APPELLANT'S CORRECTED SUPPLEMENT BRIEF

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 21-3467

GARY FERKO,

Appellant

v.

DENIS MCDONOUGH,

SECRETARY OF VETERANS AFFAIRS,

Appellee

May 12, 2023

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I. Precipie.

The Panel issue is whether equitable tolling is available for the period to file a Notice of Disagreement (NOD) under 38 U.S.C. § 7105[1]. Though hinted at in earlier case law, this question has not yet been clearly answered. See *Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) ("[T]he availability of equitable tolling . . . should be interpreted liberally with respect to filings during the nonadversarial stage of the Veterans' benefits process."); see also *McPhail v. Nicholson*, 19 Vet.App. 30, 34–35. On February 1, 2023, this Court issued a supplemental briefing order to address several questions.

Since this Order, the Supreme Court of the United States issued *Wilkins v. United States*, 143 S. Ct. 870 (2023). This case further defines the equitable tolling principle and its interplay with the concepts of jurisdictional rules and non-jurisdictional claims processing rules.

II. Discussion

[1] Note that statutes and case citations that are underlined are hyperlinked to Lexis. The various symbols were added by Lexis for Microsoft Office; undersigned counsel apologizes that he was unable to remove them. Every time this is accomplished the result poorly affects the coding and presentation of the brief.

Jurisdiction defines the subject matters federal Courts can hear and administrative bodies' functions.[2] Congress, in its interpretation of the Constitution, sets forth said jurisdiction. Congress set for the subject matter, i.e., the jurisdiction for the VA - the care of our Veterans and their families. See generally Title 34 USC Parts I & II. These rules cover a wide range of issues, such as eligibility criteria, rating criteria for disabilities, and evidentiary requirements. Meanwhile, the claims processing rules are guidelines and criteria used by the VA to determine how to process a claim that has been denied, and are found further away in Part V.

The problem before us is that these two concepts, "Jurisdiction" and "Nonjurisdictional claims' processing" rules (NJCPR), have been muddled together over the decades in various Supreme Court cases.

Just recently Justice Sotomayor eloquently separated these concepts:

> "Jurisdiction, this Court has observed, is a word of many, too many, meanings." In particular, this Court has emphasized the distinction between limits on "the classes of cases a Court may entertain (subject-matter jurisdiction)" and "[NJCPR], which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." The latter category generally includes a range of "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit."

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[2] Jurisdiction also defines personal jurisdiction. But that issue does not seem present in this matter.

Wilkins v. United States, 143 S. Ct. 870, 875-76 (2023) (internal Citations omitted).

The statute of limitations and claims processing rules can intersect separately from an agency's subject matter over a claim. The subject matter has already been established prior to when a Veteran files an out-of-time appeal from a (timely filed initial) claim. The subject matter jurisdiction (of the Agency) is established with the filing of the claim - the Agency is the forum for the citizen's claim to be made. When the claim needs to be filed or when an appeal for a denied claim has to be made, it is part of the claim processing rules, i.e., the statute of limitations (SoL) for said actions.[3]

Mr. Ferko argues that the timeliness of his appeal should be based on a specific claims processing rule, i.e., §7105.

1. **Yes, § 7105 can be characterized as a statute of limitations such that the presumption in favor of equitable tolling applies.**[4]

A. *38 USC §7105 Defined.*

38 USC §7105 (2004) provides in pertinent part:

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be

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[3] The concepts of how claims processing rules are distinguished between defining jurisdiction versus NJCPRs is discussed in §2, infra.

[4] See *Irwin v. Department of Veterans Affair*s, 498 U.S. 89, 95–96 (1990); *Arellano v. McDonough*, 598 U.S. __ (2023).

accorded hearing and representation rights pursuant to the provisions of this chapter [38 USCS §§ 7101 et seq.] and regulations of the Secretary.

(b)

(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed ... . A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter [38 USCS §§ 7101 et seq.] within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

B. *Congress created jurisdiction letting Veterans act against the Government, i.e., filing an appeal for a disagreement in a benefits award, like the right EEOC complainants have the right to sue the federal Government per Irwin.*

To sue the federal Government, there must be a "waiver" of sovereign immunity. This waiver "'cannot be implied but must be unequivocally expressed.'" Id. at 95 citing *United States v. Mitchell,* 445 U.S. 535, 538, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1980) (quoting *United States v. King,* 395 U.S. 1, 4, 23 L. Ed.

2d 52, 89 S. Ct. 1501 (1969). The *Irwin* Court found such language in 42 U. S. C. § 2000e-16 (c).[5], [6] Id at 94. Likewise, it should be found for Mr. Ferko in §7105.

i. Irwin.

The Plaintiff in *Irwin*, a federal employee Equal Employment Opportunity Commission (EEOC) matter, was appealing a denial of his case because he failed to file a timely appeal. See *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 111 S. Ct. 453 (1990). He argued that although he missed his SoL deadline to continue his case from the agency level to federal court, equitable tolling should apply. This would allow for a timely appeal. The Supreme Court in *Irwin* acknowledged its past inconsistency in letting SoL apply in cases against the federal Government. The Supreme Court recognized that *Irwin* provided the it with an opportunity to generalize the equitable tolling rule in cases against the federal Government.

Given the structure and history of the congressionally created Federal Rules of Civil Procedure (FRCP)[7] (and Federal Rules of Criminal Procedure [Fed. R.

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[5] The Court provided that the EEOC statute of limitations language that even contained the liberal language like *may* (versus *shall*) is still sufficient to make the language jurisdictional and therefore accessible to equitable tolling. *Irwin* at 13. Conversely, statutory deadlines with the language "shall" can be found as jurisdictional.

[6] Although the Court found the statute a NJCPR and apt for equitable tolling, the Plaintiff in *Irwin* was denied relief on due to Petitioner's failure to exercise due diligence. See *Irwin* at 96.

[7] It is not uncommon for agencies in their administrative processing of cases, e.g., the EEOC, to loosely adopt the FRCP. See .

Crim], the Rehnquist Court found no reason litigants against the Government should not have the same equitable tolling principles for SoL issues that litigants have against private parties:

> C.J. Rehnquist for the Court concluded:
>
> Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96, 111 S. Ct. 453, 457 (1990). The SoL rules embedded in the FRCP that could be tolled were, as defined by Congress and those read by the Supreme Court, are NJCPR. These rules define how a case should move forward through the system, not whether it could start or must stop. See further discussion of equitable tolling and non-claims processing rule in § 2, *infra.*

ii. Ferko.

The statutory language waiving sovereign immunity in *Irwin* does not differ from §7105. Both codes permit citizens to take action against the Government when they disagree with the results of specific agency activities for a claim already

in process. And in both situations, Congress has set forth specific time frames for the aggrieved citizen to act.[8]

Mr. Ferko asserts that § 7105 meets *Irwin's* NJCPR. Congress created a right for Veterans to potentially act against the Government with §7015. This is no different than when EEOC complainants disagree with decisions the Government makes (via its agency) like in *Irwin*. Similarly, these waivers of Government immunity both have time frames within which citizens must act. But tolling should be more available for Mr. Ferko as the Supreme Court has noted Congress gives Veterans before the VA the *thumb-on-the-scale* consideration[9], which should allow for equitable tolling. Especially in the non-adversarial stage at the BVA[10] given *Jaquay* and *McPhail,* discussed *supra.*

C. *Yes, § 7105 can be characterized as a statute of limitations such that the presumption in favor of equitable tolling applies.*

Like in *Irwin* and *Soriano*, Congress has waived its sovereign immunity for Veterans letting them appeal initial decisions for VA benefits claims under § 7105. The language speaks for itself: "A notice of disagreement [against the United States Government via the VA] *shall* be filed within one year from the date of the

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[8] See fn. 15, *infra.*

[9] See *Shinseki v. Sanders*, 556 U.S. 396, 416, (2009).

[10] The BVA is a nonadversarial stage. See generally *Evans v. Skinseki*, 25 Vet.App. 7, 15 (2011).

issuance of notice of the decision of the agency of original jurisdiction." § 7105 (b)(1)(A) (emphasis added). The filing deadline requirement does not differ from in *Soriano, supra,* at 271, n.1, as discussed in *Irwin*.

The Court in *Irwin* determined that language creating a jurisdictional backdrop, i.e., the use of *may* for setting a deadline, is not a stretch from the more stringent word *shall* when setting a SoL. For Mr. Ferko, the language setting standard *is:* "… *shall* be filed within one year from the date of mailing of notice of the result of initial review or determination." § 7105(b)(1) (emphasis added). clearly meets the more *preferred* stringent language for a SoL requirement.

These statutes of limitations are unnecessary to grant subject matter to the Government bodies over the respective starting claims. For clarity, there is no "presumption of tolling" principle as the Congressional language is clear. The language setting the respective deadlines is not complex: Both are simple statements in the middle of claims processing statutes for the respective claims.[11] And with no clear congressional (or even judicial) language to the contrary[12], equitable tolling for this statute of limitations must be allowed.

[11] See discussion of how the Courts are to read statutes pass by Congress in the next section.

[12] See fn. 11.

2. The Secretary cannot rebut the presumption of the VA has equitable authority as there is no "good reason to believe that Congress did not want the equitable tolling doctrine to apply."[13]

The parties were requested to discuss the Secretary's assertion in *Arellano*, 598 U.S. __ n.1[14], that equitable tolling is a judicial doctrine not presumptively available to executive agencies generally absent a specific grant of equitable power from Congress. First, it should be clear that "equitable tolling" as a concept in American jurisprudence is not automatically "presumable". Congress through its clear statutes prescribe when "equitable tolling" is available to statute of limitations. The premise that the VA does have equitable authority and that Congress has not provided otherwise follows the Courts' rulings in *Arellano* and *Checo* and the Supreme Court's recent ruling in *Wilkins*.

Yes, executive agencies require specific Congressional language to utilize equitable tolling. In Mr. Ferko's case, like many others, the necessary language has indeed been provided. § 7105 provides the "[NoD] shall be filed within one year

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[13] *United States v. Brockamp*, 519 U.S. 347, 350 (1997).

[14] Equitable tolling, a judicial doctrine, is typically applied by Courts. See *Sebelius v. Auburn Regional Medical Center*, 568 U. S. 145, 158-159, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013). In *Arellano*, petitioner posits that the VA would apply the doctrine in the first instance. Reply Brief 18-19; Tr. of Oral Arg. 16-17. The Secretary counters that the doctrine is not presumptively available to agencies because they possess no equitable power unless Congress grants it to them—which, he says, Congress has not done here. Brief for Respondent 32-35. We need not settle this dispute. Our conclusion that the presumption is rebutted means that no adjudicator, whether an agency or a Court, may equitably toll the effective date.

from the date of mailing of notice of the result of initial review or determination". After a statute of limitations has been accessed, the next question turns to whether the statute is simple versus either being complex or contains a legislative history where Congress has spoken when its citizens may avail themselves to equitable tolling.

The Supreme Court requires this Court not to read into the statutory language passed by Congress: The "principle of construction is not a burden Courts impose on Congress. To the contrary, this principle seeks to avoid judicial interpretations that undermine Congress' judgment. Loosely treating procedural requirements as jurisdictional risks undermining the very reason Congress enacted them." Wilkins at 876. Following, the Court found that "'traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.'" Id. at 370. (Internal citations omitted). In *Wilkins,* petitioners filed a claim under the Quiet Title Act against the Government. The petitioners argued that the 12-year statute of limitations to file an action against the Government can be equitably tolled, thus making it an NJCPR. The Government countered arguing the clear language of 12-year statute of limitations: Simply, "[a]ny civil action . . ., . . . , shall be barred unless it is commenced within twelve years of the date upon which it accrued." §2409a(g). Accrual is defined as "the date the plaintiff or his predecessor in interest knew or should have known of

the claim of the United States." Ibid. Therefore, the Government argued, the SoL was a Jurisdictional Rule and (subject matter/personal jurisdiction) cannot be equitably tolled. The Supreme Court disagreed with the Government. The argument for §7105 being a NJCPR almost mirrors the argument for §2409a(g) in *Wilkins*:

Nothing about §7105's, like §2409a(g), text or context gives reason to depart from this clear statement rule. §7105 simply states that an appeal of an NOD must be filed within a year. This "text speaks only to an appeal's timeliness," and its "mundane statute-of-limitations language say[s] only what every time bar, by definition, must: that after a certain time a claim is barred." Id., at 410, 135 S. Ct. 1625, 191 L. Ed. 2d 533. Further, "[t]his Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." Id., at 411, 135 S. Ct. 1625, 191 L. Ed. 2d 533. The jurisdictional grant for the VA is 38 USC Title I & II, while its claim's preprocessing, is well afield of Title V's §7105. And "[n]othing conditions the jurisdictional grant on the limitations perio[d], or otherwise links those separate provisions." Paraphrasing *Wilkins* at 874 (internal citations omitted). Therefore §7105, like § 2409a(g), lacks a jurisdictional clear statement.

Simply put, §7105 is simple like that in *Irwin* and Wilkins. The comparative statutes have a set number of days for an SoL[15] and do not have complex language surrounding it making it immovable. Further, neither have legislative history where Congress has seen fit to toll such statutes of limitations. See discussion of *Soriano* below. Based on the clear language of § 7105 and the similarities between it and that in *Irwin,* tolling is congressionally mandated for § 7105. Meanwhile, Mr. Ferko's case is unlike the statutory complex statutes discussed in *Arellano*, *Brockamp,* and *Soriano*.

In *Arellano*, the statutory language in question is complex: The structure of §5110 reinforces Congress's choice to set effective dates solely as prescribed in the text. The statute sets out detailed instructions that explain when various types of benefits qualify for an effective date earlier than the default.

> There are 16 such exceptions—and equitable tolling is not on the list. See §§5110(b)(1), (b)(2)(A), (b)(3), (b)(4)(A), (c), (d), (e)(1), (e)(2), (f), (g), (h), (i), (j), (k), (l), (n). Notably, these exceptions do not operate simply as time constraints, but also as substantive limitations on the amount of recovery due. See, *e.g.*, §5110(g) ("In no event shall [an] award or increase [under this paragraph] be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier").

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[15] Thirty for EEOC and One Year for VA. See 42 U.S.C.S. § 2000e-16(c) and §7105, respectively.

Arellano v. McDonough, 143 S. Ct. 543, 548-49 (2023). The *Arellano* Court opinion noted that Congress's clear intention rebuts any allowance of equitable tolling on this issue. This intention is made clear by utilizing complex language in § 5110 that the Government only has certain exceptions when the SoL made be waived.[16] Prior precedent supports that Congress is clear in its statutory scheme when equitable tolling cannot be applied by the Courts (and by implication government agencies).

In *Brockamp*, the plaintiffs (of two combined cases before the Supreme Court) asked the Court: Can Courts toll, for non-statutory equitable reasons, the statutory time limitations for filing tax refund claims set forth in § 6511 of the Internal Revenue Code of 1986? *United States v. Brockamp*, 519 U.S. 347, 348, 117 S. Ct. 849, 850 (1997). Justice Breyer, for the Court, opined the Courts could not. The opinion provides two factors: The complex language limits the SoL. Id. at 519 U.S. 350-351. The second is the financial protection to the Government by

[16] There may be an argument the co-existing limiting language as it relates to direct claims for Government money might be required. See discussion of *Arellano*, *Brockamp*, and *Soriano* in this section. But given the "mandatory and jurisdictional" carve outs in the Federal Rules of Civil and Criminal Procedure don't have any outwardly direct financial considerations from the Government, Counsel is not yet ready to advance this theory. But the inclusion of financial concerns in the respective statutes in *Arellano*, *Brockamp*, and *Soriano*, does seem to give greater credence that Congress did not want these SoL disturbed.

not keeping refund periods open indefinitely and worrying about stale claims. Id. at 353.[17]

In *Soriano*, the plaintiff argued that his late initial claim filing in the United States Court of Federal Claims should be tolled as the country was at war. Our Supreme Court denied him relief because "Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war." And in his case, they had not. See Soriano v. United States, 352 U.S. 270, 276, 77 S. Ct. 269, 273 (1957). This is important because § 7105 and any immediate interlocking statutes appear bereft of any prior limitations set by Congress.

As discussed in other Supreme Court rulings, identifying time limits alone does not satisfy the irremovable limits required for certain cases. The Court identifies time-stringent statutes as those with the repeated Court qualification of "mandatory and jurisdictional." See *Eberhart v. United States*, 546 U.S. 12, 17, 126 S. Ct. 403, 406 (2005) and *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906 (2004) referring *United States* v. *Robinson,* 361 U.S. 220, 228-229, 4 L. Ed. 2d 259, 80 S. Ct. 282 (1960) Congressional language making an SoL "mandatory and jurisdictional" needs to be crafted with clear complex language.

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[17] See fn. 16, *supra*.

Congress did not make §7105 complex, there is no congressional history (known to Counsel) where tolling limitations have been placed, and the Courts have not found it to be "mandatory and jurisdictional." Congress gave this Court *broad discretion to prescribe, interpret, and apply its own rules*. It also gave the BVA the discretion to make its own determination if a NOD is timely.[18] Given the rulings *Checo*[19] and *Henderson v. Shinseki,* 589 F.3d 1201 (Fed. Cir. 2009) has already acknowledged that SoL to file an appeal to this Court can be tolled and in *Jaquay*, where the BVA can toll an NOD that was misfiled to an AOJ, it is not a far stretch that the BVA has the same ability with respect to determining if an untimely NoD can be equitably tolled. And given the language has not been changed by Congress (at least in *Checo, Henderson* and *Jaquay*) as it is free to do

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[18] Ms. Checo's arguments that Congress could have, and did not, make § 7266(a) unwaivable, we conclude that Congress nonetheless gave the Veterans Court broad discretion to prescribe, interpret, and apply its own rules. The Veterans Court uses that discretion here to require that a claimant file an NOA within the time allowed by law. *See* U.S. Vet. App. R. 38(b) (authorizing the Veterans Court to take "such action as the Court deems appropriate, including dismissal of the appeal," when a party fails to comply with a rule of the Veterans Court).

Checo v. Shinseki, 748 F.3d 1373, 1377 (Fed. Cir. 2014).

[19] See fn 18, supra.

so, equitable tolling should be allowed in matters involving a Veteran timely filing a notice of appeal/disagreement.[20]

Like our superior Court's interpretation in *Checo*, Congress's language in § 7105 (b)(1)(C) gives the Secretary through the BVA discretion to determine if an appeal is timely: "A question as to timeliness or adequacy of the notice of disagreement shall be decided by the Board." Further, as this Court has jurisdiction to determine its own jurisdiction over a case[21], it is not a far leap that so too should the BVA. But while the BVA does have said discretion, it is not so absolute that it can do so indiscriminately. It must follow its statutory construct and the other laws of the land, i.e., tolling: The rule in *Checo* did allow for equitable tolling to be applied in this Court.

Chief Justice Rehnquist provided in *Irwin*: If Congress disagrees with its decision, "Congress, of course, may provide otherwise if it wishes to do so." See discussion in § B(i), supra noting *Irwin*, 498 U.S. 89 at 96. Undersigned Counsel is not aware of any statute (in effect prior to Mr. Ferko's case) that prohibits the VA from using equitable tolling in §7105 matters. Indeed, some of VA's own claims processing language seems to invite it:

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[20] Counsel is not advocating there is an automatic "presumption" that SoL can be equitably tolled. The Courts just need to read the statute in the context of the entire code to find the answer. See discussion of *Wilkins, supra*.

[21] *Henderson v. West*, 12 Vet. App. 11, 14 (1998).

> **(b)** Extension of time limit. Time limits within which claimants or beneficiaries are required to act to perfect a claim or challenge an adverse VA decision may be extended for good cause shown. Where an extension is requested after expiration of a time limit, the action required of the claimant or beneficiary must be taken concurrent with or prior to the filing of a request for extension of the time limit, and good cause must be shown as to why the required action could not have been taken during the original time period and could not have been taken sooner than it was. Denials of time limit extensions are separately appealable issues.

38 C.F.R. § 3.109.

Thus, Veterans like Mr. Ferko are entitled to equitable tolling for filing their NODs before the BVA. Mr. Ferko asserts that it erred in not correctly applying the equitable tolling principle, in his case, as it had in *Wilkens*.

3. Response to Question III: Yes, the stop-clock approach adopted by the U.S. Court of Appeals for the Federal Circuit for an NOA to this Court should apply to tolling NODs as well if the Court determines that tolling is available for the NOD deadline.[22]

Most notably, the Secretary had already conceded that the stop-clock approach is the most appropriate for Veterans in cases like Mr. Ferko's. Recall in *Checo*, the Veteran was homeless. She was in financial despair, had no permanent address, and could not receive mail. In that situation, the Secretary conceded the stop-clock approach was appropriate. The "stop-clock" approach is appropriate

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[22] See *Checo* at 1378 (holding that a filing period may be tolled when an obstacle to timely filing arises, and it begins to run again when that obstacle is removed).

when "extraordinary circumstances" can be defined in finite periods that can be assessed, e.g., several months of homelessness that Ms. Checo endured, versus "when the extraordinary circumstance period has no end date, such as the recovery period after a hurricane." See *Checo* at 1380 and *McCreary v. Nicholson*, 19 Vet. App. 324 (U.S. 2005).

As discussed below, Mr. Ferko's situation meets the "extraordinary circumstances" criteria of the "stop-clock" approach to warrant equitable tolling in his case.

4. The Veteran can demonstrate to this Court that his situation is an "extraordinary circumstance" that warrants equitable tolling of his *alleged*[23] untimely NOA.

This Court has already acknowledged and followed our superior Court's definition of equitable tolling. *Checo* at 1380. We must demonstrate three elements to toll an untimely NOA: (A.) extraordinary circumstance; (B.) due diligence; and (C.) causation. Checo, 748 F.3d at 1378 citing *McCreary v. Nicholson*, 19 Vet.App. 324, 332 (2005), adhered to on reconsideration, 20 Vet.App. 86 (2006)). Mr. Ferko easily meets the *Checo* standard for equitable tolling.

[23] See fn. 33, infra.

A. The Veteran meets the extraordinary circumstances required for the equitable tolling principle at apply in his case.[24]

Mr. Ferko's delay was due to his hospitalization from service-connected open-heart surgery (CABG X3). Physical and mental incapacitation are both considered legitimate bases for equitable tolling. See *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005). Mr. Ferko was hospitalized for five (5) days.[25] R. at 1271. Given the less-than-rigid language of (a) and the unusual pro-Veteran language the Secretary operates under[26], equitable tolling in claims processing,

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[24] We note that this case is not a tolling for an earlier effective date for an initial claim that was not filed until thirty years later. There is not a statute of limitations as the claim had not been filed to start the SoL clock for an appeal. (Both of which established subject matter jurisdiction). Instead, this matter is regarding the tolling of an SoL in a typical claim processing matter, as the initial claim has already been filed and denied.

[25] If the Secretary disputes that medical issues Mr. Ferko was dealing with while hospitalized do not rise to the level of "incapacitation" then as this Court is precluded from reviewing factual determinations or from deciding fact questions in the first instance under 38 U.S.C. § 7292(d)(2), this case should be remanded to the BVA on this issue. *See* *Bailey v. West*, 160 F.3d 1360, 1362 (Fed. Cir. 1998) ("[This Court's] review is limited to questions of law.").

The Secretary asserts with no apparent medical opinion that the Veteran's known conditions as he had presented pro se at the time, the known recovery time in the hospital for such a procedure, and the known recovery time while under the known effects a medication that left him incapable of handling his legal affairs, that he failed to provide any basis that he was not competent to handle his legal affairs is astounding. If the information was not readily available to the Secretary (even though he was a patient at a VA Hospital at the time, the information could be found on the internet.

[26] See fn. 9, *supra*.

especially when it is a service-connected condition prohibiting a Vietnam-Era Veteran from filing his timely Notice of Disagreement, seems obvious.[27]

Second, Appellant was not represented by counsel (or any other party) during the SoL period as evidence by his request for an extension to file his NOD. If this was a run-of-the-mill error, then the Veteran may be hard-pressed for such a waiver. However, there was no run-of-the-mill error due to his delay in filing his appeal. And given the medical conditions at hand the delay meets "exceptional circumstances" criteria.

Third, unlike the thirty-year mental health tolling case to file an initial claim, *Arellano*, or even the outdated request for an IRS refund case, *Brockamp*, the issue before us is not an initial claim for benefits. This is an appeal from a denial of an initial claim; this is a mere claims processing matter. Veterans have been able to equitably toll other internal VA claims processing matters, e.g.,. the misplaced

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[27] Meanwhile, the VA still has not produced any evidence that it timely let alone actually mailed the decision to the Veteran let alone provide any proof of the Veteran's postmarked appeal. See fn. 32, *infra*. The Secretary noted in its brief that Appellant may have abandoned his argument that the calculation of the SoL still may be timely. The genesis of this appeal has also been the alleged receipt, timely filing and potential necessary tolling. Further, as the Board must review this matter, de novo, the record is clear from Appellant Counsel's October 12, 2020, request for reconsideration, R. 4065-4072, that his appeal was timely (even without the tolling).

filing before the AOJ versus the BVA. See *Jaquay*. Thus, it should be no different here.

Fourth, as discussed in the sections above, *infra*., there is no congressional jurisdictional language preventing the tolling of an SoL. Congress has not taken C.J. Rehnquist's invitation to provide restrictions if it so wanted. See discussion of *Irwin* in §I, *infra*. Thus, it did not wish for this SoL to be immovable that equitable tolling could not be considered.

Further, allowing equitable tolling can easily be inferred from other parts of the same SoL statute. § 7105 (b)(1)(C) provides, "A question as to timeliness or adequacy of the notice of disagreement shall be decided by the Board." In other words, missing a deadline to file an appeal is not an automatic end of a case. The Board has the discretion to determine the timeliness of a Veteran's appeal. Unlike various cases where Congress or the Courts have been more than clear that an SoL cannot be tolled; the SoL in Mr. Ferko's case can be. See discussion § 2, *infra.* But given the equitable tolling already provided to the Secretary in the claims processing at the BVA level (and the CAVC level which technically is not an Article III Court), the pro "thumb on the scale" policy Congress and SCOTUS endorse[28], and the lack of language from Congress to the contrary, the Board, in

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[28] See fn 9, *supra.*

this case, erred as a matter of law and fact. Extraordinary circumstances exist for Mr. Ferko that the Secretary must consider in possibly tolling his *allegedly*[29] late filing.

B. *Due Diligence*

Our superior Court has required that for equitable tolling to be found, the party must show he acted with due diligence. *Checo* at 1379 referencing *Irwin,* 498 U.S. at 96; *Harper v. Ercole,* 648 F.3d 132, 136 (2d Cir. 2011); *McCreary, 19 Vet. App. at 327*. But the *Checo* Court reiterated *McCreary* referencing the Supreme Court's decision in *Holland* that "due diligence" requires reasonable action, not "maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (finding that the "diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence'" (citations and internal quotation marks omitted)); *cf. McCreary*, 19 Vet. App. at 332 (requiring an appellant to demonstrate that he exercised "'due diligence' in preserving his appellate rights, meaning that a reasonably diligent appellant, under the same circumstances, would not have filed his appeal"). *Checo* at 107. Further, the Courts do not require that an appellate file before the

[29] See fn 23, *supra*.

extraordinary circumstance(s) occurred, immediately after they occurred, or on or before the original deadline occurred. See .

As discussed below, Mr. Ferko's service-connected illness is finite. The period(s) are "average time for prep[30] and conduct of surgery and in-patient recovery time," or "medicated outpatient time," or both. The heart attack and recovery time are "extraordinary" circumstances, enhanced by the fact the medical emergency is due to a service-connected condition. R 479-480. This Honorable Court should find Mr. Ferko filed within the tolled SoL period.

C. *Causation*

Physical illness, and mental illness, are considered by this Court or our superior Court to qualify as "extraordinary circumstances." See *Arbus v. Nicholson, 403 F.3d 1379, 1381-82 (Fed. Cir. 2005)*⚠, and *Barrett v. Principi,* 363 F.3d 1316, 1318-21 (Fed. Cir. 2004)⚠Mr. Ferko was hospitalized for a service-connected operation for five days and recovering at home on prescribed medication that left him mentally incapable to handle his legal affairs for several months.[31]

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[30] Remember, the "heart attack" was not expected as it was an emergency.

[31] If the Secretary has doubts about whether a heart attack, operation, hospital stay, and recovery at home with medication that rendered him incapable of handling his legal affairs, are enough to qualify the Veteran for tolling, then the Secretary did not consult the appropriate medical information available online to everyone. Furthermore, the Secretary apparently did not provide a medical opinion based on both the aforementioned factors and the Veteran's statement provided in his notice of appeal/disagreement.

Presuming this period of time is allowed, it more than meets the timeliness threshold for one year (with tolling) to file his NOD.[32, 33, 34]

The basis for Mr. Ferko's hospitalization and medicated recovery period clearly qualifies as "extraordinary circumstances": Mr. Ferko was mentally and physically incapacitated from the trauma of a service-connected heart attack. The Veteran was incapacitated for five days while suffering from, being operated on for, and recovering from a service-connected heart attack. At very minimum, his time in the hospital should be used for purposes of calculating the tolling period. He was diligent after the finite period of recovering from a heart attack. He filed the appeal within one year of the denial, let alone if the hospitalization and out-patient recovery period are allowed to toll the SoL.

III. Conclusion

This Honorable Court should find that the Veteran's NOD is timely either under the timely filed NOD whether it be equitably tolled or not.

/s/ Michael D.J. Eisenberg

Michael D.J. Eisenberg
Attorney for Appellant

[32] The Veteran still disputes that decision was timely received. See Appellant's Brief at 10-14 and Reply Brief at 8-10.

[33] If there is any uncertainty regarding the facts surrounding the recovery period(s) being either finite or infinite, a remand would be appropriate. See *Bailey* at 1362.

[34] See fn 32, *supra.*

CERTIFICATE OF SERVICE

I hereby certify that the aforementioned was served to the clerk and opposing counsel via e-file.

/s/ Michael D.J. Eisenberg

Michael D.J. Eisenberg
Attorney for Appellant