

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-5294

LEONARD McCRAY,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENBERG, *Judge*.

ORDER

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

On August 31, 2020, the Secretary filed, pursuant to Rule 4(c) of the Court's Rules of Practice and Procedure (Rules), a copy of the Board of Veterans' Appeals (Board) decision on appeal, specifically (1) a March 31, 2020, Board Chairman ruling on the appellant's October 2, 2019, motion for reconsideration of a July 2, 2014, Board decision, and (2) the July 2014 Board decision. U.S. VET. APP. R. 4(c). The appellant filed the motion for reconsideration with the Board on October 2, 2019, more than 120 days after the date reflected on the 2014 Board decision. The 120th day would have been October 30, 2014. The Board Chairman denied the motion on March 31, 2020, and the appellant's Notice of Appeal (NOA) was filed, on July 29, 2020, within 120 days following the Board Chairman's denial.

On February 15, 2021, the Secretary filed a motion to dismiss the instant appeal for lack of jurisdiction, asserting that the appellant had filed an untimely motion for Board reconsideration and, therefore, an untimely NOA. However, the Secretary did not file his motion within 45 days of filing of the Board decision with the Court. U.S. VET. APP. R. 4(a)(3)(A). The Secretary filed a copy of the Board decision on August 31, 2020, but did not file his motion to dismiss until February 15, 2021, more than 45 days after he filed the Board decision. The 45th day would have been October 15, 2020. In his motion, the Secretary does not address his untimeliness but rather asserts, *inter alia*, that while the appellant may file for reconsideration at any time, "the Court lacks jurisdiction over the [March 31, 2020, denial of reconsideration] because it lacks jurisdiction over the underlying [July 2014] Board decision" because the motion for reconsideration was submitted more than five years after the 2014 Board decision (and the NOA was filed more than six years after the 2014 Board decision), beyond the 120-day appeal period. Feb. 15, 2021, Secretary's Motion to Dismiss at 4-6.

On April 15, 2021, the appellant filed a response, asserting that the Secretary's motion was untimely filed. He argues that "because the Secretary did not file a motion to dismiss within 45 days of the date the Secretary filed the July 2014 and March 2020 BVA decisions with the Court, his appeal of the July 2014 BVA decision and the March 2020 denial motion for reconsideration

should be "treated as timely regardless of the date it was received." Apr. 15, 2021, Appellant's Response at 1 (quoting U.S. VET. APP. R. (4)(a)(3)(A)). The appellant argues that the Court should deny the Secretary's motion to dismiss because the Secretary (1) failed to timely file the motion under the Court's Rule 4, (2) sought no extension of time to file his motion to dismiss, (3) did not seek leave to file the motion for dismissal out of time, (4) never mentioned or discussed Rule 4(a)(3)(A), and (5) and did not ask for an exception to the Rule. *Id.* at 2. He requests that the Court to treat his July 2020 NOA as timely as to both the July 2014 BVA decision and the March 2020 denial of the motion for reconsideration. He further contends that because the Board's July 2014 decision is final and within the Court's jurisdiction, the Court also has jurisdiction to review the Board's denial of the March 2020 reconsideration motion. He notes that a decision by the Court as to whether to exercise its discretion to review the reconsideration denial is best reserved for the merits briefing. *Id.*

Pursuant to Rule (4)(a)(3)(A) of the Court's Rules "[i]f the Secretary does not within 45 days after the filing date of the Board decision (pursuant to Rule 4(c)) file a motion to dismiss an appeal for failure to file a timely Notice of Appeal within the 120-day appeal period, the Notice of Appeal will be treated as timely regardless of the date it was received." U.S. VET. APP. R. 4(a)(3)(A). The 120-day judicial-appeal period is not jurisdictional and can be waived by inaction by the Secretary during the 45-day period following the Secretary's transmittal of the Board decision – even one dated 5 years prior to the filing of the NOA. *See Henderson ex rel. Henderson v. Shinseki*, ("We hold that the deadline for filing a notice of appeal with the Veterans Court does not have jurisdictional attributes. The 120-day limit is nevertheless an important procedural rule."); *see also McGee v. Wilkie*, 31 Vet.App. 368, 371 (2019) (per curiam order) ("Under 38 U.S.C. § 7264(a), we may prescribe the rules of practice and procedure parties must follow when appearing before us."). Accordingly, the Court will accept the appellant's NOA as timely and deny the Secretary's motion to dismiss.

The Court notes that the appellant was notified on December 7, 2020, to file his brief within 60 days after the date of the notification, but proceedings were stayed as a result of the Secretary having filed the motion to dismiss. The Court will revoke its order and reset the briefing period.

On consideration of the foregoing, it is

ORDERED that the stay of proceedings imposed by the Court on February 16, 2021, is hereby lifted. It is further

ORDERED that the appellant's July 29, 2020, Notice of Appeal is accepted as timely. It is further

ORDERED that the Secretary's motion to dismiss is denied. It is further

ORDERED that the Court's December 7, 2020, order is hereby revoked. It is further

ORDERED that, in due course, the Clerk of the Court shall issue a new notice to file brief.

DATED: June 22, 2021

BY THE COURT:

A handwritten signature in blue ink, appearing to read "William S. Greenberg", with a long horizontal flourish extending to the right.

WILLIAM S. GREENBERG
Judge

Copies to:

Christopher F. Attig, Esq.

VA General Counsel (027)