No. 18-0180

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S BRIEF

Re

ROY E. ANANIA,

Appellant,

versus

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

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Statement of the Issue

Whether the Board misapplied the common law mailbox rule because that rule applies to mailings to VA by accredited representatives of substantive appeals, as its does to the filing of a notice of appeal to this Court?

Statement of the Case

At issue in this appeal is whether the Board misapplied the common law mailbox rule when it found that the mailbox rule presumption did not attach in this case. In order to reach this issue, this Court must address an issue of first impression. The common law mailbox rule has been determined to apply to the filing of a notice of appeal to this Court. The question presented by this appeal is whether the common law mailbox rule applies to mailings of notices of disagreements and substantive appeals by accredited representatives to VA. If so, then the Board misapplied the common law mailbox rule when it found that the sworn affidavit of Mr. Anania's representative was not sufficient to trigger the common law mailbox rule.

Course of Proceedings Below

On May 10, 2005, the VA submitted a rating decision awarding Mr. Anania service- connected compensation as follows: for degenerative joint disease of the lumbar spine with a 20 percent evaluation, effective November 16, 2004; service-connected compensation for degenerative joint disease of the right knee with a 10 percent evaluation, effective November 16, 2004; and continued his award of service-connected compensation for a disability from traumatic hemarthrosis of the left knee, history of, with degenerative changes, at 2 percent disabling. RBA 2028-2034.

On May 28, 2006, Mr. Anania submitted lay statements from himself, RBA 2009

and his wife. RBA 2015. On May 30, 2006 he submitted a statement in support of claim seeking increased compensation. RBA 2011. On June 1, 2006, Mr. Anania submitted a VA Form 21-8940 seeking increased compensation based on unemployability. RBA 1952-1953. On August 21, 2006, the VA submitted a rating decision denying increased schedular compensation and denying extra-schedular compensation. RBA 1922-1928. On August 26, 2006, Mr. Anania filed a notice of disagreement. RBA 1915. On September 25, 2006, Mr. Anania filed a second notice of disagreement. RBA 1904-1907. On March 27, 2007, the VA submitted a statement of the case. RBA 1542-1560. On April 5, 2007, Mr. Anania filed a substantive appeal on the VA's denial of increased schedular compensation. RBA 1535-1537.

On July 26, 2007, the VA submitted a rating decision which awarded Mr. Anania additional compensation for a disability resulting from depression at an initial rating of 10% disabling from October 31, 2006. RBA 1390-1393. On January 29, 2008, the VA submitted a supplemental statement of the case which included the issue of an extra-schedular total rating. RBA 1201-1208. On July 8, 2008, Mr. Anania filed a notice of disagreement with the initial rating of 10% assigned to his disability resulting from depression. RBA 981. On July 30, 2008, Mr. Anania signed a second VA Form 21-8940 seeking increased compensation based on unemployability. RBA 1058-1059. On July 31, 2008, Mr. Anania submitted new and material evidence in support of his claim for increased schedular as well as extra-schedular compensation. RBA 956-961 and 972-980 and 1057-1060.

On February 26, 2009, the VA submitted a rating decision finding that Mr. Anania

was entitled to an extra-schedular total rating from June 22, 2008. RBA 896-903. This decision also increased Mr. Anania's schedular rating for his depression from 10 percent to 30 percent from October 1, 2006 and to 50% disabling from June 22, 2008. *Id.*

On March 26, 2009, the VA submitted a statement of the case on the issue of the rating assigned Mr. Anania's schedular rating for his depression. RBA 868-885. On March 31, 2009, the VA wrote Mr. Anania and advised that the rating decision dated February 26, 2009, which granted entitlement to individual unemployability, is a full grant of the benefit sought and resolves the appeal issue of individual unemployability. RBA 856. On September 3, 2009, Mr. Anania filed a notice of disagreement with the VA's February 26, 2009 rating decision seeking an effective date of August 1, 2007. RBA 825-830. On December 12, 2009, the VA submitted a statement of the case on the effective date of the VA's award of an extra-schedular total rating. RBA 785-800. On January 18, 2010, Mr. Anania's representative placed in the United States mail a substantive appeal to the Board. RBA 167-173.

On March 22, 2013, the Board of Veterans Appeals found that a valid, timely, substantive appeal was not received by VA as to the effective date for the grant of an extra-schedular total rating in VA's February 2009 rating decision and denied Mr. Anania consideration of his appeal. RBA 353-387. Mr. Anania appealed to this Court. *See* Vet. App. No.13-2119. On February 20, 2014, the VA agreed to a partial remand. RBA 328-331. On February 26, 2014, the Court granted the joint motion of the parties and vacated that portion of the Board's 2013 decision related to whether a timely substantive appeal had been submitted on the issue of the effective date for grant of an extra-

schedular total rating in VA's February 2009 rating decision. RBA 332. On June 26, 2014, the Board remanded this issue to the VA regional office for a decision. RBA 311-314. On July 23, 2014, VA submitted a supplemental statement of the case which found that VA had not received a timely substantive appeal submitted on the issue of the effective date for the grant of an extra-schedular total rating in VA's February 2009 rating decision to the VA regional office for a decision. RBA 291-307. On November 19, 2014, Mr. Anania's counsel executed a sworn affidavit affirming that a timely substantive appeal had been submitted on the issue of the effective date for grant of an extra-schedular total rating in VA's February 2009 rating decision to the VA regional office for a decision. RBA 175-176. On November 19, 2014, Mr. Anania submitted the affidavit of his counsel an additional argument to the Board. RBA 164-165. On May 18, 2015, the Board submitted a decision finding that a timely substantive appeal had not been submitted on the issue of the effective date for the grant of an extra-schedular total rating in VA's February 2009 rating decision. RBA 150-158.

Mr. Anania appealed to this Court. *See* Vet. App. No. 15-3413. On April 10, 2017, the Court issued a memorandum decision vacating the Board's May 18, 2015 decision and remanding, with instructions to the Board to analyze the evidence and argument submitted in support of application of the presumption of receipt and provide a statement of reasons or bases explaining why that evidence was or was not found sufficient to trigger the presumption. RBA 17-22 at 21. On September 22, 2017, the Board continued its decision that a timely substantive appeal had not been submitted on the issue of the effective date for the grant of an extra-schedular total rating in VA's

February 2009 rating decision. RBA 1-14.

Arguments

STANDARD OF REVIEW

This Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); *see Butts v. Brown*, 5 Vet. App. 532 (1993) (*en banc*); *Palmer v. Nicholson*, 21 Vet. App. 434, 436 (2007). This Court also reviews *de novo* whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19Vet.App. 36, 42-46 (2005). This Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet. App. at 538. In the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, the Court shall hold unlawful and set aside or reverse such finding if the finding is clearly erroneous. 38 U.S.C. § 7261(a)(4). *Padgett v. Nicholson*, 19 Vet. App. 133, 147 (2005).

The Court here should determine whether the Board's decision was made in accordance with the correct application of law. The Board erred as a matter of law when it incorrectly applied the law and a remand is the appropriate remedy, with instructions to the Board to correctly apply the law. *See Tucker v. West,* 11 Vet. App. 369, 374 (1998).

Summary of the Arguments

Mr. Anania's appeal was remanded by this Court for the Board to analyze the evidence and argument submitted in support of application of the presumption of receipt under the common law mailbox rule and provide a statement of reasons or bases explaining why that evidence was or was not found sufficient to trigger the presumption of receipt under the common law mailbox rule. The Board found that the affidavit signed from Mr. Anania's representative in November 2014, attesting that he mailed the Veteran's substantive appeal to the Waco RO on January 18, 2010, did not provide any independent proof of a postmark, a dated receipt, or other evidence of the mailing, other than his own testimony. This was a misapplication of the common law mailbox rule.

Before this Court can determine whether the Board misapplied the common law mailbox rule, this Court must address for the first time whether this rule applies to mailings of notices of disagreements and substantive appeals by representatives of claimants to VA.

I.

The Board failed to correctly apply the common law mailbox rule.

Mr. Anania's appeal relies on the Federal Circuit's decision in *Rios v. Nicholson*, 490 F.3d 928 (Fed. Cir. 2007), which interpreted the provisions of 38 U.S.C. § 7266 involving filing an appeal to this Court, and determined that the common law mailbox rule applied. This appeal, however, deals with a mailing by an accredited representative of a substantive appeal to VA, as required by the provisions of 38 U.S.C. § 7105. Therefore, this Court must address for the first time whether the common law mailbox rule applies

to mailing of notices of disagreement and substantive appeals by accredited representatives. If it does, the Board misapplied the common law mailbox rule.

A. The common law mailbox rule applies to mailings of notices of disagreements and substantive appeals to VA by accredited representatives.

In *Rios v. Nicholson*, 490 F.3d 928 (Fed. Cir. 2007) the Federal Circuit explained:

> . . . as with any common law provision, we must begin our analysis with the presumption that the mailbox rule applies, absent clear statutory abrogation thereof. *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952) ("Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles...."). The parties agree that the rule applies unless Congress clearly intended to abrogate the common law rule when enacting section 7266(c)(2) and (d). Congress's intent to abrogate a common law rule may be shown (1) expressly where the statute "speaks directly" to the question addressed by the common law, *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993), or (2) impliedly where application of the common law rule would render an aspect of the statute superfluous or inoperative, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). Both parties appear to agree that Congress did not explicitly speak to abrogate the common law mailbox rule. *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). Instead, the parties disagree as to whether sections 7266(c)(2) and (d) exclude operation of the common law rule by implication.

Rios, 490 F.3d 931.

In this case, Mr. Anania does not know whether the Secretary will agree that Congress did not explicitly speak to abrogate the common law mailbox rule. Mr. Anania anticipates, however, that the Secretary will assert that the provisions of § 7105 exclude

operation of the common law rule by implication.

Mr. Anania, like Mr. Rios, asserts that § 7105 can co-exist with the mailbox rule, and as such there is no evidence that Congress intended to abrogate the common law rule when enacting the provisions of § 7105. The Federal Circuit in *Rios* held that Congress did not intend to abrogate the common law mailbox rule as it applies to the filing of notice of appeal to this Court because application of the common law mailbox rule would not render the statutory postmark rule of §§ 7266(c)(2) and (d) superfluous. *Rios*, 490 F.3d 931-932. Section 7105 does not include a statutory postmark rule for mailings of substantive appeals[1]. Therefore, there is no basis to imply that the application of the common law rule would render any aspect of § 7105 superfluous or inoperative. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991).

The Federal Circuit in *Rios* also noted:

> The statutory postmark rule, however, does not contemplate a scenario where the Veterans Court alleges that it never received a petitioner's NOA, and therefore cannot be abrogated or rendered useless by application of the common law mailbox rule. In other words, the postmark rule only comes into play when the NOA is mailed before the deadline but received by the Veterans Court after the deadline for

[1] Section 7105(b)(1) does provide: "A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed." Congress in this provision gave no indication or intent to abrogate the common law mailbox rule as it applies to the filing of notices of disagreements mailed to VA by claimants or their representatives because application of the common law mailbox rule would not render the statutory postmark rule of § 7105(b)(1) superfluous. *Rios*, 490 F.3d 931-932.

> filing. In every case contemplated under the postmark rule, the NOA is, in fact, actually received by the Veterans Court. The common law mailbox rule, on the other hand, only comes into play for purposes of section 7266 when the Veterans Court alleges that it never received the petitioner's NOA. In such a scenario, the common law mailbox rule may be utilized by the petitioner to presume receipt upon a showing that he placed a properly addressed and stamped NOA in the USPS within sufficient time for it to have been received by the Court within the 120-day filing period and therefore filed on the date of regular business delivery. In sum, then, the common law mailbox rule is a legal fiction relied upon to meet the requirement of actual receipt under section 7266(c)(1) within the statutory deadline of 120 days. It does not subsume or vitiate the postmark rule under sections 7266(c)(2) and (d), which only apply when actual receipt occurs, in fact, after 120 days.

Rios, 490 F.3d 932.

The same analysis applies to the provisions of § 7105. The **statutory** postmark rule, applicable only to notices of disagreements received by VA, does not contemplate a scenario where VA alleges that it never received a claimant's NOD and, therefore, cannot be abrogated or rendered useless by application of the common law mailbox rule. More importantly, in this case, the issue is VA's allegation that it never received Mr. Anania's substantive appeal, which has no statutory postmark rule under § 7105. As a result, this Court should determine that the common law mailbox rule applies to an accredited representative's mailing of a substantive appeal to VA.

B. The Board made a clear error of law when it found that the mailbox rule presumption did not attach.

The clear error of the Board is shown by the following:

> In this appeal, **the Board similarly finds that the mailbox rule presumption does not attach. While the Veteran's representative has averred that he mailed the required**

> **substantive appeal on January 18, 2010, he has provided no evidence of this mailing other than his own sworn affidavit**. There is no tangible evidence of mailing such as a proof of postmark or dated receipt to support his contention that he mailed the substantive appeal on that date. Notably, in arguments raised before the Board and before the Court, the representative does not raise any contention, or claim to have any tangible evidence, indicating that he mailed the substantive appeal as alleged in January 2010. Rather, the only evidence cited by the representative as proof of the mailing is his own sworn affidavit. **Unfortunately, the representative's affidavit amounts to no more than self-serving testimony, as described by the Court in *Rio s* II.** As the mailbox rule presumption does not attach to this appeal, there is no need for the Board to embark on a factual determination as to the question of whether the Veteran's substantive appeal was actually received by the RO, as such would presume that the mailing of the substantive appeal took place as contended, which would thereby contradict the Board's determination that the presumption was not properly invoked.

RBA 1-14 at 10. (emphases added).

The Board's reliance on this Court's decision in *Rios v. Mansfield*, 21 Vet. App. 481 (2007) is misplaced for two important reasons. *First*, *Rios* II, concerned the mailing of a notice of appeal to this Court and did not concern the mailing of a substantive appeal to VA. *Second*, *Rios* II, concerned the mailing by a veteran and not by a representative.

This Court in *Rios* II was not addressing the issue of tangible evidence of mailing such as a proof of postmark or dated receipt. To the contrary, this Court explained:

> Under the common law mailbox rule, "if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal*, 111 U.S. at 193, 4 S.Ct. 382; *see also Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *Lewis v. United States*,

> 144 F.3d 1220, 1222 (9th Cir.1998); *Wood v. Comm'r*, 909 F.2d 1155, 1161 (8th Cir.1990). This mailbox rule is based on the presumption that the officers of the government will do their duty in the normal course of business. *See Rosenthal*, *supra*; *see also United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (" '[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties.' "); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

Rios, 21 Vet. App. 482.

Misunderstood by the Board was that, under the common law mailbox rule, Mr. Anania's counsel's affidavit is proof that his substantive appeal was timely mailed to the VA regional office in Waco, Texas and, therefore, must be presumed by the Board to have been received by the VA regional office in Waco, Texas. It was proof because the affidavit from an accredited representative that a letter containing a clamant's substantive appeal which was properly directed to VA was proof that Mr. Anania's substantive appeal had been either put into the post office or delivered to the postman in the regular course of business by the accredited representative. *See Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir.1993) (finding that to invoke the presumption of delivery, a party may "either present evidence of actual mailing, such as an affidavit from the employee who mailed the [tax return] or present proof of procedures followed in the regular course of operations which give rise to a strong inference that the [return] was properly addressed and mailed"); *Myers v. Moore-Kile*, 279 F. 233, 235 (5th Cir.1922) (using evidence that a document was mailed in the regular course of business as proof that it was actually

mailed).

The Board's use of a tangible evidence standard of mailing, such as a proof of postmark or dated receipt, to allow the common law mailbox rule to attach relied upon the wrong legal standard. The use of a strict proof standard is also at odds with the veteran's friendly nature of VA's adjudicatory scheme. The veterans' benefits system designed by Congress has always been pro claimant. *See, e.g., Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011) ("The solicitude of Congress for veterans is of long standing.") (quoting *United States v. Oregon*, 366 U.S. 643, 647 (1961)). The statutes governing veterans' benefits are "strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). Congress designed the veterans' benefits adjudication process to be "a nonadversarial, ex parte, paternalistic system." *Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998); *see also Hayre v. West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999) (observing that Congress has established a "uniquely claimant friendly system of awarding compensation"), overruled in part on other grounds by *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002). The veterans' benefits regime is thus the "antithesis of an adversarial, formalistic dispute resolving apparatus." *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc), superseded on other grounds by statute, Veterans Benefits Act of 2002, Pub. L. No. 107-330, Section 402, 116 Stat. 2820, 2832. The rules and procedures of the veterans' benefits system differ sharply from the procedures of normal civil litigation, as the Supreme Court explained in *Henderson*.

The Federal Circuit in its *Rios* decision explained:

> . . . in order for the presumption to attach, Mr. Rios must provide evidence demonstrating that his NOA was properly

> addressed, stamped, and mailed in adequate time to reach the Veterans Court in the normal course of post office business before the elapse of the 120-day deadline. *Id.* at 193, 4 S.Ct. 382; *see also Barnett v. Okeechobee* Hosp., 283 F.3d 1232, 1240 (11th Cir.2002); *O'Toole v. United States Sec'y of Agric.*, 471 F.Supp.2d 1323, 1329 (Ct. Int'l Trade 2007). In lieu of "direct" proof of mailing, Mr. Rios may also prove the fact of mailing through evidence of mailing custom or routine practice. *O'Toole*, 471 F.Supp.2d at 1329-30 (citing *United States v. Green*, 745 F.2d 1205, 1208 (9th Cir.1985);*United States v. Brackenridge*, 590 F.2d 810, 811 (9th Cir.1979); *United States v. Joyce*, 499 F.2d 9, 15 (7th Cir.1974); *Stevens v. United States*, 306 F.2d 834, 835 (5th Cir. 1962)).

Rios, 490 F.3d 933. Thus, the correct legal standard for whether the common law mailbox rule attaches to the mailing by an accredited representative of a substantive appeal to VA is evidence demonstrating that the substantive appeal was properly addressed, stamped, and mailed in adequate time to reach VA in the normal course of post office business before the elapse of the 60-day deadline.

The Federal Circuit also noted in its *Rios* decision:

> We recognize nonetheless that "[d]etermining whether an office receives an item mailed to it is ... a complicated matter." *Barnett*, 283 F.3d at 1241. Indeed, courts have found that an addressee's simple failure to uncover an item does not rebut the presumption of delivery. *Id.* at 1241-42; *see also In re Nimz Transp., Inc.*, 505 F.2d 177, 179 (7th Cir.1974) (holding absence of proof of claims in clerk's files "by itself insufficient to rebut the presumption of receipt"); *Jones v. United States*, 226 F.2d 24, 27 (9th Cir.1955) (explaining that search of the pertinent files in addressee's office revealing no record of disputed mail "is a purely negative circumstance, insufficient ... to rebut the presumption of delivery"). Our predecessor court has held that "evidence as to the habit and custom of [a] court's officers and employees in handling the mail is negative evidence and has no appreciable value" in rebutting the presumption of receipt. *Charlson Realty Co. v. United States*, 181 Ct.Cl. 262, 277, 384 F.2d 434 (1967). Rather, such negative evidence merely gives rise to a

> "presumption that the ordinary course of business or procedure was followed on a given day" and that, alone, cannot overcome another presumption. *Id.* at 277-78, 384 F.2d 434.

Id.

Using the correct legal standard, the evidence presented warranted attachment of the presumption of receipt by VA under the common law mailbox rule.

CONCLUSION

The Board incorrectly applied the common law mailbox rule by relying upon strict proof of the mailing of Mr. Anania's substantive appeal. Mr. Anania made a sufficient showing to require that the Board presume a timely mailing of his substantive appeal. As a result, the Board erred by failing to presume receipt or to rebut the presumption. Therefore, the Board's decision must be reversed and Mr. Anania's appeal be ordered to be adjudicated by the Board.

Respectfully submitted by,

/s/Kenneth M. Carpenter
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Roy E. Anania
Electronically filed on August 16, 2018