UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INFORMAL REPLY BRIEF OF PETITIONER/APPELLANT

Case Number: 22-1854

Short Case Caption: DiMasi vs HHS

Petitioner/Appellant: Stephanie DiMaai

Instructions: Read the Guide for Unrepresented Parties before completing this form. Answer the questions as best as you can. Attach additional pages as needed to answer the questions. This form and continuation pages may not exceed 15 pages.

You may attach other record material as an appendix. Any attached material should be referenced in answer to the below questions. Do not attach material already attached to your informal opening brief. Please redact (erase, cover, or otherwise make unreadable) social security numbers or comparable private personal identifiers that appear in any attachments you submit.

1. Have you received a copy of the respondent/appellee's response brief?
☑ Yes ☐ No

STOP: You may use this form to respond to arguments raised in the brief of respondent/appellee. If you have not received that brief, you may not file this form. **Do not proceed or file this form if you answered "No."**

2. What are your arguments in response to the respondent/appellee?

Rule 60(b) provides that a court may relieve a party from final judgment for, "(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." (RCFC). Rule 59(a)(1)(C) states that a new trial may be granted "upon the showing of satisfactory evidence...that any fraud, wrong or injustice has been done to the United States." (RCFC)
(continued)

3. Are there other arguments you wish to make? ☑ Yes ☐ No
If yes, please state them.

While I have no other arguments, I would like to add that since the establishment of the vaccine injury compensation fund in 1988, of the over 25,000 claims filed, 60% of them were denied. (And of the 40% actually awarded compensation, 60% were opposed by HHS and then settled. This means that 86% of all claims filed since 1988 were opposed and litigated against by HHS (Ex 18,p 12). This is very sad, considering the fund is set up to help people who have been injured with financial difficulties including medical expenses due to disabilities caused by no fault of their own - or worse for family members of those who have lost their lives. In addition, attorneys are compensated whether they win or lose a case, giving them no real motivation to put forth the effort to be successful. My attorney received over 60,000 from this fund to lose my case. It is truly disheartening that there is more money going into the litigation process to avoid paying legitimate claims than there is to helping the people for whom this fund was set up to protect.

Date: 08/11/2022

Signature: 

Name: Stephanie V. DiMasi

1.) Attorney abandonment occurred in my case

A.) Failure to submit all medical records

The Secretary argues that new medical records should be disallowed and that my failure to submit them during my case does not qualify as an excusable mistake nor culpable conduct by my attorney. I supplied Mr. Gold with a signed release for each and every hospital and physician I had seen prior to our first meeting and personally provided him with visit notes from each appointment and hospitalization thereafter. I meticulously ensured that he had all of the records that he would need to pursue my case, appropriately relying on his responsibility as my counsel to deliver all of them to the court. I did not have any access to the submissions, nor did my attorney request that review them beforehand; to my knowledge, this is not standard practice. I had no reason to question his reliability and responsibility as my legal representative and officer of the court. His failure to submit a complete record, (particularly pertinent records) is certainly an example of egregious/culpable conduct, as it is very likely to have had a negative impact on the outcome of my case.

B.) Loss of substantial rights and failure by my attorney to defend my case

Regarding my attorney's decision to fail to inform me (and to purposefully misinform me) of my legal rights: the argument by the Secretary describing this as "tactical" or justifiable in any way, is unfounded. Mr. Gold told me that I was "not allowed" to give oral or written testimony when I specifically requested this. He then declined it on my behalf without my knowledge or consent and requested a ruling on the record. These actions were not ethical and deliberately misleading, causing me to lose substantial

rights. If I had been given the opportunity to exercise this right, I would likely have had a very different outcome in my case.

Mr. Gold did not discuss or share any of his legal arguments or the Secretary's responses during the last 3 years of my case, or inform me at any time of concern for a denial based on pre-existing. I was extremely healthy in the years prior to my injury so I had no reason to anticipate this and since Mr. Gold did not share this concern with me, I had no idea that there was even a possibility for denial on such grounds. Because I was uninformed, I lost any opportunity to solicit statements from my doctors or medical records to prove otherwise. Much worse, Mr. Gold did not address or defend this critical issue during my case. In the decision denying compensation, the Special Master states, "In her amended motion for ruling on the record, Ms DiMasi does not address any of her medical history before 2012." (Ex A, p 8, pp4). The notion of pre-existing was again emphasized In the Secretary's final argument, after which Mr. Gold was given the opportunity to submit a reply. He failed to do so, letting the deadline pass without response, leaving me virtually unrepresented. The court was then allowed to adopt the false assumption that my condition pre-existed based on unrelated, vague symptoms from years prior, without any defense or explanation from myself or from my attorney. On these grounds, my case was denied

There is no "tactical" basis for an attorney to not defend his client as the Secretary suggests and no justifiable reason for misinforming a client of her rights. It is also argued that my request is "untimely". When Mr. Gold notified me of the decision, I requested a copy, along with the arguments, which took several requests over months before he finally sent them to me. Because of this delay, I was completely unaware of

what had transpired during my case and that such wrongdoings had occurred,until finally receiving them.

Additionally, the Secretary's highlight of the reviewing judge's false statement that I "admitted to doctoring medical records" as support for this argument is unfounded (Resp Brief, p 18, pp 3). The court has this clinical note from Dr. Chen and if viewed by the Secretary, it would be clear that it was *not* altered. (Pet Ex 13 from vaccine case). Making notes for my attorney's personal knowledge on my own copy of this record in order to bring to his attention errors in the history, was in no way an example of my "doctoring medical records." This false accusation made by the reviewing judge and the highlighting of this comment in the Secretary's argument (in what appears to be an attempt to discredit my character), is very disheartening.

C.) Missed deadlines

My attorney failed to get back to me and missed the deadlines for both a Motion for Reconsideration and Review, forfeiting my chance to appeal my case. The Secretary argues that I was "on notice" of my attorney's intention to not file an appeal of the decision and did not exercise diligence based on a statement from Mr. Gold in response to my motion to reopen my case. He reported that he had informed me that he "would not file an appeal" on the day he advised me of the decision.

He may not have remembered the conversation at the time, as he has many cases and this was brought to his attention almost one year later. But I remembered it well, because it was very important to me. In our conversation on Nov. 11, 2019, Mr. Gold told me that he was "shocked by the decision to deny my case based on pre-existing" and that he "completely disagreed" with the decision. In response, I asked if I could

appeal the decision. He informed me that in order to do so, there needed to be a “matter of law” and that he needed time to find out whether or not it “could” be appealed and that he would get back to me. He did not mention any deadlines. Appropriately relying on Mr. Gold as my counsel, I honored his request. I followed up our conversation with an email the following day sharing some medical articles to aid in the appeal. After not hearing back for a few weeks, I reached out again. It was in this second conversation, that he told me he had looked into it and there was no basis for appeal. I accepted his explanation as fact and thanked him for his efforts, not having any idea that on the date of this conversation, (Dec. 11, 2019), both deadlines had already passed and any chance I had to appeal had been lost.

Mr. Gold also states in response that he informed me he would continue thinking about it and let me know if he changed his mind. He did not say this at all, nor would it be appropriate for an attorney to refuse to appeal and in the same sentence say they may “change their mind.” Importantly, my email to Mr. Gold the day after I asked to appeal, (which I submitted to the Special Master per his request), would not be at all appropriate after a conversation in which he told me that he “would not file an appeal”. In this email, I started out saying, “I know you needed a couple of days to think, so feel free to read this after that.” I then shared the information to help in the appeal and finally stated, “I really feel strongly that I would like to appeal this..” and “Please reach out to me when you are ready to discuss next steps.” (Ex 17, p 1). This would not have made sense following a conversation in which he stated that he “would not” appeal the decision. In addition, the fact that I “felt strongly” about appealing, then waited for his response, and reached out again when he didn’t get back to me, rather than immediately looking into

other options, further emphasizes that I was not on notice of this at all. It is likely that Mr. Gold did not remember the details of these conversations, such as in which one he informed me he could not appeal. since he also stated in his affidavit that he did not recall whether or not he had informed me of deadlines. He kept no contemporaneous documentation of what was discussed and there were no letters sent to me informing me of his intentions. He simply submits a phone log to the court, showing dates of calls. Since I had requested to appeal, it was his duty to inform me of motions that could be filed and their deadlines. It was also his duty to inform me of his intentions in a timely manner and of my option to appeal on my own or with other counsel, had he not wished to pursue this. Leaving me in the dark and letting the deadlines pass without informing me of any of this, is another example of abandonment. I was again, left virtually unrepresented and lost the substantial right to appeal the decision. .

The Secretary argues that I did not exercise diligence in making a “single attempt” to reach out to Mr. Gold. I called him after I received an email from him, informing me of the decision and immediately inquired about options to appeal (first attempt), followed up the next day by email, emphasizing my wish to appeal and to offer information to support this, asking he reach out when ready (second attempt) and then reached back out to him after he did not get back to me promptly (third attempt). It was not at all unusual for him to be untimely in getting back to me and I had no idea there was a close deadline because he had not informed me of this. In addition, he asked specifically that I give him time. It is hard to imagine how I was to exercise more diligence in this instance without being disrespectful of his request. The Secretary also argues that I should have looked up vaccine rules and deadlines. As a represented client, there were

no grounds for this. Appropriately relying on Mr. Gold as my legal representative, I had no reason to doubt his integrity. Additionally, the deadline to file a vaccine injury compensation claim is 3 years, (and it took another 4 to litigate my case.) A lay person who has no experience in law, would not assume that the appeal deadlines would be 21/30 days, without being properly informed of this fact by his or her counsel. I have painstakingly taken on this arduous effort in an attempt to reopen my case in order to correct the gross errors made by my attorney and by the vaccine court, none of which would be possible if not for my perseverance and diligence.

In his decision to deny reopening of my case, the Special Master notes a case vacating judgment where an attorney's "egregious conduct amounted to nothing short of leaving his clients unrepresented", indicating that this did not occur in my case (Ex B, p 8, pp 1). My attorney missing pertinent records, misinforming me of rights, declining options without my consent and missing deadlines caused me to lose substantial rights, certainly examples of egregious conduct. As was his failure to address my pre-vaccination history in his motions. When given the opportunity to file a final reply, he remained silent, allowing my case to be denied on the pre-existing assumption, without defense and leaving me virtually unrepresented. These actions and inactions clearly show that abandonment occurred, as does the missing of appeal deadlines.

2.) Abuse of discretion occurred in my case

The Secretary states that the “Special Master’s factual determinations are reviewed under an arbitrary and capricious standard” and that “if the Special Master has considered the relevant evidence of record, drawn plausible inferences and articulated a

rational basis for the decision, reversible error will be extremely difficult to demonstrate." (Resp Brief, p 10, pp 3).

A.) Arbitrary decision making of material facts (re:pre-existing conditions)

As I explained in my opening brief, the decision to deny compensation was based on the assumption that a couple of records with reported transient symptoms (*not* diagnoses) from other causes indicated a pre-existing condition of postural tachycardia syndrome (POTS) and small fiber neuropathy. However, it was clear from my record that the treating doctor's who documented these short lived symptoms attributed them to other causes and unrelated conditions. There is no evidence of any neurological condition in my record other than mild carpal tunnel of my right hand prior to Dec 2012

A cardiac arrhythmia specialist at Boston's Brigham and Women's Hospital evaluated me following an ER visit in 2008 for sudden heart symptoms and diagnosed me with premature ventricular contractions (PVC's). Symptoms completely resolved after stopping caffeine per the doctor's advice and I was asymptomatic until 2012, which is well documented (Exhibit 7). The diagnosis of PVC's (a benign arrhythmia) is in no way related to POTS (which is a neurological condition affecting the heart). My cardiologist wrote a letter to support the fact that I did not have POTS prior to the vaccine (Ex 10, p 7). Despite my being diagnosed with a PVCs, the Special Master opined that evidence indicated I had pre-existing POTS, against the opinions of my treating physicians.

He also used select excerpts from the medical journal article relied upon by both parties as evidence that the transient, isolated symptoms I had in 2008 (feeling faint, palpitations, fast heart rate) meant I had pre-existing POTS. These symptoms, (which can apply to multiple diagnoses) were only 3 out of 10 possible symptoms listed in the

article (the rest of which I did not have). These 3 common “symptoms" were determined by the Special Master to be evidence for this factual finding, but the actual definition of POTS, diagnostic criteria and hallmark features stated in the article were not discussed in his analysis. The article notes the hallmark feature of “orthostatic intolerance” defined as “the provocation of symptoms on standing which are relieved when becoming supine” and the definition of POTS as “the presence of orthostatic intolerance symptoms associated with a heart rate increase of 30 beats per minute..within the first 10 minutes of standing up.” (Ex 8, pg.1, pp 2,3). POTS is debilitating, as the article emphasizes, noting “Patients may be severely limited in activities such as housework, bathing and even meals may exacerbate symptoms.” (id, pp 2). Exercise intolerance, fatigue, tremor, digestive issues, nausea and sweating are also listed as symptoms. My prior medical history in no way indicated any of these symptoms, nor did I fit any of the definition or hallmark criteria for POTS. It is obvious that I could not have sustained the active lifestyle of a single parent, working on my feet all day as a hairdresser and attending school full time for nursing had I had this condition for four years prior to the vaccine injury. Early cardiology records consist of follow ups noting my stability and resolution of my prior history of frequent PVCs (Exhibit 7), while the same cardiologist diagnoses “inappropriate tachycardia”, the diagnostic criteria for POTS, in 2013.(Ex 7, p 11). The Grubb article also states that the most common type of POTS has an “immune mediated pathogenesis” and “Many patients will report the abrupt onset of symptoms after a febrile illness” including “immunizations..” (Ex 8, p 1, pp 5). This is also not mentioned in the analysis. The Special Master states that the Grubb article for POTS notes “more than half of patients suffering from migraine headaches” (Ex A, p 8, pp 1). I

assume this was mentioned because I have a history of migraine headaches. However, this was not a valid statement, since the statistic in the article actually describes this as only applying to those with a rare type of POTS, called “hyperadrenergic” (Ex 8, p 2, pp2), not the type I was diagnosed with after the vaccine injury.

Given my lack of hallmark features or defining characteristics as well as many symptoms listed in the article relied on by the court, my known active lifestyle of full time work and school and the minimal level of care I received in the years prior to the injury there is no evidence to support a pre-existing condition of POTS. In addition, the fact that POTS commonly occurs from an injury, to include vaccination was not considered, nor the fact that a highly respected cardiologist diagnosed me with a completely different condition in the years prior to the vaccine and then diagnosed with POTS in the year following the vaccine, it was not reasonable for the Special Master to come to the conclusion that I had POTS prior to the injury. Nor was it appropriate to alter interpretation of the medical literature or to select distinct parts while ignoring more pertinent information in order to support the denial of my claim.

Secondly, the isolated symptoms of discomfort behind my leg lasting for one day in 2012 was also determined by the court to be indicative of pre-existing small fiber neuropathy, despite the fact that evidence in my record indicated that it was transient and non diagnostic. There was no evaluation, testing or diagnosis for the brief symptom in my record, nor mention of it at my follow up visit 4 months later. In addition, my neurological exam at both visits was completely normal. In the Lacomis article relied upon by the court, SFN is defined as, “.paresthesias with findings of small fiber dysfunction on exam” and other symptoms are also listed (burning, tingling, prickling,

shooting pain, aching, numbness, tightness and coldness) and it is most often “distal and length-dependent” (beginning in the feet or hands and spreading gradually toward the body). (Ex. 2, p 1, pp3 & p 2, pp 4). The symptom was clearly not distal and I reported no other such symptoms The article also states that it, “typically presents with painful feet in people over the age of 60…and autoimmune mechanisms are often suspected”, noting the association with autonomic dysfunction. (id, pg. 1, abstract). In addition, I had no known causes or risk factors listed in the article (id, p.3, table 3).

This structurally related symptom was casually mentioned at an unrelated visit on a single occasion. It is clear in the record that there was no concern, evaluation, abnormal finding or diagnosis of this symptom by the treating physician.

Both of these assumptions of pre-existing POTS and small fiber neuropathy based on a couple of common symptoms and against the weight of the evidence and opinions of my treating specialists at the time is not a reasonable or reliable method of fact finding. nor an example of appropriate discretionary decision making

B.) Critical fact finding against the weight and totality of the evidence (re: vaccine reaction did not occur)

Finally, despite the fact that some records were missing in my case, there was an exorbitant amount of evidence demonstrating that an injury occurred, all of which was given no acknowledgement or discussed in the analysis. The contemporaneous records after the vaccine and the timeline of them clearly indicated a vaccine injury. (Sudden symptoms after the vaccination, an abnormal EKG and ambulance the next day to hospital, a few days later, severe neurological symptoms beginning distally and moving proximally over weeks, causing diminished reflexes and weakness on exams) (Ex 11). I

had the classic presentation of an immune reaction causing acute neuropathy, (as in Guillain Barre), and since the flu vaccine is a well known cause, it is considered a “table injury” by the court. The infectious disease doctor (specializing in such reactions) whom I saw one week after the injury, attributed peripheral neuropathy to the immunization as the “only logical conclusion available.” (Ex 13, p 4). He also documented neuropathy symptoms beginning on Dec. 8th, four days after the vaccine as they had actually occurred. Ignoring all of this evidence, the Special Master picked out two records from weeks after the injury that mixed up the timing of my symptoms in the documentation. In both of his denials, he cites the isolated records with incorrect information: (Neurological symptoms beginning immediately after the shot, ((which would be too soon for an immune reaction)). Based on these two outlying records, he dismisses any idea that a vaccine injury occurred without regard for all of the contemporaneous evidence in my court record which clearly demonstrates a vaccine injury on Dec 4th and neurological symptoms beginning on Dec 8th. There is no mention of leg symptoms in my VAERS report or any of the contemporaneous records before Dec 8th. (Ex 11). I brought this to the attention of the Special Master in my motion to reopen which he again denied, reiterating the false information in the same two records and disregarding the rest. He quoted from what he reports as the original VAERS report “In addition to previously mentioned adverse events, the patient developed… numbness and tingling of left leg and weakness of both legs." And concludes, “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.” (Ex B, p 17, pp 4).

This is another example of altering the meaning of a critical detail, The report he refers to is not my VAERS report but rather an update to the manufacturer's report (Sanofi Pasteur) dated January 2, 2013, one month after the vaccine. It reads, "Follow up information was received from the consumer (patient) in the United States on 02 January 2013" clearly indicating that this update was reported later. (Ex 11, p 3, pp 4). What he does not mention is that in the *actual* original VAERS report (filed by the nurse practitioner who treated me at the time of injury at Massachusetts General Hospital on Dec 7, 2012), there is no mention of neurological symptoms. It reads, "Shortly after receiving intradermal influenza vaccine, reported feeling funny, felt heart racing + hot and cold chills bp 120/80 p 100 regular, complain of "not feeling right" Approximately 45 minutes after that reported throat feeling "funny" No sob Benadryl 25mg given with some relief referral to ED but declined." (Ex 11, p 1).

In response to my motions, which pointed out all of this evidence in my record which demonstrated that a vaccine reaction had occurred, the Special Master states, "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." (Ex B, p 17, pp 4).

In the decision, the Special Master states, "Petitioners are required to prove their cases by a preponderance of the evidence. 42U.5.C. $ 300aa-13(aX1)..."which has been interpreted to mean that a fact is more likely than not." and "Proof of medical certainty is not required." (Ex A, p.6, pp 7).

The evidence in my case fully supports a vaccine injury well beyond the preponderance of evidence, completely disproving a pre-existing condition. The decision to deny my

case was made against the weight and totality of the evidence, in direct conflict of the contemporaneous records and without regard for the preponderance of evidence standard.

Having been given all of the above information, the Special Master states, “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.” (Ex B, p 14, pp 3). For all of the reasons stated above, it is clear that many extraordinary and exceptional circumstances exist warranting relief from judgment of my case.