted a causation theory that rejected Ms. DiMasi's understanding of the true medical facts. He filed an expert report that, relying on the very records Ms. DiMasi identified as mistaken, argued Ms. DiMasi's neurological condition developed "***within a day*** of [her] influenza vaccination[.]" SAppx018–019, SAppx024 (Dr. Kinsbourne's Report) (emphasis added). Counsel further incorporated quotes from those records and the same theory of causation into Ms. DiMasi's motions for judgment on the record. *See* SAppx085–086, SAppx100–101 (not contesting "immediate onset" characterization); SAppx102 (discussing "one-day" onset). At bottom, as Counsel's post-judgment affidavit shows, Counsel chose to rely on the Chen and Fischer records to the exclusion of Ms. DiMasi's recounting of her symptoms and the immediately post-vaccine medical records that supported her account. *See* Appx154–155 (Counsel Affidavit) (arguing

"contemporaneous medical records" showed "neurological symptoms began immediately after the flu shot").

Moreover, Counsel undermined Ms. DiMasi's ability to diligently preserve her rights. There is no dispute that, as Ms. DiMasi claims, Counsel failed to provide her with key documents before (or even after) they were filed. *See* SAppx188 (DiMasi Affidavit) ("The only court document I received a copy of during my case was my affidavit and the Rule 4 report."); *cf.* Appx153–156 (Counsel Affidavit) (never claiming that Counsel provided Ms. DiMasi with her filings). Nor is there any dispute that Counsel failed to meaningfully engage with Ms. DiMasi about the content of her medical records, leaving her to provide "unsolicited" feedback about errors in those records. *See* Appx154 (Counsel Affidavit).

Counsel suggests that ethical obligations prevented him from arguing that Ms. DiMasi's symptoms did not occur immediately. *See* Appx154. As noted above (*see supra*, pp. 43–48), however, Ms. DiMasi's account of her symptoms was corroborated by the medical records created immediately post-vaccine, and Counsel does not proffer any evidence suggesting Ms. DiMasi's account was false or her instructions otherwise

unlawful. *See* Restatement (Third) of Agency § 8.09 (2006); Restatement (Third) of the Law Governing Lawyers § 120 (2000).

In any event, to the extent that Counsel was concerned that professional obligations prevented him from correcting the records (based on some fact not in evidence), Counsel was required to communicate that concern to Ms. DiMasi. *See* Restatement (Third) of Agency § 8.11 cmt. d (2006). He had no authority to continue litigating the case contrary to her clear instructions. Restatement (Third) of the Law Governing Lawyers § 21 cmt. d (2000) ("[A] lawyer may not continue a representation while refusing to follow a client's continuing instruction.").

In sum, Counsel breached his duties in a way that cut to the very core of the attorney-client relationship. He was required to "proceed in a manner reasonably calculated to advance [Ms. DiMasi's] lawful objectives, as defined by [Ms. DiMasi] after consultation." Restatement (Third) of the Law Governing Lawyers § 16(1) (2000). Yet he ignored Ms. DiMasi objectives and litigated the case in a manner that was fundamentally inconsistent with the facts of Ms. DiMasi's medical condition—facts that were uniquely within her knowledge. All the while,

Counsel failed to explain his reasoning to her in a way that would have enabled her to obtain new counsel if necessary.

This is not a case about whether Counsel inadequately, incompletely, or incompetently executed Ms. DiMasi's objectives. Instead, Counsel litigated the case on a factual premise that Ms. DiMasi repeatedly explained was wrong, thereby depriving her of an adjudication of her actual claim. Under those circumstances, Counsel cannot be understood as having acted as an agent to further Ms. DiMasi's objectives. Worse, he prevented Ms. DiMasi from seeing that ***her*** objectives be accomplished. In Ms. DiMasi's own words, "[i]t was as if [Counsel] read [her] medical records, made [his] own assumptions, never discussed any of them with [her], assumed [Ms. DiMasi] was not consistently telling [him] the truth and never gave [her] a chance to explain anything." SAppx204. In the end, Ms. DiMasi "had no voice" in the relationship. *Id.* The attorney-client relationship was, therefore, vitiated. Accordingly, Ms. DiMasi cannot be held responsible for

Counsel's conduct.[8] In particular, she should not be faulted for Counsel's choice to allow a mistake of fact into the record essentially uncontested.

Correcting that mistake could make all the difference in Ms. DiMasi's request for compensation, so the interests of justice would be served by reopening the judgment. After all, the special master's decision to deny compensation relied heavily on the immediate onset of Ms. DiMasi's symptoms. It was impossible for the special master to adopt the Secretary's causation narrative (as he did, Appx28–29) without relying on the fact that Ms. DiMasi suffered only an allergic reaction to the vaccine. The Secretary's core argument was that the 2012 vaccine could not have caused (or aggravated) Ms. DiMasi's small fiber neuropathy because the onset of symptoms occurred far too quickly to be an immunological response. *See* SAppx035–036 (Dr. Leist Report) (addressing causation in fact); SAppx135–137 (Response to Amended Motion for Judgment) (addressing significant aggravation). In fact, this was the only basis the Secretary offered for discounting the import of

[8] Even if this conduct does not constitute abandonment, it is still strong justification for reopening the case. For this reason, Ms. DiMasi's motion for relief is not contingent on attorney abandonment.

Ms. DiMasi's vaccine reaction. *See* SAppx027–035. So when the special master adopted the Secretary's position, *see* Appx28–29, he also adopted this mistake. And correcting the mistake would undermine the basis for the special master's opinion.

Second, there is little evidence supporting an interest in finality. The Secretary has conceded that he would not be prejudiced if the judgment were reopened. *See* Appx187 (The Secretary "has not argued that he would be prejudiced if Ms. DiMasi's motion were granted."). Going further, the special master even found that no such prejudice could be shown on this record. *Id.* ("Furthermore, the undersigned does not foresee any substantial prejudice against respondent if the motion were granted."). Accordingly, the Secretary has little (if any) interest in finality.

Nor would reopening the case undermine broader finality or judicial economy interests. Any judicial and litigant costs from a "do-over[]" in this case would be minimal. *Talasila*, 524 F. App'x at 673 (noting these costs divert resources from fresh cases). Remand proceedings could be limited to allowing for supplemental expert reports that account for the corrected mistake and then re-briefing Ms. DiMasi's compensation claim

for decision. Given the extensive factual record, there would be no need to submit additional medical records or to engage in additional fact discovery. Then, after a hearing on the merits, the special master could issue a new decision on compensation. All told, these proceedings would impose very little burden on the special master and the Claims Court.

Likewise, there is no significant risk that reopening the judgment here would launch a flood of similar post-judgment motions. The circumstances in this case are unique, featuring conduct striking at the very heart of the attorney-client relationship that allowed a mistake of fact to infect the record. It would be highly unlikely that any other vaccine-act plaintiff could make similar allegations. And it is even less likely that those allegations would be supported by such a strong record. Given the narrow circumstances in this case, a flood of litigation is unlikely.

To recap, there is strong evidence suggesting that justice would be done by reopening this case, and there is no evidence suggesting finality demands the case remain closed. It would, therefore, be an abuse of discretion to conclude that the balance of equities does not favor Ms. DiMasi. *Cf. In re Toyota Motor Corp.*, 747 F.3d 1338, 1341 (Fed. Cir.

2014) (It is "clear abuse of discretion" to deny transfer when there is no evidence "on the transferor-forum side of the ledger.").

* * *

For all of these reasons, the existing record establishes that Ms. DiMasi is entitled to relief from judgment. The special master could reach a contrary conclusion only by making a clear error of fact or by otherwise abusing his discretion. Thus, a remand for the special master to reconsider Ms. DiMasi's motion would be "a waste of everyone's resources." *In re Vivint, Inc.*, 14 F.4th 1342, 1352 (Fed. Cir. 2021). The Court should reverse and instruct the Claims Court to reopen Ms. DiMasi's case.

III. The Special Master Abused His Discretion By Denying Relief Based On Rule 60(b)(6)

Separately, Ms. DiMasi requested relief from judgment based on Counsel's decision to surrender any significant-aggravation claim. Appx174–175. That request did not rely on an error of fact or law. Instead, Ms. DiMasi argued that Counsel compromised her "substantial right[s]" without her permission. *See id.* Such arguments sound in Rule 60(b)(6), and under the undisputed facts, Ms. DiMasi is entitled to relief under that Rule.

A. Rule 60(b)(6) May Provide Relief When An Attorney Compromises A Claim Without Authority

Rule 60(b)(6) is a catchall provision, which provides relief from judgment based on "any other reason that justifies" such relief. It is available only when the other Rule 60 provisions do not apply and when a party can make a showing of "extraordinary circumstances." *See Info. Sys.*, 994 F.2d at 795–96. As with Rule 60(b)(1), any motion for relief from judgment based on Rule 60(b)(6) must be made "within a reasonable time," *see supra*, pp. 29–31, and the ultimate reopening decision is a matter of trial court discretion, *see supra*, pp. 31–33.

A movant may prove "exceptional circumstances" by establishing that her attorney abandoned her "substantial rights" without actual authority to do so. *E.g.*, *Thomas v. Colorado Tr. Deed Funds, Inc.*, 366 F.2d 136, 139 (10th Cir. 1966); *Bradford Exch. v. Trein's Exch.*, 600 F.2d 99, 102 (7th Cir. 1979); *see also Amin v. Merit Sys. Prot. Bd.*, 951 F.2d 1247, 1254 (Fed. Cir. 1991) (noting presumption that attorney has "express authority" to settle can be overcome with affirmative evidence, resulting in the settlement being set aside).

This rule follows from the unique nature of the attorney-client relationship. Clients "entrust" their lawyers with matters "of great

importance and sensitivity" without much ability to supervise the lawyer's conduct. Restatement (Third) of the Law Governing Lawyers ch. 2 intro. note (2000). So "clients [are] vulnerable to harm," and they require protections to ensure "faithful representation" from their lawyers. *Id.* One of those protections is reserving certain, pivotal decisions for the client. *Id.* § 22 (reserving settlement and "comparable decisions" to the client). In those circumstances, when substantial rights of the client are involved, actual authority is required for attorney conduct to bind the client.

The classic example of a "substantial right" is the right to control when and on what terms to settle a claim. *E.g.*, *Amin*, 951 F.2d at 1254. "[S]ettlement definitively disposes of client rights." Restatement (Third) of the Law Governing Lawyers § 22 cmt. d (2000). Thus, a settlement entered into without client authority "deprives the client of the right to have [her] claim resolved on other terms." *Id.* § 27 cmt. d. It makes sense, then, to place "the burden of inconvenience resulting if the client repudiates the settlement" on "the opposing party." *Id.* The potential for harm is much lower: "[r]efusing to uphold a settlement reached without the client's authority" just "means that the case remains open." *Id.* And

the opposing party "can protect itself by obtaining clarification of the lawyer's authority." *Id.*

But the scope of "substantial rights" is not limited to settlement decisions. "[D]ecisions that are substantially equivalent to" settlement are also reserved for the client. *See id.* § 22 cmt. e. "Just as lawyers cannot settle a claim without client authority, they cannot enter a stipulation or consent judgment that will similarly foreclose client rights." *Id.*; *see also Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1088 (Ct. Cl. 1981) (discussing a stipulation). Several factors bear on whether right is "comparable" enough to settlement to be reserved for the client. *See* Restatement (Third) of the Law Governing Lawyers § 22 cmt. e (2000) (collecting factors).

B. Counsel Lacked Authority To Abandon Ms. DiMasi's Significant-Aggravation Claim

The special master never engaged with Ms. DiMasi's claim that Counsel lacked actual authority to surrender her significant-aggravation claim. *See* Appx196–197 (Rule 60 decision). Instead, he characterized Counsel's actions as "tactical decision by which Ms. DiMasi remain[ed] bound" absent abandonment. Appx197. Although abandonment is a ground for relief under Rule 60(b)(6), *see Mackey*, 682 F.3d at 1251, relief

based on a lack of actual authority is a distinct question, and the special master should have considered it separately. Although this Court could remand for the special master to address this question, on this record, there is no need. The undisputed facts establish that Ms. DiMasi is entitled to relief.

(1) Counsel abandoned Ms. DiMasi's significant-aggravation claims without authority. His affirmative statement that Ms. DiMasi "does not allege a significant[-]aggravation claim" (SAppx104) is analogous to a settlement decision in that it unequivocally surrendered Ms. DiMasi's "substantial right" to assert such a claim. Yet there is no dispute that Counsel lacked actual authority to make that decision on Ms. DiMasi's behalf.

Counsel's abandonment of Ms. DiMasi's significant-aggravation claim is "comparable" to a decision "whether and on what terms to settle a claim." *See* Restatement (Third) of the Law Governing Lawyers § 22 (2000). Both the special master and the Secretary recognized that Ms. DiMasi may have had a claim for significant aggravation of a preexisting condition. Indeed, the special master recognized "the elements of a significant[-]aggravation claim include the elements of an

initial onset claim with some minor modifications in wording." SAppx043. So he ***expressly*** ordered Counsel to address whether Ms. DiMasi was entitled to relief based on such a claim, including by addressing "all the elements of a significant-aggravation case." *Id.* He even detailed precisely ***how*** Counsel should have addressed those factors. SAppx043–048. Similarly, the Secretary conceded that "discussion of [a significant-aggravation] claim" was "relevant to [Ms. DiMasi's] case." SAppx117 (Response to Amended Motion for Judgment).

Yet Counsel ignored this clear basis for relief. At first, violating the special master's clear order, Counsel failed to address a significant-aggravation claim ***entirely***. *See* Appx049–064 (Motion for Judgement). The phrase "significant aggravation" is wholly absent from Counsel's first motion for judgment on the record. Counsel addressed the significant-aggravation claim only after the Secretary, who was also bound by the special master's order, raised it. *See* SAppx117 (Response to Initial Motion for Judgement). Even then, Counsel conceded away Ms. DiMasi's claim without substantive analysis in his motion. SAppx104 (Amended Motion for Judgment). Given the special master's clear direction to

address significant aggravation of a preexisting medical condition, this amounts to a stipulation that Ms. DiMasi had no such claim. That was, in effect, a consent judgment that impaired Ms. DiMasi's "substantial rights." *See* Restatement (Third) of the Law Governing Lawyers § 22 cmt. e (2000) (noting consent judgments are comparable to settlement).

There is no dispute that Counsel lacked authority to compromise any significant-aggravation claim. In her affidavits, filings, and emails, Ms. DiMasi alleges that Counsel ***never*** told her about the availability of a significant-aggravation claim. *E.g.*, Appx31 (Rule 60 motion); Docket SAppx188 (DiMasi Affidavit); *see also* SAppx161 (Email from Ms. DiMasi to Counsel). Counsel never contests these allegations. In fact, rather than informing Ms. DiMasi of his concession, he misrepresented the basis for the special master's denial of a significant-aggravation claim. *See* SAppx151 (Email from Counsel to DiMasi) ("The Court believed that . . . [t]he onset of the tachycardia after the flu shot was too short to be the result of a signficant aggravation [sic] of small fiber neuropathy.").

Counsel also claims he was under an ethical obligation not to raise a significant-aggravation claim because Ms. DiMasi "negated every prior symptom" before her vaccine. SAppx206 (Email from Counsel to DiMasi);

see Appx155 (Counsel Affidavit). But the ***exact opposite*** is true. Counsel had an ethical obligation to comply with the special master's order by addressing "all the elements of a significant-aggravation case." SAppx041–048 (Special Master's Order). *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 105 (2000) ("In representing a client in a matter before a tribunal, a lawyer must comply with . . . specific tribunal rulings."). When he did not do so—both by failing to raise that claim in his first motion and conceding the claim without analysis in the second—he violated a court order.

To be sure, Counsel was not required to suborn perjury or present a frivolous claim in response to the special master's order. *See id.* § 120 (addressing obligation not to offer false evidence), § 110 (addressing obligation not to engage in frivolous advocacy). But on this record, neither of those rules applied to Ms. DiMasi's significant-aggravation claim. Certainly, Ms. DiMasi denied the existence of a preexisting small fiber neuropathy. But her medical records contained pre-vaccine neurological and cardiac symptoms. In light of those symptoms (and the special master's explicit instructions to address "all elements" of significant-aggravation), Counsel was required to present Ms. DiMasi

with the possibility of pleading a significant-aggravation claim in the alternative. *See* SAppx161 (Post-Judgment Email from DiMasi to Counsel) (suggesting such an argument). He could not, therefore, compromise Ms. DiMasi's claim without her permission.

Moreover, the special master's analysis throughout the case shows Ms. DiMasi had a plausible claim for significant-aggravation compensation. He expressly found that Ms. DiMasi's initial-onset claim was "legally tenable," Appx187, and he suggested the facts underlying that claim could support a significant-aggravation claim in the alternative, *see* SAppx041–048. The very fact that the special master ordered briefing on the issue suggests that he viewed the claim as tenable. Indeed, before her 2012 vaccine, Ms. DiMasi's cardiac and neurological symptoms were stable. *See* Appx22–23 (summarizing symptoms). After the vaccine, Ms. DiMasi suffered unrelenting cardiac and neurological distress. *See* Appx23–24 (summarizing symptoms); SAppx028–029 (same).

In any event, if Counsel decided to abandon the significant-aggravation claim because of ethical or factual concerns, he was required to communicate those concerns to Ms. DiMasi before irrevocably

abandoning the claim. *See* Restatement (Third) of the Law Governing Lawyers § 20 cmt. c (2000) (requiring lawyers to communicate "problems" of the representation); Restatement (Second) of Agency § 381 cmt c (1958) (explaining that if counsel believes he cannot legally perform an act, "it is the usual understanding that he will notify the principal of such an event, unless he has reason to believe that the principal knows of it").

(2) For the same reasons expressed above (*see supra*, pp. 48–49), Ms. DiMasi raised this ground in a timely Rule 60 motion.

(3) The balance of equities warrants relief from judgment. *See supra*, p. 31–33 (outlining balancing standard). As discussed above (*see supra*, p. 67), Ms. DiMasi has alleged a tenable claim for compensation based on significant aggravation of a preexisting condition, and judgment against her on that claim was entered based only on Counsel's concession. Justice would, therefore, be done by reopening the case. Moreover, no interest in finality weighs against reopening. As is true with the "mistake" claim, the costs of a do-over here are small, and the narrow circumstances of this case (i.e., failure to follow a court order) make a flood of litigation unlikely. *See supra,* pp. 57–58. It would, therefore, be an abuse of discretion to deny Ms. DiMasi relief.

* * *

In sum, Ms. DiMasi has established a Rule 60(b)(6) claim for relief based on the undisputed facts. It was, therefore, an abuse of discretion for the special master to deny relief based on this ground.

IV. At A Minimum, Special Master Abused His Discretion By Denying Relief Without A Hearing

The special master, in the first instance, could and should have granted Ms. DiMasi's Rule 60 motion. As explained above, it would be an abuse of discretion to deny relief based on Rule 60(b)(1) and Rule 60(b)(6). But in all events, the special master could not ***deny*** relief—under either ground—without conducting a hearing.

First, to deny relief based on a "mistake," the special master would have to resolve questions of credibility. As explained (*see supra*, pp. 43–48), it would be an abuse of discretion for the special master to find no "error of fact" in his compensation decision. Although Ms. DiMasi's medical records are inconsistent regarding the onset of her neurological symptoms, the immediate post-vaccine records support her account, and she unequivocally stated that her neurological symptoms did not start until four days after her vaccine. The only way the special master could discount this evidence would be to find that Ms. DiMasi's statements are

false, i.e., that Ms. DiMasi is not credible. Before reaching that conclusion, the special master should have had a hearing to assess her credibility—particularly in light of the "generosity" embodied in Vaccine Act's remedial system. *See Andreu*, 569 F.3d at 1383. To be sure, there is no basis to find no mistake existed on this record, but even if the Court disagrees on that point, the existence of a mistake of fact turns on Ms. DiMasi's credibility.

For many of the same reasons, the special master could not resolve the counsel-related allegations against Ms. DiMasi without a hearing. For the reasons explained above, the undisputed facts show that Counsel was not acting as Ms. DiMasi's agent (*see supra*, pp. 51–56) and compromised her significant-aggravation claim without authority (*see supra*, pp. 62–69). But even if the counsel-related allegations turn on questions of credibility between Ms. DiMasi and Counsel, the special master was required to conduct a hearing to resolve those credibility disputes.

Thus, the special master erred by denying relief without conducting an evidentiary hearing. His fact-finding procedures—i.e., reviewing the paper records—were inadequate to resolve the credibility questions

necessary to his ultimate determination. Therefore, if the Court disagrees with amicus that the current record demonstrates Ms. DiMasi's entitlement to relief from judgment, the Court should remand for the special master to hold an evidentiary hearing.

V. The Special Master's Rule 60 Decision Is Based on an Unsupported Presumption of Accuracy

Finally, yet another legal error infected the special master's Rule 60 decision. This Court has unequivocally rejected "as incorrect" any "presumption that medical records are accurate and complete." *Kirby*, 997 F.3d at 1383. But the special master relied on such a presumption when denying Ms. DiMasi's Rule 60 motion. Independently, this legal error requires a remand.

Until recently, the Claims Court read this Court's decision in *Cucuras* as creating a presumption that medical records are complete and accurate. *E.g.*, *Robi v. Sec'y of Health & Human Servs.*, No. 12-vv-352, 2014 WL 1677116, at *1 (Fed. Cl. Spec. Mstr. Apr. 4, 2014) (citing *Cucuras v. Sec'y of Health & Human Servs.*, 993 F.2d 1525, 1528 (Fed. Cir. 1993)). It further justified that presumption with a "series of propositions" that boil down to two points: sick people report all of their

symptoms to their doctor, and doctors dutifully record those symptoms. *Id.*

But as this Court explained in *Kirby*, "[n]othing in *Cucuras* supports either the presumption or *Robi*'s 'series of propositions.'" *Kirby*, 997 F.3d at 1382 (abrogating *Robi*). Instead, *Cucuras* stands for the "unremarkable proposition that it was ***not erroneous*** to give greater weight to contemporaneous medical records than to later, contradictory testimony." *Id.* (emphasis added).

Despite this clear precedent, the special master still relied on *Cucuras* for a presumption that medical records are complete and accurate:

> More importantly, the undersigned found facts about Ms. DiMasi's pre-vaccination history primarily by reviewing the medical records, expert reports, and medical literature. *See Cucuras v. Sec'y of Health & Human Servs.*, 993 F.2d 1525, 1528 (Fed. Cir. 1993) (reports prepared during the course of medical treatment are ***presumed reliable***).

Appx193 (emphasis added); *see also* Appx18 (suggesting it was "inappropriate" for Ms. DiMasi to correct her records).

That was legal error. Ms. DiMasi's Rule 60 motion identified errors in her medical records. At minimum, the special master's application of the presumption of reliability to ***some*** of Ms. DiMasi's medical records,

while ignoring other contrary records, rendered the decision internally inconsistent.

Even putting aside that inconsistency, the special master's presumption that the Chen and Fischer records were accurate prevented him from properly analyzing Ms. DiMasi's mistake claim. He dismissed Ms. DiMasi's arguments based on his review of Ms. DiMasi's "medical records," often while citing *Cucuras* for a presumption of accuracy. Appx193 (citing *Cucuras*); Appx194; Appx196 (citing *Cucuras*). This discussion entirely misses the point. In effect, the special master denied relief by doubling down on the ***very*** mistake Ms. DiMasi identified, reincorporating the medical records' errors into the Rule 60 decision. Such circular reasoning, predicated on a presumption this Court rejected, cannot support the special master's denial of relief.

Had the special master not relied on a presumption of accuracy, his Rule 60 analysis would be markedly different. He would have had to engage with the substance of Ms. DiMasi's mistake arguments before relying on the medical records to deny relief from judgment. Thus, a remand is necessary even without considering the "mistake" and "exceptional circumstances" analyses above.

Conclusion

Amicus urges the Court to reverse and remand for the special master to reopen Ms. DiMasi's case. Alternatively, even if reversal is not warranted, the Court should vacate and remand with instructions to conduct an evidentiary hearing.

DATED: March 6, 2023

MUNGER, TOLLES & OLSON LLP

By: /s/ *J. Kain Day*

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Certificate of Compliance

1. This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1). The body of the petition contains 13,983 words, excluding the portions exempted by rule.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in New Century Schoolbook 14-point font.

DATED: March 6, 2023 By: /s/ *J. Kain Day*
J. Kain Day

Certificate of Service

I hereby certify that on March 6, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit through the Court's CM/ECF system. A copy has been served on all parties by electronic means.

DATED: March 6, 2023 By: /s/ *J. Kain Day*
J. Kain Day

ADDENDUM

In the United States Court of Federal Claims

No. 15-1455V
(Filed: April 4, 2022)
*Reissued on: April 19, 2022

NOT FOR PUBLICATION

STEPHANIE DIMASI, *Petitioner,* **v.** **SECRETARY OF HEALTH AND HUMAN SERVICES,** *Respondent.*	)))))))))

Stephanie V. DiMasi, pro se petitioner.

Claudia B. Gangi, Senior Trial Attorney, Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for respondent.

OPINION AND ORDER

BONILLA, Judge.

Petitioner Stephanie V. DiMasi filed a petition under the National Childhood Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-10 to -34 (2012), seeking compensation for injuries she allegedly sustained following an influenza vaccine administered on December 4, 2012. The Special Master issued a decision denying entitlement on November 7, 2019. Judgment was entered on December 11, 2019, after petitioner did not file a motion for review. Petitioner subsequently moved for relief from judgment pursuant to Rule 60(b) of the Rules of the United States Court of Federal Claims (RCFC), arguing that her former counsel abandoned her and caused petitioner to miss the filing deadline. The Special Master denied the motion on November 10, 2021.

Pursuant to Rule 36 of the Vaccine Rules of the Court of Federal Claims (Vaccine Rules), RCFC App. B., petitioner now seeks this Court's review of the Special Master's denial of her motion for relief from judgment. Because petitioner failed to timely seek review of the Special Master's November 7, 2019 entitlement decision, the sole issue properly before this Court is whether the Special Master abused his discretion in denying petitioner's motions to reopen and for reconsideration on November 10, 2021. For the reasons set forth below, the Court concludes that the Special Master did not. Accordingly, petitioner's motion for review is denied.

BACKGROUND

The petition in this case was filed on December 2, 2015, by petitioner's former attorney, Howard S. Gold. Petitioner alleged that she suffered injuries following an influenza vaccine administered on December 4, 2012, and that the vaccine was the causation-in-fact of her injuries. On November 7, 2019, the Special Master issued a decision denying entitlement. *DiMasi v. Sec'y of Health & Hum. Servs.*, No. 15-1455V, 2019 WL 6878732 (Fed. Cl. Spec. Mstr. Nov. 7, 2019). The Special Master found that petitioner's pre-December 4, 2012 medical records documenting symptoms related to her claimed vaccine-induced medical condition, coupled with petitioner's decision to forego a significant aggravation claim, barred her claim for compensation. *Id.* at *5. A motion for review was not filed and, in accordance with Vaccine Rule 11(a), judgment was entered on December 11, 2019.[1]

On September 15, 2020 – nine months after the entry of judgment on petitioner's entitlement claim – petitioner moved to proceed *pro se* and to reopen her case. In support of her requests for relief, petitioner asserted that her former counsel abandoned her and failed to timely file a motion for review of the Special Master's November 7, 2019 entitlement decision. The Special Master granted petitioner's motion to substitute counsel and proceed *pro se* on September 22, 2020. Thereafter, on June 3, 2021, after initially deferring his ruling on the motion to reopen to request additional information, including from petitioner's former counsel, the Special Master denied the petitioner's request for relief. On June 25, 2021, in response to petitioner's motion for reconsideration, the Special Master vacated the June 3, 2021 order, and again requested supplemental briefing.

On November 10, 2021, the Special Master issued a final decision denying petitioner's motion for reconsideration.[2] *DiMasi v. Sec'y of Health & Hum. Servs.*, No. 15-1455V, slip op. (Fed. Cl. Spec. Mstr. Nov. 10, 2021). In addressing petitioner's attorney abandonment claim, the Special Master found that petitioner "has not shown that her attorney's work was deficient, let alone so poor that a miscarriage of justice occurred." *Id.* at 2. Turning first to petitioner's pre-vaccination medical history, the Special Master explained that his independent review of the medical records, expert reports, and medical literature – not counsel's representations – dictated the critical factual findings underlying the entitlement decision (*i.e.*, pre-vaccination

[1] In an order dated July 13, 2020, the Special Master granted petitioner's motion for attorney's fees and costs in the aggregate amount of $48,108.49, payable to the Gold Law Firm LLC. *DiMasi v. Sec'y of Health & Hum. Servs.*, No. 15-1455V, 2020 WL 4581287 (Fed. Cl. Spec. Mstr. July 13, 2020). The following day, on July 14, 2020, counsel for petitioner and respondent filed a joint notice not to seek review of the attorney's fees order and judgment was immediately entered in the court-ordered amount.

[2] The Special Master's November 10, 2021 order also denied petitioner's motion for leave to file additional materials (*i.e.*, approximately 150 pages of proposed exhibits). *DiMasi*, slip op. at 5-13. Notably, in denying petitioner's motion, the Special Master inventoried and reviewed the tendered documents. *Id.* The Special Master ultimately determined: "The proposed exhibits (medical records and medical literature) are neither material nor newly discovered" and, in fact, "many of these medical records, as acknowledged by [petitioner], are already in the record." *Id.* at 13. In light of the Special Master's thoughtful review and consideration of the documents in issue, petitioner's motion is effectively moot. Accordingly, this Court need not address whether the Special Master abused his discretion in disallowing the petitioner to formally file the additional materials.

symptoms related to the claimed vaccine-caused medical condition). *Id.* at 15-17. The Special Master then addressed petitioner's former counsel's decisions to request a ruling on the record, forego a significant aggravation claim, and not file a motion for reconsideration or review of the November 7, 2019 entitlement decision. *Id.* at 18-22. In each instance, the Special Master found that petitioner's former counsel's decisions were intentional, tactical, and based upon the facts presented and the attorney's efforts to meet his ethical obligations to his client and the Court. *Id.* In turn, the Special Master determined that petitioner "did not diligently act to preserve her rights." *Id.* at 22. Accordingly, the Special Master denied petitioner's request for extraordinary relief.

On December 10, 2021, petitioner filed a timely motion for review of the Special Master's November 10, 2021 order. 42 U.S.C. § 300aa-12(e); RCFC App. B at Rule 36(b)(6).

ANALYSIS

A. Standard of Review

As recently iterated by this Court:

> In evaluating a special master's decision, the assigned judge may set aside the ruling only if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. When reviewing a legal determination, no deference is afforded to the special master's decision, which the court reviews *de novo*; in reviewing a special master's factual determinations, the court may only set them aside if they are arbitrary and capricious. The court reviews a special master's discretionary rulings under an abuse-of-discretion standard.
>
> In the Rule 60(b) context, the grant or denial of a motion for relief from judgment is discretionary, and the standard of review on a motion to review therefore is whether the trial court abused its discretion. An abuse of discretion exists when the trial court's decision is clearly unreasonable, arbitrary or fanciful, or is based on clearly erroneous findings of fact or erroneous conclusions of law.

M.D. (by Dilascio) v. Sec'y of Health & Hum. Servs., 153 Fed. Cl. 544, 558 (2021) (cleaned up).

B. Attorney Abandonment

Relief from judgment under RCFC 60(b) is reserved for "extraordinary circumstances." *Perry v. United States*, 558 Fed. Appx. 1004, 1006 (Fed. Cir. 2014) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (additional citations omitted)). In addressing allegations of attorney misconduct, more specifically, courts generally have held that attorney negligence – even conceded "gross negligence" – does not merit relief. *G.G.M. (through Mora) v. Sec'y of Health & Hum. Servs.*, 122 Fed. Cl. 199, 204-09 (2015). An attorney's discharge of their duties must be "so egregious" to leave the unmistakable impression upon the court "that counsel had effectively abandoned and/or affirmatively misled their clients." *See id.* at 205.

On the record presented, there is no basis to overturn the Special Master's finding that petitioner failed to demonstrate attorney abandonment in denying petitioner's request for relief from judgment. In examining the attorney-client relationship in issue, the Special Master took the extraordinary step of soliciting an affidavit from petitioner's former counsel as well targeted communications between petitioner and her former counsel. Despite describing the attorney-client relationship as "difficult," and noting that "[counsel's] lack of communication with his client is arguably problematic" and "unfortunate at times," the Special Master "d[id] not consider the circumstances to be exceptional." *DiMasi*, slip op. at 25-26.

As outlined above, in addressing petitioner's arguments related to her former counsel's presentation of her pre-vaccination medical history, the Special Master made clear that his factual findings related to petitioner's pre-vaccine symptoms were based upon *his* independent review of the medical records, expert reports, and medical literature. *Id.* at 15-17. In reviewing the record, this Court is particularly troubled by petitioner's admission that she doctored her medical records to remove references to the symptoms she reportedly developed immediately after the administration of the December 4, 2012 vaccine. *See id.* at 17 (quoting ECF 103 (DiMasi Statement ¶ 4)). Regardless of petitioner's motive, it was inappropriate and underscores the Special Master's finding that the vaccine was not the causation-in-fact of her symptoms. Further, petitioner's pre-vaccine symptoms were documented in petitioner's medical records prior to December 2012. Put simply, the Special Master's factual findings on this issue are neither arbitrary nor capricious.

Turning to the Special Master's assessment of counsel's tactical decision to request a ruling on the record despite petitioner's request to testify, the record presented belies any claim of attorney abandonment. On this issue, counsel's sworn affidavit is most telling:

> 9. Relying on the Special Masters [sic] opinion that Petitioner appears to have waived any privilege that may exist, I can state that it was not possible to have Petitioner testify on issues of onset and medical history in a manner consistent with my obligations to the client **and** as an officer of this Court. (emphasis added).
>
> 10. Without attributing any negative intent, Petitioner's comments regarding her pre-existing medical history and post-vaccine onset became inconsistent as the case met resistance from the Sec[retar]y of HHS.

ECF No. 100 (Gold Aff. at ¶¶ 9-10) (emphasis in original), *quoted in part in DiMasi*, slip op. at 18. As the Special Master explained, an attorney's calculated decision not to seek an entitlement hearing does not constitute attorney abandonment under the exacting standard required by RCFC 60(b). *DiMasi*, slip op. at 18 (citing *M.D. (by Dilascio)*, 153 Fed. Cl. at 559-60 (counsel's decision to waive entitlement hearing, although "an unusual strategy," did not constitute attorney abandonment) (additional citations omitted)).

A similar analysis and result must be reached with regard to the Special Master's evaluation of petitioner's argument that her former attorney should have pursued a significant aggravation claim in the alternative to her causation-in-fact claim. As explained by counsel under penalty of perjury, and adopted by the Special Master, "[petitioner's] mitigation and/or denial of pre-existing symptoms negated the ethical and practical possibility of filing a significant aggravation claim." ECF 100 (Gold Aff. ¶ 22), *quoted in DiMasi*, slip op. at 20. Like counsel's affirmative litigation decision to waive an entitlement hearing, the Special Master found that the pleading decision made by petitioner's former counsel was intentional, tactical, and based upon the realities of the situation presented and the attorney's efforts to meet his ethical obligations to his client and the Court.

Lastly, as aptly described by the Special Master: "[t]he final and most troublesome issue concerns the lack of communication and lack of an appeal or motion for reconsideration following the November 7, 2019 [entitlement] decision." *DiMasi*, slip op. at 20. More specifically, the conflicting assertions by petitioner and her former counsel regarding whether counsel informed his client that he would *not* file a motion for review and, relatedly, whether petitioner was made aware of the 30-day filing deadline under Vaccine Rule 23. In assessing the weight of the evidence supporting petitioner's and her former counsel's version of events, the Special Master reviewed the petitioner's statement, her former counsel's affidavit (and attached call log), and the requested email correspondence between petitioner and her former counsel "discussing filing an appeal or a motion for review." *See DiMasi*, slip op. at 4, 20-22.

The Special Master found:

> Ms. DiMasi was on notice of Mr. Gold's position against filing a motion for review on November 11, 2019. Ms. DiMasi should have been aware after November 11, 2019, that Mr. Gold would not be pursuing an appeal absent a change in circumstances. Given the available communication, it seems unlikely that Ms. DiMasi could reasonably expect Mr. Gold to take actions toward filing a motion for review without an affirmative communication from him.

DiMasi, slip op. at 22. As for the 30-day filing deadline, petitioner is adamant that this information was not disclosed; a claim not rebutted by her former counsel. *Compare* ECF 103 (DiMasi Statement ¶ 2) ("No deadlines were mentioned at any point in our conversations.") *with* ECF 100 (Gold Aff. ¶ 8) ("I have no present recollection of whether I informed Petitioner verbally of any deadline to file said appeal in 2019. No writings from my office to Petitioner stating this deadline were found."). After reviewing the record presented, the Court concludes that the Special Master's evaluation of the evidence presented was not arbitrary or capricious.

Characterizing the issue as "a close call," the Special Master nevertheless concluded that, on balance, there was insufficient evidence to establish a meritorious claim of attorney abandonment and, further, that petitioner "did not diligently act to preserve her rights." *DiMasi*, slip op. at 22; *e.g., M.D. (by Dilascio)*, 153 Fed. Cl. at 562-63 (failure to file notice of review does not merit RCFC 60(b) relief for attorney abandonment). In support of the lack of diligence finding, the Special Master cited: petitioner's single (unsuccessful) attempt to contact her

attorney after he informed her of his unwillingness to seek further review and before the filing deadline; petitioner's failure to confirm that her counsel reconsidered his position and would undertake the continued representation; and petitioner's failure "to consult the Vaccine Rules to determine the deadline for the motion for review." *Id.*; *see Sneed v. McDonald*, 819 F.3d 1347, 1354 (Fed. Cir. 2016) ("Where the attorney has not undertaken the representation, reasonable diligence requires that the client check with the attorney before the statutory filing time is about to run out to confirm that the attorney will undertake the representation.").

To be clear, it would have been preferable had counsel sent petitioner a formal letter memorializing his position that a motion for review lacked merit and would not be filed, and further informing (or reminding) petitioner of the upcoming filing deadline should she consider retaining other counsel or proceeding *pro se*. That said, such conduct is neither required nor the standard for establishing an attorney abandonment claim for RCFC 60(b) relief. At bottom, the Special Master did not abuse his discretion in denying petitioner's requests to reopen and reconsider the November 7, 2019 entitlement decision.

CONCLUSION

For the reasons stated above, the Court finds that the Special Master's denial of relief from judgment was not an abuse of discretion. Accordingly, the petition for review is **DENIED** and the November 10, 2021, decision of the Special Master denying petitioner's motion for relief from judgment is **SUSTAINED**.

IT IS SO ORDERED.

/s/Armando O. Bonilla
Armando O. Bonilla
Judge

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

STEPHANIE DIMASI,	*	No. 15-1455V
	*	Special Master Christian J. Moran
Petitioner,	*	
	*	Filed: November 10, 2021
v.	*	
	*	Reopening judgment, attorney
SECRETARY OF HEALTH	*	abandonment
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

Stephanie DiMasi, Pro Se, Melrose, MA;
Claudia Gangi, United States Dep't of Justice, Washington, DC, for Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION, DENYING MOTION FOR LEAVE TO FILE ADDITIONAL MATERIALS[1]

The petitioner, Stephanie DiMasi, seeks to reopen a December 11, 2019 judgment entered against her. Ms. DiMasi, on September 15, 2020, sought relief from that judgment. While a June 3, 2021 order denied relief to Ms. DiMasi, Ms. DiMasi obtained reconsideration of the June 3, 2021 order, essentially reinstating the pendency of the September 15, 2020 motion. In addition, Ms. DiMasi filed a motion for leave to file additional materials.

[1] The E-Government Act, 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services), requires that the Court post this order on its website (https://www.uscfc.uscourts.gov/aggregator/sources/7). Thus, anyone can access the order via the internet. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

These motions are DENIED. As explained below, Ms. DiMasi has not satisfied the standards for reopening a judgment. While her case was pending, Ms. DiMasi was represented by an attorney and Ms. DiMasi has not shown that her attorney's work was deficient, let alone so poor that a miscarriage of justice occurred.

I. Background

A. Procedural History Through Motion to Reopen

Represented by Mr. Gold, Ms. DiMasi alleged that a December 4, 2012 influenza vaccination was the cause-in-fact of her small fiber neuropathy and postural orthostatic tachycardia syndrome ("POTS"). Pet'r's Am. Mot., filed July 7, 2019, at 1. Ms. DiMasi submitted her medical records and a statement of completion on February 19, 2016. After the Secretary identified outstanding medical records, Ms. DiMasi submitted additional records.

The Secretary recommended against compensation. In his Rule 4 report, the Secretary noted that Ms. DiMasi had a complex medical history preceding the vaccination, that she complained of tingling more than six months before the vaccination, and that she reported tingling minutes after the vaccination. Resp't's Rep., filed Sep. 19, 2016, at 2, 7-8.

After a few extensions of time, Ms. DiMasi filed an expert report from Dr. Marcel Kinsbourne on March 27, 2017. Dr. Kinsbourne did not address Ms. DiMasi's pre-vaccination medical history that was discussed in the Rule 4 report and noted Dr. Novak's diagnosis of small fiber neuropathy[2] and POTS. Exhibit 24 at 2, 4. Dr. Kinsbourne concluded that the influenza vaccine caused Ms. DiMasi to develop small fiber neuropathy within a day. Id. at 8.

The Secretary filed an expert report from Dr. Thomas Leist on October 26, 2017. Dr. Leist detailed Ms. DiMasi's pre-vaccination history back to 2008, noting recurring episodes of syncope/near syncope, palpitations, and tachycardia. Exhibit A at 1-2, 9. Dr. Leist concluded that Ms. DiMasi had small fiber neuropathy prior to the influenza vaccination. Id. at 9. Dr. Leist then filed a

[2] Dr. Kinsbourne describes Ms. DiMasi's condition as acute autonomic and sensory neuropathy ("AASN"), a subset of small fiber neuropathy, but, Ms. DiMasi's condition will be referred to as "small fiber neuropathy" for the sake of simplicity.

supplemental expert report to address diagnosis and medical theory. Exhibit E, filed Jan. 5, 2018. Dr. Leist expanded this opinion to deny that the influenza vaccination significantly aggravated Ms. DiMasi's pre-existing small fiber neuropathy. Id. at 1-2.

On May 18, 2018, Ms. DiMasi filed a supplemental expert report from Dr. Kinsbourne. In the report, Dr. Kinsbourne acknowledged Dr. Leist's description of pre-vaccination episodes of syncope/near syncope, palpitations, and tachycardia. Dr. Kinsbourne explained these problems are not surprising as it is "not unusual for the onset of POTS to be preceded by miscellaneous episodes of dysautonomia." Exhibit 25 at 2.

At a status conference on May 30, 2018, the parties decided to explore settlement before proceeding with further litigation. After submitting progress reports on settlement, a status conference was held on October 3, 2018, to discuss next steps. The Secretary stated his intent to defend the case, and Ms. DiMasi requested adjudication of the case based on the existing record, without any oral testimony taken at a hearing. Thus, the undersigned issued an order for submissions describing in detail the preferred components of the parties' filings. Order, issued Oct. 4, 2018.

After Ms. DiMasi had submitted a motion for ruling on the record, the Secretary had submitted a response, and Ms. DiMasi had concluded with a reply, a status conference was held on May 29, 2019. The undersigned noted that several aspects of the filings did not comply with the October 4, 2018 order for submissions. A new briefing schedule was set to allow the parties to remedy their submissions. Order, issued May 29, 2019.

On July 7, 2019, Ms. DiMasi filed an amended motion for ruling on the record. The Secretary filed an amended response on August 9, 2019. Ms. DiMasi did not file a reply.

On November 7, 2019, the undersigned issued a decision denying entitlement for Ms. DiMasi. Decision, 2019 WL 6878732, at *1 (Spec. Mstr. Fed. Cl. Nov. 7, 2019). The Entitlement Decision noted that the Clerk's Office would enter judgment if a motion for review were not filed pursuant to the Rules of the Court of Federal Claims, appendix B. A motion for review was not filed. Judgement was entered on December 11, 2019. Subsequently, the undersigned awarded attorneys' fees and costs. Decision, issued July 13, 2020, 2020 WL 4581287.

B. **Recent Procedural History**

After the case was closed, on September 15, 2020, Ms. DiMasi personally submitted a lengthy document in which she made two requests. First, she requested that she (and not Attorney Howard Gold) represent her. Second, petitioner requested that the December 11, 2019 judgment against her be reopened.

On September 15, 2020, the undersigned issued an order addressing Ms. DiMasi's requests. After recounting the procedural history, the order directed the Clerk's Office to file the document as a motion to substitute Ms. DiMasi as counsel of record in lieu of Mr. Gold and a motion to reopen judgment. Additionally, the order encouraged Mr. Gold to respond to Ms. DiMasi's motion by October 15, 2020. On September 19, 2020, Mr. Gold filed an affidavit responding to Ms. DiMasi's motion, defending his actions as counsel. Mr. Gold did not oppose Ms. DiMasi's motion to replace him as counsel of record. About two weeks later, Ms. DiMasi filed a response to Mr. Gold's affidavit.[3]

On September 22, 2020, the undersigned granted Ms. DiMasi's motion to substitute herself as counsel of record. In the order, the Secretary was directed to file a response to Ms. DiMasi's motion to reopen her case.

On October 7, 2020, the Secretary opposed Ms. DiMasi's motion to reopen the case on the basis that the exceptional circumstances required to grant such a motion are not present here. Two days later, the undersigned issued an order permitting Ms. DiMasi to file a response to the Secretary's filing. The order specified that the response should include any emails between Ms. DiMasi and Mr. Gold discussing filing an appeal or a motion for review.

On October 29, 2020, Ms. DiMasi filed a reply to the Secretary's opposition to reopen the case. Then, on November 16, 2020, Ms. DiMasi filed an addendum to her response which included a photocopy of her original VAERS report.[4] On February 25, 2021, Ms. DiMasi filed another addendum to her response to the Secretary.

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[3] The affidavit and response were filed without exhibit numbers. Accordingly, this order cites Mr. Gold's affidavit as "Gold Aff." and Ms. DiMasi's subsequent filing as "Resp. to Aff."

[4] This document has been designated Exhibit Z by Ms. DiMasi.

In short, by June 1, 2021, the contested issue was whether Ms. DiMasi was entitled to relief from judgment. Ms. DiMasi was contending that her former counsel abandoned her and did not file a timely motion for review despite her request.[5] She was also arguing her pre-vaccination history was not represented properly. The Secretary opposed the motion, maintaining that Ms. DiMasi has not established that extraordinary circumstances exist to merit relief from judgment.

On June 3, 2021, the undersigned denied Ms. DiMasi's motion to set aside judgment in her case. On June 24, 2021, Ms. DiMasi filed a motion for reconsideration of the June 3, 2021 order with an affidavit. The next day, the undersigned granted the motion in part, vacating the June 3, 2021 order denying Ms. DiMasi's motion to reopen the judgment. Order, issued June 25, 2021.

Ms. DiMasi next filed a motion for leave to file additional materials on July 6, 2021. Ms. DiMasi specifically requested the opportunity to submit approximately 150 pages. These 150 pages contain some of Ms. DiMasi's medical records and medial articles. The Secretary opposed Ms. DiMasi's motion, mostly arguing that Ms. DiMasi could have submitted the materials during the entitlement phase. Resp't's Resp., filed July 19, 2021. Ms. DiMasi maintained her original request. Pet'r's Reply, filed July 26, 2021.

The undersigned has reviewed and reconsidered all pertinent evidence as well as the parties' recent filings. An appendix to this order contains a summary of the exhibits Ms. DiMasi filed after judgment.

The motions are now ripe for adjudication. The analysis begins with Ms. DiMasi's motion for leave to file additional materials.

II. Motion for Leave to File Additional Materials

After the undersigned vacated the June 3, 2021 order denying Ms. DiMasi's motion to reopen, Ms. DiMasi moved for leave to file additional materials on July 6, 2021. The motion alleges "that [she] was unrepresented in regard to [her] past medical history by [her] counsel and in addition, mis-represented on critical facts regarding the timing" of her symptoms. Pet'r's Mot. for Leave to File, at 2. The

[5] Ms. DiMasi tends to refer to the action of seeking review by a higher tribunal as an "appeal." However, in the Vaccine Program, the procedure is actually called a "motion for review." The semantic differences do not affect the outcome.

motion presents Ms. DiMasi's recollection of her medical history and arguments about how her conditions did not predate the vaccination.

Along with the motion, Ms. DiMasi attached medical records dated between 2004 and 2018, medical literature, and a timeline of events. See e.g., Pet'r's Addendum, filed July 6, 2021, at 1 (proposed exhibit 10 contains "EMG report diagnosing carpal tunnel, 2004, Lumbar MRI 2013," proposed exhibit 12 contains "Concord Hospital ER notes, 5/13/12"). None of these additional materials involve communications with Mr. Gold about filing a motion for review. It appears all communications with Mr. Gold were previously filed with her motion for reconsideration. See ECF 114.

Respondent filed a response on July 19, 2021, opposing Ms. DiMasi's motion. Respondent argues the medical records and medical literature do not constitute "newly-discovered evidence" and that they would not have clearly produced a different result if presented prior to judgment. Resp't's Resp., filed July 19, 2021, at 5. Respondent also notes a piece of medical literature was published after judgment and he argues it cannot serve as newly discovered evidence because it is in fact newly created evidence.

Ms. DiMasi filed a reply on July 26, 2021. She explains: "My main purpose in submitting the motion was to offer proof that had my rights been preserved, and had I actually been represented on the issues for which I was denied, that I would have had a favorable decision in my case." Pet'r's Rep., filed July 26, 2021, at 1. Ms. DiMasi further notes that most of the medical records she seeks to file in her addendum have already been filed with the court and are being resubmitted to support her argument that she did not have small fiber neuropathy or POTS prior to the vaccination. Id. at 1-2.

Ms. DiMasi appears to base her motion for leave to file additional evidence upon three sections of Rule 60 of the Rules of the Court of Federal Claims. These are RCFC 60(b)(2), (b)(1), and (b)(6).

A. **Rule 60(b) Standard**

In accordance with the Vaccine Rules of the United States Court of Federal Claims, a litigant in the Vaccine Program may seek relief from a judgment or order pursuant to Rule 60 of the RCFC. Vaccine Rule 36(a). RCFC 60 is identical to Rule 60 of the Federal Rules of Civil Procedure and the same standards apply for evaluating the rules. Dobyns v. United States, 915 F.3d 733, 737 n.1 (Fed. Cir.

2019); Blake v. Sec'y of Health & Human Servs., No. 03-31V, 2014 WL 7331948, at *4 (Fed. Cl. Spec. Mstr. Sept. 11, 2014).

RCFC 60(b) states: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 59(b); . . . or (6) any other reason that justifies relief."

Motions for relief under RCFC 60(b) "seek...to set aside a final decision and it is incumbent upon the motion-filer to demonstrate that he...is entitled to relief." Kennedy v. Sec'y of Health & Human Servs., 99 Fed. Cl. 535, 550 (2011). The motion's statements are "not a pleading, like a complaint, in which the factual allegation[s] are presumed true." Id. "Nor does it constitute a mere invitation for the court to investigate further whether to grant relief. Rather, that motion seeks to set aside a final decision and it is incumbent upon the motion-filer to demonstrate that he or she is entitled to that relief—now." Id.

"A motion for relief from judgment is one for extraordinary relief entrusted to the discretion of the court." Matos v. Sec'y of Health & Hum. Servs., 30 Fed. Cl. 223, 225 (1993) (*quoting* Yachts America, Inc. v. United States, 8 Cl. Ct. 278, 281 (1985)). Granting this form of relief "should be the exception, not the rule." Vessels v. Sec'y of Health & Hum. Servs., 65 Fed. Cl. 563, 568 (2005).

Negligence of counsel, without more, is typically insufficient to establish extraordinary circumstances and trigger 60(b)(6). G.G.M. v. Sec'y of Health & Human Servs., 122 Fed. Cl. 199, 205 (2015), aff'd sub nom. Mora v. Sec'y of Health & Human Servs., 673 F.App'x 991 (Fed. Cir. 2016). Attorney negligence does not constitute an extraordinary circumstance because the attorney is acting as an agent for the principle (client) who is charged with the acts and omissions of the agent. Id. at 205-09.

On the other hand, when attorneys effectively abandoned their clients leaving them virtually unrepresented and/or affirmatively misled, extraordinary circumstances may justify relief pursuant to Rule 60. See, e.g., Lal v. California, 610 F.3d 518, 524 (9th Cir. 2010) (granting relief from dismissal for failure to prosecute where attorney virtually abandoned client and misled him); Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1171-72 (9th Cir. 2002) (defendant's attorney ignored court orders, neglected motions, missed hearings and other court appearances, failed to file pleadings or serve them on opposing counsel, and

otherwise "virtually abandoned his client by failing to proceed with his client's defense despite [repeated] court orders to do so."); Boughner v. Sec'y of Health, Ed. & Welfare, 572 F.2d 976, 978 (3d. Cir. 1978) (vacating judgment where attorney's "egregious conduct amounted to nothing short of leaving his clients unrepresented"); cf. Heim v. Comm'r of Internal Revenue, 872 F.2d 245, 248 (8th Cir. 1989) (stating that "any errors committed by [counsel], even accepting the designation of gross negligence, do not constitute an adequate showing of 'exceptional circumstances'" and distinguishing cases granting relief for attorney negligence because in those cases client was left virtually unrepresented).

When petitioners are in fact abandoned by counsel, they must also show that they diligently pursued their rights before relief can be granted under Rule 60(b)(6). See Gonzalez v. Crosby, 545 U.S. 524, 537–38 (2005); Foley v. Biter, 793 F.3d 998, 1004 (9th Cir. 2015). A failure to appeal can be held against the moving party in the Rule 60(b)(6) analysis. Medinol Ltd. v. Cordis Corp., 817 F. App'x 973, 979 (Fed. Cir. 2020).

B. **Analysis**

Ms. DiMasi's motion invokes relief under RCFC 60(b)(2), (b)(1), and (b)(6). Each section is discussed below.

1. RCFC 60(b)(2)

A court may relieve a party from a final judgment when presented with "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 59(b)." RCFC 60(b)(2). When seeking relief because of newly discovered evidence, the claimant must show "(1) that the evidence was actually 'newly discovered,' that is, it must have been discovered subsequent to trial; (2) that the movant exercised due diligence; and (3) that the evidence is material, not merely impeaching or cumulative, and that a new trial would probably produce a different result." Sigmatech, Inc. v. United States, 144 Fed. Cl. 159, 175 (2019) (quoting TDM Am., LLC v. United States, 100 Fed Cl. 485, 490 (2011)).

Respondent argues there is no colorable argument that Ms. DiMasi was "excusably ignorant" of her own medical records, and therefore she lacked the requisite reasonable diligence. Resp't's Resp., at 5 (citing Yachts Am., Inc. v. United States, 8 Cl. Ct. 278, 281 (1985), *aff'd* 779 F.2d 656 (Fed. Cir. 1985)). Ms. DiMasi notes "these [medical] records should already be in the court record."

Pet'r's Rep. at 2. Respondent also argues these records are not material but rather "merely impeaching or cumulative."

Ms. DiMasi's case was litigated to completion and she had ample opportunity to file all of her medical records. These documents were mostly accessible to her and Mr. Gold prior to adjudication and were discoverable with reasonable due diligence. Furthermore, Ms. DiMasi does not explain, nor it is apparent, how these medical records are material. As such, Ms. DiMasi is not entitled to submit these medical records post-judgment under RCFC 60(b)(2). For a summary of the medical records, see the attached appendix.

The medical literature Ms. DiMasi seeks to file has similar deficiencies. The medical literature includes a 2013 article about POTS, a 2019 article regarding small-fiber neuropathy, and an article published in 2021. Ms. DiMasi's expert neurologist, Dr. Marcel Kinsbourne, submitted an expert report and medical literature discussing those conditions. Ms. DiMasi has not explained how these articles qualify as "newly-discovered evidence." Furthermore, it is unclear how these articles would be material to the record rather than cumulative, given Dr. Kinsbourne's report and previously filed literature.

The article published in 2021 is not newly discovered but rather newly created, and it cannot be submitted now in an effort to change the case result. For these reasons, RCFC 60(b)(2) does not justify supplementing the record with Ms. DiMasi's additional materials.

2. RCFC 60(b)(1)

Ms. DiMasi suggests "that 'mistake' or 'inadvertence' would apply under Rule 60(b)(1) to anything missing from [her] record." Pet'r's Rep., at 2. Because this issue was raised in reply, respondent did not address the applicability of RCFC 60(b)(1).

Rule 60(b)(1) permits a court to grant a party relief from final judgment due to "mistake, inadvertence, surprise or excusable neglect." RCFC 60(b)(1). Though the rules do not define "mistake," the Court of Federal Claims held the term encompasses "[a]n error or misconception, or misunderstanding; an erroneous belief." Curtis v. United States, 61 Fed. Cl. 511, 514 (2004). The mistake at issue may be the fault of a party, counsel, or the court. Id. at 514-15. Special masters have granted relief under RCFC 60(b)(1) when a petitioner inadvertently overlooked invoices and failed to submit them with a fees application. See Yalacki v. Sec'y of Health & Hum. Servs., No. 14-278V, 2021 WL 2070629 (Fed. Cl.

Spec. Mstr. Apr. 27, 2021); Williamsen v. Sec'y of Health & Hum. Servs., No. 10-223V, 2014 WL 1388894 (Fed. Cl. Spec. Mstr. Mar. 4, 2014).

To determine whether a movant has made a prima facie case for relief under Rule 60(b)(1), a court considers: "(1) whether the movant has a meritorious claim or defense; (2) whether the nonmovant would be prejudiced by the granting of relief; and (3) whether the matter sought to be relieved was caused by the movant's own culpable conduct." Orient Overseas Container Line (UK) Ltd. v. United States, 52 Fed. Cl. 805, 807 (2002) (citing Information Systems & Networks Corp. v. United States, 994 F.2d 792, 795–96 (Fed. Cir. 1993)). Courts apply a balancing approach, "taking account of all relevant circumstances surrounding the party's omission." Pioneer Inv. Servs. Co. v. Brunswick Ltd. P'ship, 507 U.S. 380, 395 (1993). Thus, no single factor is determinative.

a) Meritorious Claim

The first factor is whether Ms. DiMasi has a meritorious claim. A claim may be deemed meritorious if it "merely states a legally tenable cause of action, *i.e.* alleges a set of operative facts, which, if proven true at trial, would establish … entitlement." Stelco Holding Co. v. United States, 44 Fed. Cl. 703, 709 (1999).

In this case, Ms. DiMasi presented a legally tenable claim. The petition was timely. Ms. DiMasi with assistance from Mr. Gold supported the claim with medical records and expert reports. After Ms. DiMasi (via Mr. Gold) moved for a ruling on the record, entitlement was denied on the merits. However, now Ms. DiMasi moves to supplement the record so as to relitigate her pre-vaccination history. While there is certainly no guarantee that Ms. DiMasi would prevail if the case were to be reopened, the claim is a meritorious one.

b) Prejudice

The second factor is whether respondent would be prejudiced if Ms. DiMasi were permitted to file additional materials. To address this question, courts may evaluate whether relief from judgment "would present any concrete threat of injury" to the nonmovant. Stelco, 44 Fed. Cl. at 714.

In this case, respondent has not argued that he would be prejudiced if Ms. DiMasi's motion were granted. Furthermore, the undersigned does not foresee any substantial prejudice against respondent if the motion were granted.

c) Culpable Conduct

The final factor considers "whether the matter sought to be relieved was caused by the movant's own culpable conduct." Orient Overseas, 52 Fed. Cl. at 807. A litigant's action or inaction may be deemed "excusable neglect" if due solely to intervening circumstances beyond the litigant's reasonable control. Pioneer, 507 U.S. at 388, 394. However, an act or omission "within the reasonable control" of the litigant "strongly militates against a grant of relief from judgment." Guillot v. Sec'y of Health & Hum. Servs., 2012 WL 3867160 at *7 (Fed. Cl. Spec. Mstr. Aug. 15, 2012) (citing Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366 (2d Cir. 2003)).

Here, the action at issue is an alleged mistake to submit medical records and literature which Ms. DiMasi asserts would have resulted in a different decision. Ms. DiMasi has not presented any intervening circumstances beyond her control that prevented her or Mr. Gold from previously submitting the medical records or literature. Rather, these proposed exhibits are accompanied by a motion that seeks to use these exhibits to argue that she would have had a favorable decision, "had [she] been properly informed and represented." Pet'r's Mot. for Leave to File, at 1.

Ms. DiMasi is ultimately responsible for the failure to previously submit the exhibits she now seeks to file. Petitioners are held accountable for the acts and omissions of their chosen legal counsel. Pioneer, 507 U.S. at 397 ("Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to 'have notice of all facts, notice of which can be charged upon the attorney.'" (citations omitted)). Ms. DiMasi was responsible for supervising and assisting her counsel with obtaining and filing medical records during the litigation phase.

Ms. DiMasi does not explain what caused the alleged mistake beyond the general allegation that her attorney did not represent her. Medical records were last filed in this case on January 31, 2017, and medical literature was last filed on March 27, 2017. Ms. DiMasi, via Mr. Gold, continued litigating the case for nearly three years. The medical records and literature were reasonably within the party's control and otherwise accessible (aside from the newly created literature). The records and literature could have been found and submitted earlier. These facts militate against the relief sought.

d) Balancing of Factors

With each factor analyzed, the court must now weigh them to determine whether to grant relief for a mistake under RCFC 60(b). Ms. DiMasi's claim is sufficiently meritorious to consider the motion. Additionally, respondent would not be unduly prejudiced if the motion for relief were granted. However, Ms. DiMasi seeks relief due to a "mistake" for which she bears responsibility.

In Mora v. Sec'y of Health & Hum. Servs., the special master denied a motion to reopen based primarily on the third factor. No. 13-421V, 2015 WL 1275389 (Fed. Cl. Spec. Mstr. Feb. 27, 2015), *mot. for rev. denied*, 122 Fed. Cl. 199 (2015) (finding special master's denial of relief from judgment was not abuse of discretion), aff'd, 673 Fed. App'x 991 (Fed. Cir. 2016).

Here, the medical records and literature were arguably relevant during the entitlement phase of Ms. DiMasi's case. However, Mr. Gold already represented Ms. DiMasi through entitlement, during which time he submitted essential medical records. It is possible that a better or more complete set of records could have been submitted. However, Ms. DiMasi, like all petitioners, is responsible for supervising her attorney.

Ms. DiMasi has a sufficiently meritorious claim and it is not clear that respondent would be unduly prejudiced if the motion for relief were granted. However, the failure to file some records and literature does not qualify as an excusable mistake here.

The undersigned finds that petitioner's counsel's failure to submit records or literature constitutes culpable conduct. For the above reasons, relief is not appropriate here under RCFC 60(b)(1).

3. 60(b)(6)

A court may also relieve a party from judgment for "any other reason that justifies relief." RCFC 60(b)(6). However, without a showing of extraordinary or exceptional circumstances, a Rule 60(b)(6) motion is generally not granted. CTS Corp. v. Piher Int'l Corp., 727 F.2d 1550, 1555 (Fed. Cir. 1984). The residual catchall provision, Rule 60(b)(6) has been characterized as a "grand reservoir of equitable power to do justice in a particular case." Lazare Kaplan Int'l, Inc. v. Photoscribe Techs., Inc., 714 F.3d 1289, 1295 (Fed. Cir. 2013) (quoting Stevens v. Miller, 676 F.3d 62, 67 (2d Cir. 2012)). A movant is entitled to relief under Rule 60(b)(6) if "such action is appropriate to accomplish justice" and only in

"extraordinary circumstances." CEATS, Inc. v. Cont'l Airlines, Inc., 755 F.3d 1356, 1361 (Fed. Cir. 2014) (internal quotation marks omitted). However, RCFC 60(b)(6) does not relieve a party from a "free, calculated, and deliberate choice." Kennedy, 99 Fed. Cl. at 548 (quoting Paul Revere Variable Annuity Ins. Co. v. Zang, 248 F.3d 1, 6 (1st Cir. 2001)).

Here, Ms. DiMasi has not demonstrated extraordinary circumstances to justify this relief. Failing to discover and to file some medical records and literature could rise to gross negligence in certain circumstances. However, the prior failure to file these non-material records does not rise to the same level of egregious conduct as an attorney's abandonment or affirmative misleading of a client. See Cmty. Dental Servs., 282 F.3d at 1170–71. Extraordinary circumstances have not been shown here. The failure to file some seemingly non-essential records is not such an extraordinary situation so as to require the relief requested.

C. Conclusion

Ms. DiMasi has not demonstrated that she is entitled to relief under Rule 60(b). The proposed exhibits (medical records and medical literature) are neither material nor newly discovered. The alleged "mistake" is not sufficient to open judgment. Furthermore, many of these medical records, as acknowledged by Ms. DiMasi, are already in the record. See Appendix; Pet'r's Rep., at 1-2. Extraordinary circumstances have not been demonstrated. For these reasons, Ms. DiMasi's motion for leave to file additional materials is DENIED.

III. Motions to Reopen and Reconsideration

Following judgment on July 14, 2020, Ms. DiMasi moved to reopen her case on September 15, 2020. The motion to reopen was denied on June 3, 2021.

Subsequently, on June 24, 2021, Ms. DiMasi moved for reconsideration of the June 3, 2021 order. The motion was granted in part and the June 3, 2021 order was vacated. The undersigned has reconsidered the evidence and the parties' filings. This matter is now ripe for adjudication again.

A. Standards of Adjudication

A party may seek relief under from a judgment or order pursuant to Rule 60 of the RCFC. These standards are described above and govern Ms. DiMasi's motion to reopen.[6]

A party may also seek relief via Rule 59(a), which governs motions for reconsideration. Rule 59(a) provides that rehearing or reconsideration may be granted: "(A) for any reason for which a new trial has heretofore been granted in an action at law in federal court; (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States." RCFC 59(a)(1).

The court, "in its discretion, 'may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice.'" Biery v. United States, 818 F.3d 704, 711 (Fed. Cir. 2016) (quoting Young v. United States, 94 Fed. Cl. 671, 674 (2010)). Such motions must be supported "'by a showing of extraordinary circumstances which justify relief.'" Caldwell v. United States, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 300 (1999), aff'd, 250 F.3d 762 (2000)). Motions for reconsideration, however, "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008) (quoting 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d ed. 1995)). In addition, "a motion for reconsideration is not intended ... to give an 'unhappy litigant an additional chance to sway' the court." Matthews v. United States, 73 Fed. Cl. 524, 525 (2006) (quoting Froudi v. United States, 22 Cl. Ct. 290, 300 (1991)).

B. Ms. DiMasi's Motion to Reopen

Ms. DiMasi has not presented any change in controlling law that would affect this case, nor is the undersigned aware of any such law. Similarly, as discussed, there is no newly discovered evidence, aside from emails and affidavits that elucidate Ms. DiMasi's and Mr. Gold's communications and relationship. Thus, new law or new evidence will not justify relief here. See Biery, 818 F.3d at

[6] *See supra* § II.A.

711. Rather, Ms. DiMasi seems to argue that justice requires reopening her case due to attorney abandonment that led to factual or legal errors.

Ms. DiMasi contends Mr. Gold abandoned her and accordingly her case should be reopened. In opposition to Ms. DiMasi's motion, the Secretary argues that extraordinary circumstances are not present here and relief is not warranted. The prior record and decision denying entitlement provide additional context.

The undersigned has previously found facts informed by the record, and these facts remain firm. As such, previous findings will not be undone absent extraordinary or exceptional circumstances.

In determining whether to reopen this case, Ms. DiMasi's motion and subsequent filings, along with Mr. Gold's affidavit, are of primary importance. However, unlike statements in a complaint, the statements in Ms. DiMasi's motion are not presumed true. Kennedy, 99 Fed. Cl. at 550.

In her motion to reopen, Ms. DiMasi explains why she elected to terminate representation by Mr. Gold and to proceed pro se. Ms. DiMasi claims that Mr. Gold "did not present pertinent facts accurately and failed to include important information that [she] believe[s] would have led to a favorable decision." Pet'r's Mot. to Reopen, filed Sep. 15, 2020, at 1. Ms. DiMasi also alleges that Mr. Gold omitted important information that may have altered the outcome of her case.

Mr. Gold rebuts the allegations and provides his perspective in his affidavit. Summarily, Mr. Gold believes he prosecuted Ms. DiMasi's case as she directed to the full extent possible under his professional obligations.

Ms. DiMasi's filings volley a series of complaints. Each will be addressed in turn, presented roughly in the order that each issue arose.

1. Ms. DiMasi's Pre-Vaccination Medical History

"Most troubling" to Ms. DiMasi is that Mr. Gold, according to her, did not properly address or defend her pre-vaccination medical history. Pet'r's Mot. to Reopen at 1. She states that after reading respondent's Rule 4 report, she supplied important information that Mr. Gold did not present. Id.

In response, Mr. Gold states: "Without attributing any negative intent, Petitioner's comments regarding her pre-existing medical history and post-vaccine onset became inconsistent as the case met resistance from the Sec'y of HHS."

Gold. Aff., at 2. Ms. DiMasi emphatically denies her pre- and post-vaccination histories were inconsistent. Resp. to Aff., at 2.

This issue does not amount to abandonment or require extraordinary relief. Even if her attorney did not properly address her medical history, Ms. DiMasi is not entitled to the extraordinary relief requested. Errors amounting to gross negligence are not considered exceptional circumstances that warrant reopening the case. Heim, 872 F.2d at 248. More importantly, the undersigned found facts about Ms. DiMasi's pre-vaccination history primarily by reviewing the medical records, expert reports, and medical literature. See Cucuras v. Sec'y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993) (reports prepared during the course of medical treatment are presumed reliable). Findings were not based upon representations made by counsel.

2. Pre-Vaccination Onset of Ms. DiMasi's Neurological Symptoms

A related issue concerns when Ms. DiMasi's neurological symptoms started and whether alleged mistakes support reopening judgment. Ms. DiMasi states the timing of her symptoms as presented in the case was not accurate. Pet'r's Mot. to Reopen, at 1.

Ms. DiMasi states her expert witness represented that the onset of her neurological symptoms was immediately following vaccination. She further states that she advised Mr. Gold on several occasions that the neurological symptoms did not begin until three to four days after the vaccination. Ms. DiMasi claims Mr. Gold "did not correct this error," "which would have been crucial in establishing a temporal relationship." Add. to Resp., filed Nov. 16, 2020, at 1.

In his affidavit, Mr. Gold recounts several pieces of evidence discussing onset. First is Ms. DiMasi's VAERS report, dated December 10, 2012, which states that "[i]mmediately, on 04 December 2012 at 1:40pm, the patient experienced onset of adverse events. In addition to previously mentioned adverse events, the patient developed arrhythmia, slight jaw discomfort on left side, throat feeling of slight thickening, dull back pain, numbness and tingling of left leg and weakness of both legs." Exhibit 19 at 3. In response, Ms. DiMasi conceded she immediately experienced adverse symptoms, but neuropathy was not one of them. Resp. to Aff., filed Oct. 5, 2020, at 1.

Similarly, Mr. Gold relied on Dr. Chen's contemporaneous medical records. Gold Aff., filed Sept. 18, 2020, at 2-3. In notes from December 19, 2012, Dr.

Chen stated that "Immediately after the shot, she had a sensation of dizziness, shakiness, generalized weakness and tingling behind the right knee." Exhibit 19 at 17. Mr. Gold states that Ms. DiMasi "corrected" Dr. Chen's report by adding handwriting, which states the tingling was behind her left knee rather than her right knee. Gold Aff., at 2-3. Mr. DiMasi confirmed this modification and adds that she also crossed out "She has had these symptoms chronically since the injection" and wrote in "since 4 days after the injection." Resp. to Aff., at 2.

Additionally, Mr. Gold points to Dr. Fischer's December 27, 2012 notes, which stated that Ms. DiMasi "reports immediate left jaw and throat tightness, and tingling sensation in the left lower leg, all happening within a few minutes of shot." Gold Aff., at 2 (quoting exhibit 7 at 1).

Ms. DiMasi wrote to Mr. Gold to clarify that her neuropathy did not occur immediately, only a slight tingle and several other symptoms. Mr. Gold maintains that the above issues were discussed with Dr. Kinsbourne and the expert report was informed by the entire medical record. Gold Aff., at 3.

Although Ms. DiMasi claims her neurological symptoms began three to four days after vaccination, neither she nor Mr. Gold presented sufficient evidence to establish that fact. The undersigned ultimately found that symptoms related to Ms. DiMasi's small fiber neuropathy and POTS began prior to her December 4, 2012 influenza vaccination. This finding was based on medical records and the testimony of respondent's expert, Dr. Leist, who opined that Ms. DiMasi's pre-vaccination history of syncope/near syncope, palpitations, and tachycardia, as well as peripheral neuropathy, were suggestive of pre-vaccination POTS and small fiber neuropathy. Decision, 2019 WL 6878732, at *8. Ms. DiMasi did not address her pre-vaccination history in her motion for a ruling on the record or subsequent filings, although she did submit a copy of her original VAERS report, which states that the onset of an adverse event began two minutes after vaccination.

The allegation here that Mr. Gold and the experts incorrectly presented the date that Ms. DiMasi's neurological symptoms allegedly began has not been sufficiently demonstrated. Preponderant evidence, rooted in the medical records and literature regarding POTS, established that Ms. DiMasi's neurological symptoms began prior to her vaccination. Even assuming attorney negligence occurred here, it would not arise to extraordinary circumstances warranting the relief requested.

3. Ruling on the Record

Ms. DiMasi states Mr. Gold decided to request a ruling on the record even though Ms. DiMasi "specifically requested a chance to correct misconceptions with oral or written testimony." Pet'r's Mot. to Reopen at 2. She says he told her that was not an option. Id.

In response, Mr. Gold states "it was not possible to have Petitioner testify on issues of onset and medical history in a manner consistent with my obligations to the client **and** as an officer of this Court." Gold Aff., at 2 (bold in original).[7]

The disagreement here appears to involve issues of professional responsibility and the attorney-client relationship. Generally, clients dictate their objectives and attorneys possess the authority to take actions on behalf of the client. See ABA Model Rules of Prof'l Conduct, Rule 1.2.[8] In other words, attorneys handle the technical, legal, and tactical matters to accomplish the client's

[7] ABA Model Rule 3.3 provides guidance regarding candor toward tribunals. The rule states that a lawyer shall not knowingly "offer evidence that the lawyer knows to be false. . . A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false." Rule 3.3(a)(3). The comments elaborate: "If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false testimony." Id. at cmt. 6.

[8] The comments further state that "a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected." Id. at cmt. 2.

The Model Rules provide guidance about disagreements between an attorney and a client. "If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3)." ABA Model Rules of Prof'l Conduct, Rule 1.2, cmt. 2.

objective. Id. Additionally, attorneys must abide by rules of the court and other rules of their profession.

Mr. Gold's choice to request a ruling on the record and forgo oral testimony from Ms. DiMasi is not evidence of abandonment or misconduct warranting reopening the case. In a recent case, the Court of Federal Claims held the special master did not abuse his discretion in determining that an attorney did not abandon his client by choosing not to pursue an entitlement hearing. See M.D. v. Sec'y of Health & Human Servs., No. 10-611V, 2021 WL 1625084, at *19-21 (Fed. Cl. 2021). Litigation tactics, such as deciding which witnesses will testify in a civil case, is nearly always within the attorney's purview rather than the client's. Mr. Gold's statement suggests professional obligations informed his tactical choice. See Delhaye v. Holder, 338 F.App'x 568, 2009 WL 1974548, at *1 (9th Cir. 2009) (describing petitioner's counsel's decision to forgo testimony as a tactical decision that did not constitute ineffective assistance of counsel); see also Strickland v. Washington, 466 U.S. 668, 681 (1984). A tactical decision, "even if unwise in hindsight," does not amount to ineffective assistance of counsel. See Jiang v. Mukasey, 522 F.3d 266, 271 (2d Cir. 2008). Without suggesting Mr. Gold's decision was unwise, his tactical decision to pursue a ruling on the record in lieu of a hearing with testimony from Ms. DiMasi is an insufficient allegation to succeed on abandonment or ineffective assistance of counsel claims. Furthermore, oral testimony may not have altered the findings of fact. See Curcuras v. Sec'y of Health & Human Servs., 993 F.2d 1515, 1528 (Fed. Cir. 1993). Thus, this issue does not support reopening the case.

4. Significant Aggravation Claim

In her motion, Ms. DiMasi states she was never informed of the option to pursue a significant aggravation claim.[9] Pet'r's Mot. to Reopen at 2. Mr. Gold states that a significant aggravation claim was not pursued because Ms. DiMasi's

[9] Ms. DiMasi also writes "In your decision, it states that I specifically declined this option. This is not true, in fact, it was never mentioned to me." Mr. Gold, as counsel representing Ms. DiMasi's petition, declined to pursue that claim. See Gold Aff., at 3. The Supreme Court has ruled that "each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Link v. Wabash R.R. Co., 370 U.S. 626, 633–634 (1962) (quoting Smith v. Ayer, 101 U.S. 320, 326 (1880)).

"mitigation and/or denial of pre-existing symptoms negated the ethical and practical possibility of filing" such a claim. Gold Aff., at 3.

This issue again amounts to a tactical decision by which Ms. DiMasi remains bound. Ms. DiMasi as client/principal could dictate the objectives, i.e. to pursue compensation for a vaccine-related injury. Mr. Gold as attorney/agent was tasked with making informed decisions about the technical and legal hurdles of litigation. See Model Rule 1.2. She was not left virtually unrepresented or affirmatively misled by Mr. Gold. Instead, counsel appears to have deliberately chosen not to pursue an avenue for relief based on practical and ethical concerns. Though displeased with this choice, Ms. DiMasi is not entitled to relitigate her case at this juncture.

5. Submission of Evidence

Ms. DiMasi also states she provided Mr. Gold "with a statement and medical theory written by [her] treating neuromuscular neurologist at Brigham and Women's Hospital in support of [her] claim, but [she] do[es] not know if it was presented." Pet'r's Mot. to Reopen at 1. Mr. Gold in fact presented this document as exhibit 23.

6. Ms. DiMasi's Request that Mr. Gold Appeal

The final and most troublesome issue concerns the lack of communication and lack of an appeal or motion for reconsideration following the November 7, 2019 decision.

Determining whether a failure to file an appeal constitutes attorney abandonment often requires examining whether the client was diligent in pursuing her rights and following up with her attorney on her case. The Federal Circuit has placed some responsibility for preserving appellate rights with the client, stating that "reasonable diligence requires that the client check with the attorney before the statutory filing time is about to run out to confirm that the attorney will undertake the representation." Sneed v. McDonald, 819 F.3d 1347, 1354 (Fed. Cir. 2016).

Ms. DiMasi appears to argue that Mr. Gold abandoned her because he did not file motions for reconsideration or review. The chronology of communications appears to be as follows:

Mr. Gold informed Ms. DiMasi that entitlement was denied on November 11, 2019 via email[10] and then during a half-hour phone call.[11] Gold Aff., at 1; Resp. to Aff., at 1. Mr. Gold states he told Ms. DiMasi he did not see any good-faith basis for a motion for review or reconsideration and would not file either motion. Id.

Ms. DiMasi states that after the decision denying compensation issued on November 7, 2019, she immediately requested that Mr. Gold appeal the decision. Pet'r's Mot. to Reopen, at 1. Mr. Gold responds that he continues to believe that filing a motion for review would have been inappropriate and baseless. Gold Aff., at 1. Ms. DiMasi similarly alleges Mr. Gold did not inform her about deadlines or the option to file a motion for reconsideration or review. Mr. Gold cannot recall whether he informed Ms. DiMasi of any deadlines and could not find any writings to supplement his recollection. Gold Aff., at 1-2.

Mr. Gold avers that as he believed there was a meeting of the minds regarding not filing a motion for review. Gold Aff., at 1-2. He states that when he spoke to Ms. DiMasi on the phone on November 11, 2019, he "told her explicitly that . . . [he] would not file any appeal." Id. However, Ms. DiMasi claims that "he did not tell me that he 'would not file an appeal,' as stated in his affidavit." Resp. to Aff., at 1.

Ms. DiMasi sent another email to Mr. Gold on November 12, 2019. Id. The email contained research, discussion of medical history, and a request for an appeal. Id. The next email provided is from December 11, 2019, the same day that judgment was entered in this case. In the email, Ms. DiMasi asks Mr. Gold if he received her previous email. Id. Mr. Gold responded the same day stating that

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[10] Exhibit U, filed on October 29, 2020, shows screenshots of emails. Mr. Gold emailed Ms. DiMasi on November 11, 2019 explaining the recent decision. The exhibit next shows an email from Ms. DiMasi to Mr. Gold on November 12, 2019 (with a new subject line) following up and providing research. Next, Ms. DiMasi emailed Mr. Gold on December 11, 2019 to ask if he received her prior email. Mr. Gold promptly responded, stating that he did not receive the prior email and that he believed there were no bases for a motion for review or reconsideration.

[11] Along with his affidavit, Mr. Gold attached a T-Mobile call-log, designated as Exhibit A, which shows a 32-minute call to Ms. DiMasi on November 11, 2019, at 1:46 PM.

he had not received the email, and he reiterated his belief that there were no bases for consideration. Id. He stated, "It's a frustrating decision but I do not believe it is incorrect." Id.

The undersigned finds, based on the limited available evidence, that Ms. DiMasi was on notice of Mr. Gold's position against filing a motion for review on November 11, 2019. Ms. DiMasi should have been aware after November 11, 2019 that Mr. Gold would not be pursuing an appeal absent a change in circumstances. See Gold Aff., at 1-2. Given the available communications, it seems unlikely that Ms. DiMasi could reasonably expect Mr. Gold to take actions toward filing a motion for review without an affirmative communication from him.

This issue represents a close call. Counsel told his client that a decision issued, that he did not think it was wrong, and that he was unwilling to appeal. The client immediately protested and requested an appeal, but then both the attorney and client went silent. By the time they spoke again, judgment had entered. If Ms. DiMasi had pursued her rights more diligently by establishing a plan to file a motion for review, by continuing to press Mr. Gold to reconsider or to withdraw as counsel of record, or by acting in some way to preserve her rights, she would have a stronger case for attorney abandonment.

However, Ms. DiMasi did not diligently act to preserve her rights. After Mr. Gold communicated an unwillingness to appeal on November 11, 2019, Ms. DiMasi only attempted to contact Mr. Gold one other time before judgment entered, via email the following day. Mr. Gold apparently did not receive the email. See fn 9. Though Ms. DiMasi made some attempt, she did not verify that her attorney would undertake the representation. See Sneed, 810 F.3d at 1354. Ms. DiMasi knew enough to inquire about filing a motion for review. Ms. DiMasi only needed to consult the Vaccine Rules to determine the deadline for the motion for review. Even where petitioners are abandoned by counsel, they must also show that they diligently pursued their rights before relief can be granted under Rule 60(b)(6). See Gonzalez, 545 U.S. at 537–38.

Ms. DiMasi's filings through her motion to reopen do not sufficiently demonstrate that her attorney failed to represent her or abandoned her. Furthermore, Ms. DiMasi has not demonstrated that she diligently preserved her rights, nor has she demonstrated exceptional circumstances warranting opening judgment.

C. Ms. DiMasi's Motion for Reconsideration and Attachments

Ms. DiMasi's motion for reconsideration and subsequent filings present similar evidence and arguments to those accompanying her motion to reopen. These filings purport to show she was left unrepresented by her former counsel and that she would have had a favorable outcome had events transpired differently. Attached with the motion for reconsideration, Ms. DiMasi provides an affidavit and a collection of emails between her and Mr. Gold.

1. Ms. DiMasi's Affidavit

In the affidavit, Ms. DiMasi provides her perspective on the case and her attorney-client relationship. Some allegations are general, some are specific.

Generally, Ms. DiMasi complains that throughout her case, there were times where Mr. Gold was slow to respond to communications. DiMasi Aff., filed June 24, 2021, at ¶¶ 3, 11, 12. She also states she had not been given copies of documents or informed about deadlines. Id. at ¶¶ 3, 14, 15. Specifically, she alleges that her attorney never informed her that she could file a significant aggravation claim and that he told her she could not testify, against her wishes. Id. at ¶¶ 4, 5. These issues have been analyzed above.[12]

Additionally, Ms. DiMasi insists that when Mr. Gold contacted her on November 11, 2019 to tell her entitlement had been denied, "Mr. Gold did not, in any way, tell me that he would not appeal the decision or that there was not a basis to appeal the decision." Id. at ¶ 6. Instead, she says she asked if she could appeal. "He told me that the only way to appeal is if there is a 'matter of law' and that he needed to look into whether or not it could be done." Id. at ¶ 8. Furthermore, Ms. DiMasi alleges "[h]e did not inform me that the decision 'could' be appealed pro se or by other counsel. He did not mention any deadlines." Id. at ¶ 9.

2. Emails between Ms. DiMasi and Mr. Gold

Ms. DiMasi provides three exhibits of emails. The first are various emails throughout the case. The next is one email from 2015 regarding the timing of Ms. DiMasi's symptoms. The third set contains recent emails from 2021. Each are discussed below.

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[12] *See supra* § III.B.

a) Emails During the Case

The first set, labeled "Emails during my case," contains two email chains spanning Ms. DiMasi's case.

The initial batch is from November and December 2015, showing some communications up to the point Mr. Gold filed the petition. The first email shows Ms. DiMasi asking about the status of her case on November 4, 2015, and Mr. Gold responding the next day. Then on November 17, 2015, Ms. DiMasi emailed again to make sure her check was received, and the case was filed. Mr. Gold responded on December 2, 2015, stating the petition had been filed. Based on the manually underlined dates, these emails are presumably intended to demonstrate delays in communication.

The next batch is from March of 2017. On March 6, 2017, Mr. Gold emailed Ms. DiMasi. He asked her to have one of her treaters, Dr. Battacharya, call Dr. Kinsbourne, the retained expert. The next day, the two exchanged emails back and forth, with Ms. DiMasi expressing skepticism about Dr. Kinsbourne opining on her behalf because he is a *pediatric* neurologist. The next emails, on March 10, 2017, shows Ms. DiMasi stating she left Dr. Battacharya a message and asking Mr. Gold if the doctors have spoken. Mr. Gold responded that he had not called. Ms. DiMasi expressed frustration about running close to deadlines but pressed on to get the doctors communicating. In turn, Mr. Gold expressed frustration about delays and filing the case without a diagnosis. Mr. Gold stated: "Should you wish to find other Counsel, please let me know." Ms. DiMasi responded the next day, reiterating her frustration but confirming she did not wish to find other counsel.

b) The 2015 Email Regarding Timing of Symptoms

The next proposed exhibit is an email from Saturday evening, April 11, 2015. The email from Ms. DiMasi to Mr. Gold evinces more tension between attorney and client. Ms. DiMasi offers to put together a timeline because she felt her attorney was having trouble piecing the story together and misinterpreting physician notes. The email goes on to describe Ms. DiMasi's recollection of her neuropathy and symptoms. As this email was presented alone, it is unclear whether or not Mr. Gold responded. Furthermore, the purpose of providing this email is not entirely clear, aside from perhaps demonstrating that attorney and client were in disagreement as to how the evidence fits together.

c) Recent Emails

The third set of emails consists of a back-and-forth discussion in June of 2021. On June 19, 2021, Ms. DiMasi emailed Mr. Gold regarding her motion to reopen. Ms. DiMasi accuses him of lying in his affidavit about informing her that he would not file an appeal. The email further discusses disputes over symptom onset timing and accusations that he did not properly present her medical history. The same day, Mr. Gold responded, maintaining the truthfulness of his September 18, 2020 affidavit and reiterating the difficult/conflicting medical records. After more arguing, the conversation trails off.

3. Analysis

Ms. DiMasi's affidavit and emails shed more light on the difficult attorney-client relationship in this case. Additionally, Mr. Gold's lack of communication with his client is arguably problematic. However, a more substantial showing is required for the relief sought. See Heim, 872 F.2d at 248 (stating that "errors committed by [counsel], even accepting the designation of gross negligence, do not constitute an adequate showing of 'exceptional circumstances'"). Thus, as a general matter, the sometimes slow and frustrating communications here do not merit the relief requested.

The most difficult issue raised regards the failure to file a motion for review. Ms. DiMasi states that when Mr. Gold contacted her on November 11, 2019 to tell her entitlement had been denied, "Mr. Gold did not, in any way, tell me that he would not appeal the decision or that there was not a basis to appeal the decision." Id. at ¶ 6. Mr. Gold stated that when he spoke to Ms. DiMasi on the phone that day, he "told her explicitly that . . . I would not file any appeal." Gold Aff., at 1-2. The recent emails indicate he maintains he was honest in his affidavit, and that Ms. DiMasi maintains he was lying under oath.

None of the information provided after the June 3, 2021 order makes this he-said she-said issue any less difficult to evaluate. While Ms. DiMasi's affidavit and the emails provide more context, they do not sufficiently demonstrate attorney abandonment.

IV. Conclusion

The information provided with Ms. DiMasi's motion to reopen and motion for reconsideration do not justify the relief sought. There has not been a compelling showing of a legal error, a clear factual error, or any manifest injustice.

Though the attorney-client communications were unfortunate at times, the undersigned does not consider the circumstances to be exceptional.

In addition, Ms. DiMasi has not met her burden of demonstrating that she should be permitted to file evidence after judgment entered. It appears that she, her attorney, or she and her attorney were generally responsible for any mistake in not filing material earlier.

Consequently, for the above stated reasons, Ms. DiMasi's motions are DENIED.

IT IS SO ORDERED.

s/Christian J. Moran
Christian J. Moran
Special Master