

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-7266

JERRY J. JENNINGS,

APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

ORDER

Pending before this Court is the Secretary's motion to dismiss for appellant's failure to file a timely Notice of Appeal (NOA) and a lack of jurisdiction because there is no case or controversy for the Court to adjudicate as the Board of Veterans' Appeals decision on appeal granted the appellant's claims for service connection for thoracolumbar spine arthritis, left ankle sprain, and right ankle sprain.

On February 25, 2020, the Court ordered the appellant to show cause why this case should not be dismissed for lack of jurisdiction. On March 10, 2020, the appellant filed a response asserting, in pertinent part, that: (1) the appeal should continue if for nothing else to clear up the false statements made by the VA at the Board; and (2) there are still nerve problems in his lower back that have not been addressed.

After further review, the Court's February 25, 2020, order failed to instruct the appellant to show cause for filing an untimely NOA and will do so now.

It appears that the Board of Veterans' Appeals (Board) mailed its decision on March 26, 2019. The appellant's Notice of Appeal (NOA) was filed on October 18, 2019, more than 120 days after the date reflected on the Board decision filed with the Court, which is the presumed date of mailing of the Board decision. The 120th day would have been July 24, 2019. The Secretary later moved to dismiss the instant appeal for lack of jurisdiction, asserting that the appellant had filed an untimely NOA. The motion was filed within 45 days of the filing of the Board decision. U.S. VET. APP. R. 4(a)(3)(A).

Generally, an appellant may obtain Court review of an adverse Board decision only if the appellant submits an NOA to the Court within 120 days of the date on which notice of the Board's decision was mailed. 38 U.S.C. § 7266(a). If an NOA is received within 30 days after the expiration of the filing deadline and the appellant demonstrates good cause or excusable neglect, the appeal is considered timely. U. S. VET. APP. R. 4(a)(3)(B). If an NOA is received more than 30 days after the expiration of the filing deadline, equitable tolling is available when circumstances have precluded an appellant from timely filing his or her NOA despite the exercise of due diligence. *Id.*;

see Bove v. Shinseki, 25 Vet.App. 136, 140 (2011) (per curiam order). The appellant will be directed to show cause why his appeal should not be dismissed for untimely filing. *See* U.S. VET. APP. R. 4(a), 38(b). The Court notes that in the appellant's March 10, 2020, response he asserts that he has a copy of his NOA which was filed and faxed on July 16, 2019, and will furnish a copy upon request.

On consideration of the foregoing, it is

ORDERED that, within 20 days after the date of this order, the appellant must explain why the Court should not dismiss this appeal for filing an untimely NOA and provide the Court with any documentation in support of his position. If the appellant fails to do so, the Court may dismiss this appeal without further notice. Proceedings on this appeal are stayed until further order of the Court.

DATED: March 19, 2020

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Cynthia M. Brandon-Arnold
Cynthia M. Brandon-Arnold
Chief Staff Attorney/Deputy Clerk

Copies to:

Jerry J. Jennings

VA General Counsel (027)

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