No. 18-0180

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

Re

ROY E. ANANIA,

Appellant,

versus

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

KENNETH M. CARPENTER
Carpenter, Chartered
1525 Southwest Topeka Boulevard
Post Office Box 2099
Topeka, Kansas 66601
785-357-5251

Attorney for Appellant

Table of Contents

Table of Authorities

Page

Decisions

Statutes

Regulations

Citations to Record Before the Agency

RBA Page:

Arguments

Summary of Rebuttal Arguments

The issue presented in this appeal is whether, as a matter of law, the common law mailbox rule presumption attached. The Secretary has mistakenly argued that Mr. Anania failed to show that the Board erred in determining that his attorney's affidavit, alone, was insufficient to trigger the mailbox rule presumption of receipt. Mr. Anania's attorney's affidavit triggered the mailbox rule presumption of receipt because it met the requirements at law to do so. The Secretary has conflated the requirements to rebut the presumption of regularity with the requirements for the common law mailbox rule to attach. In addition, the Secretary is wrong that independent evidence of a postmark is necessary for the common law mailbox rule presumption to attach.

I.

The Board erred in its determination that the common law mailbox rule did not attach.

The Secretary mischaracterized the issue in this appeal as:

> 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?

Sec.Brf., p. 1. The issue presented in this appeal is whether, as a matter of law, the common law mailbox rule presumption attached.

The Secretary incorrectly contends:

> 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 (sic) 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.

Sec.Brf., p. 5.

As noted in Mr. Anania's opening brief, the Federal Circuit in *Rios v. Nicholson*, 490 F.3d 928 (Fed. Cir. 2007) 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. The Secretary has chosen not to address whether Congress did or did not explicitly speak to the abrogation of the common law mailbox rule in the provisions of 38 U.S.C. § 7105.

Instead, the Secretary merely indicates as follows:

> 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.*

Sec.Brf., pp. 5-6. The preceding discussion by the Secretary pertains to actual and not presumed receipt and is, therefore, not relevant to whether the common law presumption attached in this case.

The Secretary asserts:

> 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)).

Sec.Brf., pp. 6-7. However, Mr. Anania **does not** challenge the Board's finding that the facts in this case do not warrant application of the mailbox rule because the Board made no such finding of fact. RBA 2-14 at 4-5.

Mr. Anania **does** challenge the Board's conclusion of law:

> The Veteran did not file a timely substantive appeal with respect of the effective date of June 22, 2008, assigned for the award of TDIU in the February 2009 rating decision.

RBA 2-14 at 5. The Board's conclusion of law was based on a finding of material fact that Mr. Anania's attorney's affidavit did not, as a matter of law, trigger the presumption of receipt under the mailbox rule. RBA 2-14 at 10. The Board's finding was one of material fact which was adverse to Mr. Anania.

As such, this Court reviews a finding of material fact made by the Board *de novo*.

See 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 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). This Court should not affirm the Board's finding of material fact that Mr. Anania's attorney's affidavit does not trigger the presumption of receipt under the mailbox rule. RBA 2-14 at 10.

The Secretary's reliance on this Court's decision in *Rios v. Mansfield*, 21 Vet. App. 481 (2007) (*Rios* II) is misplaced. Overlooked by the Secretary is that this Court held that Mr. Rios **had established** that his notice of appeal was mailed with the United States Postal Service (USPS), **thereby invoking presumption of receipt permitted under the common law mailbox rule**. Therefore, this Court's decision in *Rios* II could not have been correctly relied upon by the Board to support its finding of material fact that the presumption of receipt permitted under common law mailbox rule had not attached. This is because both the Board and the Secretary ignored this Court's ultimate holding:

The only evidence to rebut the presumption of receipt is the

> fact that the NOA was never logged in by the Court, however, this is insufficient to rebut the presumption of delivery under the common law mailbox rule. *See Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1241 (11th Cir.2002) ("[A] party's failure to uncover an item, which it was presumed to have received, does not mean that it never received the item and does not rebut the presumption of delivery."); *Arnold v. Wood*, 238 F.3d 992, 995 (8th Cir.2001) (stating that the presumption of accuracy in favor of docket entries may be rebutted only by a stronger presumption such as the "mailbox rule"); *In re Nimz Transp., Inc.*, 505 F.2d 177, 179 (7th Cir.1974) (holding, in a case where petitioners alleged mailing wage claims to the clerk of district court, that "the fact that the clerk's files did not contain the proof of claims" was "by itself insufficient to rebut the presumption of receipt"); *Jones v. United States*, 226 F.2d 24, 27 (9th Cir.1955) ("The showing that a search of the pertinent files in the [addressee's] office revealed no record of the [relevant documents] having been filed is a purely negative circumstance, insufficient ... to rebut the presumption of delivery."); *see also Tavares v. Principi*, 18 Vet.App. 131, 141 n. 1 (Kasold, J., dissenting) ("Documents get lost in the mail and even lost at this Court." (citing *Evans v. Principi*, 17 Vet.App. 41, 42 (2003))).

Rios II, 21 Vet. App. 484. Therefore, the Board's and the Secretary's citations from *Rios* II are simply not controlling and verge on a frivolous pleading by the Secretary.

The Secretary also mistakenly relies upon one of this Court's decisions, as did the Board, as shown by the following:

> 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).

Sec.Brf., pp. 8-9. This matter **is not** analogous to *Fithian v. Shinseki*, 24 Vet.App. 146, 151 (2010), as suggested by both the Board and the Secretary. This Court's decision in *Fithian* concerned a misfiled motion for reconsideration and **did not** concern or apply the presumption of mailing. At best, there is a parenthetical reference to *Rios* II. The reference made was concerning whether the presumption of receipt under the common law mailbox rule could have been rebutted and not to whether the presumption attached. Once again, both the Board and the Secretary's reliance on this Court's decision in *Fithian* was misplaced because the issue in this appeal is whether the presumption of receipt under the common law mailbox rule **attached** and not whether it was rebutted. Both the Board and the Secretary have conflated the questions of whether the presumption of receipt under the common law mailbox rule **attached** with whether, having attached, it had been rebutted.

II.

The Secretary is wrong that independent evidence of a postmark is necessary for the common law mailbox rule presumption to attach.

The Secretary also argues: "Appellant and his attorney had the opportunity to obtain independent evidence of a postmark, but declined to do so." Sec.Brf., pp. 15-17.

In support of this argument, the Secretary begins as follows:

> 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. *See Locklear*, 20 Vet.App. at 416 (holding that the Court will not entertain underdeveloped arguments); *Hilkert*, 12 Vet.App. at 151.

Sec.Brf., p. 15. To be clear, Mr. Anania was referring to the fact that his appeal relied 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. Appellant's Opening Brief, p. 6. He **was not** asserting that the Court should find that *Rios* II does not apply in this case because his attorney is an accredited representative. Rather, he was explaining:

> 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.

Appellant's Opening Brief, pp. 6-7. Mr. Anania at page 10 and 11 of his opening brief was contending that the Board's reliance on this Court's decision in *Rios v. Mansfield*, 21 Vet. App. 481 (2007) was misplaced.

Mr. Anania's reference in his opening brief to his attorney being an accredited

representative was in support of why the presumption of mailing should be a consideration regarding whether the presumption attached. Congress has mandated that the Secretary shall prescribe in regulations which are consistent with the Model Rules of Professional Conduct of the American Bar Association that qualifications and standards of conduct for individuals recognized as an accredited representative must be competent to assist claimants in presenting claims and have such level of experience or specialized training as the Secretary shall specify. *See* 38 U.S.C. § 5904(a)(2)(A) and (B). The Secretary has prescribed by regulation that an individual desiring accreditation as an agent or attorney must establish that he or she is qualified to render valuable assistance to claimants and is otherwise competent to advise and assist claimants in the preparation, presentation, and prosecution of their claim(s) before the Department. *See* 38 C.F.R. § 14.633(b)(2). With these qualifications, when an accredited representative represents to the Secretary in an affidavit that he timely mailed a notice of disagreement or a substantive appeal to VA the need to also provide independent evidence of a postmark is both unnecessary and unreasonable when, as here, Mr. Anania's accredited representative attested under oath that the substantive appeal had been timely mailed to VA.

The Secretary is wrong when he concludes that Mr. Anania'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. Sec. Brf., p. 16.

Misunderstood by the Secretary is that there is no requirement in any case cited by the Secretary that an attorney's sworn statement that the substantive appeal had been timely mailed to VA must be supported by independent evidence to trigger the presumption of mailing. The Secretary's reliance on his manual provision which recommends that representatives send correspondence to the RO by certified mail is misplaced. Sec. Brf., p. 16. Such a recommendation does not impose an affirmative requirement that a veteran seeking the benefit of the presumption of mailing must be supported by independent evidence to trigger the presumption of mailing. It is the Secretary who is proffering *post-hoc* rationalization for the Board's clear error of law in determining that the presumption of mailing did not attach when it unquestionably did attach under both *Rios* I and *Rios* II. 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,

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Appellant,
Roy E. Anania
Electronically filed on January 14, 2019