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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-7747

CHARLIE G. JOHNSON, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

On November 8, 2019, veteran Charlie G. Johnson filed a Notice of Appeal (NOA) of a May 14, 2019, Board of Veterans' Appeals decision denying a rating in excess of 20% for a duodenal ulcer. In December 2019, he retained his current counsel.

On January 4, 2020, the Secretary filed an opposed motion to dismiss the appeal as untimely. On March 25, 2020, the Court ordered that Mr. Johnson, within 20 days after the date of the order, explain why the Court should not dismiss the appeal and instructed that if he failed to do so, the Court may dismiss the appeal without further notice. The Court also stayed proceedings pending a ruling on the motion to dismiss. Mr. Johnson failed to file a response.

Generally, to obtain judicial review, a claimant adversely affected by a Board decision must file an NOA within 120 days from the date on which notice of that decision was mailed. 38 U.S.C. § 7266(a). Here, the NOA deadline was September 11, 2019 (i.e., 120 days after May 14, 2019, the date the Board mailed the decision). Mr. Johnson filed the NOA on November 8, 2019, well after the deadline.¹

Consequently, and considering his failure to respond to the Court's March 25, 2020, order, he has not demonstrated that his NOA was timely filed or that equitable tolling of the 120-day judicial appeal period is warranted. *See Bove v. Shinseki*, 25 Vet.App. 136, 140 (2011) (per curiam

¹ As the Secretary notes, the NOA contains a line showing that the document was faxed on October 8, 2019. However, the "To" line is blank and the number to which the fax was presumably sent is not the Court's fax number. Further, Mr. Johnson attached a statement in support of the claim to his NOA, and that was signed on what appears to be October 26, 2019. Therefore, we conclude that the NOA was not faxed to the Court on October 8, 2019.

order) (holding that the 120-day period set forth in section 7266(a) is subject to equitable tolling "when circumstances preclude[] a timely filing [of an NOA] despite the exercise of due diligence").

The Court notes that, in the statement in support of the claim that he attached to his NOA, Mr. Johnson asserts that his appeal was late because he was waiting for more medical evidence to support his claim. However, this does not rise to the level of an extraordinary circumstance. *See Toomer v. McDonald*, 783 F.3d 1229, 1238 (Fed. Cir. 2015); *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014). Further, even if this constituted good cause or excusable neglect, the appeal was not filed within 30 days after expiration of the NOA deadline. *See* U.S. VET. APP. R. 4(a)(3)(B)(i) (an untimely [NOA] will be treated as timely if . . . the [NOA] is received within 30 days after the expiration of the filing deadline and the appellant demonstrates good cause or excusable neglect for failure to file the [NOA] within the 120-day period").

Therefore, Mr. Johnson's appeal must be dismissed.

Upon consideration of the foregoing, it is

ORDERED that the stay of proceedings is lifted. It is further

ORDERED that the Secretary's motion is granted and this appeal is DISMISSED.

DATED: May 4, 2020

BY THE COURT:

A handwritten signature in blue ink, appearing to read "J. Falvey, Jr.", with a stylized flourish at the end.

JOSEPH L. FALVEY, JR.
Judge

Copies to:

Maxwell D. Kinman, Esq.

VA General Counsel (027)