

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-4543

JOHN F. JOE,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

ORDER

It appears that the Board of Veterans' Appeals (Board) mailed its decision on October 5, 2021. The appellant filed a Notice of Appeal (NOA) 297 days later, on July 29, 2022. The 120th day would have been February 2, 2022. The Secretary later moved to dismiss the instant appeal for lack of jurisdiction, asserting that the appellant had filed an untimely NOA. The Secretary filed the motion within 45 days of filing of the Board decision. U.S. VET. APP. R. 4(a)(3)(A).

To be timely, an NOA generally must be filed with the Court within 120 days after the Board mailed notice of its decision. 38 U.S.C. § 7266(a). If an NOA is received within 30 days after 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)(i). Examples of good cause and excusable neglect include, but are not limited to, the appellant's confusion due to the Board mailing duplicate decisions with different date stamps, *McGee v. Wilkie*, 31 Vet.App. 368, 372 (2019), and the appellant miscalculating the filing deadline, in addition to the specific circumstances presented, such as an appellant's familiarity with the appeals procedure, any prejudice to the Secretary, and an appellant's good faith, *Benson v. Wilkie*, 32 Vet.App. 381, 384-86 (2020).

If an NOA is received more than 30 days after expiration of the filing deadline, the deadline may be equitably tolled and the NOA may be accepted as timely if circumstances precluded the appellant from timely filing an NOA despite the exercise of due diligence. U.S. VET. APP. R. 4(a)(3)(B)(ii); *see Bove v. Shinseki*, 25 Vet.App. 136, 140 (2011) (per curiam order). To benefit from equitable tolling, an appellant must demonstrate: (1) an extraordinary circumstance; (2) due diligence exercised in attempting to file; and (3) a connection between the extraordinary circumstance and failure to timely file. *See Toomer v. McDonald*, 783 F.3d 1229, 1238 (Fed. Cir. 2015). "Equitable tolling is not limited to a small and closed set of factual patterns," and the Court must consider equitable tolling on a "case-by-case basis," "avoiding mechanical rules" and observing "the need for flexibility." *Sneed v. Shinseki*, 737 F.3d 719, 726 (Fed. Cir. 2013) (internal quotation marks omitted). Cases in which equitable tolling has been allowed include illness that renders an appellant incapable of rational thought or deliberate decision making, *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004); physical illness that impairs cognitive function or

the ability to communicate, *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005); reliance on incorrect advice from a VA official, *Bailey v. West*, 160 F.3d 1360, 1365-68 (Fed. Cir. 1998); attorney abandonment of an appellant, *Sneed*, 737 F.3d at 728; and other extraordinary circumstances, such as homelessness, *Checo v. Shinseki*, 748 F.3d 1373, 1378-79 (Fed. Cir. 2014). *See generally Bove*, 25 Vet.App. at 140 (collecting cases).

The appellant will be directed to show cause why this appeal should not be dismissed for untimely filing. *See* U.S. VET. APP. R. 4(a), 38(b). It is the appellant's burden to produce any evidence necessary to support an argument that the Court should treat an untimely NOA as timely filed. *Palomer v. McDonald*, 27 Vet.App. 245, 251 (2015) (per curiam order).

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, providing any evidence necessary to support that argument. 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: October 20, 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

Copies to:

Harold H. Hoffman, III, Esq.

VA General Counsel (027)

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