IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROY E. ANANIA,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROY E. ANANIA,	)	
	)	
Appellant	)	
	)	
v.	)	Vet.App. No. 18-0180
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Should the Court affirm the September 22, 2017, decision of the Board of Veterans' Appeals (Board) holding that Appellant failed to file a timely substantive appeal to a February 2009 rating decision granting entitlement to a total disability rating based on individual unemployability (TDIU), effective June 22, 2008?

STATEMENT OF THE CASE

Nature of the Case

Appellant, Roy E. Anania, appeals the September 22, 2017, Board decision that determined Appellant failed to file a timely substantive appeal to a February 2009 Rating Decision. [R.at 1–14].

Statement of Relevant Facts

Appellant served on active duty from August 1972 to August 1975. [R. at 243]. In July 2008, Appellant appointed his current attorney as his representative before VA. [R. at 972–979] (Contingent Fee Contract); [R. at 980] (VA Form 21-22); *see also* [R. at 962–963]. In February 2009, the Department of Veterans Affairs (VA) Regional Office (RO) in Witchita, Kansas, granted entitlement to TDIU, effective June 22, 2008. [R. at 904 (888-95, 904–911)].

In September 2009, Appellant's attorney filed a notice of disagreement informing VA that Appellant disagreed with the effective date of the TDIU award. [R. at 827 (825–830)]. In December 2009, the RO in Waco, Texas,[1] provided Appellant and his attorney a Statement of the Case (SOC). [R. at 785–800].

Over two-and-a-half years later, in June 2012, Appellant's attorney requested confirmation that Appellant's earlier effective date claim was docketed for appeal at the Board. [R. at 608 (608–616)]. In this letter, he stated that, "[o]n January 19, 2010, Mr. Anania filed a substantive appeal with [the December 4, 2009, SOC] in order to obtain *de novo* appellate review by the Board of Veterans' Appeals." *Id.* at 613. Appellant's counsel attached a letter dated January 18, 2010, labeled as a "[s]ubstantive appeal with the statement of the case

[1] During his appeal, Appellant moved from Kansas to Texas. [R. at 814 (811–820)]. In November 2009, the RO in Wichita, Kansas transferred jurisdiction of Appellant's claim to the RO in Waco, Texas. [R. at 808]

of December 4, 2009." [R. at 629–641]. The RO marked this letter as received on June 29, 2012. *See, e.g., id.* at 630.

In March 2013, the Board determined that Appellant failed to file a timely substantive appeal to the February 2009 rating decision assigning an effective date of June 22, 2008, for TDIU. [R. at 353–387]. Appellant appealed to this Court, and the parties agreed to a Joint Motion for Partial Remand. [R. at 328–331]. The parties agreed that the Board erred by addressing the issue of a timely filed substantive appeal without first remanding the issue for the RO to adjudicate in the first instance. *Id.* at 328–331; *see also* [R. at 332] (Feb. 2014 Order granting the Joint Motion). In turn, the Board remanded the issue to the RO for adjudication. [R. at 311–314]. In May 2014, Appellant informed the Board that "no additional argument or evidence will be submitted on behalf of Appellant at this time." [R. at 309 (309–310)]. In July 2014, the RO provided Appellant a Supplemental Statement of the Case (SSOC) informing him that it did not receive a timely substantive appeal of the effective date for his grant of TDIU. [R. at 306–307 (291–307)].

In November 2014, Appellant's attorney faxed to the Board "additional evidence and argument" related to the issue of whether Appellant filed a timely substantive appeal. [R. at 163–165]. Appellant's attorney attached two exhibits to this submission: a copy of a letter dated January 18, 2010, and an affidavit signed by Appellant's attorney. [R. at 167–173]; [R. at 174–177]. In the affidavit,

Appellant's attorney stated, "On January 18, 2010, I mailed a substantive appeal (in lieu of a VA form 9) to the Regional Office in Waco, Texas."[2] *Id.* at 175.

In May 2015, the Board determined that Appellant did not file a timely substantive appeal of the February 2009 rating decision. [R. at 150–158]. Appellant again appealed to this Court. *See* [R. at 92–110] (Appellant's Br.); [R. at 111–130] (Sec'y's Br.); [R. at 131–141] (Appellant's Reply Br.). In an April 2017 memorandum decision, this Court vacated and remanded the Board's decision, holding that the Board had "failed to analyze the evidence and argument submitted in support of the presumption of receipt and provided no statement of reasons or bases explaining why that evidence was found insufficient to trigger the presumption." [R. at 146 (142–147)]; *Anania v. Shulkin*, No. 15-3413, 2017 U.S. App. Vet. Claims LEXIS 486, at *8 (Apr. 10, 2017).

On September 22, 2017, the Board again determined that Appellant did not file a timely substantive appeal. [R. at 1-14]. The Board found that Appellant's attorney "did not provide any independent proof of a postmark, a dated receipt, or other evidence of the mailing, other than his own testimony." [R. at 5 (1–14)].

[2] In Appellant's attorney's June 2012 letter, he stated that "[o]n January 19, 2010, Mr. Anania filed a substantive appeal" to the December 2009 SOC. [R. at 613 (608–616)].

ARGUMENT

A. Appellant fails to show that the Board erred in determining that his attorney's affidavit, alone, was insufficient to trigger the mailbox rule presumption of receipt.

Appellant submits no evidence that he mailed a timely substantive appeal in January 2010, other than a statement from his attorney in November 2014 that he had mailed a timely substantive appeal on January 18, 2010. The Bound determined that the November 2014 statement amounted "to no more than self-serving testimony, as described by the Court in *Rios II.*" *See* [R. at 10 (1–14)] (citing *Rios v. Mansfield* (*Rios II*), 21 Vet.App. 481, 482 (2007)). Appellant now asserts that the Board misunderstood the common law mailbox rule and that his attorney's one-sentence statement was sufficient evidence to trigger the presumption of receipt merely because it was submitted by Appellant's representative, and not Appellant himself. *See* Appellant's Br. at 10-11. The Court should find Appellant's arguments unpersuasive and contrary to caselaw.

To be timely filed, a substantive appeal must be filed within 60 days from the date on which the SOC is mailed to the claimant. 38 U.S.C. § 7105(d)(3); 38 C.F.R. § 20.302(b)(1). In the alternative, the appeal may be filed "within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later." 38 C.F.R. § 20.302(b)(1). VA will accept a postmark, prior to the expiration of the applicable time limit, as showing that the substantive appeal was timely filed. 38 C.F.R. § 20.305(a). If the postmark

is not readable, it will be presumed that the substantive appeal was mailed five days prior to the date of receipt by VA. *Id.*

This case involves the Board's determination that Appellant did not trigger the attachment of the mailbox rule presumption. 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.'" *Rios v. Nicholson* (*Rios I*), 490 F.3d 928, 931 (2007) (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884)). For the presumption to attach, Appellant needed to provide evidence that his substantive appeal "was properly addressed, stamped, and mailed in adequate time" to reach the RO within the normal course of post office before the 60-day deadline. *Id.* at 933 (citing *O'Toole v. United States Sec'y of Agric.*, 471 F. Supp.2d 1323, 1329 (Ct. Int'l Trade 2007)); *see* 38 U.S.C. § 7105(d)(3); *see also* 38 C.F.R. § 20.302(b)(1). Because Appellant challenges the Board's finding that the facts in this case do not warrant application of the mailbox rule, this Court should review this case under the "arbitrary and capricious" standard." *See* 38 U.S.C. § 7261(a)(3)(A); *Butts v. Brown*, 5 Vet.App. 532, 538–40 (1993) (holding that the Court reviews the Board's application of law to facts under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of proof). Under this standard, "[s]o long as the

Board articulates a satisfactory explanation for its decision, 'including a rational connection between the facts found and the choice made,' the Court must affirm." *George v. Shulkin*, 29 Vet.App. 199, 206 (2018) (quoting *Lane v. Principi*, 16 Vet.App. 78, 83 (2002)).

The Court should affirm the Board's finding that Appellant's attorney's bare-bones affidavit does not trigger the presumption of receipt under the mailbox rule. *See* 38 U.S.C. § 5107(a); *Skoczen v. Shinseki*, 564 F.3d 1319, 1323–29 (Fed. Cir. 2009) (notwithstanding VA's obligations under the duty to assist, a claimant has the responsibility to present and support a claim for benefits). As the Board explained, this Court has held that the mailbox rule is "'not invoked lightly'" and "'requires proof of mailing, such as an independent proof of a postmark, a dated receipt, or evidence of mailing apart from a party's own self-serving testimony.'" [R. at 10 (1–14)] (quoting *Rios II*, 21 Vet.App. at 482); see *also Kyhn v. Shinseksi*, 716 F.3d 572, 578 n. 9 (Fed. Cir. 2013) (noting that the mailbox rule's application is "triggered by the preliminary factual findings that the letter was properly addressed and mailed"). To show "independent proof of a postmark," an appellant may provide: (1) evidence of business records establishing the mailing; (2) evidence of a course of business regarding mailing; or (3) third party testimony witnessing the mailing. *Rios*, 21 Vet.App. at 483. Appellant's attorney's statement that he had mailed a substantive appeal on January 18, 2010, does not fall within any of these categories. *See* [R. at 175 (174–177)].

In *Rios II*, the Court addressed whether the appellant had provided sufficient evidence to show that he had filed a timely Notice of Appeal (NOA) with this Court. *See Rios*, 21 Vet.App. at 482. In support of his assertion that he had timely mailed an NOA, the appellant in that case provided: (1) a copy of his NOA; (2) "a copy of a 'Page of Registry of Sent Correspondence'" from a Veteran Service Organization (VSO); and (3) two affidavits from a VSO employee describing the normal mailing procedures of the VSO, and explaining that the employee had followed those procedures and logged the mailing in a registry. *Id.* at 483. With this evidence, the Court held that the appellant had timely filed an NOA because the statements in the affidavit were consistent with the actions noted in the mailing registry and Appellant timely followed up his mailing with a status inquiry approximately four months later. *Id.*at 484.

Unlike the appellant in *Rios II*, Appellant provides only an uncorroborated statement from his attorney that he had mailed a substantive appeal on January 18, 2010. *See* [R. at 175 (174–177)]. He does not provide any additional evidence in support of his statement, such as a mailing registry as the appellant did in *Rios II*. *Compare id.*, *with Rios II*, 21 Vet.App. at 483. As the Board notes, this case is analogous to *Fithian v. Shinseki*, 24 Vet.App. 146, 151 (2010), a case following *Rios II*, in which the appellant had provided only an affidavit that he had mailed a motion for reconsideration to the Board, with no independent supporting evidence. [R. at 10 (1–14)]. In *Fithian*, the Court found that an appellant's affidavit

that he had mailed a letter first class postage prepaid to the Board and had assumed it was delivered was "not sufficiently clear to rebut the presumption of regularity" and "also not sufficient to establish the presumption of receipt under the common law mailbox rule." 24 Vet.App. at 151 (citing *Rios*, 21 Vet.App. at 482).

Given the Court's holding in *Fithian*, Appellant's assertion that his attorney's affidavit "was proof that [his] substantive had been either put into the post office or delivered to the postman in the regular course of business" has no merit. Appellant's Br. at 11. First, the affidavit, on its face, falls short of the requirements laid out by the Federal Circuit in *Rios I* that an appellant must provide evidence that his substantive appeal was properly addressed, stamped, and mailed in order for the mailbox rule presumption to attach because the affidavit states only that it was mailed without any additional proof of mailing. [R. at 174–177]; *Rios I*, 490 F.3d at 934 (requiring that an appellant prove that an NOA was properly addressed or postmarked in addition to being mailed). The affidavit includes no specifics as to the time or manner of mailing, does not allege that Appellant's substantive appeal was properly addressed to the Waco, Texas, RO, or provide any evidence related to Appellant's attorney's mailing practices. *See* [R. at 174–177]. In fact, the affidavit is devoid of any details concerning the mailing other than for Appellant's attorney's recollection of having mailed the substantive appeal on the same day that the accompanying substantive appeal was apparently typed. *See O'Toole*, 471 F. Supp. 2d at 1329 (finding that "[t]he infirmities in the instant

Affidavit render it unnecessary to definitively resolve . . . whether additional evidence is required to corroborate an affidavit of mailing . . . .").

Other courts and agencies under the Federal Circuit have required greater detail than the one-line statement to trigger the mailbox rule presumption. In *O'Toole*, the Court of International Trade found an affidavit insufficient to trigger the mailbox rule presumption of receipt because it was silent as to the business's mailing custom or routine, and contained no specifics as to the time or manner of mailing. 471 F. Supp. 2d. at 1332 n.13, 1333–34. Specifically, the Court noted that the affidavit had no details on matters such as "whether some or all of the businesses' outgoing mail was temporarily held in a particular intra-office location (such as an 'outbox') designated for that purpose"; whether the business metered its own mail, maintained a store of stamps or bought postage at the post office for each envelope or package that it mailed; how often (and how consistently and reliably) mail was taken to the post office (the days of the week, the times of day, etc); or whether mail was deposited in a receptacle or taken to a service window at the post office. 471 F. Supp. 2d. at 1332 n.13, 1333–34.

Likewise, the Court of Claims, the predecessor to the Court of Federal Claims, declined to apply the mailbox rule presumption of receipt where the plaintiffs presented no evidence other than their own testimony to prove they mailed a tax return. *McIlvaine v. United States*, 23 Cl. Ct. 439, 442–43 (1991). The court held that even if a jurisdiction's law permitted "circumstantial proof of

mailing beyond the exceptions provided in [the federal tax statute] . . . plaintiffs have presented no evidence of proper preparation, addressing or mailing of their 1981 tax return." *Id.* In this case, the November 2014 affidavit states only that, "[o]n January 18, 2010, [Appellant's attorney] mailed a substantive appeal (in lieu of a VA form 9) to the Regional Office in Waco, Texas." [R. at 175 (174–177)]. This affidavit does not address whether appellant's attorney properly addressed the substantive appeal, or applied proper postage. *See Rios*, 21 Vet.App. at 482.

A mere statement from a representative has likewise been found insufficient to trigger the mailbox rule presumption. For example, in *Freeze v. Dept. of Veterans Affairs*, 65 M.S.P.R. 149, 152 (1994), the Merit Systems Protection Board (MSPB) explained that it will treat pleadings as filed, even if never received by the Board, where parties "present specific details concerning the mailing." In that case, the MSPB found "a representative's sworn statement too vague and general to show that the petition was actually mailed before the filing deadline passed." 65 M.S.P.R. at 152. The affidavit in that case related that a petition for review was addressed to the Board but gave no specifics concerning the mailing of the petition, so the Merit Systems Protection Board found that it fell "short of the nature and quality of evidence required to establish that a properly addressed petition for review even though it had not been received by the Board." *Id.* Similarly, here, the November 2014 affidavit falls short of the standards required by this Court under *Fithian* and *Rios*, because it only asserts only that the appeal was mailed to

the Waco RO, with no additional details surrounding the mailing. [R. at 175 (174–177)].

While Appellant appears to argue that his attorney is considered an "employee" and that under *Godfrey v. United States*, an affidavit from an employee would "give rise to a strong inference that [a tax return] was properly and mailed," the circumstances in this case are distinct. *See* Appellant's Br. at 11 (citing 997 F.2d 335, 338 (7th Cir. 1993)). Appellant fails to note that the Seventh Circuit discussed the application of the presumption of delivery to the federal government and ruled against the government because a submitted computer transcript was too vague. *Godfrey*, 997 F.2d at F.2d at 338 (recognizing "that the government is entitled to a rebuttable presumption of delivery upon presentation of evidence of proper mailing."). In doing so, the Court noted that "[t]o invoke the presumption of delivery, the government could either present evidence of actual mailing such as an affidavit from employee or present proof of procedures followed in the regular course of operations which give rise to a strong inference that the check was properly mailed." *Id.* Moreover, that case did not involve an employee affidavit, but a computer transcript which the Court ultimately found too vague to establish that a refund check "was actually prepared, enclosed in an envelope and mailed." *Id.*

Appellant provides no evidence of his attorney's law firm's normal mailing procedures or whether his attorney had followed those procedures on January 18,

2010. For example, it is unclear whether Appellant's attorney kept a mailing log or business records related to mailings. It is also unclear how Appellant's attorney mailed the letter—whether he put it in a mailbox, took it to a post-office, or delegated it to a law firm employee. *See id*.; *O'Toole*, 471 F. Supp. 2d at 1332, 1333–34 (listing specific details regarding mailing lacking in an affidavit). Simply put, a one-line statement that he had mailed the substantive appeal on a certain date is insufficient to a show a regular course of business or that the appeal was properly, addressed, stamped, or mailed in adequate time. *See* Appellant's Br. at 11, 13. In *Sorrentino*, cited by this Court in *Rios*, the Tenth Circuit explained why it required something more than the self-serving testimony of the mailer:

> Allegations of mailing are easy to make and hard to disprove. *Cf. Benavidez v. City of Albuquerque*, 101 F.3d 620, 626 (10th Cir. 1996) (recognizing that proving a negative may be difficult). Because the taxpayer, not the IRS, controls the mailing of a tax return, the taxpayer, not the IRS, has access to any evidence demonstrating the return has been mailed. To establish a presumption of delivery . . . the burden in these types of cases thus rests on the taxpayer to make "a meaningful evidentiary showing" at the outset.

383 F.3d at 1194. This requirement of a "meaningful evidentiary showing" beyond self-serving testimony is consistent with a claimant's "responsibility to present and support a claim for benefits" under 38 U.S.C. § 5107(a). *Skcozen*, 564 F.3d at 1323–29. The same rationale applies whether an attorney mails a letter to VA or a taxpayer mails a tax return to the IRS.

Recently, in a Social Security Administration benefits appeal, the Sixth Circuit held that a claimant's "dated request for appeal and his attorney's testimony

that he timely mailed the request is not proof that the request was actually mailed." *Smith v. Comm'r of Soc. Sec.*, 880 F.3d 813, 816 (6th Cir. 2018) (citing *McKentry v. Sec'y of Health & Human Servs*, 655 F.2d 721, 722 (6th Cir. 1981)). In support, the Court noted that the agency "had no record of ever timely receiving the request" and that the appellant was unable to provide independent evidence, such as a postmark or dated receipt. *Id.* (citing *Crook v. Comm'r*, 173 F. App'x 653, 657 (10th Cir. 2006) ("Self-serving declarations of mailing, without more, are insufficient to invoke the presumption of delivery.")). As in *Smith*, there is no record that VA had ever received a timely appeal and Appellant has declined to provide independent evidence of mailing.

Appellant's attorney's November 2014 statement is also inconsistent with his earlier statements related to the mailing. In June 2012, when Appellant's attorney first submitted the purported January 2010 substantive appeal, he asserted that "[o]n January 19, 2010, Mr. Anania filed a substantive appeal . . . ." [R. at 613 (608–616)]. Later, in the November 2014 affidavit, Appellant's attorney asserted that he filed the substantive appeal, but a day earlier, on January 18, 2010. [R. at 175 (174–177)]. The inconsistency in these statements reinforces the Board's requirement of proof beyond this affidavit. *See* [R. at 10 (1–14)]; *see also Spencer v. United States Postal Serv.*, No. 3:07cv150, 2007 U.S. Dist. LEXIS 64568 at *12–16 (N.D. Fla. Aug. 31, 2007) (declining to apply the mailbox rule presumption of receipt where the Court found contradictions and inconsistencies

in an attorney's affidavit). In sum, because the affidavit does not show that his filing was properly addressed, stamped, or mailed, and is unsupported by independent proof of mailing, Appellant fails to show that the Board erred in finding that his attorney's affidavit was insufficient evidence to trigger the mailbox rule presumption of receipt. *See Fithian*, 24 Vet.App. at 151; *Rios*, 21 Vet.App. at 482; *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999).

B. Appellant and his attorney had the opportunity to obtain independent evidence of a postmark, but declined to do so.

Appellant also, without explanation, summarily asserts that the Court should find that *Rios* does not apply in this case because his attorney is an accredited representative. *See* Appellant's Br. at 6, 10. However, Appellant fails to explain why his attorney's statements should be considered distinct from his own statements, and, as noted above, other courts have found no distinction.[3] *See* Locklear, 20 Vet.App. at 416 (holding that the Court will not entertain underdeveloped arguments); *Hilkert*, 12 Vet.App. at 151. In *Rios I* and *Rios II*, both the Federal Circuit and this Court have declined to find that the burden to invoke the mailbox rule presumption of receipt is lowered in the veterans' context. *Rios* I, 490 F.3d at 931; *Rios II*, 21 Vet.App at 481.

[3] On this point, the Court has noted the confusion caused when an attorney combines the role of advocate and witness. *See Harvey v. Shulkin*, 30 Vet.App. 10, 17–19 (2018).

Appellant's current arguments amount to little more than post-hoc rationalization for his attorney's failure to ensure that his alleged mailing was supported by independent evidence. For example, Appellant's attorney could have guaranteed proof of receipt by sending his substantive appeal to the RO by fax, by certified mail, or by registered mail. Certified and registered mail are well-known and easy ways to establish receipt of a claim. *See Carroll v. Comm'r*, 71 F.3d 1228, 1229 (6th Cir. 1995) (noting that "a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril."); *see also Banks v. Chater*, 949 F. Supp. 264, 268 (D. N.J. 1996) (noting three ways of establishing receipt by the Social Security Administration and that "[t]he lawyer who takes a more relaxed approach does so at the peril of her client and herself").

Moreover, a practitioner's guide for attorney and representatives, the Veterans Benefits Manual, recommends that representatives send correspondence to the RO by certified mail.[4] *See* Nat'l Veterans Legal Servs. Program, *Veterans Benefits Manual* 12.11.2 at 1035 (2013) (noting that "[o]nly certified mail, return receipt requested, will establish that the RO or Intake Center

[4] While not authoritative, the Veterans Benefits Manual advises representatives of best practices for representation before VA, and has previously been referenced by this Court. *See, e.g., Harvey v. Shinseki,* 24 Vet.App. 284, 291, n.2 (2011) (referencing the Veterans Benefits Manual for EAJA fee calculation); *Thompson v. Brown*, 8 Vet.App. 169, 175 (1995) (noting VA forms that were printed in appendices to the Manual).

received the NOD (or other document) in a timely manner"). Given that Appellant's attorney could have taken steps to ensure receipt of his substantive appeal and declined to do so, the Court should reject Appellant's post-hoc argument that his attorney's affidavit, alone, is sufficient evidence for the mailbox rule to attach. *See Carroll*, 71 F.3d at 1229; *Banks*, 949 F. Supp. at 268.

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. *See Norvell v. Peake*, 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it to be necessary.

CONCLUSION

For the above reasons, the Secretary respectfully requests that this Court affirm the September 22, 2017, Board decision.

Respectfully submitted,

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