

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

Richard C. Boone,)	
)	
Appellant,)	
)	
v.)	Vet.App. No. 08-1257
)	
James B. Peake,, M.D.,)	
Secretary of Secretary of Veterans Affairs,)	
)	
Appellee.)	
)	

**APPELLANT'S MEMORANDUM OF LAW RESPONDING
TO THE COURT'S ORDER OF OCTOBER 29, 2008**

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

On October 16, 2007, the Board of Veterans' Appeals (BVA) denied Mr. Boone entitlement "to an initial rating in excess of 40 percent prior to September 24, 2004 and in excess of 60 percent for a low back disorder." BVA Dec. at 1. On January 8, 2008, 84 days after the BVA decision was mailed, the Department of Veterans Affairs Regional Office (VA Regional Office) received a VA Form 21-4138 (Statement in Support of Claim) from Mr. Boone. Although the VA Regional Office considered this document as a notice of disagreement, the face

of the VA Form 21-4138 shows that Mr. Boone intended it to be his notice of appeal to this Court. The notice of appeal stated, in relevant part:

The veteran [Mr. Richard C. Boone] wishes to appeal the decision rendered by the [BVA] on 10-16-07. . . . I can not afford to hire an attorney and take this to the Court of Veterans Appeals. I wish to handle this case pro se.

VA Form 21-4138 of Jan. 8, 2008.

When Mr. Boone filed his notice of appeal with the VA Regional Office, 36 days remained in the 120-day appeal period prescribed by 38 U.S.C.A. § 7266 (West 2002).

The VA Regional Office did not forward Mr. Boone's notice of appeal to the Court; the VA Regional Office did not return the notice of appeal to Mr. Boone; and the VA Regional Office did not advise Mr. Boone to file the notice of appeal with the Court.

The Court physically received Mr. Boone's notice of appeal in April 2008.

On June 27, 2008, Mr. Boone responded to the Court's Order to show cause why his appeal should not be dismissed. Mr. Boone argued that his appeal should be accepted as timely filed because he sent his notice of appeal to the VA Regional Office and the VA Regional Office received the notice of appeal well within the 120-day appeal period. The Court issued an Order on October 29, 2008, to the parties. In this Order, the Court requested the parties to file memoranda of law addressing the following issues:

1. Whether the document filed by Mr. Boone constitutes an NOA, and whether the Secretary or the Board has a duty to liberally read such a document to ascertain if there is an intent to appeal a Board decision to the Court?
2. Whether the filing of an NOA within the 120-day judicial appeal period at the RO that decided the claim provides the Court jurisdiction over the matter. *See* 38 U.S.C. § 7266(a)?

October 29, 2008, Order.

SUMMARY OF ARGUMENT

Mr. Boone filed a notice of appeal to this Court. He filed his notice of appeal when he submitted his VA Form 21-4138 to the VA Regional Office on January 8, 2008 and stated: "The veteran [Mr. Richard C. Boone] wishes to appeal the decision rendered by the [BVA] on 10-16-07." This document provided all of the information that is necessary to constitute a notice of appeal under this Court's Rules of Practice and Procedure. Mr. Boone's notice of appeal is timely under § 7266(a). While the statute directs that an appellant "shall file" a notice of appeal with the Court within the 120-day appeal period, the statute does not define when a notice of appeal has been filed or designate the person with whom it must be filed. Therefore, under the unique facts of this case and the ambiguous language of § 7266, the Court should hold that the VA Regional Office is the Court's agent for receiving Mr. Boone's notice of appeal and that Mr. Boone filed a timely notice of appeal.

ARGUMENT

I. THE VA FORM 21-4138 THAT MR. BOONE FILED WITH THE VA REGIONAL OFFICE IS A NOTICE OF APPEAL.

The VA Form 21-4138 that Mr. Boone filed with the VA Regional Office on January 8, 2008, is a notice of appeal. This is clear from the face of the VA Form 21-4138. The VA Form 21-4138 fully complies with the requirements of this Court's Rules of Practice and Procedure. *See* Vet. App. R. 3. By filing the VA Form 21-4138 with the VA Regional Office, Mr. Boone provided the Secretary with notice of his intent to appeal the October 16, 2007, BVA decision. *See* Vet. App. R. 3(b). Mr. Boone also met the content requirements of Rule 3(c). He provided his name, address, phone number, VA claims file number, the BVA decision he was appealing, and he "express[ed] an intent to seek Court review of that decision [.]" Vet. App. R. 3(c)(1), (2). As the Supreme Court has said: "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is sufficient as a notice of appeal." *Smith v. Barry*, 502 U.S. 244, 248-49 (1992). Mr. Boone's VA Form 21-4138 is, therefore, a notice of appeal.

II. THE NOTICE OF APPEAL WAS TIMELY FILED WHEN MR. BOONE SUBMITTED IT TO THE VA REGIONAL OFFICE AND THE COURT HAS JURISDICTION OVER THE APPEAL.

Section § 7266(a), (c) of title 38 United States Code provides:

(a) In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120-days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

* * *

(c) A notice of appeal shall be deemed to be received by the Court as follows:

(1) On the date of receipt by the Court, if the notice is delivered.

(2) On the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.

38 U.S.C.A. § 7266(a), (c) (West 2002).

Mr. Boone filed his notice of appeal to this Court when he submitted the notice of appeal to the VA Regional Office on January 8, 2008. His notice of appeal is timely as long as the notice of appeal is deemed "file[d]," as that term is used in § 7266(a), when he submitted it to the VA Regional Office in January 2008, and not when it ultimately reached the Court in April 2008.

Although § 7266(a) specifies when a notice of appeal must be filed with this Court and § 7266(c) describes when a notice of appeal is "deemed to be received by the Court" they do "not define when a notice of appeal has been 'filed' or designate the person with whom it must be filed [.]" *Houston v. Lack*, 487 U.S. 266, 272 (1988) (addressing similar language in 28 U.S.C.A. § 2107).

The Court should decide that Mr. Boone's notice of appeal was filed when the VA Regional Office (acting as an agent of the Court) received it and not when it ultimately reached the Court in April 2008. The statutory ambiguity in § 7266 must be resolved in Mr. Boone's favor.¹

When there is, as here in § 7266(a), ambiguity in the words of a statute, the Court must consider their purpose, and read them "in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1990). Here, the ambiguous language of § 7266(a), along with the fundamental canon of statutory construction that ambiguous veterans' benefits statutes are to be construed in favor of veterans, establish that Mr. Boone did file a timely notice of appeal with the Court when the notice of appeal was submitted to the VA Regional Office in January 2008.²

¹ See, e.g., *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (veterans benefits statutes must be liberally construed for the benefit of the returning veteran) (citation omitted); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (noting that, where statute is ambiguous, "interpretive doubt is to be resolved in the veteran's favor" (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994))).

² If *Bowles v. Russell*, 551 U.S. ___, 127 S.Ct. 2360 (2007), did hold that § 7266(a), is not subject to equitable considerations, then, the Court must rethink § 7266's interpretation, because the legal landscape is now completely changed. The availability of equitable tolling must have influenced the courts' interpretation of § 7266 before *Bowles*. Its unavailability now must lead to a new court interpretation of § 7266.

III. ALTHOUGH NOT CONTROLLING AUTHORITY, THE FEDERAL RULES OF APPELLATE PROCEDURE CONTAIN SEVERAL PROVISIONS THAT COUNSEL AGAINST A CRAMPED READING OF § 7266 CONCERNING WHEN MR. BOONE FILED HIS NOTICE OF APPEAL WITH THE COURT.

Several features of the Federal Rules of Appellate Procedure help establish that Mr. Boone filed a timely notice of appeal with this Court when he submitted his notice of appeal to the VA Regional Office in January 2008. Rules 4 and 25 of the Federal Rules of Appellate Procedure codify the "prison mailbox" rule first announced by the Supreme Court in *Houston*. See Fed. R. App. P. 4 (c)(1) ("[T]he notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."); Fed. R. App. P. 25(a)(2)(C) (same rule applied to other filings). And Rule 26 states that "a day on which the weather or other conditions make the clerk's office inaccessible" should not count towards a filing deadline. Fed. R. App. P. 26(a)(3). More significantly, another section of Rule 4 deems a filing with the clerk of an incorrect court to be a timely filing with the clerk of the correct court. See Fed. R. App. P. 4(d) ("The notice is then considered filed in the district court on the date so noted [by the clerk]."). The Court should hold, consistent with these authorities, that Mr. Boone timely filed his notice of appeal with this Court when he submitted his notice of appeal to the VA Regional Office, in January 2008. The Court should hold that the filing of the notice of appeal with the VA

Regional Office is equivalent to filing the notice of appeal with an incorrect court, but, because it was timely filed, it constitutes timely filing with the Clerk of the correct court – this Court. *See* Fed. R. App. P. 4(d).

IV. ALTHOUGH THE COURT NEED NOT CONSIDER EQUITABLE FACTORS TO DECIDE WHETHER MR. BOONE FILED A TIMELY NOTICE OF APPEAL, THE COURT CAN CONSIDER EQUITABLE FACTORS TO DECIDE THAT MR. BOONE FILED HIS NOTICE OF APPEAL WHEN HE SUBMITTED HIS VA FORM 21-4138 TO THE VA REGIONAL OFFICE ON JANUARY 8, 2008.

Although the Court should decide that the ambiguous language of § 7266(a), along with the canon of statutory interpretation that an ambiguous veterans' benefit statute must receive a liberal interpretation, compel the conclusion that Mr. Boone filed a timely notice of appeal when he submitted his VA Form 21-4138 to the VA Regional Office in January 2008, the Court need not do so in order for Mr. Boone to prevail on the jurisdictional question. In *Houston v. Lack*, the Supreme Court addressed another question that turned on the meaning of the word "filed." Whether a prisoner's notice of appeal is "filed at the time the petitioner delivered it to the prison authorities for forwarding to the Court Clerk." 487 U.S. at 276. The Supreme Court's analysis of the question is instructive here. When the Court decided *Houston*, the Court interpreted three provisions:

- * A statute that provided that a civil notice of appeal must be filed "within thirty days after the entry of [a] judgment, order, or decree," 28 U.S.C. § 2107;
- * A federal rule stating that an appeal "shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4," Fed. R. App. P. 3(a) (subsequently amended in 1998); and
- * A federal rule stating that an appeal "shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from," Fed. R. App. P. 4(a) (subsequently amended in 1998).

None of these provisions intuitively suggested that "filed" could mean "mailed." Cf. Fed. R. App. P. 4 (c)(1) and Fed. R. App. P. 25(a)(2)(C) (subsequently enacted codification of *Houston's* holdings). Nevertheless, the Supreme Court held that a *pro se* prisoner's notice of appeal is filed as soon as it is given to prison authorities to mail. The Court reasoned that "nothing in the statute suggests that . . . it would be inappropriate to conclude that a notice of appeal is 'filed' . . . at the moment it is delivered to prison officials for forwarding to the clerk of the district court." *Houston*, 487 U.S. at 272. Similarly, the two rules make clear that the notice "must be directed to the clerk of the district court" but not "whether the moment of 'filing' occurs when the notice is delivered to prison authorities or at some later juncture in its processing." *Id.* at 272-73. Without definite guidance from the statute, the Court declined to "disturb" the traditional rejection of the mailbox rule, *id.* at

274, but concluded that a range of equitable considerations justified an exception in the case of *pro se* petitioners. *Id.* at 275.

Mr. Boone's claim that he timely filed his notice of appeal parallels that of the petitioner in *Houston*. Like the statute at issue in *Houston*, § 7266(a) ("a person adversely affected by [a BVA] decision shall file a notice of appeal with the Court within 120-days after the date on which notice of the decision is mailed"), does not say when a notice of appeal is filed or with whom it must be filed. It certainly does not prohibit this Court from considering the VA Regional Office to be the Court's agent for receiving Mr. Boone's notice of appeal. Like the rules at issue in *Houston*, § 7266(a), (c), resolve some questions regarding when a notice of appeal is filed or deemed received by this Court, but leave open a vital one – namely, when does receipt by a different servant or agent of the Court count as receipt of the notice of appeal by the Court. Like the Court in *Houston*, this Court should look to considerations of equity in resolving this vital question, if the Court has not already concluded that the ambiguous text of § 7266, liberally construed, as discussed above, settles it in Mr. Boone's favor.

V. THE SUPREME COURT'S DECISION IN *BOWLES* DOES NOT CONTROL HERE AND THE COURT MAY CONSIDER EQUITABLE FACTORS.

Nothing in the Supreme Court's decision in *Bowles*, calls into question the validity of the *Houston* Court's equitable balancing analysis or the availability of

an equitable balancing analysis here. In *Bowles*, the question was whether the district court had the authority to extend the time limit to appeal beyond the period allowed by statute. The Supreme Court, applying a straightforward, separation-of-powers analysis, concluded it could not.³ In *Bowles*, the Court held that "statutory limitations on the timing of appeals [are] limitations on a court's own jurisdiction" and is not subject to equitable tolling. 127 S.Ct. at 2364. That holding plainly does not forbid the consideration of equitable factors in construing an ambiguous statute like § 7266(a), rather than in excusing non-compliance with an unambiguous one, like the one at issue in *Bowles*.

Mr. Boone also respectfully asserts that *Bowles* does not foreclose the possibility of equitable tolling of the filing period in his case and that this Court should hear the appeal even if the Court concludes that his notice of appeal was not timely filed. The Supreme Court's decisions recognize a distinction between timing rules governing the transfer of a case among federal courts, which are jurisdictional, *see Bowles*, 127 S.Ct. at 2363, and those governing appeals from administrative adjudications, which are not, and, therefore, are subject to equitable tolling. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Bowen v. City of New York*, 476 U.S. 467, 478 (1986).

³ No separation-of-powers problem exists here since Congress created the VA and this Court under its Article I power. This is another reason supporting the conclusion that *Bowles* will not control the panel's decision here.

The equities strongly favor this Court finding that Mr. Boone's notice of appeal was timely filed. One, when he filed his notice of appeal with the VA Regional Office, Mr. Boone was proceeding, *pro se*, making it "'particularly inappropriate' to foreclose equitable relief." *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 840-41 (Fed. Cir. 2007) (en banc), *cert. denied*, ___ U.S. ___ (No. 07-19, Oct. 5, 2007) (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982)).

Two, Mr. Boone received no notice that the VA Regional Office would not deliver his notice of appeal to this Court in the ordinary course of its business. The VA Regional Office did not inform Mr. Boone that he could not file his notice of appeal with the VA Regional Office; nor did it notify him that it would not forward his notice of appeal to this Court. Given that more than 30 days remained in the 120-day appeal period, failure of the VA Regional Office to take any of these actions is significant. If the VA Regional Office had taken a single one of these actions, Mr. Boone's notice of appeal could have easily arrived at the Court within the 120-day appeal period.

Three, the delay in this case was actually caused by the VA – the government entity that is now Mr. Boone's litigation adversary before the Court. The Supreme Court has noted that courts "have allowed equitable tolling in situations . . . where the complainant has been induced or tricked by his

adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Mr. Boone wants to be clear. He does not assert that the VA Regional Office engaged in intentional trickery or misconduct here. However, the VA Regional Office did accept his notice of appeal in January 2008; it did not forward the notice of appeal to the Court; it did not return it to Mr. Boone so that he could forward it to the Court; and it did not notify him that it would not forward the notice of appeal to the Court. Under the unique facts of this case, it would be inequitable to permit VA's conduct however justified it may appear, to cause Mr. Boone to lose his claim against VA.⁴ But this is what will happen here if Mr. Boone's notice of appeal is dismissed as untimely.

VI. HENDERSON DOES NOT CONTROL THE PANEL'S DECISION.

The Court's recent opinion in *Henderson v. Peake*, 22 Vet.App. 217 (2008), will not control the panel's decision. Mr. Boone's case is factually distinguishable from *Henderson*. Because the two cases are factually distinguishable, *Henderson* is not a precedent. For example, unlike the appellant in *Henderson*, Mr. Boone did act within the 120-day appeal period to file a

⁴ See *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002) (applying equitable tolling in a case where the veteran, like Mr. Boone, filed his notice of appeal with the VA Regional Office).

timely notice of appeal. Therefore, *Henderson* will not control the panel's decision here.

The Court refers to *Henderson* in its October 29, 2008, Order. *See* October 29, 2008, Order at 2. The Court indicates that *Henderson* held that "*Bowles*, 127 S.Ct. 2360, provides for 'no equitable exceptions to the 120-day judicial appeal period established by [38 U.S.C. §] 7266(a)'. Mr. Boone respectfully disagrees with *Henderson's* statement of the holding of *Bowles*. In *Bowles*, the Supreme Court did not consider or decide whether § 7266(a) is subject to equitable exceptions. Therefore, while *Bowles* is certainly authoritative, it did not hold that equitable exceptions could not be made to § 7266(a).⁵ However, if the panel disagrees that *Bowles* did not hold that § 7266(a) is not subject to equitable exceptions Mr. Boone must request that the Court convene en banc to reconsider *Henderson*.⁶ Because one panel of this Court cannot overrule the decision of another panel, Mr. Boone will not present the Court with extensive argument on this issue. He does respectfully suggest that *Henderson* misinterpreted *Bowles*. As noted in Section V, above, in *Bowles*, the question was whether the district court had the authority to extend

⁵ *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue . . . we are free to address the issue on the merits.") citing *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

⁶ Mr. Boone must also ask the Court to reconsider *Henderson* so that the issue is preserved should one of the parties appeal to the Federal Circuit.

the time limit to appeal beyond the period allowed by statute. The Supreme Court, applying a straightforward, separation-of-powers analysis, concluded it could not. This case does not involve a separation-of-powers problem since the VA and the Court are both Article I creations of Congress. Therefore, *Bowles*, 127 S.Ct. 2360, does not prohibit equitable exceptions to the 120-day judicial appeal period established by § 7266(a).

CONCLUSION

For these reasons, the Court should find that Mr. Boone filed a timely notice of appeal.

Respectfully submitted,

/s/ Michael P. Horan

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