

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

MARIA MARLINA T. TOMAS,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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Vet. App. No. 19-0253

**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court should affirm the September 8, 2017, Board of Veterans' Appeals (Board) decision that found that Appellant had not filed a timely substantive appeal as to an April 2011 rating decision denying service connection for the cause of the Veteran's death.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252, which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Maria Marlina T. Tomas, appeals the September 2017 Board decision that found that Appellant had not filed a timely substantive appeal as to an April 2011 rating decision denying service connection for the cause of the Veteran's death. (Record (R.) at 2-6).

C. Statement of Facts

The Veteran served from August 1942 to April 1943. (R. at 740-41). He died in August 1981. (R. at 657-58).

Appellant, the Veteran's surviving spouse, filed a claim for service connection for the cause of the Veteran's death in September 2010. (R. at 218-19). The claim was denied in April 2011, (R. at 150-56), she filed a Notice of Disagreement (NOD) in September 2011, (R. at 143-44), and a Statement of the Case (SOC) was issued in June 2012, (R. at 110-33). Appellant filed a VA Form 9 appeal in December 2012. (R. at 78-80).

Later in December 2012, VA informed Appellant that her VA Form 9 was not timely filed because it was not filed within 60 days from the date the SOC was issued. (R. at 75-77). She filed an NOD in February 2013, reporting that she was not at home at the time, her "helping lady" received the message then left to assist with a family member, and when the "helping lady" returned aft three months, she reminded Appellant that Appellant had a letter. (R. at 72-74). An SOC was issued in September 2013, continuing to find the VA Form 9 untimely filed. (R. at 65-66

(48-66)). She filed a substantive appeal in October 2013, (R. at 45-47), and submitted an additional letter in June 2016, (R. at 19).

III. SUMMARY OF THE ARGUMENT

Appellant makes no arguments in her brief in support of the issue on appeal: the timeliness of her substantive appeal. Her substantive appeal was not timely filed, and VA did not grant a waiver of timeliness. The Court should therefore affirm the Board's decision.

IV. ARGUMENT

A. Appellant has made no arguments relating to the sole issue on appeal.

An appellant carries the burden of presenting coherent arguments and providing adequate support for those arguments. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005) (noting that “every appellant must carry the general burden of persuasion regarding contentions of error”), *rev'd on other grounds*, 444 F.3d 1328 (2006). When an issue is not argued by a claimant in their opening brief, it is generally considered waived. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001) (“It is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief.”). Here, Appellant makes no arguments relevant to this issue on appeal in her opening brief; as such, she has not met her burden to show prejudicial error before the Court. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error), *Mayfield*, 19 Vet.App. at 111.

In her brief, Appellant only raises arguments relating to entitlement to service connection for the cause of the Veteran's death. Appellant's Informal Brief (App. Inf. Br.) 1-7. The sole issue on appeal, however, is timeliness of her December 2012 Form 9. She provides no arguments relating to timeliness. *Id.* Because she has made no arguments relevant to the only issue on appeal in her opening brief, her claim may properly be deemed abandoned. See *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995), *aff'd*, 104 F.3d 1328 (Fed. Cir. 1997) (finding that issues or claims not argued on appeal are deemed to be abandoned); see also *Sanders*, 556 U.S. at 409.

B. Appellant's substantive appeal was not timely.

To the extent that the merits are raised at all, Appellant's substantive appeal was untimely. Appellate review will be initiated by an NOD and completed by a substantive appeal after the issuance of an SOC. 38 U.S.C. § 7105(a). A substantive appeal must be filed within 60 days from the date that the agency of original jurisdiction (AOJ) mails the SOC to the appellant, or within the remainder of the one-year period from the date of mailing of the determination being appealed, whichever period ends later. 38 U.S.C. § 7105(d)(3), 38 C.F.R. § 20.302(b). The AOJ may close the case for failure to respond after receipt of the SOC. 38 U.S.C. § 7105(d)(3). There is no question that Appellant's Form 9 was filed out of time. It was filed one year, eight months, and nine days after the April 2011 initial claim, and 189 days after the June 2012 SOC was issued. See (R. at

150-56 (April 2011 rating decision), 110-33 (June 2012 SOC), 78-80 (December 2012)). Thus, the AOJ's decision to treat the appeal as untimely was proper.

Questions as to timeliness or adequacy of response shall be determined by the Board. 38 U.S.C. § 7105(d)(3). The timeliness requirement is not a jurisdictional predicate to the Board's adjudication of an appeal and therefore, the Secretary may waive the issue of timeliness in the filing of a substantive appeal. *See Percy v. Shinseki*, 23 Vet.App. 37 (2009). A waiver may be granted explicitly or implicitly; however, the decision whether to grant one is within the discretion of the Secretary. *Id.* Here, VA did not grant a waiver and found that none of the exceptions to the timeliness rule applied to Appellant's circumstances. (R. at 5-6 (2-6)). Because the December 2012 Form 9 was untimely and VA did not grant a waiver, the AOJ properly closed the case for failure to respond.

C. Appellant has abandoned all issues not argued in his brief

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief. It is axiomatic that any issues or arguments not raised on appeal are abandoned. *Pieczenik*, 265 F.3d at 1332-33; *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should affirm the September 8, 2017, decision of the Board that found that Appellant had not filed a timely substantive appeal as to an April 2011 rating decision denying service connection for the cause of the Veteran's death.

Respectfully submitted,

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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 January 6, 2020, a copy of the foregoing was mailed postage prepaid to:

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