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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0553

JAMES F. MILLS II, APPELLANT,

V.

ROBERT L. WILKIE,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, James F. Mills II, through counsel appeals a February 2, 2017, Board of Veterans' Appeals (Board) decision that determined that documents received on February 2, 2010, did not constitute a timely or adequate Substantive Appeal and therefore denied the appellant's claim for benefits for a back disability. Record (R.) at 2-12. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will reverse the Board's decision and remand this matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from May 1975 to July 1979 and from May 1984 to January 1986. R. at 155-56.

In October 2007, the appellant filed a claim for benefits for a low back disability. R. at 1473-75. On that document, the appellant listed his address as Ross Road in Lexington, Ohio. R. at 1473. Later that month, a VA regional office (RO) sent the appellant a letter acknowledging

receipt of his claim to an apartment on Main Street in Bellville, Ohio.[1] R. at 1410. That letter was returned to VA as undeliverable. R. at 1431. In January 2008, VA resent the letter to the appellant at the correct Ross Road address. R. at 1354.

In April 2008, the RO sent its rating decision denying the appellant's claim to the Main Street address. *See* R. at 1320. According to handwritten notes on a copy of the decision in the record of proceedings, the decision was returned to VA as undeliverable. *See* R. at 1320, 1321. In May 2008, VA re-sent the decision to the Ross Road address, which the handwritten notes indicate was found in VA's Compensation and Pension Record Interchange. R. at 1314; *see* R. at 1320, 1321. The RO found:

> Service connection for a back injury is denied because[,] although there is a record of treatment in service for your lower back[,] no permanent residual or chronic disability subject to service connection is shown by the service medical records or demonstrated by evidence following service until 20 years after service when you had an injury at work.

R. at 1333. In January 2009, the appellant filed a Notice of Disagreement (NOD) with the April 2008 decision. R. at 1303. His NOD listed his address as Ross Road. *Id.*

On January 5, 2010, the RO mailed a Statement of the Case (SOC) to the appellant at the Main Street address. R. at 1180. The letter accompanying the SOC advised the appellant that he had to file an appeal "within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action you have appealed." *Id.* The letter indicates that VA Form 9, Appeal to Board of Veterans' Appeals, was enclosed. R. at 1182. The SOC was returned to VA as undeliverable on January 16, 2010. R. at 1175.

On January 22, 2010, the assistant director of the Cleveland, Ohio, RO sent a letter to the appellant at the Ross Road address, stating:

> We apologize for the delay in the processing of your NOD for service-connection of a back injury and bilateral lumbar radiculopathy. Our records indicate that we received your NOD on January 6, 2009. Our appeals section reviewed your NOD and sent you a[n SOC] on January 5, 2010. If you wish to continue your NOD, we must receive a signed VA Form 9, *Substantive Appeal To Board Of Veterans' Appeals*, within 60 days from the date of our SOC or within one year from the date of the letter which notified you of the action you are appealing, whichever is later.

R. at 1178. No enclosures were included. *See* R. at 1179.

[1] In his brief, the appellant states that this was his former address. Appellant's Brief (Br.) at 2.

On February 2, 2010, VA received a VA Form 21-4138, Statement in Support of Claim, from the appellant, who wrote:

> I am writing this statement i[n] regards to my claim for my back. I am submitting a letter from my VA doctor from the Chalmers P[.] Wiley VA Ambulatory Center in Columbus, Ohio[,] in support of my claim. Please also continue to receive my records from the VA[;] they are doing extensive tests and procedures in regards to my back.

R. at 1168. The appellant attached a note from his VA neurologist, who opined that it is at least as likely as not that an in-service back injury "initiated [the appellant's] problems with low back pain and predisposed him to increased lower back sensitivity and to his chronic back problems." R. at 1170. The appellant also attached a letter from his former employer, who stated that the appellant had not sustained a back injury on the job that required him to file for worker's compensation benefits. R. at 1172.

On February 8, 2010, the RO re-sent its SOC, still dated January 5, 2010, *see* R. at 1183, to the appellant at the Ross Road address, R. at 1176. The cover letter to the SOC advised the appellant to file a Substantive Appeal within 60 days of the date of the letter.[2] *Id.*

On February 25, 2010, the RO issued a Supplemental Statement of the Case (SSOC), which the RO stated was "an update" to the January 5, 2010, SOC. R. at 1161. The SSOC indicates that it was issued in response to the evidence that VA received from the appellant on February 2, 2010. R. at 1164. The cover letter to the SSOC advised the appellant how to continue his appeal and directed him to follow the instructions provided. R. at 1161. The RO explained that a "'formal appeal'" means "a completed and signed VA Form 9" or "the same information [from a Form 9] in a letter." *Id.* The first set of instructions—to be followed if a claimant had already filed a "formal appeal"—advised the appellant that a response to the SSOC was "optional," but that, if he wished, he could write to VA and explain his objections to the SSOC. *Id.* The second set of instructions—to be followed if a claimant had not yet filed a "formal appeal"—instructed the appellant to complete a formal appeal as "explained above" and return it to VA as soon as possible. *Id.* VA directed the appellant to "read the instructions that come with the VA Form 9 carefully, particularly the information about how long you have to file the form," R. at 1161-63, and stated that he could lose his right to appeal if he did not timely file a formal appeal, R. at 1163.

[2] The typewritten date on this cover letter is January 5, 2009. R. at 1176. In handwriting, "09" is struckthrough and replaced with "10." *Id.* The parties do not dispute the date of the SOC.

On April 30, 2010, VA received the appellant's VA Form 9, as well as a statement in support of his claim. R. at 1142-47. The appellant indicated that he was appealing "all" the issues included in the SSOC and offered arguments in support of his claim. *Id.*

In September 2010, the RO sent the appellant a letter to the Ross Road address advising him that his Substantive Appeal was untimely because it was received after April 8, 2010, which VA stated was 60 days after February 8, 2010, the date of the reissued SOC.[3] R. at 1115. The RO advised the appellant that his claim had become final by virtue of his failure to file a timely formal appeal. *Id.* The appellant filed an NOD with that determination, R. at 1091-96, and ultimately appealed to the Board, R. at 891-94.

In March 2015, the appellant testified at a hearing before a Board member. R. at 122-39. At the hearing, the appellant's nonattorney representative argued that the appellant's February 2, 2010, submission—the statement in support of claim, VA neurologist's opinion, and supervisor's statement—showed "a clear attempt to continue the appeals process." R. at 127.

In May 2015, the Board issued a decision finding that the appellant's April 30, 2010, VA Form 9[4] was not timely filed and denying his claim as a result. R. at 111-18. The appellant appealed that decision to the Court which, in July 2016, issued a memorandum decision, finding that the Board failed to consider whether the appellant's February 2, 2010, filing could be considered a Substantive Appeal.[5] R. at 78-84.

In February 2017, the Board issued the decision on appeal, finding that the February 2010 filing could not constitute a Substantive Appeal "because (1) it was not filed within one year of the Apri1 9, 2008, rating decision or within 60 days following issuance of the February 8, 2010, SOC[;] and (2) it did not satisfy the regulatory requirements for an appeal." R. at 8 (emphasis omitted). This appeal followed.

[3] Sixty days from February 8, 2010, was April 9, 2010.

[4] The Board in May 2015 stated that the appellant's Form 9 was received on April 28, 2010. R. at 111. The Form 9, however, is date stamped as received on April 30, 2010. R. at 1143.

[5] The appellant did not challenge the Board's determination that his April 30, 2010, Substantive Appeal was untimely, and the Court dismissed any appeal of that matter. R. at 80.

II. ANALYSIS

On appeal, the appellant argues that the Board erred in finding both that his February 2010 filing could not be considered a timely Substantive Appeal because the appellant had not yet received the reissued SOC sent to the appellant's correct address and that the substance of his February 2010 filing did not constitute a Substantive Appeal. Appellant's Br. at 7. More specifically, the appellant asserts that there is no requirement that a claimant receive an SOC before filing a Substantive Appeal, only that an SOC be issued, *id.* at 9-15, and that there is no requirement that a Substantive Appeal express an intent to appeal or set out specific arguments, *id.* at 15-18. The appellant contends that his February 2010 filing was intended as a Substantive Appeal and that it meets both timeliness and content requirements. *Id.* at 18-19.

The Secretary argues that the Board properly determined that the substance of the appellant's February 2010 filing could not be construed as a Substantive Appeal. Secretary's Br. at 6-13. Consequently, the Secretary posits, the appellant's "arguments regarding timeliness are superfluous." *Id.* at 13. The Secretary urges the Court to affirm the Board decision.

A. Content of the Substantive Appeal

"Appellate review will be initiated by a[n NOD] and completed by a [S]ubstantive [A]ppeal after a[n SOC] is furnished." 38 U.S.C. § 7105(a). As the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has explained:

> The [VA] appeal process requires a claimant to make two filings in response to a decision by a[n RO] with which the claimant disagrees. First, the claimant must file a[n NOD], which need only express a desire for review of the [RO's] decision. In response, the [RO] prepares a[n SOC] explaining its decision on the claim. To trigger review by the Board, the claimant is required to file an appeal, identifying the error or errors committed by the [RO].

Rivera v. Shinseki, 654 F.3d 1377, 1380 (Fed. Cir. 2011) (quotation and citation omitted); *see* 38 U.S.C. § 7105(a), (d)(3); 38 C.F.R. § 20.201 (2009); 38 C.F.R. § 20.302(b)(1) (2017). [6]

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[6] The Federal Circuit cited the regulation pertaining to NODs that was in effect in 1980, which provided:

> A written communication from a claimant or his representative expressing dissatisfaction with an adjudicative determination of an agency of original jurisdiction will constitute a[n NOD]. The notice should be in terms which can be reasonably construed as evidencing a desire for review of that determination. It need not be couched in specific language. Specific allegations of error of fact or law are not required.

38 C.F.R. § 19.113 (1980). That regulation was renumbered § 20.201 in 1992 and provided, as it did in 2010:

> A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire

Section 7105 provides:

> Copies of the [SOC] . . . will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of [60] days from the date the [SOC] is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. *The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the [SOC]. The benefits sought on appeal must be clearly identified.* The agency of original jurisdiction may close the case for failure to respond after receipt of the [SOC], but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

38 U.S.C. § 7105(d)(3) (emphasis added). The Federal Circuit has stated that "[s]ection 7105(d)(3) does not prescribe a particular format for the veteran's appeal or a particular degree of specificity that must be provided." *Rivera*, 654 F.3d at 1381. VA's implementing regulation, however, provides:

> A Substantive Appeal consists of a properly completed VA Form 9, "Appeal to Board of Veterans' Appeals," or correspondence containing the necessary information. If the [SOC] and any prior [SSOCs] addressed several issues, the Substantive Appeal must either indicate that the appeal is being perfected as to all of those issues or must specifically identify the issues appealed. *The Substantive Appeal should set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed. To the extent feasible, the argument should be related to specific items in the* [*SOC*] *and any prior* [*SSOCs*]. The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal, but the Board may dismiss any appeal which fails to allege specific error of fact or law in the determination, or determinations, being appealed. The Board will not presume that an appellant agrees with any statement of fact contained in a[n SOC] or a[n SSOC] which is not specifically contested. Proper completion and filing of a Substantive Appeal are the last actions the appellant needs to take to perfect an appeal.

38 C.F.R. § 20.202 (2017) (emphasis added).

> to contest the result will constitute a[n NOD]. While special wording is not required, the [NOD] must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review. If the agency of original jurisdiction gave notice that adjudicative determinations were made on several issues at the same time, the specific determinations with which the claimant disagrees must be identified. For example, if service connection was denied for two disabilities and the claimant wishes to appeal the denial of service connection with respect to only one of the disabilities, the [NOD] must make that clear.

38 C.F.R. § 20.201 (1992); *see* 57 Fed. Reg. 4088-01 (Feb. 3, 1992). Section 20.201 was amended in September 2014 and former § 20.201 was renumbered as § 20.201(b) with a few nonsubstantive changes. *Compare* 38 C.F.R. § 20.201 (2009), *with* 38 C.F.R. § 20.201(b) (2017).

Whether a document constitutes a Substantive Appeal is a matter that the Court reviews de novo. *Gibson v. Peake*, 22 Vet.App. 11, 15 (2007). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1991).

Here, the Board found that "the documents that the [appellant] submitted on February 2, 2010, did not meet the requirements of a [S]ubstantive [A]ppeal." R. at 7. The Board explained:

> [The appellant] did not submit a VA Form 9, and the accompanying correspondence did not indicate in any way that [he] was intending to appeal the denial. Instead, it is clear from the [appellant's] statement that his purpose was to submit a medical nexus statement in support of his claim and to request that VA continue to collect his VA treatment records. These documents provided no discussion regarding the appeal of an issue. Under 38 C.F.R. § 20.202, "a [S]ubstantive [A]ppeal should set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination or determinations being appealed." Even reading the [appellant's] statement liberally, he simply stated he was submitting a medical opinion in support of his claim and he asked that the RO continue to update his VA medical records. There were absolutely no statements as to errors of fact or law the RO had made in denying his claim, or in any way suggesting his intent to appeal.
>
> While there is caselaw that a premature [S]ubstantive [A]ppeal can be accepted in certain situations, it must still otherwise meet the requirements for being an adequate appeal. *See, e.g., Gibson*[], 22 Vet.App. [at] 17[]. Since that requirement has not been met here, the Board declines to find the February 2010 documents the equivalent of a premature appeal.

R. at 7-8. The Board also found that the submission of additional evidence, such as the appellant's VA neurologist's statement, "does not extend the time limit for completing an appeal," nor does it "equal filing a [S]ubstantive [A]ppeal." R. at 8 (emphasis omitted) (citing 38 C.F.R. § 20.304 (2017) ("[T]he filing of additional evidence after receipt of notice of an adverse determination does not extend the time limit for initiating or completing an appeal from that determination.")).

The appellant first contends that the Board erred in requiring that his filing evidence an "intent" to appeal the April 2008 RO decision. Appellant's Br. at 15-16. In support of his argument, the appellant cites *Rivera* for the proposition that "all that is required is that the veteran make clear that he disagrees with the [RO's] conclusion." 654 F.3d at 1381; Appellant's Br. at 16. This argument is unpersuasive.

This portion of the Federal Circuit's decision reveals that *Rivera* dealt with a decision in which "the [RO] decided a single issue," *Rivera*, 654 F.3d at 1381, prompting the Federal Circuit to hold that, where "the sole issue on appeal is the factual question of the sufficiency of the veteran's evidence to reopen his claim, all that is required is that the veteran make clear that he disagrees with the [RO's] conclusion that he failed to offer new and material evidence," *id.* In other words, where there is only one claim at issue, it is reasonable to expect the Board to understand that a claimant's expression of disagreement relates to that claim. In this case, however, the April 2008 RO decision and January 2010 SOC both included multiple claims. *See* R. at 1183 (January 2010 SOC addressing two issues), 1331-33 (April 2008 RO decision addressing six issues). Accordingly, this portion of *Rivera* is not applicable to the appellant's case.

The Court notes, however, that the appellant did specify in his February 2010 filing that he was referring to his claim for benefits for a back disability. *See* R. at 1168. Accordingly, the Court turns to the Board's finding that the appellant did not specify errors of fact or law in the RO decision and the appellant's argument that he sufficiently identified the errors. Appellant's Br. at 18-19.

Although section 7105, § 20.202 (as the Board found, R. at 7), and *Rivera* all require that a claimant identify the errors made by the RO, "this Court has long taken the position that VA must not confine its review of a document from a pro se claimant to the four corners of the document itself." *Evans v. Shinseki*, 25 Vet.App. 7, 14 (2011) (citing *Douglas v. Derwinski*, 2 Vet.App. 435, 439 (1992) (en banc)); *see Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) ("[W]ith respect to all pro se pleadings, [ ] VA [must] give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001))). Moreover, "there is nothing magical about the statements actually made in a [Substantive Appeal], given the VA's non-adversarial process." *EF v. Derwinski*, 1 Vet.App. 324, 326 (1991); *see* 38 C.F.R. § 20.202 ("The Board will construe [a claimant's] arguments in a liberal manner for purposes of determining whether they raise issues on appeal."). As the Court in *EF* found, "[t]he VA's statutory 'duty to assist' must extend [VA's] liberal reading [of a pro se claimant's filings] to include issues raised in all documents or oral testimony submitted prior to the B[oard] decision." *Id.* (finding that an issue for appeal to the Board was raised in a psychiatrist's statement submitted with the appellant's NOD).

Here, the RO denied the appellant's claim for benefits for a back disability because it found no relationship between the appellant's current back disability and his in-service treatment for back pain and because he suffered an intervening back injury at work in 2000. R. at 1333. The January 2010 SOC rested on the same basis. R. at 1191-92. In the February 2010 filing, submitted after the appellant had been informed that VA had issued an SOC on January 5, 2010, and that he had 60 days to file an appeal, R. at 1178, the appellant not only plainly referred to his back disability but also submitted two pieces of evidence directly responsive to the reasons the RO denied his claim: a favorable nexus opinion from his VA neurologist and a statement from his former employer stating that he had not suffered a back injury at work, R. at 1168-72. Given that VA is required to construe the submissions of pro se claimants liberally and is not confined by the four corners of the VA Form 21-4138 on which the appellant wrote his statement, the Court concludes, on de novo review, that the appellant's February 2010 filing was sufficient to put the Board on notice of the specific errors of fact in the RO decision being appealed. *See Szemraj*, 357 F.3d at 1373; *Evans*, 25 Vet.App. at 14; *Gibson*, 22 Vet.App. at 15; *EF*, 1 Vet.App. at 326; 38 C.F.R. § 20.202.

Moreover, the Court notes that the January 22, 2010, letter from the assistant director of the RO advising the appellant that VA had issued an SOC and that he had 60 days to perfect his appeal did not contain a copy of VA Form 9. *See* R. at 1178-79. Because of VA's error in mailing the SOC—despite having known the appellant's correct address, *see* R. at 1473—it is understandable that the appellant did not file his Substantive Appeal on that form.

In light of this discussion, the Court will reverse the Board's determination that the appellant's February 2010 filing did not meet the content requirements for a Substantive Appeal. *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) ("[R]eversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision." (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996))). The Court now turns to the question of the timeliness of the February 2010 filing.

B. Timeliness

The appellant asserts that the Board "misinterpret[ed] and misapplie[d] applicable caselaw and confuse[d] the issuance of an SOC with receipt of the same." Appellant's Br. at 9 (emphasis omitted). He further contends that, to the extent that the February 2010 filing was premature, prematurity does not render it invalid as a Substantive Appeal. *Id.*

Ordinarily, whether a Substantive Appeal is timely is a factual question that the Court reviews under the "clearly erroneous" standard of review. *See Mason v. Brown*, 8 Vet.App. 44, 56 (1995) (finding that the Board's determination that the appellant had not "completed a timely appeal" from an RO decision was not clearly erroneous). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co*., 333 U.S. 364, 395 (1948); *see Gilbert*, 1 Vet.App. at 52. Here, however, the Court concludes that the Board erred as a matter of law in finding that the appellant's Substantive Appeal was untimely because it was filed before he received the SOC. *See Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc) (holding that the Court reviews the Board's interpretation of the law de novo).

The Board found that the appellant's Substantive Appeal was due April 9, 2010, 60 days from the date that the SOC was reissued to the appellant's correct address. R. at 6. The Board stated that the appellant had been "accorded the most time possible under the regulations to file an appeal" in light of the confusion surrounding the issuance of the SOC due to VA's mailing errors. R. at 9. The Board further explained:

> [T]he February 2, 2010, submission cannot constitute a [S]ubstantive [A]ppeal. The Board acknowledges that the January 22, 2010, letter noting that the [appellant] had been issued a[n] SOC on January 5, 2010, may have been confusing. However, the fact remains that, at the time of the February 2, 2010, submission, the [appellant] had not yet received a[n] SOC. It is not possible for him to appeal an issue for which he had not been properly issued a[n] SOC. Since the initial SOC was returned due to use of an old address, it is clear he did not receive it, and that SOC cannot be considered as properly issued. The regulations require that an appeal be submitted ***after*** issuance of a[n] SOC. *See* 38 C.F.R. § 20.200. Since the [appellant] did not receive a proper SOC here until February 8, 2010, any documents received beforehand simply could not be an appeal. The February 8, 2010[,] SOC cover letter explicitly put the [appellant] on notice that filing a [S]ubstantive [A]ppeal was necessary to perfect his appeal to the Board.

R. at 7.[7] This conclusion reflects a misapplication of relevant law. *See Butts*, 5 Vet.App. at 534.

The Court has already answered the question of whether an appellant must have received an SOC before filing a Substantive Appeal. In *Archbold v. Brown*, the Court found that a written statement from the appellant presented at a Board hearing constituted a valid, timely Substantive

[7] The appellant did not receive the reissued SOC on February 8, 2010; that is the date the SOC was reissued to the correct address. R. at 1176. Further, the cover letter to the SOC, as well as the SOC itself, retained the January 5, 2010, date. *See id.*; R. at 1183.

Appeal despite the fact that VA had not issued an SOC following the appellant's NOD. 9 Vet.App. 124, 132 (1996). The Court determined that the appellant's statement met the content requirements of a Substantive Appeal and, "since no SOC was provided to the veteran . . . and, in any event, since the statement was received within the one-year appeal period" from the date of the RO decision, the Substantive Appeal was timely. *Id.* Accordingly, the Board's conclusion that the appellant's February 2010 filing was untimely as a Substantive Appeal *because* VA received it before the appellant received the SOC is incorrect as a matter of law.[8] *Id.*; *see Butts*, 5 Vet.App. at 534.

The Board cited no authority other than § 20.200 for the proposition that a Substantive Appeal cannot be filed until a claimant actually receives the SOC. That regulation, however, only requires that an SOC be "furnished," not received. 38 C.F.R. § 20.200 ("An appeal consists of a timely filed [NOD] . . . and, after a[n SOC] has been furnished, a timely filed Substantive Appeal."). The statute provides that a claimant has 60 days from the date the SOC is "mailed" to file his or her appeal, not from the date the SOC is received. 38 U.S.C. § 7105(d)(3); *see also Mason*, 8 Vet.App. at 55. The caselaw also generally refers to the issuance of an SOC, not the receipt. *See, e.g.*, *Gibson*, 22 Vet.App. at 17; *Marsh v. Nicholson*, 19 Vet.App. 381, 384 (2005); *Beyrle v. Brown*, 9 Vet.App. 24, 27 (1996); *Archbold*, 9 Vet.App. at 130; *Mason*, 8 Vet.App. at 54; *but see Archbold*, 9 Vet.App. at 132 ("After a claimant receives the SOC, he or she must file a [Form 9] Appeal within 'sixty days from the date the [SOC] is mailed,'" (quoting 38 U.S.C. § 7105(d)(3))); *Roy v. Brown*, 5 Vet.App. 554, 555 (1993) ("After an appellant receives the SOC, he must file a formal appeal within 'sixty days from the date the [SOC] is mailed.'" (quoting 38 U.S.C. § 7105(d)(3))).

Further, as the appellant argues, there is no authority that precludes the Board from entertaining a prematurely filed or untimely Substantive Appeal. Appellant's Br. at 9; *see Gomez v. Principi*, 17 Vet.App. 369, 372 (2003) (finding that the Board's ability to dismiss an appeal for failure to respond to an SOC under section 7105 is discretionary); *Archbold*, 9 Vet.App. at 132; *Rowell v. Principi*, 4 Vet.App. 9, 17 (1993) ("The biggest difference between the filing requirements for the NOD and the [Substantive] Appeal, however, is that failure to file a timely

[8] Notably, the Court has also expressly declined to hold that an SOC must have been *issued* before a claimant can file a Substantive Appeal. *See Gibson*, 22 Vet.App. at 17 (acknowledging that section 7105 "envisions issuance of an SOC as a prerequisite for filing a VA Form 9 or completion of the appeal," but stating that it did "not . . . hold that issuance of an SOC is categorically a prerequisite to the submission of a valid Substantive Appeal.").

[Substantive] Appeal does not automatically foreclose an appeal, render a claim final, or deprive the B[oard] of jurisdiction."); *see also* 38 U.S.C. § 7105(d)(3) ("The agency of original jurisdiction *may* close the case for failure to respond after receipt of the [SOC]." (emphasis added)).

The Court concludes that the Board's determination that the appellant's Substantive Appeal was untimely because it was submitted prior to his actual receipt of the SOC is incorrect as a matter of law and must be reversed. *See Butts*, 5 Vet.App. at 534.

On remand, the Board must entertain the appellant's appeal of the RO's April 2008 denial of his claim for benefits for a back disability. The appellant is free to submit additional evidence and argument on the remanded matter to the Board, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's February 2, 2017, decision is REVERSED and this matter is REMANDED for further proceedings consistent with this decision.

DATED: April 13, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)