

IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS

DARALD BLY,

Appellant

v.

ROBERT A. MCDONALD,  
Secretary of Veterans Affairs

Defendant

Vet. App. No. 15-0502

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**APPELLANT’S SUPPLEMENTAL MEMORANDUM OF LAW**

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APPELLANT hereby responds to the Court’s Order for parties to submit supplemental memoranda of law on the following questions:

1. In light of the Supreme Court's holding in *Scarborough v. Principi*, 541 U.S. 401 (2004), is the 30-day filing period for an EAJA application (28 U.S.C. § 2412(d)(1)(B)), subject to the doctrine of equitable tolling?

Answer: Yes. The Court in *Scarborough* grounds its discussion on equitable tolling in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), in which the plaintiff had untimely filed a Title VII discrimination claim against the Government. “Although the petitioner had missed the filing deadline, we held that Title VII's statutory time limits are subject to equitable tolling, even against the Government.” *Id.* at 420-421. That the defendant was the Government and had waived sovereign immunity was inconsequential, according to the Court. “We

therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.” *Id.* at 457.

The statute in *Irwin* stated that an employee may file a civil action “[w]ithin thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity Commission.” 42 U.S.C. § 2000e-16(c). The time requirement in the instant case is very similar, requiring an application for attorney fees and costs under EAJA to be filed “not later than 30 days after the Court’s judgment becomes final.” 28 U.S.C. § 2412(d)(1)(A); U.S. VET. APP. R. 39(a). The only notable difference, though not material to this issue, is that EAJA is not concerned with receipt of a notice, but the date of the judgment becomes final. However, statutes of limitations need not be identical to 42 U.S.C. § 2000e-16(c) for equitable tolling to apply. *Irwin*, 111 S.Ct. at 457.

*Scarborough* directly applied the equitable tolling holding in *Irwin* to EAJA. In *Scarborough*, the attorney applied for EAJA fees after prevailing in an action against the Department of Veterans Affairs. However, he had failed to include in his timely-filed application a statement alleging that the Government’s case was not substantially justified. The attorney amended his application more than 30 days after the judgment had become final, to include the “not substantially justified” statement. *Scarborough*, 541 U.S. at 405. The Court held that equitable tolling applied to allow the out-of-time amendment. In doing so, the Court also held that: 1) whether the plaintiff was time barred from collecting a fee under EAJA was not a jurisdictional issue (*Id.* at 413); 2) allowing the “curative amendment” advances Congress’s purpose in enacting EAJA, (*Id.* at 417); and 3) that EAJA has a built-in check, allowing the court to disallow fees “where special circumstances seem unjust” (*Id.* at 422-423) (internal citations omitted).

These holdings directly support a finding that EAJA filing requirements are subject to equitable tolling. First, whether the present application for EAJA fees is time barred is not a jurisdictional issue and the Court is therefore not precluded from applying equitable tolling. Second, the purpose of EAJA is to reduce the emphasis on cost of litigation “in a party’s determination of whether to challenge unjust governmental action” (*Scarborough*, 541 U.S. at 417) (internal citation

omitted). It also allows a dollar-for-dollar recovery by the veteran because EAJA fees offset the contingency fee owed to counsel. *Id.* at 408, citing 38 U.S.C. § 5904(d)(1).

Finally, finding that equitable tolling applies in this case “will not expose the Government to any unfair imposition.” *Scarborough*, 541 U.S. at 404. The Government never objected to Plaintiff’s application for EAJA fees and has not claimed to be prejudiced by Plaintiff’s filing date. The Court may disallow fees if circumstances seem unjust but there has been no allegation that Plaintiff’s claimed fees are in any way unjust. Appellant respectfully requests that the Court find that the 30-day filing requirement for EAJA is subject to the doctrine equitable tolling.

2. If so, what standard should be applied? In addressing this question, the parties should be mindful that the Court has stated (A) in a non-equitable tolling case, that “[t]he prospect of financial harm to the veteran is a concern to the Court; if dismissal may financially disadvantage the appellant, and ‘where the error is not egregious and is easily remedied,’ the Court will not dismiss an EAJA application,” *Molden v. Peake*, 22 Vet. App. 177, 181 (2008), and (B) in non-EAJA cases, that garden variety attorney negligence does not support equitable tolling, see *Nelson v. Nicholson*, 19 Vet. App. 548, 552 (2006) (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)); see also *Gilbert v. Secretary of Health and Human Services*, 51 F.3d 254 (Fed. Cir. (1995) (rejecting ordinary attorney negligence as a basis for equitable tolling).

Answer: The standard that should be applied for equitable tolling is: 1) Will the veteran be financially harmed without it? If so, then 2) will the government be prejudiced with it?

*Molden* provides a compelling starting point for the application of equitable tolling. In that case, the Court found good cause to set aside Rule 46, requiring an attorney filing an EAJA application to have “good moral character,” because dismissing the EAJA application “could cause financial harm to the veteran.” *Molden*, 22 Vet.App. at 181. The Court was addressing this finding in making the above statement that “[t]he prospect of financial harm to the veteran is a concern to the court,” etc. *Id.* The Court cited *Martini v. Principi*, 19 Vet.App. 20 (2005), where the Court had

refused to dismiss an EAJA application when one of the veteran's attorneys had simply failed to sign the fee agreement, in violation of Rule 46(d)(2); and distinguished *Jones v. West*, 13 Vet.App. 543 (2000), in which the Court dismissed the EAJA application for a violation of Rule 46(d) but only because the attorney had been representing the veteran *pro bono* and the veteran would not be financially harmed if EAJA fees were not paid.

This Court has been candid in affirming its duty to veterans. In *Morrow v. McDonald*, 27 Vet.App. 92 (2014), the prevailing attorney applied for EAJA fees more than 30 days after the effective date of the mandate. The Government objected, arguing that the attorney had not sufficiently proven that equitable tolling was warranted. The attorney thereafter moved to withdraw his application for EAJA fees, which the Court granted. Judge Greenberg, in a concurring opinion, pointed out that the EAJA statute is a “veteran-friendly, lawyer-friendly, statute, enacted by Congress to encourage worthy litigation,” the intent of which was frustrated by the Court’s granting of counsel’s motion to withdraw. *Id.* at 92. He concluded that “the EAJA application period at this Court is subject to equitable tolling, not unlike the other nonjurisdictional claims processing rules of this Court,” indicating he would have found that it applied in that case. *Id.* at 94. Judge Greenberg strongly favored paying attorneys for the work they do in the CAVC. “We should encourage lawyers to represent veterans, not place needless additional obstacles on the long road toward an adequate award.” *Id.* at 92.

The Supreme Court has refused to extend equitable tolling to a “garden variety claim of excusable neglect.” *Irwin*, 111 S.Ct. at 455. This standard would not provide any kind of consistent results as it only identifies a situation when equitable tolling will *not* apply, and “garden variety excusable neglect” is vague and imprecise. In *Gilbert*, the court refused to excuse a late filing under a rule that relieved a party from a final judgment or order because of excusable neglect. *Gilbert* The court found that the filing—an election to file a civil suit—was not an order or judgment, and therefore the rule regarding excusable neglect did not apply. The court also found that the failure to timely file was effectively a jurisdictional issue that the court itself did not have the authority to

excuse. For these reasons, *Gilbert* is not helpful in identifying a standard for equitable tolling. *Nelson* does reference *Irwin* but also attempts to apply a standard outlined in *McCreary* (*McCreary v. Nicholson*, 19 Vet.App. 324 (2005)). However, the Court concedes that the *McCreary* standard, which includes demonstrating the existence of circumstances beyond the veteran's control, would require judges to make determinations on a case-by-case basis and would therefore not contribute to a consistent and reliable standard.

The two-part standard described at the beginning of this answer, on the other hand, is precise and would produce a reliably consistent outcome. It considers the importance this Court places on its duty to veterans but not at the expense of the Government. This standard is appropriate for EAJA as distinguished from other types of issues by the Court in *Scarborough*, e.g., it may not be appropriate for jurisdictional issues.

3. Under the standard presented in your briefing, is equitable tolling warranted in this case?

Answer: Yes. 1) The veteran would be financially harmed as the EAJA fees would offset his contingent fee, dollar-for-dollar. 2) The government was not been prejudiced by the timing of the EAJA application.

4. Whether the appellant has any alternative means of ensuring that his potential overall award is not reduced beyond this Court accepting the EAJA application as timely, including whether the Court is able to hold, and should hold, that payment of fees out of any award of past-due benefits under 38 U.S.C. § 5904(d) should be offset by the amount sought in an EAJA application when that application has been denied for failure to timely file that application.

Answer: Appellant does not have any alternative means at this time.

Dated: June 30, 2016

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2016, I electronically filed the foregoing motion with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/ Brandon M. Selinsky