

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-0945

GEORGE ROSEBERRY,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

ORDER

On July 20, 2021, the Court issued a Memorandum Decision that set aside and remanded in part the January 28, 2020, Board of Veterans' Appeals (Board) decision. On August 12, 2021, judgment entered. On October 15, 2021, the Court issued an order that provided: "Under Rule 41(a) of the Court's Rules of Practice and Procedure, mandate is effective October 12, 2021." Oct. 15, 2021, Order at 1. On November 13, 2021, the appellant filed an application for attorney's fees and expenses. On January 19, 2022, after the Court granted the Secretary's motion for an extension of time to file a response, the Secretary filed a motion to dismiss the appellant's application as untimely. To date, the appellant has not filed a response.

Any application for the award of attorney fees and expenses, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, must be filed within 30 days after this Court's judgment becomes final. *See* U.S. VET. APP. R. 39(a). In this case, judgment became final on October 12, 2021, because the 60th day following the entry of judgment was October 11, 2021, a legal holiday. *See* U.S. VET. APP. R. 26(a). The 30th day following October 12, 2021, was November 11, 2021, also a legal holiday; therefore, the 30th day was November 12, 2021. *See id.*; *see also* U.S. VET. APP. R. 26(b) (providing that "the Court may not extend the time for filing . . . an [EAJA] application"); *Pardue v. Principi*, 15 Vet.App. 120 (2001), *Strouth v. Brown*, 8 Vet.App. 502, 504 (1996). The 30-day EAJA filing period is statutory, 28 U.S.C. § 2412(d)(1)(B), but not jurisdictional. *See Scarborough v. Principi*, 541 U.S. 401, 414 (2004) ("30-day deadline for [EAJA] applications and its application- content specifications are not properly [termed] 'jurisdictional'."); *see also Coley v. Wilkie*, 32 Vet.App. 284, 286 (2020) (per curiam order). This Court has interpreted this to mean that EAJA applications are subject to equitable tolling. *See Coley*, 32 Vet.App. at 287 (citing *Bly v. McDonald*, 28 Vet.App. 256, 261 (2016), *vacated on other grounds sub nom. Bly v. Shulkin*, 883 F.3d 1374 (Fed. Cir. 2018)). It is the applicant's burden to demonstrate that equitable tolling is warranted. *See Mead v. Shulkin*, 29 Vet.App. 159, 163 (2017) (per curiam order) (denying equitable tolling because the appellant's "counsel ha[d] not demonstrated that an extraordinary circumstance prevented her from filing a timely EAJA application despite her exercise of due diligence"); *see also Sneed v. Shinseki*, 737 F.3d 719, 725 (Fed. Cir. 2013).

Upon consideration of the foregoing, it is

ORDERED that the appellant show cause, within 30 days after the date of this order, why the EAJA application should not be dismissed as untimely. Proceedings are stayed pending further order of the Court.

DATED: February 9, 2022

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

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