2022-1854

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

STEPHANIE DIMASI,

Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

Appeal from a judgment of the United States Court of Federal Claims
in No. 1:15-vv-01455-AOB, Judge Armando O. Bonilla

CORRECTED BRIEF OF RESPONDENT-APPELLEE SECRETARY OF HEALTH AND HUMAN SERVICES

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STATEMENT OF RELATED CASES

No appeal of this case has been before this or any other appellate court. To the knowledge of Respondent-Appellee, there is no same or similar case, filed pursuant to the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"), 42 U.S.C. § 300aa-1 to -34, pending before the Supreme Court, this Court, or any other Circuit Court of Appeals.

STATEMENT OF THE ISSUE

Whether the Special Master's denial of petitioner's motions for leave to file additional materials, to reopen the judgment denying her claim, and for reconsideration was arbitrary or capricious, an abuse of discretion, or not in accordance with the law.

STATEMENT OF THE CASE

I. Nature of the Case

Petitioner-appellant Stephanie DiMasi (hereinafter "petitioner") filed a claim pursuant to the Vaccine Act, in which she alleged that a seasonal influenza ("flu") vaccine she received in December 2012 caused her to suffer small fiber neuropathy and postural orthostatic tachycardia syndrome ("POTS"). In November 2019, after reviewing the evidentiary record and the parties' written submissions, the Special Master dismissed petitioner's claim because the evidence established that her small

fiber neuropathy and POTS pre-dated her vaccination, and she declined to allege a significant aggravation claim. Petitioner did not seek review of that decision. Rather, several months later, petitioner filed motions seeking to reopen the case and file additional evidence on the merits of her claim. The Special Master construed this as an attempt to seek relief from judgment pursuant to Rule 60(b) of the Rules of the United States Court of Federal Claims ("RCFC"), and ultimately denied petitioner's motions on November 10, 2021.

In her motion for review to the Court of Federal Claims ("CFC") and in her appeal to this Court, petitioner challenges the Special Master's factual finding that her small fiber neuropathy and POTS pre-dated vaccination, and argues that the Special Master erred by failing to consider all of the evidence in the contemporaneous medical records. The CFC's decision rejecting those arguments as untimely is sound and should be affirmed. 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. *See* RCFC, Appendix B, Vaccine Rule 23(a).

Because petitioner failed to timely seek review of the Special Master's November 7, 2019 entitlement decision, the sole issue properly before the CFC and this Court is whether the Special Master abused his discretion in denying petitioner's motions for leave to file additional materials and for reconsideration of

his denial of her motion for relief from judgment on November 10, 2021. Petitioner asserts that the Special Master's denial of her motions for leave to file additional materials and for reconsideration of his denial of her motion for relief from judgement was an abuse of discretion. The CFC correctly concluded that Special Master Moran did not commit legal error in denying petitioner's requests to file additional evidence and for reconsideration of his denial of her motion for relief from judgment, and the CFC's decision should be affirmed.

II. Rule 60(b)

RCFC 60(b) states, in relevant part:

> 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.

A motion seeking relief from a judgment under Rule 60(b) is a highly specialized pleading. It "is not a pleading, like a complaint, in which the factual allegation[s] are presumed true. 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." *Kennedy v. HHS*, 99 Fed. Cl. 535, 550 (2011), *aff'd*, 485 F. Appx 435 (Fed. Cir. 2012) (citations omitted). Such a motion is therefore "'one for extraordinary relief entrusted to the discretion of the Court

. . . which may be granted only in extraordinary circumstances.'" *Sigmatech, Inc. v. United States*, 144 Fed. Cl. 159, 175 (2019) (quoting *TDM Am., LLC v. United States*, 100 Fed. Cl. 485, 490 (2011)).

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). 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). Accordingly, no single factor is determinative.

With respect to petitioner's motion for leave to file additional materials, the Court of Federal Claims has held that, in order to be entitled to relief under Rule 60(b)(2), a 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.*, 144 Fed. Cl. at 175 (quoting *Yachts Am., Inc. v. United States,* 8 Cl. Ct. 278, 281 (Fed. Cl. 1985), *aff'd*, 779 F.2d 656 (Fed. Cir. 1985)).

As to the first and second requirements, new discovery and due diligence, "'newly-discovered evidence'" is limited to "'evidence of facts which existed at the time of decision and of which the aggrieved party was excusably ignorant.'" *TDM Am.*, 100 Fed. Cl. at 490 (quoting *Yachts Am., Inc.,* 8 Cl. Ct. at 281). Put another way, "newly discovered evidence," as defined in Rule 60(b)(2), "*only* encompasses facts which existed at the time the court made its decision and entered judgment." *Q Integrated Cos., LLC v. United States*, 131 Fed. Cl. 125, 132 (2017) (emphasis added); *see also Sigmatech, Inc.*, 144 Fed. Cl. at 181 (concluding that the Court was only "able to consider evidence that occurred before the [C]ourt's issuance of its . . . Opinion."). Finally, "[n]ewly discovered evidence is material if the court's decision would have been different had the court been aware of it prior to judgment." *Mark Dunning Indus., Inc. v. United States*, 143 Fed. Cl. 735, 740 (2019). Hence, "[i]n order to prevail on a Rule 60(b)(2) motion, a movant must demonstrate . . . that the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment." *Venture Indus. Corp. v. Autoliv ASP, Inc.*, 457 F.3d 1322, 1328 (Fed.

Cir. 2006) (citation and internal quotation marks omitted); *accord Sigmatech, Inc.*, 144 Fed. Cl. at 175; *Q Integrated Cos., LLC*, 131 Fed. Cl. at 131.

In addressing more specifically the allegations of attorney misconduct, negligence of counsel, even "gross negligence," does not warrant relief under Rule 60(b). *G.G.M. (through Mora) v. HHS*, 122 Fed. Cl. 199, 204-09 (2015), *aff'd sub nom. Mora v. HHS*, 673 F. App'x 991 (Fed. Cir. 2016). An attorney's conduct must be "so egregious" that it essentially equates to counsel effectively abandoning and/or affirmatively misleading their clients. *See id.* at 205.

III. **Background**

The relevant procedural history is set forth in the Special Master's November 10, 2021 Order and is not in dispute. *See* Appx179-182. Petitioner, by her former attorney, Howard S. Gold, filed the petition alleging that she suffered small fiber neuropathy and POTS following her receipt of an influenza vaccine on December 4, 2012, and that the vaccine was the cause-in-fact of her injuries. Appx179. On November 7, 2019, the Special Master issued a decision denying entitlement. *DiMasi v. HHS*, No. 15-1455V, 2019 WL 6878732 (Fed. Cl. Spec. Mstr. Nov. 7, 2019) (Appx21-29)). The Special Master found that petitioner's pre-vaccination medical records documenting symptoms related to her claimed injuries of small fiber neuropathy and POTS, coupled with petitioner's decision to forego a significant aggravation claim, precluded her claim for compensation. Appx29.

Petitioner did not file a motion for review. Accordingly, judgment was entered pursuant to Vaccine Rule 11(a) on December 11, 2019. Appx30.

On September 15, 2020, just over nine months after the entry of judgment on petitioner's entitlement claim, petitioner moved to proceed *pro se* and to reopen her case. Appx31-32. In support of her motions 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. *Id*. The Special Master granted petitioner's motion to substitute counsel and proceed *pro se* on September 22, 2020. *See* Appx 160. However, the Special Master requested additional information, including from petitioner's former counsel, prior to ruling on petitioner's motion to reopen. Following a review of that information, on June 3, 2021, the Special Master denied petitioner's request for relief. Appx157-171. Petitioner filed a motion for reconsideration. Appx172-176. On June 25, 2021, the Special Master vacated the June 3, 2021 order, and again requested supplemental briefing. Appx177.

On November 10, 2021, the Special Master issued a final Order denying petitioner's motion for reconsideration and motion for leave to file additional materials (i.e., approximately 150 pages of proposed exhibits). *DiMasi v. HHS*, No. 15-1455V, slip op. (Fed. Cl. Spec. Mstr. Nov. 10, 2021) (Appx178-203). Prior to denying petitioner's motion for leave to file additional materials, the Special

Master inventoried and reviewed the proffered exhibits. Appx182-190. The Special Master ultimately determined the additional documents were "neither material nor newly discovered" and, in fact, "many of these medical records, as acknowledged by [petitioner], are already in the record." Appx190.

The Special Master next addressed petitioner's attorney-abandonment claim, and found that petitioner "has not shown that her attorney's work was deficient, let alone so poor that a miscarriage of justice occurred." Appx179. He first reviewed petitioner's pre-vaccination medical history, and explained that his factual findings that petitioner's pre-vaccination symptoms related to the alleged vaccine-caused injuries were based on his independent review of the medical records, expert reports, and medical literature – not counsel's representations. Appx192-194. 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. Appx195-199. In each instance, the Special Master found that Mr. Gold'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.* Additionally, the Special Master concluded that petitioner "did not diligently act to preserve her rights." Appx199. Accordingly, the Special Master denied petitioner's request for extraordinary relief. Appx202-203.

On December 10, 2021, petitioner filed a timely motion for review of the Special Master's November 10, 2021 Order. Appx210-229.

IV. Course of Proceedings and Disposition In the Court of Federal Claims

On April 4, 2022, Judge Bonilla affirmed the Special Master's Order denying petitioner's motions for reconsideration and to reopen her claim. *DiMasi v. HHS*, No. 15-1455V, 2022 WL 1153477 (Fed. Cl. Apr. 4, 2022) (Appx15-20). Judge Bonilla determined that petitioner's request for review of the Special Master's November 7, 2019 entitlement decision was untimely, and that the Special Master did not abuse his discretion in denying petitioner's motions for leave to file additional materials and for relief from judgment on November 10, 2021. This appeal ensued.

SUMMARY OF THE ARGUMENT

Petitioner has made the same arguments on appeal as in her motions for leave to file additional materials, reconsideration, and to reopen the December 11, 2019 judgment entered against her, and in her motion for review to the CFC. For the same reasons that her previous motions were denied, her appeal should be denied as well.

Special Master Moran did not abuse his discretion in determining that petitioner failed to satisfy the "extraordinary circumstances" standard for her Rule

60(b) motion. Petitioner did not establish that the additional evidence she sought to file was material or newly discovered, or that her attorney's conduct regarding a potential motion for review equated to "attorney abandonment." The opinion of the CFC sustaining the Special Master's decision should therefore be affirmed.

STANDARD OF REVIEW

In cases brought under the Vaccine Act, this Court reviews a decision of the special master under the same standard as the CFC, and determines if the findings of fact and conclusions of law are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Rodriguez v. HHS*, 632 F.3d 1381, 1384 (Fed. Cir. 2011) (citing *Avera v. HHS,* 515 F.3d 1343, 1347 (Fed. Cir. 2008)); *see also* 42 U.S.C. § 300aa-12(e)(2)(B).

A special master's factual determinations are reviewed under an arbitrary and capricious standard. *See Pafford v. HHS*, 451 F.3d 1352, 1355 (Fed. Cir. 2006). The Court is required to give appropriate deference in its application of this standard. *Avila ex rel. Avila v. HHS*, 90 Fed. Cl. 590, 594 (2009) (citing 42 U.S.C. § 300aa–12(e)(2)); *see also Munn v. HHS*, 970 F.2d 863, 870 (Fed. Cir. 1992) (noting that the court owes the "findings and conclusions by the special master great deference" and explaining that the arbitrary and capricious standard is "well understood to be the most deferential possible"). Accordingly, "[i]f the special master has considered the relevant evidence of record, drawn plausible inferences

and articulated a rational basis for the decision, reversible error will be extremely difficult to demonstrate." *Avila*, 90 Fed. Cl. at 594 (quoting *Hines v. HHS*, 940 F.2d 1518, 1528 (Fed. Cir. 1991)).

A decision to grant or deny relief pursuant to Rule 60(b) "should be reviewed on an abuse of discretion basis." *Patton v. HHS*, 25 F.3d 1021, 1029 (Fed. Cir. 1994). An abuse of discretion exists when the lower court's decision is based upon erroneous conclusions of law, such as the court's misinterpretation of its own rules. *Id.* Under this standard, "[it] is not enough that the granting of relief might have been permissible, or even warranted[,] denial must have been so unwarranted as to constitute an abuse of discretion." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

ARGUMENT

Although petitioner specifically challenges the Special Master's November 7, 2019 decision denying her claim, it is actually the Special Master's November 10, 2021 Order that is under review here. That Order contains two determinations: (1) the denial of petitioner's motion for leave to file additional evidence, and (2) the denial of petitioner's motion for reconsideration of the denial of her motion to reopen judgment. Both determinations were soundly within the Special Master's discretion and should be affirmed.

I. The Special Master Did Not Abuse His Discretion in Denying Petitioner's Motion for Leave to File Additional Materials.

The Special Master did not abuse his discretion in denying petitioner's motion for leave to file additional materials. The Special Master analyzed this motion in the context of petitioner's request for relief under Rule 60(b) and correctly concluded that none of the additional materials would have entitled petitioner to relief from judgment. Appx185-190. Significantly, prior to denying the motion the Special Master engaged in a painstakingly thorough examination of the materials petitioner sought to submit post-judgment, as evidenced in the Appendix to the Order. Appx204-209 (Table of Exhibits filed after Judgment, noting a description of each exhibit, whether it was a duplicate, cumulative or new, and explaining the rationale for denying each submission). As Judge Bonilla concluded, "In light of the Special Master's thoughtful review and consideration of the documents in issue, petitioner's motion is effectively moot." Appx16 n.2.

With respect to Rule 60(b)(2), the Special Master correctly found that the materials did not constitute "newly discovered evidence," noting that petitioner "had ample opportunity to file all of her medical records," and that the additional records were "mostly accessible" to her and Mr. Gold prior to adjudication, and were discoverable with reasonable due diligence. Appx186.

The Special Master also properly determined that petitioner's failure to file the relevant records in her underlying case was not a "mistake" or "inadvertence"

that would justify relief from judgment under Rule 60(b)(1). Appx186-187. Applying the relevant balancing test, he acknowledged that petitioner's claim was "meritorious" and found that respondent would not be prejudiced by admitting the additional materials. Appx187 (citing *Overseas Container Line (UK) Ltd.*, 52 Fed. Cl. at 807). However, with respect to the third factor – whether petitioner's conduct was culpable – the Special Master found that petitioner "is ultimately responsible for the failure to previously submit the exhibits she now seeks to file." Appx188 (citing *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)).

The Special Master concluded that petitioner did not explain what caused the alleged mistake beyond the general allegation that her attorney did not represent her, and determined that the medical records were reasonably within petitioner's control and that of her attorney over the course of nearly three years of litigation. Under these circumstances, the materials "could have been found and submitted earlier. These facts militate against the relief sought." Appx188.

In balancing the factors for relief under Rule 60(b)(1), the Special Master noted that petitioner was seeking "relief due to a 'mistake' for which she bears responsibility." Appx189 (citing *G.G.M. (through Mora) v. HHS*, No. 13-421V,

2015 WL 1275389 (Fed. Cl. Spec. Mstr. Feb. 27, 2015), *mot. for rev. denied G.G.M.*, 122 Fed. Cl. 199, *aff'd sub nom. Mora*, 673 F. App'x 991 (finding special master's denial of relief from judgment was not abuse of discretion), *aff'd*, 673 Fed. App'x 991 (Fed. Cir. 2016). The case law amply supports his ultimate decision that petitioner's failure to file some records and literature does not qualify as an excusable mistake, and her attorney's failure to submit those records or literature does not constitute culpable conduct. Appx189.

Finally, the Special Master's determination that petitioner has not demonstrated the extraordinary circumstances necessary for relief under Rule 60(b)(6) is legally sound. He noted in his Order that "RCFC 60(b)(6) does not relieve a party from a 'free, calculated, and deliberate choice.'" Appx190 (citing *Kennedy*, 99 Fed. Cl. at 548 (quoting *Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 6 (1st Cir. 2001)). He discussed the relevant case law regarding negligence of counsel, Appx184-185, and found that Mr. Gold's failure to file some seemingly non-essential records "does not rise to the same level of egregious conduct as an attorney's abandonment or affirmative misleading of a client" required to meet the "extraordinary circumstances" standard for relief under Rule 60(b)(6). Appx190 (citing *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1170-71 (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.")).

The Special Master did not abuse his discretion in denying petitioner's Motion for Leave to File Additional Materials pursuant to Rule 60(b). The fact that the granting of such relief "might have been permissible, or even warranted," does not constitute an abuse of discretion. *Seven Elves, Inc.*, 635 F.2d at 402. Thus, his decision to deny petitioner's request to submit additional materials post-judgment must stand.

II. The Special Master Did Not Abuse His Discretion in Denying Petitioner's Motions to Reopen and for Reconsideration.

As the Special Master notes in his Order, following judgment on December 11, 2019, petitioner moved to reopen her case on September 15, 2020. Appx190. The Special Master denied the motion to reopen on June 3, 2021. *Id.* Subsequently, on June 24, 2021, petitioner moved for reconsideration of the June 3, 2021 order. The Special Master granted the motion in part and the June 3, 2021 order was vacated. *Id.* He then reconsidered the evidence and parties' filings, and issued his decision denying both the motion to reopen and the motion for reconsideration. Appx191-203. His decision regarding these motions was not an abuse of discretion. *See* 42 U.S.C. § 300aa-12(e)(2)(B); RCFC, Appendix B, Vaccine Rule 27(b).

In reaching his decision, the Special Master cited the relevant standards of adjudication, and properly applied those standards to the facts of this case. Appx191-202. He noted that petitioner's motion to reopen her case was apparently based on the argument "that justice requires reopening her case due to attorney abandonment that led to factual or legal errors," Appx192, and that the motion for reconsideration presented similar evidence and arguments to those in support of her motion to reopen. Appx200. Accordingly, he treated petitioner's motions in tandem.

Petitioner argues that the Special Master committed the following legal errors:

1. The entitlement decision was based on erroneous findings of material facts;

2. The Special Master misapplied Rule 60(b);

3. The Special Master failed to consider all of the relevant evidence;

4. Petitioner was wrongly denied the right to testify; and

5. The Special Master erroneously concluded that petitioner failed to establish that her counsel abandoned her. Appellant's Informal Br. at 1-3.

A. Any challenge to the findings of facts in the November 2019 decision denying entitlement is untimely.

Petitioner's first and third arguments above are based on allegedly erroneous findings of fact in the Special Master's November 7, 2019 decision denying

entitlement to compensation. Appellant's Informal Br., *passim*. The deadline for petitioner to seek review of that decision was December 7, 2019 (*see* RCFC, Appendix B, Vaccine Rule 23), more than nine months before she sought to reopen her claim. Appx31-32. Therefore, as Judge Bonilla found, any attempt to review the Special Master's November 7, 2019 findings is time-barred. Appx15.

An appeal of the denial of a Rule 60(b) motion is limited to that narrow issue and does not encompass a review of the underlying decision. *See Inwood Intern. Co. v. Wal-Mart Stores, Inc.*, 2000 WL 1720676 at *3, 243 F.3d 567 (Fed. Cir. 2000) ("In other words, '[t]he denial of a Rule 60(b) motion does not bring up the underlying judgment for review.'") (citing *In re Ta Chi Navigation (Pan.) Corp. S.A. v. United States*, 728 F.2d 699, 703 (5th Cir.1984)). Allowing parties to use Rule 60(b) to make arguments that should have been raised on direct appeal would "permit the circumvention of the time restrictions for an appeal, and thus, would undermine the concepts of orderly procedure and desirable finality in judgments." *Id.* at 6.

B. The Special Master properly denied petitioner's Motions to Reopen and for Reconsideration under Rule 60(b).

Petitioner's remaining challenges on appeal raise questions of negligence of counsel as a justification for relief pursuant to Rule 60(b). First, any argument that petitioner's attorney never informed her of the option to pursue a significant aggravation claim is moot. Petitioner now states she would *not* have opted to

pursue a significant aggravation claim and instead would have maintained a causation-in-fact claim. Appellant's Informal Br. at 24.

Nonetheless, for the sake of argument, in his affidavit filed on September 18, 2020, Mr. Gold explained that he did not pursue a significant aggravation claim on behalf of petitioner because petitioner's "mitigation and/or denial of pre-existing symptoms negated the ethical and practical possibility of filing" such a claim. Appx155. The Special Master determined that Mr. Gold's decision was a tactical decision by which petitioner remains bound. Appx197. The Special Master did not abuse his discretion in reaching this determination, and correctly applied the law which makes clear that tactical decisions that prove to be unsuccessful do not justify relief under Rule 60(b)(6). *See Greenbrier v. U.S.*, 75 Fed. Cl. 637, 641 (2007)).[1]

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[1] In addressing the issue of a significant aggravation claim, Judge Bonilla raised concerns regarding petitioner's alteration of her medical records. He wrote:

> 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

…(cont'd)

Similarly, the Special Master did not err in finding that Mr. Gold's choice to request a ruling on the record and forgo oral testimony from petitioner was not evidence of abandonment or misconduct warranting reopening the case.[2] As the Special Master explained, mere negligence by an attorney does not constitute an extraordinary circumstance that would justify relief under Rule 60(b)(6). Appx184 (citing *G.G.M.*, 122 Fed. Cl. at 205-09 (attorney negligence does not constitute an extraordinary circumstance because the attorney is acting as an agent for the principal (client) who is charged with the acts and omissions of the agent)). Rather petitioner must show that her lawyer "effectively abandoned" her leaving her "virtually unrepresented and/or affirmatively misled." Appx184-185 (citing *Cmty. Dental Servs.,* 282 F.3d at 1170-71; *Heim v. Comm'r of Internal Revenue*, 872 F.2d 245, 248 (8th Cir. 1989) (stating that "any errors committed by [counsel], even

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> Special Master's factual findings on this issue are neither arbitrary nor capricious.

Appx18.

[2] The Vaccine Act and Rules not only contemplate but encourage special masters to decide petitions on the papers where, in the exercise of their discretion, they conclude that doing so will properly and fairly resolve the case. 42 U.S.C. § 12(d)(2)(D); RCFC, Appendix B, Vaccine Rule 8(d). The decision to rule on the record in lieu of conducting a hearing has been affirmed on appeal. *Kreizenbeck v. HHS*, 945 F.3d 1362, 1366 (Fed. Cir. 2020) (Special Master did not abuse his discretion by resolving allegations on the record without parents' consent).

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 the client was left virtually unrepresented)).

Against this standard, and without suggesting Mr. Gold's decision was unwise, the Special Master found that his tactical decision to pursue a ruling on the record in lieu of a hearing with testimony from petitioner was an insufficient basis for a successful claim for attorney abandonment or ineffective assistance of counsel. Appx196. "Furthermore, oral testimony may not have altered the findings of fact. Thus, this issue does not support reopening the case." *Id.* (citation omitted).

In reviewing this issue, Judge Bonilla properly determined the following:

> 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)).

Appx18.

Petitioner's final point of error is that the actions and inactions of her attorney foreclosed her rights and the opportunity to appeal the November 2019 decision. The Special Master aptly described petitioner's argument as a "he-said

she-said" issue, noting the difficult attorney-client relationship in this case. Appx202. He acknowledged that "Mr. Gold's lack of communication with his client is arguably problematic." *Id.* However, applying the adjudication standards for 60(b)(6) relief, the Special Master found that "the sometimes slow and frustrating communications here do not merit the relief requested" and that the evidence presented did not demonstrate attorney abandonment. *Id.*

The Special Master also correctly concluded that petitioner did not act diligently to preserve her right to appeal. Appx199. He characterized this issue as "a close call," but was well within his discretion to reach this conclusion and his factual findings were not arbitrary or capricious. *Id.* Judge Bonilla agreed, noting the Special Master's citation of (1) 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; (2) petitioner's failure to confirm that her counsel reconsidered his position and would undertake the continued representation; and (3) petitioner's failure to consult the Vaccine Rules to determine the deadline for the motion for review. Appx19-20 (citing *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.")).

As Judge Bonilla found, a review of the Special Master's Order confirms that he applied the proper legal standards in assessing petitioner's motions, and that he did not abuse his discretion in finding that petitioner failed to establish an attorney abandonment claim for Rule 60(b) relief. Appx20. Indeed, as Judge Bonilla noted, the Special Master took the "extraordinary step" of soliciting an affidavit from Mr. Gold, and reviewed written communications between petitioner and Mr. Gold as well as Mr. Gold's call log. Judge Bonilla correctly concluded that the Special Master's evaluation of the evidence was not arbitrary or capricious. Appx19.[3]

CONCLUSION

Petitioner has failed to demonstrate that the Special Master erred, or that his actions were arbitrary, capricious, an abuse of discretion, or otherwise not in

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[3] Judge Bonilla included the following caveat:

> 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.

Appx20.

accordance with the law. Therefore, his Order dated November 10, 2021, is entitled to deference and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, based on the line count of the word-processing system used to prepare this brief, that the brief contains 5,035 words and 462 lines of text, and is, therefore, in conformity with Fed. Cir. R. 32(a).

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2022, the foregoing **CORRECTED BRIEF OF RESPONDENT-APPELLEE SECRETARY OF HEALTH AND HUMAN SERVICES** was served by mail upon:

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