

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

JOHN F. JOE,
Appellant,
v.
DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

Docket No. 22-4543

**MR. JOE’S RESPONSE IN OPPOSITION TO THE
SECRETARY’S MOTION TO DISMISS**

On September 12, 2022, the Secretary moved the Court to dismiss Mr. Joe’s appeal as untimely. The Court should not dismiss Mr. Joe’s appeal.

BACKGROUND

This appeal arises from an October 5, 2021, Board decision. Mr. Joe filed his appeal 297 days later. The Secretary moved to dismiss Mr. Joe’s appeal as untimely. The Court should deny the Secretary’s motion and equitably toll Mr. Joe’s appeal because he thought I appealed his Board decision for him and exercised reasonable due diligence to file his appeal on time when he discovered I had not. This same argument is also being filed in

opposition to the Secretary's motion to dismiss Mr. Joe's other appeal in CAVC docket # 22-4542

ARGUMENT

The Court should equitably Mr. Joe's filing period because extraordinary circumstances, despite his due diligence, caused him to file his NOA outside the 120-day filing period.

Mr. Joe's NOA was filed more than 120 days after the Board mailed its October decisions. But NOA's "received more than 30 days after the expiration of the filing deadline" can be considered timely if equitable tolling is warranted.¹ And in this case, it is.

According to the Court's rules, an untimely NOA will be treated as timely if:

... the Notice of Appeal is received more than 30 days after the expiration of the filing deadline but equitable tolling is warranted because the appellant demonstrates an extraordinary circumstance that prevented filing in a timely manner and the exercise of reasonable due diligence in attempting to file a timely Notice of Appeal.²

¹ U.S. Vet. App. R. 4(a)(3)(B)(ii).

² U.S. Vet. App. R. 4(a)(3)(B)(ii).

In other words, Mr. Joe must demonstrate (1) an extraordinary circumstance, (2) due diligence, and (3) causation.³ Mr. Joe's reasonable mistaken belief that I had filed his appeals for him were extraordinary circumstances that, despite his due diligence, caused him to file his NOA outside of the 120-day appeal period.

I. This case's unusual procedural history is an example of an extraordinary circumstance that precluded Mr. Joe from filing within the 120-day appeal period.

The procedural history of this case is unusual. Over the years, Mr. Joe has filed multiple claims for an earlier effective date for TDIU. This ultimately led to his claim being docketed at the Board under two docket numbers at the same time. Mr. Joe has been (and remains to be) confused about the VA appeal process throughout the duration of his appeals. He has received decisions from the VA, Board, and Court regarding his TDIU claim.

In February 2021, Mr. Joe contacted VetLAG about a Board denial. But he could not produced the Board's decision. I explained

³ *Checo v. Shinseki*, 748 F.3d 1373 (Fed. Cir. 2014); *Sneed v. Shinseki*, 737 F.3d 719 (Fed. Cir. 2013) (noting that equitable tolling is not "limited to a small and closed set of factual patterns" (quoting *Mapu v. Nicholson*, 297 F.3d 1375 (Fed. Cir. 2005))).

to him that based on his recitation, I think that his appeal would not have merit because according to Mr. Joe, it was of a Board decision that correctly held there is no such thing as a claim for an earlier effective date. But because I cannot know his case is meritless for sure unless I review the Board decision and maybe the record, and despite my bad news, I agreed to represent him as long as he let it go if I discovered there was no merit. So I filed Mr. Joe's appeal for him with an understanding that his case was likely to be dismissed.

In July 2021, VetLAG offered to represent Mr. Joe at the VA at a low bono non-profit rate, but he declined. The Board issued decisions on October 5, 2021, and October 21, 2021, denying an earlier effective date for TDIU. Mr. Joe sent me the Board decisions in early December 2021, well within the 120-day appeal period.

Similar to his previous appeal, I gave him a negative opinion of his appeal.. But this time, I said so after reviewing the Board decision and knowing the case history. Despite this, Mr. Joe thought that I was going to appeal the Board decisions for him, as I did in February 2021.

On July 26, 2022, Mr. Joe called and asked me for an update on his appeals. After discussing the situation with him, he and I quickly completed the necessary paperwork and I entered an appearance and filed his appeals on July 29, 2022.

II. Mr. Joe’s neglect in filing on time was excusable.

Mr. Joe received multiple Board decisions in 2021 and mistakenly believed that I filed his appeals for him—as I have done in the past. This was a direct result of his confusing and unusual procedural history. He missed the filing date due to reasonable neglect. His neglect to file his appeal on time was excusable.

III. Mr. Joe exercised reasonable diligence to file his appeal within the 120-day appeal period.

Mr. Joe’s failure to file his appeal on time was not due to “general negligence or procrastination.”⁴ Mr. Joe was reasonably diligent in trying to file his NOA on time.⁵ He took steps to appeal the Board’s October 2021 decision as soon as he received it. He sent

⁴ See *Brandenburg v. Principi*, 371 F.3d 1362 (Fed. Cir. 2004).

⁵ See *Checo v. Shinseki*, 748 F.3d 1373 (Fed. Cir. 2014) (citing *Holland v. Florida*, 560 U.S. 653, 130 S. Ct. 2549 (2010); see also *McCreary v. Nicholson*, 19 Vet. App. 324 (2005).

me the decision he wanted to appeal less than 60 days after it was issued by the Board. I advised him that he should not appeal the decision. Considering that he thought I had appealed the October Board decision for him as I had done in the past, believed his appeal was alive, and immediately fixed the error when discovered, Mr. Joe exercised reasonable due diligence in filing his appeal.

CONCLUSION

The Supreme Court defined excusable neglect as “late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party’s control.”⁶

Reasonable neglect caused Mr. Joe to miss his deadline to appeal. He thought that I had appealed the Board’s decision for him, and he filed a motion for reconsideration at the Board.. The Court should consider his appeal on time.

⁶ *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380 (1993); see also *United States v. Boyle*, 469 U.S. 241 (1985).

October 26, 2022.

Submitted,

/s/ Harold Hoffman
Harold H. Hoffman, III
haroldhoffman@vetlag.org
2776 S Arlington Mill Dr.
Suite 804
Arlington, VA 22206
202-677-0303