

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

JERRY J. JENNINGS,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-7266
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

APPELLEE’S MOTION TO DISMISS

Pursuant to U.S. Vet. App. Rule 27(a), Appellee, Secretary of Veterans Affairs (Secretary), moves the Court to dismiss this appeal because Appellant did not file a timely Notice of Appeal (NOA) and no case or controversy exists for the Court to adjudicate because the March 26, 2019, Board decision is not adverse to Appellant.

BACKGROUND

On March 26, 2019, the Board of Veterans' Appeals (Board) rendered and mailed to Appellant the decision at issue in this appeal. On October 18, 2019, Appellant filed an NOA. See NOA; Notice of Docketing. On November 22, 2019, the Secretary filed a signed and dated copy of the Board’s decision with the Court, which granted service connection for thoracolumbar spine arthritis, a left ankle sprain, and a right ankle sprain. The Board also remanded the issue of service connection for cervical spine arthritis.

BASES FOR DISMISSAL

Appellant's NOA is untimely. In order to obtain judicial review of a final Board decision in this Court, a claimant must file an NOA with the Court within 120 days after the date the decision is mailed. 38 U.S.C. § 7266(a). While the Supreme Court has held that the 120-day appeal period does not have jurisdictional attributes, it recognized that "[t]he 120-day limit is nevertheless an important procedural rule." *Henderson v. Shinseki*, 131 S.Ct. 1197, 1206 (2011). Thus far, Appellant has neither asserted a compelling reason for his failure to submit a timely NOA, nor alleged any factors that would raise the question of equitable tolling of the appeal period as enumerated by the Court in *Bove v. Shinseki*, 25 Vet.App. 136 (2011).

Appellant did not file the NOA within 120 days of the mailing of the Board's March 26, 2019, decision. The October 18, 2019, NOA was filed after the 120-day period, which ended on Wednesday, July 24, 2019. Because Appellant's NOA was filed after the 120-day statutory appeal period, the Court should dismiss the appeal.

Further, the Court lacks jurisdiction because no case or controversy exists with respect to the March 26, 2019, Board decision. 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).

In order for a claimant to obtain review of a final Board decision by this Court, that decision must be final and adverse. 38 U.S.C. § 7266(a). Since the Board granted Appellant's claims for entitlement to service connection for thoracolumbar spine arthritis and left and right ankle sprains, Appellant's claims were resolved favorably and there is no remaining case or controversy concerning the March 26, 2019, Board decision. Moreover, because the Board's decision to remand Appellant's claim for entitlement to service connection for cervical spine arthritis is not a final decision, this Court does not have jurisdiction over that issue. *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005) (remand from Board is not a final decision for Court of Appeals for Veterans Claims jurisdiction). Therefore, the Court lacks jurisdiction in this matter. See *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990) (adopting the case or controversy rubric of Article III of the United States Constitution); see also *Nolan v. Nicholson*, 20 Vet.App. 340, 349 (2006) (Court will dismiss any case in which there is no actual controversy); *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) ("When there is no case or controversy, or when a once live case or controversy becomes moot, the Court lacks jurisdiction.").

Appellant also lacks standing to bring this appeal. As this Court has emphasized, "an 'aggrieved party' has standing to challenge administrative action only if the party has suffered 'injury in fact' to an interest 'arguably within

the zone of interests' protected by the underlying statute." *Gifford v. Brown*, 6 Vet.App. 269, 271 (1994) (citation omitted). Where, as here, the only matters decided by the Board and appealed by Appellant were decided in his favor or remanded for further adjudication, Appellant has no standing to appeal that decision to this Court.

Appellant is proceeding pro se in this matter.

WHEREFORE, the Appellee moves the Court to dismiss this appeal for an untimely appeal and a lack of jurisdiction.

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CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America, that on December 3, 2019, a copy of the foregoing was mailed, postage prepaid, to:

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