

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Leonard McCray  
Appellant,

v.

No. 20-5294

Denis McDonough,  
Secretary of Veterans Affairs,  
Appellee.

**APPELLANT’S RESPONSE TO THE SECRETARY’S MOTION TO DISMISS**

The Secretary moves to dismiss this appeal claiming the Court lacks jurisdiction to review a March 2020 BVA denial of a request to reconsider a July 2014 BVA decision because it lacks jurisdiction over the July 2014 BVA decision.<sup>1</sup> He argues that the “NOA was filed on July 29, 2020, which is more than six years (2219 days to be exact) after the July 2, 2014, Board Decision,” and Mr. McCray “has not asserted any compelling reason for his failure to submit a timely NOA nor alleged any factors that might allow him to invoke equitable tolling.”<sup>2</sup>

Mr. McCray responds that because the Secretary did not file a motion to dismiss within 45 days of the date the Secretary filed the July 2014 and March 2020 BVA decisions with the Court, his appeal of the July 2014 BVA decision and the March 2020 denial motion for reconsideration should be “treated as timely regardless of the date it was received.”<sup>3</sup> The Secretary’s concerns about equitable tolling and other factors are irrelevant because he did not file his motion to dismiss “within 45 days after the filing date of the Board decision.”<sup>4</sup>

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<sup>1</sup> *Secretary’s Motion to Dismiss*, pages 2, 5, and 6.

<sup>2</sup> *Id.*, page 2.

<sup>3</sup> U.S. Vet. App. R. 4(a)(3)(A).

<sup>4</sup> *See* U.S. Vet. App. R. 4(a)(3)(A) - (B).

Because the Secretary failed to timely file a motion to dismiss, sought no extension of time to file his motion to dismiss, did not seek leave to file the motion for dismissal out of time, never mentioned or discussed Rule 4(a)(3)(A), and did not ask for an exception to that rule, Mr. McCray requests the Court deny the Motion to Dismiss and hold that his July 29, 2020, appeal of the July 2014 BVA decision and the March 2020 denial of the motion for reconsideration will be “treated as timely regardless of the date it was received.”<sup>5</sup>

Further, because the BVA’s July 2014 decision is final and within the Court’s jurisdiction, the Court also has jurisdiction to review the BVA’s denial of the March 2020 reconsideration motion. Whether the Court exercises its discretion to review the reconsideration denial is best reserved for merits briefing.

### **1. Relevant Facts.**

On July 2, 2014, the BVA denied Mr. McCray’s claim for service connection of his lung cancer, which he related to his exposure to herbicides, including Agent Orange, while serving in classified missions in Laos.<sup>6</sup> The BVA concluded in July 2014 that Mr. McCray was not actually exposed to herbicides, including Agent Orange, rejecting Mr. McCray’s lay evidence that he had observed the spraying of herbicides in Laos as well as favorable lay evidence that herbicides were sprayed in Laos.<sup>7</sup> The BVA wrote that “[w]hile the Veteran may have observed spraying or its effects, it is unclear how he could have knowledge of the

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<sup>5</sup> U.S. Vet. App. R. 4(a)(3)(A).

<sup>6</sup> Appx 7 – 16. Citations containing “Appx” refer to Mr. McCray’s appendix in support of his response to the motion to dismiss, filed simultaneously with his response. A table of contents identifying the documents in that appendix, and their source, is found at Appx 1. Citations to “R. at” in that table of contents refer to the Record Before the Agency served on September 28, 2020.

<sup>7</sup> Appx 13.

substances actually used.”<sup>8</sup> Further, the BVA acknowledged that Mr. McCray had never been afforded a medical exam with respect to his claim of direct service connection of lung cancer based on actual exposure to herbicides, including Agent Orange.<sup>9</sup> The BVA relied on what it perceived to be the absence of “competent or credible lay or medical evidence to support a relationship between his lung cancer and service,” in finding that “a VA examination is not necessary for final disposition of the claim.”<sup>10</sup>

In October 2019, Mr. McCray filed a motion asking the BVA to reconsider this decision.<sup>11</sup> The BVA denied the motion for reconsideration in March 2020.<sup>12</sup>

Mr. McCray appealed to the Court on July 29, 2020.<sup>13</sup> The Court issued its docketing notice on July 30, 2020.<sup>14</sup> On August 31, 2020, the Secretary filed a copy of the July 2014 BVA decision, and the March 2020 BVA denial of the motion for reconsideration.<sup>15</sup>

The Court’s rules require the Secretary to move to dismiss appeals on the grounds of timeliness within 45 days of the date the Secretary files with the Court the BVA decisions on appeal.<sup>16</sup> In this case, that date was October 15, 2020.

The Secretary filed his motion to dismiss 4 months after his deadline, on February 15, 2021. He did not seek an extension. He did not seek leave of Court to file the motion to dismiss out of time. He did not mention Rule 4(a)(3)(A), discuss his obligations under the

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<sup>8</sup> *Id.*

<sup>9</sup> Appx 10.

<sup>10</sup> Appx 11.

<sup>11</sup> Appx 17 – 23.

<sup>12</sup> Appx 3 – 6.

<sup>13</sup> Appx 24.

<sup>14</sup> Appx 25.

<sup>15</sup> Appx 2 – 16; *accord* U.S. Vet. App. R. 4(c).

<sup>16</sup> U.S. VET. APP. R. 4(a)(3)(A).

rule, or claim any exception to it. Mr. McCray opposes the motion to dismiss.

**2. Mr. McCray’s July 29, 2020, appeal of the July 2014 BVA decision and the March 2020 denial of reconsideration “will be treated as timely.”**

**2.1. The Secretary has waived any challenge to the timeliness of Mr. McCray’s appeal of the July 2, 2014, BVA decision.**

Generally, a party has 120 days from the date of a BVA decision to file a Notice of Appeal with the Court.<sup>17</sup> In 2011, the Supreme Court held that the 120-day appeal period is not jurisdictional, but instead a claims processing rule.<sup>18</sup>

In light of the Supreme Court’s decision in *Henderson*, the Court issued an order that “all parties are hereby notified that for all appeals filed beginning on December 6, 2017, the Court will act on matters of timeliness of an appeal only if the Secretary of Veterans Affairs (Secretary) raises the issue in a motion to dismiss.”<sup>19</sup> In January 2019, the Court sought to effectuate this change by proposing to revise its rules.<sup>20</sup> After public comment and the views of the Court’s Rules Advisory Committee, the Court adopted specific changes to Rule 4, quoted in relevant part:

“If the Secretary does not within 45 days after the filing date of the Board decision (pursuant to Rule 4(c)) file a motion to dismiss an appeal for failure to file a timely Notice of Appeal within the 120-day appeal period, the Notice of Appeal will be treated as timely regardless of the date it was received.”<sup>21</sup>

The Court has consistently applied Rule 4(a)(3)(A). Even when there was a 15-year gap between a BVA decision and an appeal and the “circumstances behind the delay [we]re

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<sup>17</sup> U.S. VET. APP. 4(a)(1).

<sup>18</sup> See *Henderson ex re. Henderson v. Shinseki*, 562 U.S. 428 (2011).

<sup>19</sup> U.S. VET. APP. Misc. Order 15-17 (December 20, 2017).

<sup>20</sup> U.S. VET. APP. Misc. No. 04-19 (January 29, 2019).

<sup>21</sup> U.S. VET. APP. R. 4(a)(3)(A).

unclear,” the Court treated the appeal as timely and addressed the merits of the appeal.<sup>22</sup> Mr. McCray has been unable to find any case where the Court issued an exception to Rule 4(a)(3)(A).<sup>23</sup> Mr. McCray does not cite to these cases for their precedential value, but to demonstrate that there is no precedent allowing an exception to Rule 4(a)(3)(A).<sup>24</sup>

On August 31, 2020, the Secretary filed copies of the BVA decisions under appeal: the March 31, 2020, BVA decision denying the motion for reconsideration, and the July 2, 2014, BVA decision on the merits.<sup>25</sup>

The Secretary was required to file a motion to dismiss the appeal for failure to file a timely notice of appeal within 45 days after he filed the BVA decision which, in this case, was Thursday, October 15, 2020.<sup>26</sup> The Secretary filed his Motion to Dismiss 4 months after his deadline, on February 15, 2021.<sup>27</sup> He argued that “[b]ecause the NOA was filed after the 120-day statutory appeal period, the Court should dismiss the appeal.”<sup>28</sup> He added that the Court lacked jurisdiction over the March 2020 denial of the October 2019 reconsideration motion because “the Court lacks jurisdiction over the underlying July 2014 BVA decision.”<sup>29</sup>

The Secretary did not seek any extension to his deadline to file the motion to dismiss. He did not seek leave of Court to file his Motion to Dismiss out of time. His Motion to Dismiss does not mention the Secretary’s obligations under the Court’s Rule 4(a)(3)(A). And

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<sup>22</sup> See *Pinckney v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 1004, at \*1 (May 29, 2020).

<sup>23</sup> See e.g., *Jackson v. McDonough*, 2021 U.S. App. Vet. Claims LEXIS 413 (March 11, 2021); *Shandley v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 2056 (November 6, 2020).

<sup>24</sup> U.S. VET. APP. R. 30(a).

<sup>25</sup> Appx 2 – 16; accord U.S. VET. APP. R. 4(c).

<sup>26</sup> U.S. VET. APP. R. 4(a)(3)(A).

<sup>27</sup> *Secretary’s Motion to Dismiss* (February 15, 2021).

<sup>28</sup> *Id.*, page 2.

<sup>29</sup> *Id.*, page 6.

he does not ask the Court to consider any exception Rule 4(a)(3)(A).

Because the Secretary: i) did not request an extension of time to file his motion to dismiss; ii) did not timely file a motion to dismiss; iii) did not seek leave of Court to file a motion to dismiss out of time; iv) did not mention or discuss his obligation to follow each of those steps; v) did not provide any reason why he did not comply with Rule 4(a)(3)(A); and, vi) did not ask the Court to consider any exception to Rule 4(a)(3)(A), the Court should treat the appeal of the July 2014 BVA decision “as timely regardless of the date it was received.”<sup>30</sup>

**2.2. Because the Court has jurisdiction over the July 2, 2014, BVA decision, the Court has jurisdiction to review the BVA’s March 2020 denial of reconsideration.**

There is no deadline within which a veteran can seek reconsideration of a BVA decision.<sup>31</sup> The BVA can take one of two actions in response to a motion for reconsideration of a BVA decision.<sup>32</sup> First, the BVA may allow the motion and send the matter to a reconsideration panel.<sup>33</sup> Second, the BVA may disallow the motion.<sup>34</sup> In the second scenario, the BVA’s denial constitutes the final disposition of the motion.<sup>35</sup>

The Court has jurisdiction to review the BVA’s denial of a reconsideration motion when it has jurisdiction to review the BVA decision underlying the motion.<sup>36</sup> The Court’s jurisdiction on the BVA decision underlying the reconsideration motion is “premised on and

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<sup>30</sup> U.S. VET. APP. R. 4(a)(3)(A).

<sup>31</sup> See 38 C.F.R. §20.1001 (2019).

<sup>32</sup> See 38 C.F.R. §20.1002(c).

<sup>33</sup> 38 C.F.R. §20.1002(c)(2).

<sup>34</sup> 38 C.F.R. §20.1002(c)(1).

<sup>35</sup> *Id.*

<sup>36</sup> See *Palomer v. McDonald*, 27 Vet. App. 245 (2015).

defined by the Board's decision concerning the matter being appealed."<sup>37</sup>

Here, the Court has jurisdiction over the July 2, 2014, BVA decision because it is a final decision.<sup>38</sup> Neither party disputes that the July 2014 BVA decision is a final decision denying service connection for lung cancer, claimed as a result of exposure to herbicides, including Agent Orange. Mr. McCray intends to challenge that decision on appeal, including challenging the BVA's conclusion that he was not actually exposed to herbicides, including Agent Orange, while stationed in Laos.<sup>39</sup> The BVA's conclusion that Mr. McCray was not actually exposed to herbicides rested on the BVA's rejection of Mr. McCray's lay evidence that he had observed the spraying of herbicides in Laos, and favorable lay evidence that herbicides were sprayed in Laos.<sup>40</sup> The BVA wrote, specifically, that "[w]hile the Veteran may have observed spraying or its effects, it is unclear how he could have knowledge of the substances actually used."<sup>41</sup> The Court has recently noted its disdain for this BVA tactic, noting that it is a "particularly odious tactic – common in Board decisions addressing herbicide exposure – of suggesting that the appellant must have been able to either recognize Agent Orange or otherwise definitively show that he was in an area immediately after its application to establish herbicide exposure."<sup>42</sup> Because the July 2014 BVA decision is a final decision on a claim to service connect lung cancer, because Mr. McCray intends to appeal the findings of fact and conclusions of law in that decision, and because the Secretary has

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<sup>37</sup> *Ledford v. West*, 136 F.3d 776 (Fed. Cir. 1998).

<sup>38</sup> 38 U.S.C. §7252(a).

<sup>39</sup> See Appx 13.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Gabrielli v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 2314, at \*8 (Dec. 23, 2020).

waived his challenge to the timeliness of the appeal of that decision, the Court has jurisdiction to review the July 2014 BVA decision.

Because the Court has jurisdiction to review the July 2014 BVA decision, it has jurisdiction to review the BVA's March 2020 denial of the reconsideration motion.<sup>43</sup> The Court typically limits the scope of its review of BVA reconsideration denials to cases in which an appellant alleges either new evidence or changed circumstance.<sup>44</sup> Mr. McCray meets this standard. He submitted, after his July 2014 decision, at least three new pieces of evidence. First, he submitted an article from the VA's own website titled, "Information from Department of Defense (DoD) on Herbicide Tests and Storage outside Vietnam."<sup>45</sup> He submitted a copy of "The Air Force and Herbicides in Southeast Asia, 1961 – 1971" from the Office of Air Force History.<sup>46</sup> That report shows that Operation Ranch Hand aircraft conducted herbicide operations in Laos consistently from 1965 through 1969, spraying 419,850 gallons of Agents Blue, Orange and White over Laos.<sup>47</sup> He submitted the Air Force Historical Research Agency report "Agent Orange at Udorn Royal Thai Air Force Base, Thailand, December 1968 through February 1969."<sup>48</sup> This report shows that Operation Ranch Hand missions spraying herbicides in Laos were based partly out of Thailand, and that herbicide missions in Laos likely extended past 1969.<sup>49</sup> The scope of the Court's review of the denial of the reconsideration motion, and whether it will exercise its discretion to

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<sup>43</sup> See e.g., *Engelke v. Gober*, 10 Vet. App. 386 (1997).

<sup>44</sup> See *Owens v. Brown*, 7 Vet. App. 429, 433 (1995).

<sup>45</sup> Appx 20 – 21.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Appx 20 – 21.

review that denial, is a matter best addressed in briefing on the merits, should the parties be unable to resolve the dispute over the July 2014 decision with a joint motion to remand.

Because the July 2014 BVA decision is a final decision on Mr. McCray's claim to service connect his lung cancer due to herbicide exposure, including Agent Orange, which the Court has jurisdiction to review, the Court also has jurisdiction to review the BVA's March 2020 denial of the reconsideration motion.

**2.3. The Secretary fails to develop an argument why a February 2018 claim to reopen deprives this Court of jurisdiction to review a July 2014 BVA decision.**

The Secretary's motion notes that before he filed the October 2019 motion for reconsideration, Mr. McCray "filed a request to reopen this claim in February 2018."<sup>50</sup> The Secretary argues that Mr. McCray's appeal of the denial of that claim to reopen was pending at the BVA when he filed his motion for reconsideration with the BVA in October 2019.<sup>51</sup>

The Secretary does not explain the relevance of this timeline or develop any argument that the existence of a separate claim to reopen the matter denied in the July 2014 BVA decision would somehow impact the Court's jurisdiction to review the July 2014 BVA decision. The Secretary waives arguments he does not develop.<sup>52</sup>

Nevertheless, the February 2018 claim to reopen and the instant appeal seek distinct relief. Applying the current law, if the February 2018 claim to reopen were granted, Mr. McCray would only be entitled to an effective date of the date of the claim to reopen,

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<sup>50</sup> *Secretary's Motion to Dismiss*, page 6.

<sup>51</sup> *Id.*, page 6.

<sup>52</sup> *MacWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992) (internal quotation marks omitted); *see also Brewer v. West*, 11 Vet. App. 228 (1998); *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006); *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

February 2018.<sup>53</sup> Should Mr. McCray prevail before this Court on his appeal of the July 2014 BVA decision, he would be entitled to an effective date of at least April or May 2009.<sup>54</sup>

Because the February 2018 claim to reopen and the current appeal of the July 2014 BVA decision would yield different relief, and because the Secretary has failed to develop any argument why the February 2018 claim to reopen affects this Court's jurisdiction over an appeal of the July 2015 BVA decision, the Court need not address the Secretary's point.

### 3. Relief Sought.

Mr. McCray respectfully requests the Court deny the Motion to Dismiss, treat the July 29, 2020, appeal of the July 2, 2014 BVA decision as timely, and direct the Clerk to schedule a settlement conference pursuant to Rule 33.

Respectfully submitted,  
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<sup>53</sup> 38 C.F.R. §3.400®; *but see*, *Constantine v. McDonough*, No. 18-7044 (pending panel decision)(generally, whether *Nehmer* consent decree extends to veterans exposed to herbicides outside of the RVN).

<sup>54</sup> *Compare* Appx at 2; 8 – 13 (April 2009); 26 (May 2009).

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the United States of America that on April 15, 2021, I caused this motion to be served on the Secretary by and through the Court's E-Filing system:

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