

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

CHARLIE G. JOHNSON,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-7747
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

APPELLEE’S OPPOSED MOTION TO DISMISS

Pursuant to Rule 27(a) of this Court’s Rules of Practice and Procedure, Appellee moves the Court to dismiss this case because Appellant did not file a timely notice of appeal (NOA).

BACKGROUND

On May 14, 2019, the Board of Veterans’ Appeals (Board or BVA) rendered and mailed to Appellant, the decision at issue in this appeal. Appellant’s Notice of Appeal (NOA) with this Court was docketed on November 8, 2019¹, more than 120 days after the BVA decision was mailed to Appellant. In his NOA, Appellant acknowledges that his appeal is untimely.

BASIS FOR DISMISSAL

¹ The Secretary notes that Appellant’s NOA shows that it was faxed on October 8, 2019, but it is unclear as to who it was faxed to. Nonetheless, even accepting the more favorable date of October 8, 2019, Appellant’s NOA was still filed with the Court more than 120 days after the BVA decision on appeal. To be clear, September 11, 2019, was 120-days after the May 14, 2019, Board decision.

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. See 38 U.S.C. § 7266(a).

The ultimate burden of establishing jurisdiction rests with the Appellant. See *McNutt v. G.M.A.C.*, 298 U.S. 178, 189 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992). Pursuant to 38 U.S.C. § 7266(a), in order for a claimant to obtain review of a BVA decision by this Court, that decision must be final, and the person adversely affected by that decision must file a timely NOA with the Court. See *Bailey v. West*, 160 F.3d 1360, 1363 (Fed.Cir.1998) (en banc). To have been timely filed under 38 U.S.C. § 7266(a) and Rule 4 of this Court's Rules of Practice and Procedure, an NOA generally must have been received by the Court (or, in certain circumstances, be deemed received) within 120 days after notice of the underlying final BVA decision was mailed. See *Cintron v. West*, 13 Vet.App. 251, 254 (1999).

In *Henderson v. Shinseki*, the U.S. Supreme Court held that the 120-day time limit to file a NOA with this Court, pursuant to 38 U.S.C. § 7266(a)—although an important procedural rule—was not jurisdictional, 131 S.Ct. 1197, 1206 (2011). This Court issued its decision in *Bove v. Shinseki*, and consolidated several appeals, for the sole purpose of addressing whether the 120-day filing period is subject to equitable tolling and, if so, whether the circumstances in each case warrant equitable tolling. 25 Vet.App. 136, 137 (2011) (per curiam).

In *Bove*, the Court held that “the important procedural rule” in section 7266(a), requiring a judicial appeal be filed within the 120–day period following the mailing of a Board decision, is subject to equitable tolling “within the parameters established in *Bailey* [*v. West*, 160 F.3d 1360 (Fed.Cir.1998) (*en banc*)], and its progeny, and the precedential decisions of this Court prior to this Court’s *Henderson* decision.” *Id.* at 140. The Court explained that, over time, court decisions have addressed the parameters in the context of appeals to this Court:

Thus, for example, equitable tolling was not applied when failure to file was due to general negligence or procrastination. Rather, it was applied only when circumstances precluded a timely filing despite the exercise of due diligence, such as (1) a mental illness rendering one incapable of handling one’s own affairs or other extraordinary circumstances beyond one’s control, (2) reliance on the incorrect statement of a VA official, or (3) a misfiling at the regional office or the Board. See, e.g., *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004) (NOA submitted to Board); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004) (mental illness rendering one incapable of handling his own affairs); *Santana–Venegas*, 314 F.3d at 1298 (NOA submitted to RO); *Bailey*, 160 F.3d at 1365–68 (reliance on incorrect statement of VA official); *McCreary v. Nicholson*, 19 Vet.App. 324 (2005) (extraordinary circumstances), adhered to on reconsideration by 20 Vet.App. 86 (2006).

Id.

However, thus far, in the instant case, Appellant has not asserted any compelling reason for his failure to submit a timely NOA, nor alleged any factors that might allow him to invoke equitable tolling. See *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990).

Because the NOA was filed after the 120-day statutory appeal period, the Court should dismiss the appeal.

Counsel for the Appellant has been contacted regarding this motion and has indicated that he is opposed to the motion.

WHEREFORE, the Appellee moves the Court to dismiss this appeal.

Respectfully submitted,

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