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

NO. 17-3293

DOUGLAS J. ROSINSKI, APPELLANT,

V.

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

Before BARTLEY, *Chief Judge*, and MEREDITH and TOTH, *Judges*.

**O R D E R**

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

Before the Court are two motions filed by Douglas J. Rosinski. The first moves this Court to dismiss as untimely the Secretary's notice of appeal (NOA) to the Federal Circuit. The second asks us to claw back the NOA, which was transmitted to the Federal Circuit on August 19, 2020, before we could rule on the first motion. Given the many post-decision procedural irregularities in this case, we think we owe it to the parties and the Federal Circuit to disentangle and clarify those proceedings. Ultimately, however, they are immaterial to our resolution of the motions before us. As explained below, this Court has no authority to do what Mr. Rosinski asks: to dismiss an NOA to the Federal Circuit. In general, when a party seeks to appeal a final decision of this Court, we are bound to transmit that appeal to the Federal Circuit unless it is clearly deficient. And, under the circumstances here, whether such an NOA is untimely or otherwise jurisdictionally defective is for that court—not us—to decide.

In January 2020, a divided panel of the Court reversed the Board's denial of Mr. Rosinski's request for attorney's fees. Thereafter, the Secretary filed timely motions for panel reconsideration, to suspend the precedential effect of the decision, and for full-Court review. All were ruled on, culminating with a May 29, 2020, order denying en banc review. Since no further review was available in this Court, judgment should have entered immediately. *See* U.S. VET. APP. R. 35(a)(2)(C), 36(b)(2)(B). However, judgment did not enter until July 29, 2020.

Generally, decisions of this Court "are appealable to the Federal Circuit for 60 days after judgment is entered." *Bly v. Shulkin*, 883 F.3d 1374, 1375-76 (Fed. Cir. 2018). On July 27, 2020, the Department of Justice (DOJ) electronically submitted to this Court an NOA to the Federal Circuit on behalf of the Secretary. In the absence of an explicit entry, DOJ treated the May 29 order denying en banc review as the date of this Court's judgment, which began the 60-day appeal period. That period expired on July 28. But the NOA was not posted to the docket until July 29.

And, per Mr. Rosinski, he did not receive notice of the NOA's submission until July 30. Nevertheless, the NOA was docketed as received on July 27.[1]

At this point, proceedings got more complicated. Observing that judgment had not yet been officially entered, Court personnel did so and dated the notice of judgment July 29. The July 27 NOA was then re-posted to the docket as "received" with a July 29 date. Then, also on July 29, DOJ made two additional electronic submissions. First, it resubmitted the July 27 NOA, this time with the certificate of service to Mr. Rosinski that had been omitted from its initial submission. Second, and seemingly in response to the Court's July 29 entry of judgment, DOJ submitted an amended NOA listing July 29—rather than May 29—as the date of the Court's judgment. Both of these documents were docketed with July 29 dates.

On August 3, Mr. Rosinski filed an opposed motion to dismiss the Secretary's NOA as untimely. (One day later, he filed a corrected version of the motion.) The motion argued that, to be timely, the NOA was due by July 28, 2020, but the Secretary's initial NOA did not count because, although electronically submitted on July 27, Mr. Rosinski purportedly did not receive notice of it until July 30, and because DOJ's failure to include a certificate of service rendered the NOA defective. Moreover, the motion contended, the Court's entry of judgment on July 29 was legally erroneous and did nothing to cure the timing issues. A motion for this Court to dismiss an appeal to the Federal Circuit is, to say the least, a rare occurrence.

In his opposition filed two weeks later, *see* U.S. VET. APP. R. 27(b)(1), the Secretary urged the Court to deny the motion. He argued that the NOA electronically filed on July 27 was valid and timely under all applicable rules and, in any event, it's for the Federal Circuit—and not this Court—to determine whether any NOA invoking its jurisdiction is sufficient.

On August 19, the day after the Secretary filed his opposition and before this Court could consider Mr. Rosinski's motion, the NOA was transmitted to the Federal Circuit. Giving only the barest hint of the procedural turmoil that preceded it, the transmittal letter stated: "Enclosed is a notice of appeal to your Court. It was filed by this Court on July 30, 2020. The judgment of this Court was entered on July 29, 2020."[2] The Federal Circuit promptly opened a docket (number 20-2169) and issued notice of the same. Before the day was out, Mr. Rosinski filed with this Court an opposed motion to immediately recall the transmission of the Secretary's NOA so that this Court could rule on his motion to dismiss. The Secretary opposed this motion as well, recapitulating his earlier arguments.

"After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision" in the Federal Circuit, and "[s]uch

[1] This delay was apparently caused, at least in part, by procedural changes put in place because of the COVID-19 pandemic. DOJ's traditional method of filing NOAs to the Federal Circuit was by hand delivering the appeals to this Court's Public Office. Because of the pandemic, the NOA in this case was submitted electronically. But the email address to which it was sent is normally used by litigants appealing *to* this Court from the Board. Personnel in the Court's Public Office did not process the Secretary's NOA until July 29, whereupon it was posted to the docket with a receipt date of July 27.

[2] In light of the events already recounted, the dates listed in the Court's transmittal letter cannot be accepted as presumptively correct.

a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeals to United States courts of appeals from United States district courts." 38 U.S.C. § 7292(a). Because VA is a Federal agency, an NOA to the Federal Circuit must be filed within 60 days after the entry of this Court's judgment. *See* 28 U.S.C. § 2107(a), (b)(2); PRACTICE NOTES TO FED. CIR. R. 4.

We take as a starting point the "widely accepted practice in Federal appellate courts . . . . that '[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" *Monk v. Wilkie*, 32 Vet.App. 87, 94 (2019) (en banc order) (emphasis omitted) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). Like many legal rules, it has its exceptions. Mr. Rosinski relies heavily on *Gilda Industries, Inc. v. United States*, 511 F.3d 1348 (Fed. Cir. 2008), wherein the Federal Circuit concluded that, although this rule "[o]rdinarily" obtains, it "does not extend to deficient notices of appeal." *Id.* at 1350. "[W]here the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is *clear* to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction." *Id*. (emphasis added). Mr. Rosinski contends that the Secretary's NOA here was two days late because it was not filed until July 30. And, given this lateness, he argues that this Court was not divested of jurisdiction and retained the authority to rule on his motion to dismiss.

We are not persuaded. First, we think the language italicized above is important—deficiency in an appeal to a higher court must be "clear" to the lower court receiving it. In *Gilda*, the NOA to the Federal Circuit filed by the appellant in the Court of International Trade was indisputably one day late. *Id.* "As such, it neither conferred jurisdiction on [the Federal Circuit] nor divested the trial court of jurisdiction to entertain Gilda's subsequent motion to extend the filing deadline." *Id*. at 1351. Here, it is not "clear" to the Court that the NOA submitted by the Secretary was deficient. It was received electronically on July 27, which even Mr. Rosinski concedes is within the 60-day appeal period that began to run, at the earliest, on May 29, 2020. *See* Corrected Motion to Dismiss at 2 ("the Secretary's notice of appeal in this matter was apparently received by the Clerk of the Court on July 27, 2020"). It was submitted with respect to a final appealable order and appears to contain the essential recitals. *Cf.* FED. R. APP. P. 3(c)(1) (requiring the name of the party taking the appeal, designation of the judgment being appealed, and the name of the court to which the appeal is being taken). As such, the July 27 NOA is not so obviously deficient that this Court could have simply ignored it.

Second, and more importantly, the action that Mr. Rosinski asks us to take—dismissing an appeal to the Federal Circuit—is one that we as a lower court have no authority to take. In *Gilda*, the question was whether the belated filing of the NOA and its transmission to and docketing by the Federal Circuit deprived the Court of International Trade of jurisdiction to rule on the appellant's motion under Federal Rule of Appellate Procedure 4 to extend the time to appeal. *See* 511 F.3d at 1350. The authority in certain circumstances to extend the time to appeal to a circuit court has been expressly granted by Congress to lower courts, *see* 28 U.S.C. § 2107(c), and it's one we have presumed (albeit nonprecedentially) that we also possess, *see, e.g., Pate v. Shulkin*, No. 16-2613, 2017 WL 2062309 (May 15, 2017). So, the clear untimeliness of the NOA in *Gilda*

allowed the Court of International Trade to "disregard the purported notice of appeal and proceed with the case." *Gilda*, 511 F.3d at 1350.

What Mr. Rosinski seeks is qualitatively different. He isn't asking this Court to rule on a motion or other matter properly within our competence *while* the Federal Circuit sorts out the sufficiency or deficiency of an appeal to it. The case, at least as it stands now, is over in this Court. Instead, Mr. Rosinski is asking us to decide for the Federal Circuit whether the Secretary's NOA to that court is valid. *Moore's Federal Practice*, cited by the court in *Gilda*, *see id.* at 1350-51, makes clear that this is not permitted.

> The district court lacks authority to strike a notice of appeal. The district clerk has a duty to forward to the appropriate circuit court any notice of appeal that is filed. Therefore, any attempt by the district court to strike a timely notice is ineffective. The district court even lacks the authority to return the notice of appeal to the appellant at the appellant's request.

20 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 303.32[2][a][i] (3d ed. 2020) (footnotes omitted); *see also* 16A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3949.1 (5th ed. 2020) ("The district court has no power under any statute or rule to prevent or void the timely filing of a notice of appeal in any case in which an appeal as of right is assured. The district court is required to honor a notice of appeal and to transmit the file of its proceedings to the court of appeals. Any objection to the form or timeliness of the notice of appeal should normally be made by a motion to dismiss the appeal, addressed to the court of appeals in execution of its jurisdiction that attached upon the filing of the notice." (footnotes omitted)).

The impropriety of a lower court dismissing, striking, or otherwise impeding the filing of an appeal to a circuit court is generally recognized by the Federal courts of appeals. *See, e.g.*, *Sperow v. Melvin*, 153 F.3d 780, 781 (7th Cir. 1998) ("A district court cannot dismiss an appeal."); *Dickerson v. McClellan*, 37 F.3d 251, 252 (6th Cir. 1994) ("In fact, the district courts have a ministerial duty to forward to the proper court of appeals any notice of appeal which is filed."); *Camby v. Davis*, 718 F.2d 198, 200 n.2 (4th Cir. 1983) ("The district court entered an order dismissing the notice of appeal. This it was without jurisdiction to do."). And the ministerial duty to transmit an NOA is reflected in both the Federal Rules of Appellate Procedure and the Federal Circuit's own rules. *See* FED. R. APP. P. 3(d)(1) ("The [district] clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice."); FED. CIR. R. 3(a) ("When a notice of appeal is filed, the trial court clerk of court must promptly send to this court's clerk of court a copy of the opinion, if any, that accompanied the judgment or order being appealed. The trial court clerk of court must certify the copy of the docket entries and send it with the notice of appeal."); *see also* FED. CIR. R. 1(a)(1) (stating that references to "district court" and "trial court" in the rules include, as appropriate, this Court).

Citing many of these authorities, the Federal Circuit itself recognized this principle. "It is the duty of this court, not the district court, to determine whether [an] appeal belonged in this court." *In re Lockhart*, No. 504, 1997 WL 264846, at *2 (May 6, 1997). This decision is

nonprecedential, and we could not find a precedential decision from the Federal Circuit addressing the same issue. But we attribute that to the rarity with which lower courts usurp the power of superior tribunals to determine their own jurisdiction, rather than to any doubt about the principle's correctness. We see nothing in the holding, reasoning, or circumstances of *Gilda* that is in tension with *Lockhart* or the other authorities cited above.

Thus, we must dismiss Mr. Rosinski's motion to dismiss the Secretary's NOA as outside our jurisdiction. We also dismiss his motion to recall the NOA, since the prohibition on dismissing an appeal clearly includes a prohibition on seeking to undo our transmission to the Federal Circuit. *Cf. Gilda*, 511 F.3d at 1351 ("[T]he critical date for determining whether jurisdiction passes to the court of appeals is the date of the filing of the notice of appeal. That is, when a notice of appeal is timely filed, a trial court is divested of jurisdiction at the time the notice is filed, not when the appeal is subsequently docketed by the appellate court." (citation omitted)). Whatever arguments the parties wish to make regarding the timeliness or validity of the Secretary's NOA, they must be presented to the Federal Circuit. It is for that Court to decide its jurisdiction, not us.

Upon consideration of the foregoing, it is

ORDERED that Mr. Rosinski's August 4, 2020, motion to dismiss the Secretary's appeal as untimely and his August 19, 2020, motion to recall transmission of the NOA to the Federal Circuit are DISMISSED.

DATED: September 9, 2020 PER CURIAM.

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)