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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0277

MARY STERLING, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Chief Judge*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

On January 21, 2016, Mary Sterling, who was then self-represented, filed a Notice of Appeal from a September 22, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to compensation benefits for the cause of her veteran-husband's death.

Because the 120-day period to appeal the September 2015 Board decision ended on January 20, 2016, *see* 38 U.S.C. § 7266(a), on February 11, 2016, the Court ordered Mrs. Sterling to show cause why her appeal should not be dismissed due to the untimely filing. Mrs. Sterling filed a response on February 22, 2016, asserting that the Board decision was mailed to the wrong address and returned to the Board as undeliverable. She stated that she received the Board decision on November 20, 2015, after it was remailed to the correct address. She noted that she filed her Notice of Appeal less than 60 days later.

The Secretary filed a preliminary record on May 4, 2016, and argued that, although the September 2015 Board decision was returned to the Board as undeliverable and later remailed to a different address, Mrs. Sterling had not rebutted the presumption of regularity because there was no evidence of any other addresses to which the decision could have been sent at the time of the decision.

In the meantime, on March 7, 2016, attorney Michael R. Viterna filed an appearance on behalf of Mrs. Sterling. On May 4, 2016, attorney Ashley C. Gautreau filed an appearance on behalf of Mrs. Sterling.

On June 14, 2016, the Court issued an order permitting Mrs. Sterling, through counsel, to file a substitute response to the show cause order. On July 11, 2016, Mrs. Sterling filed her substitute

response, explaining that she was homeless for a period of time and also lived with each of her two daughters at separate addresses periodically. Mrs. Sterling argues that, because it is undisputed that the September 2015 Board decision was returned as undeliverable, and because she filed her Notice of Appeal within 120 days of the date on which the Board *remailed* its decision, her Notice of Appeal is timely and her appeal should not be dismissed.

The Board mailed its September 2015 decision to Mrs. Sterling at 623 Dixy Drive, Lake Charles, Louisiana, 70601. In October 2015, Mrs. Sterling contacted VA to advise that she had not received any correspondence related to her claim. *See* Secretary's Response at Exhibit F. At that time, she confirmed the Dixy Drive address. *See id.*

According to a declaration by Barbara C. Morton, Director of the Office of Management, Planning, and Analysis of the Board of Veterans' Appeals, attached to the Secretary's response, Mrs. Sterling's address was changed to 2109 4th Street, Lake Charles, Louisiana, 70601, on November 17, 2015. The Board decision was remailed to Mrs. Sterling at that address the following day.

In a declaration attached to her July 11, 2016, response, Mrs. Sterling states that, in September 2015, she resided with her daughter at the Dixy Drive address. Appellant's Substitute Response at 3. Although Mrs. Sterling asserts that she did not receive the September 2015 Board decision until after it was remailed to her at the Fourth Street address in November 2015, nonreceipt alone is not sufficient to rebut the presumption of regularity in VA's mailing practices. *Clark v. Nicholson*, 21 Vet.App. 130, 133 (2007); *see Sthele v. Principi*, 19 Vet.App. 11, 16 (2004) ("[T]here is a presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties.'" (quoting *Ashley v. Derwinski*, 2 Vet.App. 307, 308-09 (1992))).

"[T]o rebut the presumption [of regularity] under current caselaw[,] the appellant must establish both that the mailing was returned as undeliverable and that there were other possible and plausible addresses available to the Secretary at the time of the [Board] decision." *Davis v. Principi*, 17 Vet.App. 29, 37 (2003). Here, although the Secretary concedes that the September 2015 Board decision was returned to VA as undeliverable, Mrs. Sterling essentially concedes that the Board mailed its decision to the correct address—she stated in her substitute response that she resided at the Dixy Drive address in September 2015—and she offers no evidence that there was any other "possible and plausible" address to which the Board decision should have been mailed in September 2015. *Id.*

In light of the above discussion, the Court concludes that Mrs. Sterling's Notice of Appeal was untimely, and her appeal must be dismissed. *See* 38 U.S.C. § 7266(a).

The Court acknowledges Mrs. Sterling's assertion that she was homeless for "several years" and that homelessness is an extraordinary circumstance that may warrant equitable tolling of the 120-day period to file a Notice of Appeal with the Court. *See Checo v. Shinseki*, 748 F.3d 1373 (Fed. Cir. 2014). Mrs. Sterling, however, does not assert that she was homeless at the time the September 2015 Board decision was mailed, nor does she allege that her homelessness was the cause of the untimely

filing of her Notice of Appeal. Under these circumstances, the Court concludes that it need not consider whether equitable tolling is warranted.

Upon consideration of the foregoing, it is

ORDERED that this appeal is DISMISSED.

DATED: August 17, 2016

BY THE COURT:



/s/ Lawrence B. Hagel
LAWRENCE B. HAGEL
Chief Judge

Copies to:

Ashley C. Gautreau, Esq.

VA General Counsel (027)