No. 22-1854

United States Court of Appeals for the Federal Circuit

STEPHANIE DIMASI,
Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent-Appellee.

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

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REPLY BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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May 17, 2023

Certificate of Interest[1]

Amicus Curiae Counsel certifies the following:

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

   N/A

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

   N/A

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

   N/A

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

   N/A

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

   None.

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

DATED: May 17, 2023 By: /s/ *J. Kain Day*
J. Kain Day

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

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Introduction

The Secretary's brief focuses on whether an ***attorney*** mistake justifies relief in this case, rather than addressing the ***judicial*** mistake identified in Amicus's principal brief. As a result, very little about this case is disputed. Apart from disagreements at the margins, none of which impact the outcome here, Amicus and the Secretary agree on the standards that govern relief from judgment under Rule 60. Amicus and the Secretary are even on common ground with respect to almost all of the operative facts. Disagreement arises, primarily, in how the agreed-upon law applies to the undisputed facts. On this point, the Secretary's arguments are unavailing. Because Ms. DiMasi is entitled to relief for two distinct reasons and because it would be an abuse of discretion to reach any contrary conclusion, the Court should reverse and remand with instructions to reopen Ms. DiMasi's case.

First, a judicial mistake of fact warrants relief from judgment under Rule 60(b)(1). In his compensation decision, the special master relied on errors of fact in the Chen and Fischer medical records. Because Counsel failed to correct those records, despite repeated instructions from Ms. DiMasi, Ms. DiMasi never had an a opportunity for ***her***

compensation claim to be adjudicated based on the true medical facts, which were uniquely within ***her*** personal knowledge. The mistaken records provided critical support for the special master's erroneous understanding that Ms. DiMasi's neurological symptoms occurred immediately upon her vaccination. Thus, reopening Ms. DiMasi's case would serve the ends of justice. Moreover, as the special master found below, reopening would not impose an undue burden on government resources. For these reasons, and because Ms. DiMasi's motion was timely, relief is warranted under Rule 60(b)(1).

Second, Counsel's decision to, in effect, stipulate to judgment against Ms. DiMasi on any significant-aggravation claim warrants relief under Rule 60(b)(6). The special master issued a detailed order to "guide the parties in discussing the elements of Ms. Di[M]asi's case." SAppx041. Every aspect of that order suggested that Ms. DiMasi should bring a significant-aggravation claim, yet Counsel affirmatively abandoned that claim without consulting Ms. DiMasi. Thus, Counsel usurped Ms. DiMasi's exclusive authority to set the objects of ***her*** litigation, and Ms. DiMasi is entitled to relief from judgment under Rule 60(b)(6).

Although, on this record, the special master should have granted relief from judgment, it was an abuse of discretion to deny Ms. DiMasi's motion without a hearing. Any credibility disputes necessary to the special master's decision ought to have been heard in live testimony. Thus, if this Court disagrees with Amicus that the current record establishes that Ms. DiMasi is entitled to relief, it should remand for the special master to hold a hearing.

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

Argument

I. The Special Master Abused His Discretion by Denying Relief Based on a Judicial Mistake

This case involves a ***judicial*** mistake—an error of fact in the special master's compensation decision—and turns on whether that mistake warrants relief under Rule 60(b)(1). *E.g.*, Amicus Br. 21.[2] Thus, the Secretary's focus on potential "attorney errors" is inapposite. *E.g.*, Sec'y Br. at 14–23.[3] Many of the Secretary's arguments have no impact on the judicial mistake question, and the arguments that do bear on that question cannot overcome Amicus's showing that, based on the undisputed facts, Ms. DiMasi is entitled to relief. The Court should, therefore, reverse the special master's mistake decision and remand with instructions to reopen Ms. DiMasi's case.

A. The Legal Standards for Relief from Judgment Based on a Judicial Mistake Are Largely Undisputed

Before granting relief from judgment based on a mistake, a court must consider three questions: (1) whether the special master made a

[2] Cites to "Amicus Br." refer to the Principal Brief of Amicus Curiae in Support of Appellant and Reversal.

[3] Cites to "Sec'y Br." refer to the Corrected Supplemental Brief for Respondent-Appellee Secretary of Health and Human Services.

mistake; (2) whether the motion seeking relief was timely; and (3) if the first two requirements are satisfied, whether relief is warranted based on equitable considerations. *See* Amicus Br. 27–33. The Secretary does not take issue with this overarching framework, *see* Sec'y Br. 15–16, instead disputing a few of the finer points in the legal standard. None of these disputes impact the outcome in this case, and in all events, the Secretary misunderstands the standards governing those finer, immaterial points of law. Each of the three elements underlying the "mistake" inquiry are discussed further below.

(1) As the Secretary recognizes (Sec'y Br. 16), a "mistake" includes any error of fact or law,[4] whether by the parties ***or the court***. *Kemp v. United States*, 142 S. Ct. 1856, 1862 (2022). The court may make a "mistake," under the plain meaning of that word—that is, the court may issue a ruling inadvertently premised on a legal or factual error. That is so even if the error was precipitated by a party's litigation choice.

[4] At times, the Secretary suggests that only "factual mistake[s]" that were "evident in the record at the time of the judgment" or "obvious" fall within the scope of Rule 60(b)(1). Sec'y Br. at 17, 39–40. But the Supreme Court has already rejected that argument. *See Kemp*, 142 S. Ct. at 1861–62 (rejecting the government's argument that only "obvious legal error[s]" qualify for relief).

See Amicus Br. at 38. In such circumstances, the fact that the parties may have taken (or omitted) actions that contributed to the court's error do not render that error any less of a ***mistake*** for purposes of Rule 60(b)(1). Therefore, the parties' actions (or lack thereof) are best considered in the equitable balancing analysis. *Id.*

For this reason, the Secretary's lengthy discussion of party mistakes under Rule 60(b)(1), *see* Sec'y Br. 17–23, does not impact the analysis as to whether Ms. DiMasi has identified a judicial mistake that warrants reopening. The existence of a judicial mistake is distinct from whether a *party's* mistake (excusable or otherwise) or tactical decision (well-informed or otherwise) might separately justify reopening under Rule 60(b)(1). That said, even though these disputes do not affect the outcome here, Amicus disagrees with the Secretary's assertions that "mistake" is limited to excusable mistakes and that "mistake" cannot be read to include tactical decisions infected by an underlying mistake.

As Amicus explained in its principal brief, the word "mistake" in Rule 60(b)(1) is not limited to excusable mistakes. Amicus Br. 35–36; *Contra* Sec'y Br. 19–21. Nothing in the term "mistake" itself inherently connotes only *excusable* mistakes, and such a limited interpretation

would thus conflict with the plain text of Rule 60(b)(1). Moreover, limiting "mistake" to excusable mistakes would be inconsistent with Rule 60(b)(1)'s broader structure. In the same provision, the drafters of Rule 60(b)(1) limited the grounds for relief based on neglect to "***excusable*** neglect," while allowing for relief based on a "mistake" without adding the "excusable" modifier.

This reasoning is consistent with "the Supreme Court's approach to construing the scope of the 'mistake' provision by looking to 'the words surrounding "mistake" in Rule 60(b)(1).'" *See* Sec'y Br. 20–21 (citation omitted). In fact, this is precisely the point of Amicus's argument. "Mistake" should be interpreted in light of the surrounding language in Rule 60(b)(1), including the drafters' deliberate choice to limit the grounds for relief to "excusable neglect." The drafters used distinct phrasing when setting out the grounds under Rule 60(b)(1), and accordingly, it makes sense that those grounds would cover different conduct.

Moreover, Amicus agrees with the Secretary that an attorney's tactical decisions are generally not "mistake[s]." Sec'y Br. 17–19. The Secretary seizes on Amicus's statement in his principal brief that "well-

informed tactical decisions" are outside the scope of "mistake" in Rule 60(b)(1)—but the Secretary misapprehends the point. Sec'y Br. 18. When a tactical decision is based on a mistake, "some misapprehension or misunderstanding," then that tactical decision can be thought of as being infected by the underlying mistake. Amicus Br. 28. It is the underlying mistake that meets Rule 60(b)(1)'s requirements, not the tactical decision itself, and Amicus's point was only that a "mistake" rolled into a tactical decision is no less of a mistake.

That is not to say that inexcusable mistakes or tactical decisions based on a mistake will invariably justify relief under Rule 60(b)(1). As always, requests for relief based on such mistakes will have to clear the equitable hurdles of timeliness and the court's discretionary balancing. *See* Amicus Br. 29. For this reason, Amicus's interpretation of "mistake" in Rule 60(b)(1) would not "open the door to undoing final judgments anytime a client could point to an attorney action that was, in hindsight, suboptimal." Sec'y Br. 20. That client would still need to show entitlement to relief under the other requirements established in the text of Rule 60, and in any event, the Court need not address this question because Amicus does not rely on an attorney or a party mistake.

(2) To be timely, a motion for relief from judgment must have been filed "within a reasonable time," and no more than a year, after entry of judgment. Rule 60(c)(1); *see* Amicus Br. 29–31. "What constitutes [a] reasonable time necessarily depends on the facts in each individual case," 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2866 (3d ed. 2022), including any relevant attorney conduct, *see* Amicus Br. 36–41. But the conduct of an attorney who has vitiated the attorney-client relationship should not be held against the client, and attorney conduct short of complete abandonment may be relevant to the reasonableness determination. *Id.*

The Secretary does not contest these points, at least not expressly. His only reference to timeliness comes in arguing that Ms. DiMasi was required to file a "timely appeal" in order to challenge the special master's "finding that she could not prove causation-in-fact because her neuropathy conditions pre-dated her December 2012 flu vaccination." Sec'y Br. 43 (citing, e.g., *Patton v. Sec'y of Dept. of Health & Hum. Servs.*, 25 F.3d 1021, 1028–29 (Fed. Cir. 1994)). Thus, the Secretary seems to argue that the availability of direct review is a *per se* bar on Rule 60 relief. But this Court has already rejected such a rule.

In *Patton*, this Court disagreed with the Claims Court's holding that "the ***only*** means available to correct a mistake by the special master is to file a timely motion for review under section 300aa–12(e)(1)"—which is precisely the argument the Secretary makes here. 25 F.3d at 1030 (emphasis added). The Court concluded that such a "restrictive view of the availability of Rule 60(b) relief" would render "the rule a legal nullity" and would be "inconsistent with [that Rule's] purposes." *Id.* As the Court explained, "[t]he exhaustion of pre-judgment remedies is not a mandatory condition precedent for obtaining post-judgment relief under Rule 60(b)." *Id.*

To be sure, some other circuits have "used overly broad language that may be read to foreclose Rule 60(b) relief for any error that could be corrected on appeal." *Mendez v. Republic Bank*, 725 F.3d 651, 659 (7th Cir. 2013); *see also* Sec'y Br. 43 (citing *Lebahn v. Owens*, 813 F.3d 1300, 1305 (10th Cir. 2016). But "the significant majority of the circuits"—including this Court—allow "a district court to correct its own errors that could be corrected on appeal, at least if the motion is not a device to avoid expired appellate time limits." *Mendez*, 725 F.3d at 659 & n. 4 (collecting cases). These cases establish that Rule 60(c) can be used to "forestall

abusive litigation," *Kemp*, 142 S. Ct. at 1864 (discussing *Mendez*, 725 F.3d at 660), not that Rule 60(c) creates an inflexible, appeal-exhaustion rule. *Cf. Mendez*, 725 F.3d at 660 ("[T]he practice of requiring a Rule 60(b) motion to correct the court's own error to be filed before the time to appeal runs is a 'sensible' one 'provided that it is flexibly applied.'" (citation omitted)).

Ultimately, as explained in Amicus's principal brief, the reasonableness inquiry must look to the totality of the circumstances. Amicus Br. 29–31.

(3) There is no dispute over the legal standard governing a court's equitable balancing analysis under Rule 60. *Compare* Sec'y Br. 35–38 *with* Amicus Br. 31–33, 36–41. In that analysis, courts must weigh the interests of justice against the need for finality. This weighing requires consideration of "all relevant circumstances," *cf. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (interpreting "excusable neglect" under Rule 60(b)(1)), including attorney conduct. *See* Amicus Br. 31–33, 36–41. But a showing of exceptional or extraordinary circumstances is not required. *Info. Sys. & Network Corp. v. United States*, 994 F.2d 792, 796 (Fed. Cir. 1993). The conduct of an attorney

who has vitiated the attorney-client relationship will not bind their client. Amicus Br. 36–38. Moreover, even attorney conduct that falls short of vitiation might be relevant to the equitable balancing analysis. Amicus Br. 38–41.

* * *

Because the legal standards are largely undisputed, it is clear that the special master failed to apply those standards. *See* Amicus Br. 33–36, 41–42 (recounting legal errors). He failed to considered whether Ms. DiMasi identified an "error of fact or law" in his compensation decision. *See* Appx178–203 (Rule 60 Decision). With respect to factual errors in particular, the special master required exceptional circumstances to justify reopening—in direct contravention of this Court's precedent. *See* Appx163 (holding that "previous findings will not be undone absent extraordinary or exceptional circumstances"). Additionally, the special master did not recognize that a mistake need not be excusable to warrant relief or that attorney conduct may bear on the Rule 60 inquiry even when it falls short of vitiating the attorney-client relationship. Each of these legal errors amounts to an abuse of discretion.

B. Ms. DiMasi Is Entitled to Relief from Judgment Based on a Judicial Mistake

Because the special master applied the wrong legal standard, the Court could remand for the special master to reconsider Ms. DiMasi's Rule 60 motion in the first instance. But the record also permits this Court to conclude that Ms. DiMasi is entitled to relief from judgment without any such remand. The undisputed facts reveal that Ms. DiMasi has identified (1) a judicial mistake (2) in her timely Rule 60 motion (3) that warrants relief from judgment. Because it would be an abuse of discretion for the special master to conclude otherwise in the event of a remand, this Court should reverse and remand with instructions to reopen Ms. DiMasi's case.

(1) As explained in Amicus's principal brief, the undisputed evidence establishes a judicial mistake of fact. *See* Amicus Br. 43–48. Ms. DiMasi's neurological symptoms did not start until four days after her 2012 vaccine, and the special master reached a contrary finding only by relying on mistakes in the Chen and Fischer records that entered the record unchallenged by Ms. DiMasi's attorney. Thus, the special master incorporated an "error of fact" from those records into his decision denying compensation.

The Secretary makes no attempt to contest the existence of a judicial mistake, *see* Sec'y Br. 39–42, arguing primarily that "any mistake" regarding the onset of symptoms was immaterial, Sec'y Br. 41–42. Because materiality is best addressed under the equitable balancing step, these arguments are considered below. *See infra*, pp. 20-22.

The Secretary also disputes whether the Chen and Fischer records entered the record with their accuracy essentially uncontested. *See* Sec'y Br. 22. He claims that, by briefly raising delayed onset in one of his motions, Counsel did in fact present Ms. DiMasi's causation narrative. But this argument misses the point.

Counsel's primary argument was ***built on*** the immediate-onset narrative in the Chen and Fischer records. *See* Amicus Br. 47. He crafted a theory of "one-day onset," relying on the very records Ms. DiMasi identified as mistaken. SAppx085–086 (Motion for Judgement); SAppx102 (noting "one-day onset"). Indeed, Counsel's entire theory focuses on how "[i]n some patients, the neuropathy initiates 1 or 2 days after the antecedent infection." SAppx102; *see also* SAppx103 ("Literature supports the onset of 1-2 days."). Counsel's passing reference to delayed onset does not change the fact that he never

challenged the veracity of the Chen or Fischer records or crafted any argument for relief based on a delayed onset theory—despite Ms. DiMasi's clear instructions to do those very things. Amicus Br. 47 n.7 (discussing SAppx102). Accordingly, that passing reference did not give the special master notice that the Chen and Fischer records were inaccurate, so it cannot support a conclusion that no judicial mistake exists in this record.

(2) Based on the undisputed facts, Ms. DiMasi's Rule 60 motion was timely. *See* Amicus Br. 48–49. With respect to the "reasonable time" requirement, Ms. DiMasi has offered good reasons for her nine-month delay in seeking to reopen the final judgment. It is undisputed that Ms. DiMasi did not have access to the decision denying compensation until more than two months after the time for seeking review expired. SAppx157 (Email from Counsel to DiMasi) (attaching decision). Then, once she had a copy of the decision, Ms. DiMasi worked diligently through illness and deep stacks of medical records to prepare her motion. *See* Amicus Br. 48–49. There is no evidence that Ms. DiMasi's failure to file a petition for review reflects "abusive litigation" practices—alone or in combination with other delays in the record. *See Kemp*, 142 S. Ct. at

1864 (noting Rule 60(c) has been used to "forestall abusive litigation"). Moreover, there is no evidence of prejudice to the Secretary resulting from this delay. In light of all these circumstances, Ms. DiMasi's motion was filed within a reasonable time after judgment was entered.

The Secretary does not dispute any of these facts, instead arguing the Ms. DiMasi's motion was untimely because she should have filed a petition for review of the special master's decision. Sec'y Br. 43. In particular, the Secretary claims that "[w]hether the Special Master correctly determined that Ms. DiMasi had preexisting neuropathy conditions was squarely presented at the time of the original decision." Sec'y Br. 43. Thus, according to the Secretary, a timely appeal was the proper vehicle for Ms. DiMasi to seek redress.

This argument, however, misunderstands the relevant question. As explained (*see supra*, pp. 9-11), a party need not seek Rule 60 relief within the time for petitioning for review, so long as any delay is not abusive or prejudicial—as it was not here.

(3) On this record, it would be an abuse of discretion for the special master to deny Ms. DiMasi's motion on equitable grounds. *See* Amicus Br. 50–59.

First, reopening Ms. DiMasi's case would see that justice is done. *See* Amicus Br. 50–57. Counsel ignored Ms. DiMasi's objectives and litigated her case in a manner that was fundamentally inconsistent with the facts of Ms. DiMasi's medical condition. This led directly to the special master's mistake—a mistake that served as one of the underpinnings of the special master's decision denying compensation. And although Counsel's failure to challenge the medical records doubtlessly contributed to the special master's mistake, Ms. DiMasi should not be held responsible for Counsel's failings because Counsel's conduct vitiated the core attorney-client relationship. Thus, reopening the case would see that justice is done.

The Secretary makes a handful of arguments to the contrary, none of which are availing.

At scattered points throughout his brief, the Secretary seems to suggest that Counsel ***did*** follow Ms. DiMasi's litigation objectives, and that Counsel's actions should be seen as tactical decisions to which Ms. DiMasi is bound. *E.g.*, Sec'y Br. 21–23. He claims, for example, that Counsel "made a reasonable attempt to carry out [Ms. DiMasi's] objectives" by seeking compensation without conceding that Ms. DiMasi's

neuropathy predated the vaccine. Sec'y Br. 27; *see also* Sec'y Br. 22, 28. Likewise, the Secretary argues that Counsel "advocated for the position that [Ms. DiMasi's] symptoms began several days after the vaccination." Sec'y Br. 22. For these reasons, the Secretary claims, Ms. DiMasi cannot escape the implications of Counsel's actions.

The Secretary is wrong. Counsel failed to effectuate Ms. DiMasi's desire to see that her claim be adjudicated based on the true medical facts—one of her key litigation goals. *See* Amicus Br. at 50–56. The fact that Ms. DiMasi had other objectives for her litigation, which were not inconsistent with her desire to correct the record, is beside the point. Counsel rejected the true medical facts and actively worked against Ms. DiMasi's goals, thereby vitiating the attorney-client relationship.

Moreover, as explained above (*see supra*, pp. 14–15), Counsel's passing mention of delayed onset does not remedy his failings. He still made no attempt to correct the Chen and Fischer records, and he still failed to effectuate Ms. DiMasi's goal of receiving a decision based on the true medical facts—namely a decision uninfected by a mistake. Nothing in Counsel's brief mention of delayed onset undermines these points.

Next, the Secretary suggests that Ms. DiMasi should be held responsible for Counsel's conduct because she "did not act diligently" in supervising Counsel. Sec'y Br. 38–39. In particular, The Secretary claims that Ms. DiMasi "was aware that she was not receiving drafts or final versions of court filings" and was aware Counsel was unresponsive. Sec'y Br. 39.

This argument, however, lacks factual support. The Secretary points primarily to ***post-judgment*** affidavits in which Ms. DiMasi discusses the events in her case. Sec'y Br. 39 (citing, e.g., SAppx140–141, SAppx188–189). Nowhere in these affidavits does Ms. DiMasi suggest she was aware of key filings ***during*** the active litigation or, more importantly, the content of those filings. In fact, there is no evidence in the record that suggests any such awareness—despite Counsel's obligation to inform Ms. DiMasi when he declined to follow her instructions. Moreover, Ms. DiMasi's pre-judgment "concerns about her counsel's lack of responsiveness," without any connection to the arguments Counsel made, are beside the point. *Contra* Sec'y Br. at 39. Similarly, Ms. DiMasi's "communication[s] about her records," instructing Counsel to present the true medical facts, do not evidence

awareness of Counsel's failure to ***follow*** those instructions. *See id.* Without insight into the ***content*** of her filings, Ms. DiMasi had no way to know Counsel failed to follow her instructions. Accordingly, Ms. DiMasi cannot be faulted for failing to police or fire Counsel.[5]

Finally, the Secretary claims that any judicial mistake in the record was immaterial. Sec'y Br. 41–42. Because the special master's decision was based on pre-vaccine records, the Secretary claims, an error about post-vaccine records "was irrelevant to the outcome." Sec'y Br. 42.

This argument underestimates the impact of the (mistaken) immediate-onset narrative in the Chen and Fischer records. Everything about the special master's compensation decision turned on ***when*** Ms. DiMasi's symptoms started. Appx27 ("[A] critical question is when Ms. DiMasi first displayed symptoms of" her conditions). And the Chen and Fischer records formed a key pillar in the causal narrative the special master adopted when answering that question. *See* Appx24, 28 (Compensation Decision); *see also* Appx193–194 (Rule 60 Decision).

[5] Like the petitioner in *Maples v. Thomas*, 565 U.S. 266, 288–89 (2012), Ms. DiMasi had no right to personal notice of filings on her docket. *See* Supplement to Appendix B of the Rules of the Court of Federal Claims § II.

Without that pillar, it is not clear the special master would have reached the same result.

To be sure, the special master relied primarily on ***pre***-vaccination records and opinions from the Secretary's expert (Dr. Leist) in finding Ms. DiMasi's conditions predate her vaccine. Appx24–28. But that reliance itself flowed from the Chen and Fischer records. Dr. Leist's core opinion was that Ms. DiMasi suffered only "self-limiting, transient, allergy-like symptoms immediately following [the 2012] vaccination." SAppx35. That opinion was based, in no small part, on the Chen and Fischer records—which indicated an immediate onset of symptoms that had to be taken into account in formulating any causal theory. *See* SAppx29; SAppx34. Dr. Leist quoted those records at length and, in accordance with their immediate-onset narrative, minimized the importance of Ms. DiMasi's 2012 vaccine.

Tellingly, the special master does not appear to have concluded that the Chen and Fischer records were immaterial to his compensation decision. He never said that, even if the tingling symptoms of neuropathy manifested themselves when and how Ms. DiMasi asserts, he would still find that Ms. DiMasi's conditions preexisted her 2012 vaccination. In all

events, given the importance of the immediate-onset assertion to the overarching causal narrative adopted by the Secretary and the special master, it is impossible to conclude that the judicial mistake Ms. DiMasi identified was immaterial to the special master's compensation decision.

Second, reopening the case would have little (if any) impact on the finality of judgments. The special master has already found that the Secretary would not be prejudiced through reopening this case. Moreover, given the exceptionally narrow facts at issue here, reopening would not divert significant resources to the readjudication of closed cases.

The Secretary's arguments to the contrary misunderstand Amicus's position. The Secretary claims that "a ***per se rule*** favoring reopening based on the kind of post-judgment assertions advanced here could require the reallocation of significant government resources." Sec'y Br. 38 (emphasis added); *see also* Sec'y Br. 44. But Amicus is not advocating for any sort of per se rule. The plain text of Rule 60 calls for a flexible balancing analysis, *see supra*, pp. 11–12, and Amicus just applies that analysis to the unique facts of this case, *see* Amicus Br. 50–59. The allegations here, involving Counsel's affirmative efforts to litigate

Ms. DiMasi's case in way that rejected her clear instructions that certain medical records were flawed, are to Amicus's knowledge extremely rare. No flood of litigation would follow from recognizing that, in these narrow circumstances, relief from judgment is warranted.

Moreover, the Secretary fails to address the special master's specific findings on prejudice. Sec'y Br. 38. In deciding Ms. DiMasi's Rule 60 motion, the special master found that he did "not foresee any substantial prejudice against [the Secretary] if the motion were granted." Appx187. The Secretary does not argue, let alone show, that this finding was clearly erroneous. Indeed, the special master was in the best position to consider whether reassessing or supplementing the record below would cause the Secretary substantial prejudice. *Contra* Sec'y Br. 38, 44 (arguing this would result in prejudice).

In sum, the balance of equities clearly tilts in Ms. DiMasi's favor. Justice would be done through reopening the case, and there is no reason to think that reopening Ms. DiMasi's case would undermine interests in finality. In such circumstances, it would be an abuse of discretion for the special master to conclude that the equities do not favor reopening. Because the existing record establishes that Ms. DiMasi is entitled to

relief from judgment, the Court should reverse and instruct the Claims Court to reopen Ms. DiMasi's case.

II. The Special Master Abused His Discretion by Denying Relief Based on Rule 60(b)(6)

Separately, Ms. DiMasi is entitled to relief under Rule 60(b)(6). *See* Amicus Br. 59–69. The Secretary acknowledges that courts have allowed reopening when an attorney settled a claim, or took comparable action, without authority. *See* Sec'y Br. 28. This case fits comfortably within that framework, and while the Secretary makes a number of arguments at the margins, none of those arguments compel a different conclusion. Accordingly, the Court should reverse the special master's decision on this ground, remand, and instruct the special master to reopen Ms. DiMasi's case so she can present a significant-aggravation claim.

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

It is well established that Rule 60 relief may be available when an attorney settles his client's claims, or takes comparable action, without authority. *E.g.*, *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1088 (Ct. Cl. 1981) (applying the version of Rule 60 that was applicable

to this Court's predecessor, the U.S. Court of Claims); *see also, e.g.*, Restatement (Third) of the Law Governing Lawyers § 22 (2000).

The Secretary does not contest this point,[6] *see* Sec'y Br. 28, but instead argues that Rule 60(b)(6) relief is not available every time a litigant claims that her attorney has acted outside his authority. He characterizes Amicus's position as allowing litigants to "simply assert that any action was taken outside the scope of [their] attorney's authority and reopen a final judgment." Sec'y Br. 28.

But Amicus advocates for no such rule. The rule that governs this case is much narrower. The action in question must be a settlement, or a sufficiently analogous decision, and the other limitations in the text of Rule 60 (timeliness and equitable balancing) must still be satisfied. When determining whether a decision is sufficiently analogous to settlement, courts should consider a variety of factors. *See* Amicus Br. at

[6] The Secretary's reference to this Court's decision in *Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054, 1059 (Fed. Cir. 1995), does not suggest that he disagrees on this point. There, the Court noted it was not "familiar" with a "rule of agency law" that allowed a litigant to escape estoppel by claiming its "counsel acted *ultra vires*." *Id.* But it did not address relief under Rule 60, and in all events, that decision cannot overcome earlier binding precedent. *E.g.*, *Pueblo*, 647 F.2d at 1088.

62 (citing Restatement (Third) of the Law Governing Lawyers § 22 cmt. e (2000), which collects the relevant factors). At the very least, an attorney cannot enter into a "stipulation or consent judgment that will similarly foreclose client rights" without actual authority. *Id.* Pivotal decisions that amount to abandoning a claim, are reserved for the client or her agents with ***actual*** authority.

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

Ms. DiMasi's argument that Counsel surrendered any significant-aggravation claim without her permission falls within in the narrow set of cases in which relief might be granted based on a lack-of-authority argument. The Secretary disputes (1) whether Counsel's affirmative waiver is analogous to a settlement decision and (2) whether Counsel lacked authority to act on Ms. DiMasi's behalf. But these arguments are unavailing.

(1) Based on the undisputed facts, Counsel's conduct in this case is comparable to a settlement decision. *See* Amicus Br. 63–65. Both the special master and the Secretary recognized that Ms. DiMasi may have had a claim for significant aggravation of a preexisting condition. Yet Counsel affirmatively conceded any significant-aggravation claim

without so much as asking Ms. DiMasi. Thus, under these narrow facts, Counsel effectively consented to judgment against Ms. DiMasi on any significant-aggravation claim she might have had. *See* Restatement (Third) of the Law Governing Lawyers § 22 cmt. e (2000) (noting consent judgments are comparable to settlement).

The Secretary makes no attempt to dispute these facts. Instead, he tries to characterize significant-aggravation and initial-onset claims as "alternate theories of causation." *See* Sec'y Br. 24. Thus, in the Secretary's opinion, Counsel's "decision to focus on one or the other theory" was just a "strategic decision" of the sort ordinarily reserved for attorneys. Sec'y Br. 24.

But the premise underlying the Secretary's argument is incorrect: significant aggravation and initial onset are not alternative theories of causation. Causation is a separate element of *either* of those claims. *See W.C. v. Sec'y of Health & Hum. Servs.*, 704 F.3d 1352, 1357 (Fed. Cir. 2013) (holding "a petitioner in an off-table case must show the vaccine actually caused the significant aggravation"). Indeed, the only difference between significant-aggravation and initial-onset claims are the elements of proof for the relevant ***injury*** asserted. *Id.* (crafting off-table

significant-aggravation test by combining factors for significant-aggravation injury with general factors for causation). Thus, significant aggravation and initial onset are separate ***claims*** under the Vaccine Act for distinct vaccine-related injuries, *see* SAppx043 (noting these are "two different causes of action"), and the Secretary's reliance on an attorney's traditional function of deciding the theories and arguments raised in a case is inapposite.

Certainly, a claimant cannot recover for both initial-onset and significant-aggravation of the same condition based on a single vaccination. The injuries involved in those claims are distinct and mutually exclusive: a condition cannot be both caused by and aggravated by the same vaccine. *See* Sec'y Br. 24 (noting mutually-exclusive nature). But this only establishes that these are ***alternative claims***, and compromising an alternative claim is still compromising a claim. At bottom, Counsel conceded away Ms. DiMasi's ability to raise a significant-aggravation claim, and given the fact that the special master instructed Counsel to address such a claim, that decision is analogous to a settlement decision.

(2) The undisputed facts show that Counsel lacked authority to dismiss Ms. DiMasi's claim. In her affidavits, filings, and emails, Ms. DiMasi asserts without contradiction that Counsel never told her about the availability of a significant-aggravation claim. *E.g.*, Appx31 (Rule 60 motion); SAppx188 (DiMasi Affidavit); *see also* SAppx161 (Email from Ms. DiMasi to Counsel). Without any knowledge about a significant-aggravation claim, Ms. DiMasi could not have consented to Counsel's decision to abandon any such claim.

The Secretary does not contest these facts. Instead, without factual support, he claims that Counsel had implied authority to compromise any significant-aggravation claim. *See* Sec'y Br. 27–28. Implied authority is a subset of actual authority, present when some authority is "implied in [a] principal's manifestations" or "incidental to achieving the principal's objectives." Restatement (Third) of Agency § 2.02(1) (2006). But compromising a claim is not a power incidental to any of Ms. DiMasi's objectives. *Cf.* Restatement (Third) of the Law Governing Lawyers § 22 (2000) (noting that settlement, and comparable decisions, are reserved to the client). Nor was such authority implied by Ms. DiMasi's actions.

In particular, the fact that Ms. DiMasi believed (and continues to believe) that her conditions did not predate her vaccine does not create any implied authority to compromise a significant-aggravation claim. *But see* Sec'y Br. 26–27. It was entirely possible for Ms. DiMasi to avoid "conceding that she had any preexisting neurological symptoms" by simply pleading a significant-aggravation claim in the alternative. *See* Sec'y Br. 27. Alternative pleading is expressly permitted under Rule of the Court of Federal Claims 8(d)(2), and the Court already recognized such pleading as an avenue Counsel could have utilized. ECF No. 36 at 9.

Moreover, Ms. DiMasi's statements could not have been interpreted as implied consent to abandon a significant-aggravation claim. There is no evidence that Ms. DiMasi was aware of such a claim, which undermines any argument that the statements were intended to consent to abandonment. *See* Amicus Br. 65 (discussing evidence). Additionally, Ms. DiMasi recognized the possibility that her pre-vaccination cardiac and neurological symptoms might be misinterpreted as products of her later-diagnosed conditions. *See* SAppx202 (Email from DiMasi to Counsel) (noting "sometimes things are misinterpreted" in a medical

history). This awareness suggests Ms. DiMasi would have been open to a significant-aggravation claim, at least as a bulwark against the special master's errors. In fact, a post-judgment email from Ms. DiMasi to Counsel confirms Ms. DiMasi's willingness to entertain alternative arguments. *See* SAppx161 (faulting Counsel for not explaining that she "may want to submit a significant aggravation claim" so she would "have . . . protection" against a finding that her conditions preexisted the vaccine).

For similar reasons, no ethical duty prevented Counsel from raising a significant-aggravation claim. *But cf.* Sec'y Br. 26. He could have pleaded a significant-aggravation claim in the alternative, and even if Counsel thought some ethical duty prevented such a claim, he was obligated to inform Ms. DiMasi about that problem in his representation. *See* Amicus Br. 65–67.

Going further, the Secretary suggests that Counsel had apparent authority[7] to compromise Ms. DiMasi's significant-aggravation claim.

[7] Apparent authority exists when "a third party reasonably believes" an agent "has authority to act on behalf of the principal." Restatement (Third) of Agency § 2.03 (2006).

See Sec'y Br. 29. But this Court has made it clear that an attorney's apparent authority does not include the authority to compromise his client's substantial rights: "express authority" is required. *Pueblo*, 647 F.2d at 1088; *see also* Restatement (Third) of the Law Governing Lawyers § 27 cmt. a (2000) (Apparent "authority arising from the act of retention alone does not extend to matters, such as approving a settlement, reserved for client decision (see § 22).").

* * *

In sum, the undisputed facts show that Counsel compromised Ms. DiMasi's substantial rights without her permission. Moreover, as explained in Amicus's principal brief (Amicus Br. 68), this ground for relief was raised in a timely fashion and the balance of equities supports reopening. It was, therefore, an abuse of discretion for the special master to deny relief based on this ground.

III. At a Minimum, the Special Master Abused His Discretion by Denying Relief Without a Hearing

For the reasons discussed above and in Amicus's principal brief, the special master could and should have granted Ms. DiMasi's Rule 60 motion. But in all events, the special master could not ***deny*** relief—under either ground—without conducting a hearing. To deny the

existence of a mistake in the record, the special master would have to find Ms. DiMasi not credible. Likewise, even if the attorney-authority questions turn on issues of credibility, a hearing would be required before the special master denied relief.

The Secretary's arguments against the need for a hearing are bound up in his arguments on the merits of relief based on a judicial mistake or a lack of attorney authority. He claims that no hearing was required because the alleged mistake was not material, Sec'y Br. 45; because Counsel could not raise a significant aggravation claim, Sec'y Br. 45; and because failure to raise a significant aggravation claim is not the sort of conduct that can warrant relief under Rule 60(b)(1), Sec'y Br. 45–46. As explained, these arguments are unavailing. *See supra*, pp. 20–22 (mistake), 26–32 (authority).

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

Yet another legal error infected the special master's Rule 60 decision. *See* Amicus Br. 71–73. The special master relied on the presumption that medical records are accurate and complete, which this Court soundly rejected in *Kirby v. Secretary of Health & Human Services*, 997 F.3d 1378, 1383 (Fed. Cir. 2021). This reliance prevented the special

master from properly engaging with Ms. DiMasi's mistake allegations, and in all events, the special master applied that presumption inconsistently. He presumed the Chen and Fischer records were accurate, while ignoring other contrary records. Independently, this legal error requires a remand for the special master to reconsider Ms. DiMasi's Rule 60 motion.

This error was not, as the Secretary suggests, immaterial. Sec'y Br. 46. Initially, the Secretary seems to misunderstand Amicus's argument. He claims the *Kirby* argument is "predicated on a fundamental misunderstanding of the basis of the Special Master's ***original*** determination." Sec'y Br. 46 (emphasis added). But Amicus's *Kirby* argument has nothing to do with the original compensation determination. It is about the Rule 60 decision itself, in which the special master relied on a presumption of accuracy to dismiss Ms. DiMasi's claims about errors of fact. *See* Amicus Br. 72 (quoting Appx193). This presumption, applied inconsistently throughout the Rule 60 decision, prevented the special master from engaging with Ms. DiMasi's arguments.

Moreover, the Court should not decline to address *Kirby* on the basis of waiver or forfeiture. *Contra* Sec'y Br. at 46. Waiver and forfeiture are discretionary doctrines, *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1040 (Fed. Cir. 2017), and there are good reasons to decline to apply those doctrines here. The *Kirby* argument presents a pure question of law, and in requesting supplemental briefing, the Court expressly avoided confining the issues that the supplemental briefing might raise. *See* ECF No. 36 at 5.

Finally, the fact that Amicus raised this argument should have no impact on the analysis, at least with respect to a court-appointed Amicus. The rule that amici cannot raise new arguments follows from principles similar to those underlying the waiver and forfeiture doctrines. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014) (discussing factors the bear on the discretionary choice). So the same considerations that militate against waiver or forfeiture apply here as well.

Conclusion

Amicus urges the Court to reverse and remand for the special master to reopen Ms. DiMasi's case. Alternatively, the Court should vacate and remand with instructions to conduct an evidentiary hearing.

DATED: May 17, 2023

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Certificate of Compliance

1. This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1). The body of the petition contains 6,806 words, excluding the portions exempted by rule.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in New Century Schoolbook 14-point font.

DATED: May 17, 2023 By: /s/ *J. Kain Day*
J. Kain Day

Certificate of Service

I hereby certify that on May 17, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit through the Court's CM/ECF system. A copy has been served on all parties by electronic means.

DATED: May 17, 2023 By: /s/ *J. Kain Day*
J. Kain Day