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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0180

ROY E. ANANIA, APPELLANT,

V.

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

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Roy E. Anania, appeals a September 22, 2017, Board of Veterans' Appeals (Board) decision that found his Substantive Appeal concerning the effective date of a June 22, 2008, award of a total disability rating based on individual unemployability (TDIU) was not timely filed. Record of Proceedings (R.) at 1-14. Because we find the Board properly applied the common law mailbox rule, the Court will affirm the Board's decision.

I. BACKGROUND

The appellant served in the U.S. Army from August 1972 to August 1975. R. at 243. On February 26, 2009, the regional office (RO) granted, among other things, entitlement to TDIU with an effective date of June 22, 2008. R. at 904-11.

In September 2009, the appellant filed a Notice of Disagreement (NOD) contesting the effective date of the award of TDIU. R. at 825-30. That December, the RO provided the appellant with a Statement of the Case (SOC). R. at 785-800.

In June 2012, the appellant's attorney, Mr. Carpenter, sent a letter to the Board requesting confirmation that it had docketed the appellant's earlier-effective-date claim. R. at 608-16. In this letter, Mr. Carpenter stated that "[o]n January 19, 2010, Mr. Anania filed a [S]ubstantive [A]ppeal

with [the December 2009 SOC] in order to obtain de novo appellate review by the Board of Veterans' Appeals." R. at 613. The appellant's counsel attached a letter styled a "[S]ubstantive [A]ppeal with the [SOC] of December 4, 2009." R. at 629-41.

In March 2013, the Board determined that the appellant failed to file a timely Substantive Appeal. R. at 353-87. On appeal to this Court, the parties agreed to a joint motion for partial remand, agreeing 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. R. at 328-32.

A July 2014 Supplemental SOC stated that VA did not receive a timely Substantive Appeal challenging the effective date of the appellant's TDIU award. R. at 291-07. In November 2014, Mr. Carpenter submitted to the Board additional evidence and argument related to whether the appellant filed a timely Substantive Appeal, including two exhibits: A copy of a letter dated January 18, 2010, and a signed affidavit stating that "[o]n January 18, 2010, I mailed a [S]ubstantive [A]ppeal (in lieu of a VA form 9) to the [RO] in Waco, Texas." R. at 163-65, 167-77.

A May 2015 Board decision again determined that the appellant did not file a timely Substantive Appeal of the February 2009 rating decision. R. at 150-58. On appeal to this Court in April 2017, we 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; *Anania v. Shulkin*, No. 15-3413, 2017 WL 1316372, at *3 (Vet. App. Apr. 10, 2017).

The Board then issued the September 22, 2017, decision on appeal, determining that the appellant failed to file a timely Substantive Appeal. R. at 1-14. In reaching its holding, the Board determined that the affidavit submitted by the appellant was "not sufficient evidence to establish the presumption of receipt under the common law mailbox rule" and that there was "no tangible evidence of mailing such as a proof of postmark or dated receipt to support his contention that he mailed the [S]ubstantive [A]ppeal on that date." R. at 10. This appeal followed.

II. ANALYSIS

The common law mailbox rule provides that, "'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, 930-31 (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193-94 (1884)). "An issue of fact arises when the intended recipient alleges that the letter was never actually received." *Id.* When the presumption "'is opposed by evidence that the letters never were received, [it] must be weighed with all the other circumstances of the case, by the [trier of fact] in determining the question whether the letters were actually received or not.'" *Id.* (quoting *Rosenthal*, 111 U.S. at 194).

In order for the presumption to attach, the appellant must provide evidence demonstrating that his filing was properly addressed, stamped, and mailed in adequate time to reach the recipient in the normal course of post office business. *See id.* In *Rios v. Mansfield* (*Rios II*), this Court stated that the presumption 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." 21 Vet.App. 481, 482 (2007).

The appellant proffers 2 main arguments: (1) That the common law mailbox rule should apply in this case even though the case involves a Substantive Appeal, and (2) that the Board erred when it found that the presumption of receipt did not attach. Appellant's Brief (Br.) at 6-14. Regarding his second argument, the appellant more pointedly contends that because Mr. Carpenter's affidavit to the Board affirmatively stated that he mailed the appellant's Substantive Appeal in a timely manner, the Board is under the legal obligation to presume receipt. *Id.* at 11. He also argues that the Board applied the wrong legal standard by requiring "tangible evidence" when analyzing whether the presumption of receipt attached. *Id.* at 12-13. The Secretary counters that the Court should affirm the Board's findings because it properly analyzed the relevant law, applied the correct legal standard, and determined that the appellant's affidavit was nothing more than self-serving testimony, which is insufficient evidence for the attachment of the presumption of receipt. Secretary's Br. at 5-17.

In the decision on appeal, the Board discussed application of the common law mailbox rule to the facts of this case and determined that the appellant's case was analogous to the appellant in *Fithian v. Shinseki*, who submitted a sworn affidavit stating that he mailed a motion for reconsideration by a specific date, abating the finality of a Board decision.[1] 24 Vet.App. 146, 151

[1] When recounting the facts of *Fithian*, the Board inartfully conflated the concepts of tolling with abatement. In *Fithian*, the timely filing of a motion for reconsideration would have abated the finality of the Board decision, in effect resetting the clock for him to file his Notice of Appeal. The misuse of terms, however, is inconsequential here to the Board's ultimate point that a sworn affidavit was insufficient evidence for the presumption of receipt to attach

(2010). The Board noted that in *Fithian*, a sworn affidavit was "'not sufficient to establish the presumption of receipt under the common law mailbox rule.'" R. at 10 (quoting *Fithian*, 24 Vet.App. at 151). Because the Board here found that the appellant provided no evidence other than the affidavit that he timely mailed the Substantive Appeal, and because there was "no tangible evidence of mailing such as a proof of postmark or dated receipt to support his contention," it concluded that the presumption of receipt does not attach in this case. R. at 10-12. Accordingly, the Board found the Substantive Appeal untimely.

As to the appellant's first argument – that the common law mailbox rule applies under 38 U.S.C. § 7105 to mailings of NOD's and Substantive Appeals – neither the Board nor the Secretary disagree, and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) spoke to this matter in *Savitz v. Peake*, holding that its application in *Rios I* of the common law mailbox rule to 38 U.S.C. § 7266 is "equally applicable" to 38 U.S.C. § 7105. 519 F.3d 1312, 1315 (Fed. Cir. 2008). Accepting the Federal Circuit's holding as applicable to this scenario, we move to the appellant's contention that the Board misapplied the common law mailbox rule.

Despite the appellant's assertion that Mr. Carpenter's affidavit is "proof that his [S]ubstantive [A]ppeal was timely mailed to the VA[RO]" and therefore "must be presumed by the Board to have been received by the VA[RO]," Appellant's Br. at 11, nothing in this Court's or the Federal Circuit's caselaw counsels us to hold that simply receiving a sworn affidavit from the appellant's attorney necessitates the per se attachment of the presumption of receipt. To the contrary, the Federal Circuit has held that in order for the presumption to *attach*, the appellant must provide evidence demonstrating that his filing was properly addressed, stamped, and mailed in adequate time to reach the recipient in the normal course of post office business, *see Rios I*, 490 F.3d at 930-31, and this Court in *Rios II* stated that evidence requires proof of mailing "apart from a party's own self-serving testimony." 21 Vet.App. at 482. Further, this Court's precedent in *Fithian* counsels against treating a sworn affidavit as sufficient to establish the presumption of receipt. *Fithian*, 24 Vet.App. at 151.

The appellant attempts to distinguish his appeal from the facts of *Fithian* because that case concerned a motion for reconsideration and "did not concern or apply the presumption of mailing." Reply Br. at 7. Although that case in large part discussed the presumption of regularity (which

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in that case.

states that "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *Ashley v. Derwinski*, 2 Vet.App. 62, 64 (1992) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15, (1926))), it is clear to the Court that *Fithian* directly addressed the presumption of receipt, finding that it did not attach in the case because only self-serving testimony was given through affidavit:

> These statements [in his affidavit], however, are not sufficiently clear evidence to rebut the presumption of regularity. *They are also not sufficient to establish the presumption of receipt under the common law mailbox rule*. *See Rios v. Mansfield*, 21 Vet.App. 481, 482 (2007) (stating that the "presumption of receipt permitted under the common law 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"). Based on this evidence, which establishes neither that the Board received the letter nor that Mr. Fithian mailed the letter, the Court must conclude that the Board properly discharged its duties and that Mr. Fithian's July 21, 2008, letter was not received by the Board.

24 Vet. App. at 151 (emphasis added). In light of the *Fithian* Court's comments explicitly addressing the usefulness of a "self-serving affidavit" in the context of the presumption of receipt, the Court finds no legal error in the Board's reliance on that case in its discussion of whether the presumption of receipt attached.

Further, the appellant's argument that the Board applied the wrong legal standard is unpersuasive. In relevant part, his contention is that "[t]he Board's use of a tangible evidence standard of mailing, such as proof of postmark or dated receipt, to allow the common law mailbox rule to attach relied upon the wrong legal standard." Appellant's Br. at 12. Although the appellant's proposed legal standard for attachment of the presumption of receipt ("evidence demonstrating that the [S]ubstantive [A]ppeal was properly addressed, stamped, and mailed in adequate time to reach VA . . . before the elapse of the 60-day deadline") derives from *Rios I*, *id.* at 13, this Court has already taken the time in *Rios II* to expound upon what is required for the presumption of receipt to attach in a case. The Board here stated that there was "no tangible evidence of mailing such as a *proof of postmark* or *dated receipt* to support his contention." R. at 10 (emphasis added). This standard clearly reiterates the concepts this Court articulated in *Rios II* (namely, that attachment of the presumption of receipt 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"). 21 Vet.App. at 482. Because the standard simply applies our caselaw to the facts of this appeal, the Court detects no error with the standard used.

The Board here properly and accurately recited the relevant caselaw in *Rios I*, *Rios II*, and *Fithian*; applied that caselaw to the facts of the appellant's case; and determined that the affidavit was self-serving and not sufficient evidence for the presumption of receipt to attach. It then found the Substantive Appeal untimely. Because the Court agrees with the Secretary that that appellant has failed to show error with the decision on appeal, the Board decision is affirmed. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion").

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's September 22, 2017, decision is AFFIRMED.

DATED: July 31, 2019

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)