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NOT FOR PUBLICATION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).
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> 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 7, 2019
v.	*	
	*	Entitlement, motion for ruling on the
SECRETARY OF HEALTH	*	record, influenza ("flu") vaccination,
AND HUMAN SERVICES,	*	small fiber neuropathy, postural
	*	orthostatic tachycardia syndrome
Respondent.	*	("POTS")

Howard S. Gold, Gold Law Firm, LLC, Wellesley Hills, MA, for petitioner;
Claudia B. Gangi, United States Dep't of Justice, Washington, DC, for respondent.

UNPUBLISHED DECISION DENYING COMPENSATION[1]

Stephanie DiMasi alleged that an influenza vaccination was the "causation-in-fact" of her small fiber neuropathy and postural orthostatic tachycardia syndrome ("POTS"). Pet'r's Am. Mot., July 7, 2019, at 1. Ms. DiMasi has specifically denied that her conditions pre-dated the influenza vaccination and, relatedly, does not allege a significant aggravation claim. Id. at 21. Following the submission of expert reports, the parties agreed that the record was complete. Ms. DiMasi declined to offer any oral testimony at a hearing and moved for a ruling on the record.

[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 decision on its website (https://www.uscfc.uscourts.gov/aggregator/sources/7). Thus, anyone can access the decision 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.

The evidence supports a finding that Ms. DiMasi's conditions pre-dated the influenza vaccination. Thus, Ms. DiMasi has not established that she is entitled to compensation.

I. Factual Overview[2]

Because whether Ms. DiMasi's symptoms existed before the vaccination is critical, her pre-vaccination medical history is presented more extensively.

A. Before the December 4, 2012 vaccination

At a hospital admission on March 19, 2008, Ms. DiMasi reported near syncope and premature ventricular contractions. Exhibit 6 at 52, exhibit 11 at 11. The record noted that Ms. DiMasi had an event monitor to track the status of her heart. Id. A subsequent MRI of Ms. DiMasi's internal auditory canals and brain along with an ultrasound of Ms. DiMasi's lower extremities were found to be normal. Exhibit 11 at 13 (March 2008 ultrasound), 14 (April 2008 MRI).

In May and June 2009, Ms. DiMasi engaged in physical therapy to address cervical/thoracic spine issues. Exhibit 15 at 1-3. At an August 11, 2009 appointment with Dr. Fischer, a neurologist, Ms. DiMasi reported headaches that interrupted her sleep. Id. at 3. The record for Ms. DiMasi's appointment listed many problems, including peripheral neuropathy, palpitations, premature ventricular contractions, and migraine headaches. Id.

On November 2, 2009, Ms. DiMasi was again admitted to the hospital for near syncope and a history of palpitations was noted. Exhibit 16 at 12-13, 27, 34. On December 7, 2009, Ms. DiMasi saw Dr. Rho complaining of intermittent episodes of mild dizziness for the last month. Exhibit 15 at 6. Dr. Rho attributed her symptoms to migraine-associated vertigo. Id.

In later medical records, Ms. DiMasi asserts that she received the 2011 influenza vaccination and reported that she had mild tachycardia, lightheadedness, and dizziness for 30 minutes. Exhibit 17 at 28 (July 14, 2015 appointment with Dr. Cros). Ms. DiMasi has not submitted any medical records to document her

[2] The undersigned has reviewed all the records. However, this decision does not recite all of them.

2011 influenza vaccination or instances where she reported the alleged symptoms at any point soon after the 2011 vaccination.

At an April 18, 2012 follow-up appointment with Dr. Fischer, Ms. DiMasi complained of "intermittent tingling behind her knees and upper calves, particularly when she sits for prolonged periods of time." Exhibit 15 at 17. In the record for the visit, a "neurology problem list" identifies migraine headache, fibromyalgia, and intermittent vertigo. Id. At an August 14, 2012 visit with Dr. Fisher, Ms. DiMasi described an incident in May with a "headache loss of memory," possibly a syncopal event, that may have been caused by alcohol consumption. Id. at 21. Ms. DiMasi said she was assessed at a local hospital after this incident, but Dr. Fischer noted that he did not have the records for that visit. Id.[3]

On December 4, 2012, Ms. DiMasi received an influenza vaccination. Exhibit 3. She then saw several doctors in December 2012.

B. After the December 4, 2012 vaccination

On December 5, 2012, Ms. DiMasi saw her primary care provider, Dr. Sen, and reported some tachycardia and a "weird" sense of throat tightening. Exhibit 6 at 46. Dr. Sen noted that Ms. DiMasi had a history of premature ventricular contractions, determined that the EKG did not have the same results, and transferred Ms. DiMasi to the hospital via ambulance for further testing. After spending the night at the emergency room, Ms. DiMasi was discharged with a diagnosis of tachycardia. Exhibit 13 at 12. On December 8, 2012, Ms. DiMasi returned to the hospital complaining of neurological symptoms in her left leg. Exhibit 6 at 48. She was discharged with a diagnosis of elevated blood pressure. Exhibit 13 at 15.

Ms. DiMasi went back to see Dr. Sen on December 10, 2012, complaining of dizziness, left leg neurological symptoms, weakness, and palpitations. Exhibit 6 at 48. On December 12, 2012, Ms. DiMasi visited Dr. Stone, a cardiologist, who noted that she had fewer palpitations since stopping caffeine. Exhibit 5 at 4.

[3] It does not appear that the medical records for this hospital visit are in the record.

Ms. DiMasi saw Dr. Chen at a neurology outpatient clinic on December 19, 2012, and reported that "immediately after the flu shot she had a sensation of dizziness, tachycardia, shakiness, generalized weakness and tingling behind the right knee." Exhibit 13 at 17. After the vaccination, Ms. DiMasi said she "was monitored for 1 - 1/2 hours and her blood pressure was noted be elevated along with tachycardia. The symptoms subsided a little bit and she was discharged home." Id. In his impressions, Dr. Chen found it "hard to explain what could cause such a rapid response." Id. at 18.

On December 27, 2012, at a follow-up with Dr. Fischer, Ms. DiMasi described an "immediate response" after the vaccination, "within a few minutes," of a rapid heart rate, dizziness, tingling and numbness rising from left leg up her back. Exhibit 7 at 1. In his assessment, Dr. Fischer noted that "given the unilateral nature of the symptoms, it is somewhat difficult to understand how the injection could result in these symptoms." Id. at 4. This December 27, 2012 appointment with Dr. Fischer was the last appointment in December 2012.

Ms. DiMasi's symptoms continued in waxing and waning course without much clarity on a diagnosis throughout 2013.[4] On May 19, 2014, Dr. Gorson, a neurologist, suggested that a diagnosis of POTS could possibly explain Ms. DiMasi's recurrent tachycardia and dizziness. Exhibit 10 at 2.

On May 20, 2015, Dr. Kaplan, a neurology resident, offered an alternative opinion that Ms. DiMasi's symptoms were the result of an HSV-2 recurrence. Exhibit 8 at 1-3. Another alternative explanation was offered on June 2, 2015, by Dr. Shoap, a cardiologist, who knew Ms. DiMasi personally from working together. Dr. Shoap was "convinced that this is all anxiety, hyperventilation – psychoneurotic and is not 'organic.'" Exhibit 14 at 108.

On August 8, 2016, Dr. Bhattacharyya, a neurologist, stated Ms. DiMasi's course of symptoms "would best fit with post-flu small fiber neuropathy," but noted that they were still "work[ing] to figure out her syndrome." Exhibit 21 at 4.

[4] These records have been reviewed but are not addressed individually here.

On October 20, 2016, Dr. Novak, a neurologist, conducted autonomic testing and a skin biopsy. Based upon the results of that testing, Dr. Novak diagnosed Ms. DiMasi with (1) small fiber neuropathy, (2) POTS (most likely due to the small fiber neuropathy), (3) baroreflex failure, and (4) mild autonomic failure (due to small fiber neuropathy). Exhibit 23 at 9. While Ms. DiMasi has continued to seek treatment, the medical records described thus far are the most relevant for adjudicating Ms. DiMasi's vaccine claim.

II. Procedural History

Ms. DiMasi alleged that the December 4, 2012 influenza vaccination caused her to develop peripheral neuropathy. Pet., filed Dec. 2, 2015, at 1. Ms. DiMasi submitted her medical records and a statement of completion on February 19, 2016. After outstanding medical records were identified by the Secretary, Ms. DiMasi submitted additional records.

On September 19, 2016, the Secretary filed his Rule 4 report recommending against compensation. In the 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 she reported tingling minutes after the vaccination. Resp't's Rep. 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[5] 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.

Following some additional extensions of time, 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 supplemental expert report to address diagnosis and medical theory. Exhibit E, filed Jan. 5, 2018. Dr. Leist expanded

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

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 concluded with a reply, a status conference was held on May 29, 2019. The undersigned noted several aspects of the filings that 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. This matter is now ripe for adjudication.

III. Standards for Adjudication

The authority giving special masters the discretion to either hold an evidentiary hearing or to decide the case on the written record is 42 U.S.C. § 300aa-12(d)(3)(B)(v) (promulgated as Vaccine Rule 8(c) & (d)), which was cited by the Federal Circuit in D'Tiole v. Sec'y of Health & Human Servs., 726 F. App'x 809, 812 (Fed. Cir. 2018) (holding that a special master did not abuse his discretion by deciding a case without holding an evidentiary hearing).

Petitioners are required to prove their cases by a preponderance of the evidence. 42 U.S.C. § 300aa–13(a)(1). The preponderance of the evidence standard, in turn, has been interpreted to mean that a fact is more likely than not.

Moberly v. Sec'y of Health & Human Servs., 592 F.3d 1315, 1322 n.2 (Fed. Cir. 2010). Proof of medical certainty is not required. Bunting v. Sec'y of Health & Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991).

Distinguishing between "preponderant evidence" and "medical certainty" is important because a special master should not impose an evidentiary burden that is too high. Andreu v. Sec'y of Health & Human Servs., 569 F.3d 1367, 1379-80 (Fed. Cir. 2009) (reversing special master's decision that petitioners were not entitled to compensation); see also Lampe v. Sec'y of Health & Human Servs., 219 F.3d 1357 (Fed. Cir. 2000); Hodges v. Sec'y of Health & Human Servs., 9 F.3d 958, 961 (Fed. Cir. 1993) (disagreeing with dissenting judge's contention that the special master confused preponderance of the evidence with medical certainty).

IV. Analysis

Initially, both parties accept Dr. Novak's October 20, 2016 diagnosis of Ms. DiMasi to include small fiber neuropathy and POTS. Pet'r's Am. Mot. at 7; Resp't's Am. Resp. at 7-8 (citing exhibit 23 at 9 (Dr. Novak's records)). However, the parties disagree on when Ms. DiMasi first developed these conditions. If the petitioner's injury was present before the vaccine was administered, it is not necessary to conduct a complete analysis pursuant to Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Locane v. Sec'y of Health & Human Servs., 685 F.3d 1375, 1380-81 (Fed. Cir. 2012). Thus, a critical question is when Ms. DiMasi first displayed symptoms of small fiber neuropathy and/or POTS.

For the diagnostic criteria of small fiber neuropathy, both Ms. DiMasi and the Secretary rely on the Lacomis article (exhibit 24-M).[6] Pet'r's Am. Mot. at 7; Resp't's Am. Resp. at 12. Lacomis states that individuals with small fiber neuropathy present with tingling, burning, prickling, shooting pain or aching, and sometimes can experience numbness, tightness, or coldness rather than pain. Exhibit 24-M at 2. For the diagnostic criteria of POTS, both Ms. DiMasi and the Secretary rely on the Grubb article (exhibit 24-H).[7] Pet'r's Am. Mot. at 8; Resp't's Am. Resp. at 13. Grubb states that individuals with POTS present with tachycardia, palpitations, tremulousness, nausea, sweating, and increased blood pressure. Exhibit 24-H at 2. Grubb notes additional symptoms for POTS, notably

[6] David Lacomis, Small-Fiber Neuropathy, 26 Muscle Nerve 173-88 (2002).

[7] Blair P. Grubb et al., The Postural Tachycardia Syndrome: A Concise Guide to Diagnosis and Management, 17(1) J. Cardiovasc. Electrophysiol. 108-12 (2006).

including lightheadedness, near syncope, and syncope, with more than half of patients suffering from migraine headaches. Id. at 1.

Relying on Dr. Leist, the Secretary argues that Ms. DiMasi's pre-vaccination medical history of syncope/near syncope, palpitations, and tachycardia establishes that Ms. DiMasi had small fiber neuropathy and POTS since at least 2008.[8] Resp't's Am. Resp. at 13; exhibit A at 9; exhibit E at 1. Reviewing these pre-vaccination symptoms, Ms. DiMasi first reported an episode of near syncope on March 19, 2008, another episode of near syncope on November 2, 2009, and a possibly alcohol-induced syncope in May 2012. Exhibit 6 at 52; exhibit 16 at 12; exhibit 15 at 21. On August 11, 2009, Ms. DiMasi complained to Dr. Fischer of headache issues and her problem list included palpitations and migraine headaches. Exhibit 15 at 3. On December 7, 2009, Ms. DiMasi complained to Dr. Rho of intermittent mild dizziness for the last month, a reoccurring problem that had returned. Dr. Rho attributed the dizziness to migraine-associated vertigo. Id. at 6. Ms. DiMasi complained of intermittent tingling behind her knees and upper calves to Dr. Fischer on April 18, 2012. Exhibit 15 at 17. Dr. Fischer noted that Ms. DiMasi experienced the tingling "particularly when she sits for prolonged periods of time." Id. The use of "particularly" indicates that Ms. DiMasi had been experiencing tingling for long enough to recognize patterns of when the sensation would come and go.

Dr. Kinsbourne acknowledges Dr. Leist's citing of pre-vaccination episodes of syncope/near syncope, palpitations, and tachycardia, stating that "[it] is not unusual for the onset of POTS to be preceded by miscellaneous episodes of dysautonomia." Exhibit 25 at 2. Moreover, Dr. Kinsbourne notes that migraines, which Ms. DiMasi had since at least 2008, are a "frequent concomitant of POTS," and that "small fiber neuropathy and POTS are frequent associates." Exhibit 24 at 6. Dr. Kinsbourne categorically stated that "there had been no record of Ms. DiMasi experiencing symptoms of neuropathy before the vaccination." Exhibit 25 at 2. However, Dr. Leist noted that Ms. DiMasi's pre-vaccination medical history included peripheral neuropathy, exhibit A at 1 (citing exhibit [15] at 3, Aug. 11, 2009 appointment), and opined, as detailed above, that Ms. DiMasi had small fiber neuropathy for at least a few years before the vaccination.

In her amended motion for ruling on the record, Ms. DiMasi does not address any of her medical history before 2012. See Pet'r's Am. Mot.

[8] The medical records in this case only go back to 2008.

The undersigned finds that the evidence supports Ms. DiMasi having symptoms related to her small fiber neuropathy and POTS before the December 4, 2012 influenza vaccination. The presence of problems before a vaccination could serve as a predicate for an alternative cause of action—that the vaccination significantly aggravated the pre-existing problem. However, Ms. DiMasi explicitly stated that she is not pursuing a significant aggravation claim. Pet'r's Am. Mot. at 21. Thus, the undersigned will not address whether Ms. DiMasi's pre-existing symptoms worsened after the vaccination.

V. Conclusion

The evidence supports Ms. DiMasi having symptoms related to her small fiber neuropathy and POTS before the December 4, 2012 influenza vaccination. Thus, because Ms. DiMasi has pre-existing symptoms and declined to allege a significant aggravation claim, she is foreclosed from receiving compensation for her vaccine claim. Ms. DiMasi's petition for compensation is DENIED for insufficient evidence.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.

IT IS SO ORDERED.

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

CONFIDENTIAL MATERIALS HAVE BEEN OMITTED
Pages Appx30 - Appx176

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

STEPHANIE DIMASI,	*	
	*	No. 15-1455V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Filed: July 9, 2021
	*	
	*	
Respondent.	*	

ORDER

A decision denying compensation was entered November 7, 2019. CM/ECF 89. Judgment entered in accord with that decision on December 11, 2019. CM/ECF 90.

Representing herself, Ms. Dimasi filed a motion to reopen the judgment on September 15, 2020. Exhibit 98. Evidence was submitted and the parties filed briefs. The motion to reopen was denied on June 3, 2021. CM/ECF 113.

Ms. Dimasi filed a motion for reconsideration on June 24, 2021. CM/ECF 114. This motion was granted to the extent that the June 3, 2021 order was vacated. CM/ECF 115.

Ms. Dimasi sought leave to file additional materials on July 6, 2021. CM/ECF 118. The Secretary shall present a response to Ms. Dimasi's motion by the deadline set by the Vaccine Rules, which is July 20, 2021.

Any questions may be directed to my law clerk, Jason Wiener, at (202) 357-6360.

IT IS SO ORDERED.

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

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