

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-6950

MURIEL A. POLK, APPELLANT,

V.

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

Before ALLEN, *Judge*.

ORDER

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

On January 4, 2019, the Board of Veterans' Appeals issued a decision denying appellant entitlement to accrued benefits. More than 120 days later, on October 1, 2019, appellant attempted to appeal the Board's decision by filing a Notice of Appeal (NOA) with the Court. The 120th day would have been May 4, 2019. The Secretary has moved to dismiss this appeal because appellant filed his NOA more than 120 days after the Board mailed its decision to her. The Court stayed proceedings in this matter pending consideration of the Secretary's motion.

To timely appeal a Board decision, claimants must "file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed" to them.¹ There is no dispute that appellant did not submit her NOA within 120 days of the mailing of the Board decision she seeks to appeal. But that is not the end of the analysis.

Although "an important procedural rule," "the 120-day limit for seeking Veterans Court review was not meant to have jurisdictional attributes."² Thus, the Court may equitably toll the 120-day requirement where "circumstances precluded a timely filing despite the exercise of due diligence."³ Examples of such circumstances include but are by no means limited to "(1) a mental

¹ 38 U.S.C. § 7266(c).

² *Henderson ex. rel Henderson v. Shinseki*, 562 U.S. 428, 438 (2011).

³ *Bove v. Shinseki*, 25 Vet.App. 136, 140 (2011) (per curiam order), *overruled on other grounds by Dixon v. McDonald*, 815 F.3d 799 (Fed. Cir. 2016). If a claimant filed an NOA within 30 days of the expiration of the 120-day appeal period, we may excuse the lateness of the NOA for good cause or excusable neglect. U.S. VET. APP. R. 4(a)(3)(B)(i). This provision of our rules is not applicable here because appellant's late NOA was filed outside this period, making the equitable tolling standard applicable. *See* U.S. VET. APP. R. 4(a)(3)(B)(ii).

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."⁴ These situations are examples only because rigid rules are not applicable in the equitable tolling context.⁵

The Court allowed appellant an opportunity to respond to the Secretary's motion and explain why this appeal should not be dismissed, including whether she is entitled to equitable tolling of the appeal period. Appellant has not submitted a response within the time allowed for addressing this question.

On consideration of the foregoing, it is

ORDERED that the stay in this case is lifted. It is further

ORDERED that the Secretary's motion to dismiss is granted. And it is further

ORDERED that the appeal is DISMISSED for lack of jurisdiction.

DATED: May 6, 2020

BY THE COURT:



MICHAEL P. ALLEN
Judge

Copies to:

Muriel A. Polk

VA General Counsel (027)

⁴ *Id.*

⁵ *See James v. Wilkie*, 917 F.3d 1368, 1375 (Fed. Cir. 2019).