

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

JACKSON C. KILLEN,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-7347
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**APPELLEE'S MOTION TO DISMISS**

Pursuant to U.S. Vet.App. R. 27(a), Appellee notifies this Court that there is no decision by the Board of Veterans' Appeals (Board) dated October 9, 2019, and respectfully moves the Court to dismiss this appeal for lack of subject matter jurisdiction.

**BACKGROUND**

On October 22, 2019, Appellant filed a Notice of Appeal (NOA) with the Court. Appellant identified October 9, 2019, as the date of the Board decision that he sought to appeal. Information contained in the Veterans Appeals Control and Locator System (the Board's computerized appeal tracking system), does not show that an October 9, 2019, Board decision has been issued pertaining to the Appellant.

## **BASIS FOR DISMISSAL**

This Court's jurisdiction derives exclusively from statutory grants of authority provided by Congress and the Court may not extend its jurisdiction beyond that authorized by law. *Bonhomme v. Nicholson*, 21 Vet.App. 40, 42 (2007) (per curiam order). The burden of establishing jurisdiction rests with Appellant. *Hampton v. Nicholson*, 20 Vet.App. 459, 460 (2006).

Pursuant to 38 U.S.C. § 7266(a), for a claimant to obtain review of a Board decision by this Court, the decision must be final and the person adversely affected by that decision must file an NOA within 120 days after the date the Board decision was mailed. “A claimant seeking to appeal an issue to the Court must first obtain a *final* BVA decision on that issue.” *Horowitz v. Brown*, 5 Vet.App. 217, 225 (1993) (emphasis in original).

In this appeal, the Board has not issued a final decision dated October 9, 2019, pertaining to Appellant. Although there is a May 2, 2019, Board decision, the 120-days to appeal that decision expired on August 30, 2019. Therefore, even if Appellant's October 22, 2019, NOA could be read sympathetically to intend an appeal of the May 2, 2019, Board decision, it would be untimely. Moreover, as there is no final Board decision dated October 9, 2019, for the Court to review, which is the date identified in Appellant's NOA, this case must be dismissed. See 38 U.S.C. § 7252; *Breeden v. Principi*, 17 Vet.App. 475 (2004) (per curiam order).

This Court's jurisdiction is limited to appeals from final Board decisions, 38 U.S.C. § 7266. The Court has no jurisdiction to review actions by the agency

prior to a final Board decision, nor does this Court have jurisdiction to direct Appellee to provide information regarding the actions taken by the agency prior to the issuance of a final Board decision, absent a Writ of Mandamus being filed, which has not occurred. Accordingly, in the absence of a final Board decision, this matter must be dismissed for lack of jurisdiction.

Appellant is proceeding *pro se*.

**WHEREFORE**, Appellee moves the Court to dismiss this appeal for lack of subject matter jurisdiction.

Respectfully submitted,

**RICHARD J. HIPOLIT**  
Acting General Counsel

**MARY ANN FLYNN**  
Chief Counsel

/s/ Sarah W. Fusina  
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For the Secretary of Veterans Affairs

## CERTIFICATE OF SERVICE

On November 13, 2019, a copy of the foregoing was mailed postage prepaid to:

Jackson C. Killen  
4638 County Road 136  
Lexington, AL 35648

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Sarah W. Fusina  
**SARAH W. FUSINA**  
Counsel for Appellee