

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-3240

RICARTE A. SOLIBEN,

APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before HAGEL, *Chief Judge*, and BARTLEY and GREENBERG, *Judges*¹.

ORDER

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

This is an equitable tolling case. *See Henderson v. Shinseki*, 562 U.S. 428 (2011); *Bove v. Shinseki*, 25 Vet.App. 136 (2011). Before the Court is the issue of whether a September 23, 2014, Notice of Appeal (NOA) of a May 23, 2014, Board of Veterans' Appeals (Board) decision is timely, including whether the 42 days it took for the Board to respond to a request to have a copy of the decision sent to a new address is an extraordinary circumstance sufficient to warrant equitable tolling of the 120-day appeal period to this Court.

I. FACTS

On May 23, 2014, the Board issued a decision denying the appellant, Ricarte A. Soliben, entitlement to a disability rating in excess of 10% for intervertebral disc disorders, status postoperative laminectomy L5-S1, prior to November 18, 2011. That decision was mailed to 116 Grandview Drive, "Hinsville [sic]," Georgia, 31313, which was the address listed as the appellant's current address in VA's database at the time of the decision. Appellee's Preliminary Record, Exhibit B. The 120th day after May 23, 2014, would have been Saturday, September 20, 2014; a timely appeal of that decision would have had to have been filed with the Court by Monday, September 22, 2014, the first business day after the 120th day after the Board mailed notice of its decision. *See U.S. VET. APP. R. 26(a)(1)*.

On July 28, 2014, 66 days after the Board issued its decision, the appellant mailed a letter

¹The Panel reached its decision during the tenure of Chief Judge Hagel, which ended at midnight, October 7, 2016. This decision is issued nunc pro tunc to October 7, 2016.

to the Board stating that he "respectfully request[ed] a complete copy of the decision made by the Board" because "[t]his information has never been provided to me and I need this information to proceed with my claim." Appellee's April 23, 2015, Response, Exhibit 1, at 2. On August 4, 2014, 73 days after the Board issued its decision, VA received that letter. *Id.* The correspondence reflected that the appellant's address was 517 West Black Oak Road, Nixa, Missouri, 65714. Appellee's Preliminary Record, Exhibit F.

On August 8, 2014, 4 days after the Board received the letter, mail room staff forwarded the letter for action by the appropriate administrative office within the Board. Appellee's April 23, 2015, Response, Exhibit 1, at 3. On August 20, 2014, 16 days after the Board received the letter, the appellant's current address was updated in the VA system to reflect his Missouri address. Appellee's Preliminary Record, Exhibit F. On September 15, 2014, 115 days after the Board issued its decision and 42 days after the appellant notified VA of his Missouri address, the Board sent the appellant a letter notifying him that its decision had been mailed to the "116 Granview [sic] Drive, Hinsville [sic], GA 31313" address. Appellee's Preliminary Record, Exhibit E. A copy of the Board decision was enclosed. Appellee's April 23, 2015, Response, Exhibit 1, at 1. According to the appellant, he received that letter and decision on September 18, 2014, the 118th day of the judicial appeal period. NOA at 1.

The appellant's NOA was postmarked on September 23, 2014, 8 days after a new copy of the Board decision was mailed and 1 day after the 120-day appeal period expired, and received by the Court on September 26, 2014. NOA at 9. In that NOA, the appellant stated that he had received his "file"—presumably meaning the Board decision—on September 18, 2014; that the "[f]ile was sent to an old address for the veteran"; and that "[s]uch mishaps could be avoided if the veterans did not have to contact so many different departments to make a profile change." *Id.* at 1. On November 3, 2014, the Court ordered the Secretary to file a preliminary record concerning the mailing of the Board decision, which he did on January 20, 2015. On February 10, 2015, the Court ordered the appellant to file a response discussing whether the circumstances of his case warranted equitable tolling of the 120-day judicial appeal period. He did not respond.

Based on to the facts described in the preliminary record that the Secretary provided, on April 10, 2015, the Court ordered the Secretary to explain the 42-day period that preceded the Board sending materials to the appellant at his new address. On April 23, 2015, the Secretary responded, providing a declaration from Barbara C. Morton, Director of the Board's Office of Management, Planning, and Analysis, in which she accounted for the 42 days. She declared, with supporting evidence, that after 4 days, the appellant's letter was forwarded from the mail room; the appellant's address was updated 12 days after the letter being forwarded; and a response was drafted and sent to the appellant 26 days later.

Following supplemental submissions by the appellant and the Secretary, the Court held oral argument on May 11, 2016. At oral argument, the Court ordered that, for the period between May 23, 2014, the date of the Board decision before the Court, and September 23, 2014, the date that the appellant filed his NOA, the Secretary inform the Court whether (1) VA had any regulations, rules,

policies, or procedures in place regarding the Board's process for responding to an appellant who notifies the Board that a copy of its decision has not been received due to a change in address and requests a copy of that Board decision; (2) the Board's target time to respond to requests to mail a Board decision to a newly received address; (3) the average time it took the Board to respond to such requests; and (4) whether the target and average response times described above vary depending on whether the request for the Board decision was received within 120 days after the date that the Board mailed its decision and the degree of that variance, if any. This order was memorialized in a written order of the Court on May 24, 2016.

On June 23, 2016, the Secretary responded to the Court's order, providing a June 3, 2016, declaration from Ms. Morton. In her declaration, Ms. Morton swears that

the relevant VA policies and procedures in place from May 23, 2014, to September 23, 2014, do not provide specific guidance as to the time frame in which a copy of the Board decision should be resent where an appellant provided VA with a new address and requested a copy of the Board decision.

Secretary's Response to the Court's May 24, 2016, Order at 3. She also swears that, between May 1, 2014, and September 30, 2014, (1) the Board did not have a target time frame in which to respond to requests to resend a Board decision; (2) the Board's average response time to a request to resend a Board decision was 34.6 days; and (3) the Board's average response time to these requests was 34.9 days when a claimant provided a new address inside of the 120-day appeal period from the Board decision and 26.7 days when a new address was provided after 120 days had already elapsed since the original decision was mailed. *Id.* at 3-5. More simply stated, the Board resent an undelivered Board decision *more quickly* when the 120-day period to file an NOA had already *expired* than when the 120-day period had not expired, leaving the latter group of claimants with little or no time remaining to timely file an appeal.

On June 30, 2016, the appellant filed a motion to strike portions of the Secretary's response to the Court order because (1) the statistics provided by the Secretary included a class of cases not identified by the Court—i.e., cases where a Board decision was returned as undeliverable—and (2) the Secretary's response referenced internal guidelines for handling undeliverable mail but conceded that no regulations or guidelines governed the situation at issue here—i.e., responding to an appellant who contacts the Board to request a copy of a Board decision.

On July 14, 2016, the Secretary filed an opposition to the appellant's motion to strike that provided a more detailed breakdown of the statistics he initially provided to the Court. Specifically, he asserted that one employee at the Board—John Z. Jones, Interim Director of the Board's Office of Management, Planning, and Analysis—"remailed 98% of the Board decisions from May 1, 2014, to September 30, 2014," and that it took that employee, on average, 60.9 days to re-mail Board decisions prompted by a claimant request. Secretary's Opposition to Motion to Strike at 5. The Secretary included a declaration from Mr. Jones that demonstrated that it took his office, on average, 35 days to re-mail a Board decision returned as undeliverable during the 120-day judicial appeal period; 30.8 days to re-mail a Board decision returned as undeliverable after the 120-day judicial

appeal period expired; 67.6 days to remail a Board decision based on a request for remailing received within the 120-day judicial appeal period; and 36 days to remail a Board decision based on a request for remailing received after the 120-day judicial appeal period expired. *Id.* at 4-6 & Exhibit 1, at 3.

II. ANALYSIS

A. Presumption of Regularity

Congress has provided that individuals adversely affected by a final Board decision have 120 days to file an appeal to this Court after notice of the Board decision is mailed to them. 38 U.S.C. § 7266; Oral Argument at 30:35-30:42, *Soliben v. McDonald*, U.S. Vet. App. No. 15-3240 (argued May 11, 2016) (Secretary conceding that Congress "intended the veteran to have 120 days"). Significantly, the 120-day appeal period begins after notice of the Board decision is *mailed*. 38 U.S.C. § 7266. The Board's mailing of the notice of its decisions is normally supported by the "presumption of regularity" supporting official acts of public officers: "In the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties," which, in this setting, means the proper mailing by the Board of notice of its decision to the appellant's address of record. *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001). Thus, there is a rebuttable presumption that the date stamped on the Board decision itself is the date that the notice of the Board decision was mailed. *See Ashley v. Derwinski*, 2 Vet.App. 307, 309 (1992) ("The presumption of regularity is not absolute; it may be rebutted by the submission of 'clear evidence to the contrary.'" (quoting *Rosler v. Derwinski*, 1 Vet.App. 241, 242 (1991))).

However, the presumption of regularity applied by this Court is not substantially the same as the presumption of mailing applied in many jurisdictions. *See, e.g., SSI Medical Services, Inc. v. State Dept. of Human Services, Div. of Medical Assistance and Health Services*, 146 N.J. 614, 621 (1996) ("New Jersey cases have recognized a presumption that mail properly addressed, stamped, and posted was *received* by the party to whom it was addressed." (emphasis added)). The Board's proper mailing of notice of a decision accompanied by the decision itself does not establish that an appellant received such mailed items, even if it begins the 120-day appeal period.

Here, there is no evidence that the Board decision was returned as undeliverable and, although the appellant argues that VA's use of "Hinsville" instead of "Hinesville" in addressing the decision was consequential, the Court is unpersuaded that this misspelling impeded delivery of the decision to the Hinesville address that VA had on record for the appellant. *Cf. Santoro v. Principi*, 274 F.3d 1366, 1370 (Fed. Cir. 2001) (stating that "[w]here an address, *ex ante*, enables delivery to the intended destination, then that address is proper and any error is inconsequential," in a case where an incorrect zip code did not render an NOA improperly addressed); *Clarke v. Nicholson*, 21 Vet.App. 130, 133 (2007) (to rebut the presumption of regularity, the appellant "bears the burden of producing clear evidence that VA did not follow its regular mailing practices or that its practices were not regular"). Thus, the Court presumes that the Board mailed notice of its decision to the appellant's Hinesville address on May 23, 2014, and the 120-day appeal period began to run on that date.

B. Equitable Tolling

However, the commencement of the 120-day appeal period on May 23, 2014, does not end the Court's analysis. The 120-day statutory filing period, though not jurisdictional, is "an important procedural rule." *Henderson*, 562 U.S. at 441-42. Failure to file an NOA within the 120-day appeal period will ordinarily result in dismissal of an appeal unless an appellant demonstrates that equitable tolling of that period is warranted. *See Bove*, 25 Vet.App. at 140 (the 120-day appeal period is subject to equitable tolling).

Equitable tolling is available where the appellant can demonstrate (1) an extraordinary circumstance(s); (2) due diligence; and (3) that the extraordinary circumstances caused the lateness of the filing. *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014); *see McCreary v. Nicholson*, 19 Vet.App. 324, 332 (2005) (noting that this standard "ensures that the exception (equitable tolling) does not swallow the 120-day judicial-appeal period rule set forth in 38 U.S.C. § 7266(a)"), *adhered to on reconsideration* by 20 Vet.App. 86 (2006). Further, the proponent of equitable tolling bears the burden of demonstrating that it is justified. *Checo*, 748 F.3d at 1381; *see Claiborne v. Nicholson*, 19 Vet.App. 181, 185 (2005) (stating that the burden is "on the appellant to make the requisite showing").

Informing the Court's application of this test is its understanding that equitable tolling must be exercised on a case-by-case basis. *See Sneed v. Shinseki*, 737 F.3d 719, 726 (Fed. Cir. 2013) (the Court must not "focus[] too narrowly on whether [an appellant's] case fell into one of the factual patterns of past cases considering § 7266(a)"); *Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005) ("equitable tolling is not limited to a small and closed set of factual patterns" and is rather decided on a "case by case basis"); *Nelson v. Nicholson*, 19 Vet.App. 548, 551 (2006) ("[T]his Court is free to extend the principles of equitable tolling to new situations when warranted."). Further, an appellant must demonstrate diligence to warrant the benefit of tolling, but an appellant's mistake in the pursuit of his or her appeal is not an unforgivable, or uncorrectable, offense. *See Holland v. Florida*, 560 U.S. 631, 653 (2010) ("The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" (citation omitted)).

On August 4, 2014, the Board was notified by the appellant, in a letter indicating his new current address, that he had not received the Board decision. The appellant argues to the Court that the Board's 42-day delay in responding to his letter is an extraordinary circumstance sufficient to support the Court's tolling of the appeal period. Appellant's November 30, 2015, Brief in Support of Equitable Tolling at 7-8. He contends that equitable tolling is warranted because he was diligent during and after this circumstance and, because the delay caused him to file his appeal one day late, he lacked sufficient time to review the Board decision during the appeal period. *Id.* at 8-9.

The Secretary argues that the appellant failed to establish that any delay in the Board's resending its May 23, 2014, decision constitutes an extraordinary circumstance and that his failure to provide the Board with his updated address until two months after the Board issued its decision does not demonstrate that he was precluded from filing his NOA in a timely manner. Secretary's

January 25, 2016, Response to the Court's October 28, 2015, order at 21. The Secretary cites to Mr. Jones's declaration as evidence that, from May 2014 to September 2014, it took an average of 60.9 days to resend a Board decision to an appellant who requested a new copy of the decision. Secretary's Opposition to Motion to Strike, Exhibit 1 at 2. In that declaration, Mr. Jones stated that, for those requests received before the 120-day appeal period expired, it took an average of 67.6 days to resend a Board decision, but for requests received after the 120-day period expired, it took an average of 36 days to resend the Board decision.² *Id.* at 3.

1. *Extraordinary Circumstance*

The Court must first determine whether some portion of the time it took the Board to respond to the appellant's request for a copy of the May 23, 2014, Board decision constituted an extraordinary circumstance for equitable tolling purposes. When the appellant contacted the Board to request a copy of that Board decision and provided a new current address, it became the Board's responsibility under its own procedures to mail a copy of the decision to that address in a timely manner. *See* M27-1 Benefits Assistant Service Procedures, Part I, Chapter 5, section 5.h. ("It is extremely important that *all* correspondence and documents mailed to our claimants are sent to the appropriate current address of record. . . . [U]pon noting of a discrepancy in the claimant's address, every effort should be made to *immediately* rectify the situation. If the [Board] decision was not mailed to the appellant's current address: [] mail a photocopy to the most recent address of record." (emphasis added)); *cf.* Oral Argument at 33:40-34:55 (Secretary characterizing the copy of the Board decision sent to the appellant's new address as a "courtesy copy").

Despite policies imposing this responsibility, and the relative frequency of similar scenarios (according to the Secretary, 1,349 times over 106 business days from May to September 2014 where either a claimant contacted the Board to request a copy of a decision or a previously mailed Board decision was returned to the Board as undeliverable), the Board in 2014 had no governing standards for timeliness concerning its responses. Secretary's Response to the Court's May 24, 2016, Order at 3. The lack of such standards makes it difficult to assess whether the time it took the Board to respond to the appellant's request in this case was extraordinary; however, the statistics provided by the Board and the relative alacrity with which the Board responded to similar requests in other published cases leads us to conclude that an extraordinary circumstance existed for at least one day of the 42-day period between the Board's receipt of the appellant's letter and its remailing of the Board decision to him at his updated address.

The actions required by the Board to remail copies of Board decisions appear routine—processing communication by a claimant, entering information into a database, mailing a boilerplate letter—yet, the Board's response times to these requests vary dramatically, averaging 34.6

² The Court is troubled by these statistics because it demonstrates a lack of recognition that the 67.6 day average is more than half the time to file an appeal with the Court. 38 U.S.C. § 7266(a). Further, it demonstrates a lack of prioritization for veterans who request a copy of a Board decision within the statutory appeal period. As demonstrated in this case, such delay can be detrimental for appellants who wish to timely appeal a Board decision before the Court.

days after a request in 2014, reaching 42 days in this case, and requiring a mere 8 days in *Toomer v. Shinseki*, 524 Fed. Appx. 666, 667 (Fed. Cir. 2013), a case where a veteran called VA and requested a decision be remailed to an address already on record. *See also Checo*, 748 F.3d at 1375 (where the appellant provided VA with her new address and she received a copy of the Board decision 9 days later). Notwithstanding the lack of a target time to respond to such requests, the foregoing statistics and the Board's actions in *Toomer* and *Checo* illustrate that it was not only possible, but expected, for the Board to have remailed the appellant a copy of the Board decision in less than 42 days. *See Secretary's Opposition*, Exhibit 1, at 3; *Checo*, 748 F.3d at 1375; *Toomer*, 524 Fed. Appx. at 667.

Although the Secretary argues that the appellant cannot demonstrate a delay constituting an extraordinary circumstance because, during the relevant period, it took an average of 60.9 days for Mr. Jones to respond to a claimant's request to re-mail a copy of a Board decision, that argument is mere ipse dixit. The Secretary has not provided any explanation as to why it takes two months to perform the routine tasks associated with re-mailing a Board decision, and the evidence he provided shows that it actually takes, on average, about half that time to respond when a new address is received within the 120-day period. Secretary's Response to the Court's May 24, 2016, Order at 5. Moreover, the cases cited by the appellant demonstrate that the Board is capable of re-mailing copies of Board decisions prompted by a claimant request in significantly less time than that. *See Checo*, 748 F.3d at 1375 (9 days); *Toomer*, 524 Fed. Appx. at 667 (8 days). Given the Court's case-by-case analysis for determining whether equitable tolling is warranted, *see Sneed*, 737 F.3d at 726; *Mapu*, 397 F.3d at 1380; *Nelson*, 19 Vet.App. at 551, and given that previous cases have demonstrated the Board's ability to resend a copy of its decisions to new addresses in a more timely manner than what has occurred in this case, *see, e.g., Checo*, 748 F.3d at 1375; *Toomer*, 524 Fed.Appx. at 667, the Court can only conclude here that some portion of the delay in resending the May 23, 2014, Board decision to the appellant is an extraordinary circumstance, *see McCreary*, 19 Vet.App. at 332 ("the extraordinary circumstance must be beyond the appellant's control").

The Court is mindful of *Kyhn v. Shinseki*, 716 F.3d 572, 578 (Fed. Cir. 2013), where the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) vacated this Court's decision that relied on extra-record evidence not before the Board in making its decision. Mr. Soliben's case, however, differs from *Kyhn* in a significant way. Unlike in *Kyhn*, where the Court obtained extra-record evidence to decide an issue affecting the merits of a claim before the Board, *id.* at 575-77, the Court in this case is relying on extra-record evidence only to decide whether the Court may review the Board decision. As the Federal Circuit explained in *Dixon v. Shinseki*, this Court's "resolution of equitable tolling claims differs markedly—in form and substance—from its resolution of other disability claim issues" and the Court "must frequently seek facts outside the record before the Board in evaluating whether equitable tolling is warranted," because "the period relevant to the equitable tolling inquiry occurs *after* the [B]oard has rendered a final decision denying a veteran's disability claim." 741 F.3d 1367, 1377 (Fed. Cir. 2014) (internal quotation marks omitted). In other words, this Court is permitted to seek extra-record evidence "to fully evaluate the factual predicate of a veteran's equitable tolling claim" to decide whether equitable tolling is warranted. *Id.* (noting the difficulties of making equitable tolling determinations "without the benefit of a fully developed

record from the [B]oard" and "based on the submissions from unrepresented veterans who suffer from significant psychiatric and physical disabilities"). Therefore, the Court's consideration of the Secretary's statistics in determining the existence of an extraordinary circumstance in this case does not run afoul of *Kyhn* and such use of the Secretary's statistics is permissible here.

2. Exercise of Due Diligence

Next, the Court must determine whether the appellant exercised due diligence to pursue his appeal to warrant equitable tolling. To do so, the Court must first resolve the parties' dispute over which analytical framework applies, the stop-clock approach set forth in *Checo* or the "fallback approach" set forth in *McCreary*. See Secretary's Response to Appellant's Supplemental Brief at 19-20 (advocating the *McCreary* framework); Appellant's Reply Br. at 7-9 (advocating the *Checo* framework).

In *McCreary*, the appellant filed an NOA 127 days after the Board mailed notice of its decision, and he asked the Court to equitably toll the 120-day appeal period because he misplaced documents pertaining to his appeal due to hurricane damage to his home. 19 Vet.App. at 326, 332-33. The Court looked at the appellant's actions throughout the appeal period and concluded that he did not exercise due diligence in attempting to preserve his appellate rights because the hurricane "occurred early in the [judicial appeal] period" and the appellant "had over three months after [the hurricane] struck . . . to file his NOA with the Court, and he failed to do so." *Id.* at 334. Although the Court examined the appellant's actions throughout the entire appeal period, the Court declined to adopt "an explicit requirement that an appellant attempt to file an NOA early in the judicial-appeal period in order to obtain the benefit of the doctrine of equitable tolling." *Id.* at 331. Instead, the Court made clear that diligence must be assessed on a case-by-case basis and that "waiting until the end of a limitations period to file a claim does not automatically disqualify a claimant from equitable tolling." *Id.* (citing *Valverde v. Stinson*, 224 F.3d 129, 135-36 (2d Cir. 2000) ("A petitioner should not be faulted, however, for failing to file early or take other extraordinary precautions early in the limitations period against what are, by definition, rare and exceptional circumstances that occur later in that period.")).

In *Checo*, the Federal Circuit agreed with the appellant that the equitable tolling analysis in *McCreary*, in which the Court held that due diligence must be shown throughout the appeal period, is "a fallback approach, one that is to be used only when the extraordinary circumstance period has no end date, such as the recovery period after a hurricane." 748 F.3d at 1380. The Federal Circuit in *Checo* adopted a "stop-clock" approach where "due diligence must only be shown during the requested tolling period, which can occur at any time during the statutory period." *Id.* at 1379 (citing *Harper v. Ercole*, 648 F.3d 132, 136 (2d Cir. 2011)). The Federal Circuit reasoned that the "stop-clock" approach applied in that case because the extraordinary circumstance period—i.e., the duration of the appellant's homelessness—had a definite end date and clarified that the appellant must only demonstrate diligence during the extraordinary circumstance period to satisfy the diligence element for equitable tolling. *Id.* at 1380.

As explained above, the extraordinary circumstance in this case is an undefined portion of the Board's delay in remailing a copy of the May 23, 2014, Board decision to the appellant at his new address. Because the Court is unable to delineate the precise bounds of the extraordinary circumstance period in this case, the *Checo* stop-clock approach does not apply and the Court must instead analyze whether the appellant exercised the requisite diligence under the *McCreary* "fallback" approach. *See Checo*, 748 F.3d at 1380.

In his NOA to the Court, the appellant indicated that "mishaps" such as the Board's mailing the decision to his old address "could be avoided if the veterans did not have to contact many different departments" within VA to make an address change. NOA at 1. The appellant consistently referred to himself in the third person as "the veteran" throughout his NOA, and the Court consequently finds that his statement regarding "the veterans" having to contact many different departments is evidence that he contacted a department within VA other than the Board to update his address. Although his statement used the plural noun "the veterans," this appears to be the result of inartful drafting because there would have been no reason for him to have included this statement in his NOA if he had not personally updated his address with a department within VA other than the Board. *See Calma v. Brown*, 9 Vet.App. 11, 15 (1996) (liberally construing a self-represented appellant's statements in an NOA). This construction gives proper meaning to the appellant's statement, as there would have been no reason for the appellant to randomly mention the difficulties inherent in informing VA of an address change if he had not encountered those difficulties himself. *See id.* Accordingly, the Court concludes that the appellant's actions in this case satisfied the requirement that he keep the Secretary informed of his current address. *See Hyson v. Brown*, 6 Vet.App. 262, 265 (1993); *cf. Jaquay v. Principi*, 304 F.3d 1276, 1287 (Fed. Cir. 2002) (noting that the diligence requirement is "relaxed for cases where the claimant filed a pleading in the wrong place").

Moreover, midway through the 120-day judicial appeal period, the appellant contacted the Board to request that it mail a copy of any decision to his new address so that he could timely initiate an appeal to the Court. Appellee's April 23, 2015, Response, Exhibit 1, at 2. Once he received a copy of the May 23, 2014, Board decision, he promptly acted on it, mailing his NOA to the Court within five days. NOA at 1, 9. These actions constitute reasonable due diligence, particularly in light of the Court's statement in *McCreary* that an appellant is not necessarily required to act in the beginning of the judicial appeal period to establish due diligence. *See* 19 Vet.App. at 331; *see also Holland*, 560 U.S. at 653 ("The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'").³

³The Court would have reached the same conclusion under the *Checo* stop-clock approach because a reasonably diligent appellant would not have been required to take any further action during the extraordinary circumstance period present in this case after requesting that the Board remail a copy of its decision to a new address. *See Checo*, 748 F.3d at 1381 (observing that, because the appellant was homeless and unable to receive mail, it was "unclear what further actions she needed to specifically cite to support her claim that she acted diligently" during the extraordinary circumstance period).

3. Causation

Finally, as to the causation element of equitable tolling, the Court must determine whether the extraordinary circumstance caused the untimely filing despite the veteran's exercise of due diligence. In essence, the evidence must demonstrate that the untimely filing was a direct result of the extraordinary circumstance. *See Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004). We hold that the extraordinary circumstance here directly caused the untimely NOA filing. Mr. Soliben could not appeal the Board decision without reviewing the decision first, and there is sufficient evidence that the Board response time to mail him a copy after his July 28, 2014, request caused the one-day-late untimely appeal.

The Court acknowledges that the appellant's actions in preserving his judicial appeal rights were not perfect, but perfection was not required. *See Holland*, 560 U.S. at 653. Given that "Congress' longstanding solicitude for veterans is plainly reflected in the [Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988)] and in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative *and judicial review* of VA decisions," *Henderson*, 562 U.S. at 429 (emphasis added) (internal citation omitted), the Court concludes that the appellant has presented sufficient information to satisfy all of the elements necessary to establish entitlement to equitable tolling of the appeal period for at least one day.

III. CONCLUSION

The Court ultimately finds through this analysis that the time taken by the agency in responding to an inquiry by a claimant is a factor in determining whether equitable tolling is warranted, because such time taken by the agency may deprive a claimant, in whole or in part, of the full 120-day appeal period to which he or she is entitled, or may otherwise affect a claimant's ability to file his or her appeal within that period. Applied to the instant case, the Court concludes that there was an extraordinary circumstance, consisting of at least a day of excessive Board delay in responding to the appellant's request, that existed during the 120-day appeal period and caused the appellant to file late despite his exercise of reasonable diligence. Thus equitable tolling is warranted to render the appellant's appeal to this Court, which was filed but a single day after the 120-day appeal period closed, a timely filed appeal.

Accordingly, it is

ORDERED that the appellant's motion to strike portions of the Secretary's June 23, 2016, response to the Court's May 24, 2016, order is denied. It is further

ORDERED that the Clerk of the Court is directed to accept the appellant's September 23, 2014, NOA as timely filed. It is further

ORDERED that within 30 days of this order, the Secretary serve the appellant with a copy of the record before the agency and file the appropriate notice with the Court. It is further

ORDERED that this decision is issued nunc pro tunc to October 7, 2016.

DATED: October 12, 2016

PER CURIAM.

HAGEL, *Chief Judge*, concurring in the result: I fully concur in the result in this case that concludes that equitable tolling is warranted and, as a result, Mr. Soliben timely filed his appeal. I also concur with the majority's analysis regarding the presumption of regularity, as well as its findings regarding the extraordinary circumstance and causation elements of equitable tolling. However, I write separately to express my concern over the majority's resolution of the issue of due diligence.

In his Notice of Appeal, Mr. Soliben stated the following: (1) on September 18, 2014, he received his "file," which presumably included the May 23, 2014, Board decision; (2) the "[f]ile was sent to an old address for the veteran"; and (3) that "[s]uch mishaps could be avoided if the veterans did not have to contact so many different departments to make a profile change." Notice of Appeal at 1. Based on that statement alone, I do not agree with the majority that he necessarily sent his new address to multiple departments within VA and that this constitutes evidence that he kept VA "apprised of his whereabouts." *Hyson v. Brown*, 5 Vet.App. 262, 265 (1993) ("In the normal course of events, it is the burden of the veteran to keep the VA apprised of his whereabouts.").

The only evidence demonstrating that Mr. Soliben informed the Board of his new address was on July 28, 2014, 66 days after the Board issued its decision, when he sent a letter to the Board requesting that it send a copy of its May 23, 2014, decision to his new address. Although it is unclear when exactly Mr. Soliben moved to his new address, for the purposes of due diligence that is of no matter. Looking at the circumstances of this case, Mr. Soliben asserted within the 120-day appeal period that the Board decision had "never been provided to me and I need this information to proceed with my claim." Appellee's April 23, 2015, Response, Exhibit 1 at 2. Subsequently, on September 23, 2014, Mr. Soliben filed his Notice of Appeal with the Court, eight days after a new copy of the Board decision was mailed, within five days that Mr. Soliben stated he received the Board decision, and only one day after the 120-day appeal period expired. Considering these facts together, I believe Mr. Soliben demonstrated due diligence in filing his appeal. *See Holland v. Florida*, 560 U.S. 631, 653 (2010); *Davis v. Principi*, 17 Vet. App. 29, 38 (2003) (A "case does not involve a 'garden variety claim of excusable neglect' . . . [where] the appellant did all he was required to do in order to obtain the relevant information regarding the benefits that he sought." (citing *Smith v. Derwinski*, 2 Vet.App. 429, 435 (1992) (citation omitted))).

Further, I do not agree with the majority's statement that this Court would have reached the same conclusion under the *Checo* stop-clock approach "because a reasonably diligent appellant would not have been required to take any further action during the extraordinary circumstance period present in this case after requesting that the Board remain a copy of its decision to a new address." *Ante* at 9 n. 2. In *Checo v. Shinseki*, the U.S. Court of Appeals for the Federal Circuit held that Ms. Checo "must only demonstrate due diligence *during* the extraordinary circumstance period." 748 F.3d 1373, 1380 (Fed. Cir. 2014) (emphasis added). Perhaps the Federal Circuit's use of the

word "only" implies that due diligence may be demonstrated at other times outside of the extraordinary circumstance period, but at the very least, an appellant must show due diligence during the extraordinary period. Here, the Court concludes that some portion of the delay in resending the May 23, 2014, Board decision to Mr. Soliben is an extraordinary circumstance. The Court also concludes that Mr. Soliben's actions *both before and after* the Board re-sent him its May 23, 2014, decision constitute due diligence. The majority, however, makes no finding as to how Mr. Soliben exercised due diligence *during* the extraordinary circumstance period. I cannot see how Mr. Soliben could do any more while he waited for the Board to mail a copy of its May 23, 2014, decision to his new address nor do I see such information necessary to demonstrate that he exercised due diligence. Therefore, I do not agree that the *Checo* stop-clock approach applies here and the majority makes no disagreement with that position. *Ante* at 8 ("Because the Court is unable to delineate the precise bounds of the extraordinary circumstance period in this case, the *Checo* stop-clock approach does not apply. . . .").

Lastly, I believe that it is important to consider the procedural posture of Mr. Soliben's appeal. All the Court must determine is whether Mr. Soliben can enter this Court. We are not here resolving his appeal on the merits. Rather, we have recognized when equitable tolling is warranted due to the delay on the part of VA. Mr. Soliben had roughly 54 days left to file his Notice of Appeal with the Court when he requested that the Board mail a copy of its May 23, 2014, decision to his new address. The Board, however, mailed that decision 42 days later, and he received it on September 18, 2014, which was the 118th day of the statutory appeal period. As the Court found, the Board's delay in sending Mr. Soliben that decision significantly reduced his time to file his Notice of Appeal. Therefore, as I have described in my statement and considering the facts of this case described by the majority, I believe that the correct resolution of this issue both legally and equitably is to find that Mr. Soliben has sufficient justification to allow his case to proceed.