

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

KENDRICK E. BRADLEY,)	
Appellant,)	
)	
v.)	CAVC No. 17-3797
)	EAJA
)	
ROBERT L. WILKIE,)	
SECRETARY OF)	
VETERANS AFFAIRS,)	
Appellee)	

APPELLANT’S RESPONSE TO APPELLEE’S OPPOSED MOTION FOR
LEAVE TO FILE HIS RESPONSE TO APPELLANT’S SUPPLEMENTAL
APPLICATION FOR ATTORNEY FEES AND EXPENSES

Mr. Bradley filed a Supplemental EAJA application on November 8, 2019. Appellee’s response was due on December 2, 2019. The Secretary filed his response one week late, on December 9, 2019. He now seeks leave to file his response to Appellant’s supplemental application for attorney fees and expenses out of time. Because he offers only his own misunderstanding of the Court’s rules as his explanation for the late filing, the Court should deny this motion and award the supplemental fees Mr. Bradley seeks.

The Court’s Rule 39(b)(1) plainly and clearly states that the Secretary “shall submit” any response “not later than 20 days after the date on which a supplemental application is filed. . . .” The Secretary’s pleading here was filed one week after the deadline. The Court should treat the supplemental application

as unopposed and grant it in full. *See, e.g., In re Violation of Rule 28(c)*, 388 F.3d 1383, 1385 (Fed. Cir. 2004) (“The Court, ‘in order to get its work done, must insist on strict compliance with its rules. Violations of [the Rules] ... are all too frequent. In addition to imposing an unfair burden on opposing parties, violations of our rules are also a burden on the [C]ourt. The [C]ourt must consider a large number of appeals each year. It can only conduct its work fairly and efficiently if counsel cooperate by abiding by the pertinent rules.’”).

The Secretary’s only reason for failing to file a timely response is that he “misunderstood” the Court’s rule. Sec. Mot. At 1. This rule in no uncertain terms commands that the Secretary “shall” respond not later than 20 days. While the undersigned appreciates the Secretary’s apology and the Court’s traditional understanding and leniency when counsel inadvertently misses a deadline in merits pleadings, late filing of an EAJA petition is permitted only if the party shows he has been pursuing his rights diligently and some extraordinary circumstance prevented him from filing on time. *See Bly v. McDonald*, 28 Vet.App. 256, 262 (2016), *overruled on other grounds sub. nom. Bly v. Shulkin*, 883 F. 3d 1374 (Fed. Cir. 2018); *Mead v. Shulkin*, 29 Vet.App. 159, 161 (2017) (holding, “a diagnosis alone does not warrant equitable tolling; rather, a claimant must demonstrate that an untimely filing was the direct result of an illness.”).

No such circumstance or allegation exists here. This application of the rules should apply to the Secretary as well.

For these reasons, Appellant respectfully moves the Court to deny Appellee's Motion for Leave as his response was not timely filed. The Court should grant Mr. Bradley's supplemental application in full.

Respectfully submitted,
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