

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

DAVID A. ADEYI,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,
Respondent-Appellee

2021-1400

Appeal from the United States Court of Appeals for
Veterans Claims in No. 19-884, Judge Joseph L. Toth.

Decided: February 16, 2022

DAVID ADEYEMI ADEYI, Bronx, NY, pro se.

KELLY A. KRISTYNYIAK, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, for respondent-appellee. Also represented by
BRIAN M. BOYNTON, ERIC P. BRUSKIN, ROBERT EDWARD
KIRSCHMAN, JR.; AMANDA BLACKMON, Y. KEN LEE, Office of
General Counsel, United States Department of Veterans
Affairs, Washington, DC.

Before DYK, MAYER, and CHEN, *Circuit Judges*.

PER CURIAM.

BACKGROUND

David A. Adeyi appeals from the decision of the United States Court of Appeals for Veterans Claims (Veterans Court). *Adeyi v. Wilkie*, No. 19-0884, 2020 WL 1237739 (Vet. App. Mar. 16, 2020) (*Veterans Court Decision*). The Veterans Court affirmed the decision of the Board of Veterans' Appeals (Board), which denied service connection for right and left knee disorders. *Id.* at *1.

Mr. Adeyi served on active duty in the U.S. Army from February 2002 to July 2002 and from September 2004 to September 2005, with additional Reserve service. *Id.* In 2003, he served as an exchange soldier in Norway. *Id.* In an April 2003 medical review, Mr. Adeyi reported a right knee injury, incurred during an in-service skiing accident. *Id.*; Suppl. App. (S.A.) 21.¹ But in subsequent medical reviews over the next one-and-a-half years, he reported no medical problems, including knee problems. *Veterans Court Decision*, 2020 WL 1237739, at *1. His separation examination was normal. *Id.*

Nearly a decade after he left service, Mr. Adeyi sought disability compensation for his right and left knees, alleging that they were injured in the skiing incident. *Id.* He was examined twice by the VA. *Id.* In May 2012, the examiner diagnosed Mr. Adeyi with a right knee sprain and reviewed his medical history. He opined that, based on his present condition and the historical medical records, the knee sprain was “less likely than not” related to service.

¹ References to the Supplemental Appendix refer to the appendix filed with the government's informal brief, ECF No. 12.

Id. In December 2015, another examiner observed that Mr. Adeyi had injured his right knee in 2003 but did not have a current right knee condition. *Id.* The examiner also found that Mr. Adeyi's left knee arthralgia was not related to service. *Id.* The Board denied service connection for both knees. *Id.*

Mr. Adeyi appealed the decision to the Veterans Court. *Id.* He alleged the Board made erroneous credibility determinations, relied on deficient VA medical opinions, and provided an inadequate rationale for its findings. *Id.* The Veterans Court rejected these arguments in its decision dated March 16, 2020. *Id.* at *1-3. The Veterans Court denied Mr. Adeyi's motion for reconsideration and entered final judgment on April 15, 2020. S.A. 4. Mr. Adeyi appeals the Veterans Court's decision.

DISCUSSION

We dismiss the appeal as untimely filed and, therefore, for lack of jurisdiction. Mr. Adeyi's notice of appeal was received on October 17, 2020, more than six months (185 days) after the Veterans Court entered judgment on April 15, 2020. ECF No. 1. To be timely, a notice of appeal must be received by the Veterans Court within 60 days of the entry of judgment. *See* 38 U.S.C. § 7292(a); *see also* 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B). We have previously explained that the Supreme Court "has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,'" and "it has clearly but indirectly indicated that the same conclusion applies to appeals under section 7292(a) from the Veterans Court to this court." *Wagner v. Shinseki*, 733 F.3d 1343, 1348 (Fed. Cir. 2013) (quoting *Bowles v. Russell*, 551 U.S. 205, 209 (2007) and *Henderson v. Shinseki*, 562 U.S. 428, 438-39 (2011)). Because Mr. Adeyi failed to file his notice of appeal by June 14, 2020, we have no jurisdiction over this appeal.

That is so even though, on July 30, 2020, Mr. Adeyi filed a motion with the Veterans Court to extend the time

to file a notice of appeal. S.A. 31. On August 27, 2020, the Veterans Court denied the motion because, by statute, such a motion must be filed “not later than 30 days after the expiration of the time otherwise set for bringing appeal.” S.A. 2 (quoting 28 U.S.C. § 2107(c)). The Veterans Court also noted that, even if Mr. Adeyi’s motion for extension was considered a motion to reopen the time for appeal, relief could not be granted on that ground because Mr. Adeyi had not asserted that he did not timely receive notice of the April 15, 2020 judgment. *Id.*

The Veterans Court’s order denying the motion noted that, under Federal Circuit precedent, the denial of the motion was itself a final order that may be appealed. S.A. 3 (citing *Two-Way Media LLC v. AT&T, Inc.*, 782 F.3d 1311, 1314 (Fed. Cir. 2015)). However, Mr. Adeyi did not appeal the denial of his motion; his appeal instead is limited to only the decision on the merits. *See* ECF No. 1-2, at 1 (identifying that he was appealing the decision dated March 16, 2020); *see generally* Appellant’s Informal Br. In his reply brief, Mr. Adeyi asserts that “he did not receive judgment order notices under the Federal Rule of Civil Procedure 77(d), because he was forced to leave the city/state of New York during the Covid-19 pandemic.” Appellant’s Informal Reply Br. 1. However, this assertion is too-late raised to be deemed an appeal of the Veterans Court’s denial to reopen the time for appeal, and it was never presented to the Veterans Court in Mr. Adeyi’s original motion to extend the time. Our court therefore lacks jurisdiction to consider Mr. Adeyi’s appeal on the merits, given that we have “no authority to create equitable exceptions to jurisdictional requirements.” *Bowles*, 551 U.S. at 214.

Therefore, the untimely-filed appeal of the Veterans Court’s decision on the merits is dismissed for lack of jurisdiction. The parties shall bear their own costs.

DISMISSED

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0884

DAVID A. ADEYI,

APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before TOTH, *Judge*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

In a March 16, 2020, memorandum decision, the Court affirmed the Board's denial of veteran David A. Adeyi's service-connection claims for right and left knee disorders. At that time, he was represented. But counsel thereafter withdrew, and he has been self-represented ever since. The veteran timely moved for reconsideration, which the Court denied. He did not seek panel or en banc review. Judgment entered on April 15, 2020, and mandate issued 60 days later, on June 17, 2020. The case was closed.

Then, on July 30, 2020, Mr. Adeyi filed with the Federal Circuit a "Motion for Extension of Time for Appeal." The Federal Circuit transmitted the motion to this Court to resolve. In the motion, the veteran asks the Court to "extend[]" the time to file an appeal to the Federal Circuit because of the COVID-19 pandemic and his "loss of housing during this time, which made it difficult to get records, process mails, and effectively respond to [his] disability case especially with lack of legal counsel." Motion at 1. No document purporting to be a notice of appeal to the Federal Circuit has been received.

The Court is rarely presented with this sort of motion, and neither its Rules of Practice and Procedure nor its caselaw offers clear guidance. A party seeking review by the Federal Circuit generally must file a notice of appeal within 60 days of entry of this Court's judgment. *Bly v. Shulkin*, 883 F.3d 1374, 1375-76 (Fed. Cir. 2018); *see* U.S. VET. APP. R. 36(a). This period is "mandatory and jurisdictional." *Wagner v. Shinseki*, 733 F.3d 1343, 1347-48 (Fed. Cir. 2013). As such, even when extraordinary circumstances are present, the filing deadline may not be equitably tolled or otherwise waived. *Javillonar v. Shinseki*, 560 F. App'x 1003, 1004 (Fed. Cir. 2014) (citing *Bowles v. Russell*, 551 U.S. 205 (2007)).

But the 60-day period may be extended or reopened in certain circumstances, 28 U.S.C. § 2107(c), and Federal Rule of Appellate Procedure 4 sets these forth. By its terms, this provision speaks to the power of U.S. district courts, but the Court will assume without deciding that it has the same authority. *Cf.* 38 U.S.C. § 7292(a) (providing that Federal Circuit review may be had "by filing a notice of appeal with [this Court] within the time *and in the manner* prescribed for appeals to United States courts of appeals from United States district courts." (emphasis added)).

Although Mr. Adeyi styles his motion as one for extension, the 60-day appeal period ended when the Court's mandate issued on June 17, 2020. Any motion to "extend" this period must be filed "no later than 30 days after" the period expires. FED. R. APP. P. 4(a)(5)(i); *see also* 28 U.S.C. § 2107(c) ("The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal . . ."). Both the rule and the statute make plain that the present motion filed with the Federal Circuit on July 30 and transmitted to this Court cannot extend the appeal period because it was not filed within 30 days after the time to appeal expired. Thus, Mr. Adeyi's request is, if anything, a motion to *reopen* the time to file an appeal.

Such a request is governed by Federal Rule of Appellate Procedure 4(a)(6), which states:

The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

- (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
- (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and
- (C) the court finds that no party would be prejudiced.

Accord 38 U.S.C. § 2107(c).

To reopen the time to file an appeal, the first requirement is that Mr. Adeyi did not receive notice of the Court's March 16 memorandum decision or its April 15 judgment within 21 days of entry. He has not shown either to be the case. It is obvious that he promptly received a copy of the Court's memorandum decision, as he timely moved for reconsideration of it. As for judgment, the present motion contains no assertion that the veteran did not receive it within 21 days after its entry. Even generously construed, the veteran's motion reads like a request for equitable tolling; it alleges various circumstances—such as the current pandemic and housing problems—prevented him from timely filing an appeal to the Federal Circuit. Lack of notice, timely or otherwise, was not mentioned or suggested. Although the Court sympathizes with Mr. Adeyi, absent an indication that he failed to receive timely notice of this Court's judgment, the circumstances he alleges are

not sufficient under Federal Rule of Appellate Procedure 4(a)(6) to reopen the time to file an appeal. And, as noted above, equitable tolling is not permitted in this context.

Thus, the Court denies the veteran's motion to extend or reopen the time to appeal to the Federal Circuit. Before closing, the Court notes the Federal Circuit's statement that the denial of a motion under Rule 4 is itself a final order that may be appealed. *Two-Way Media LLC v. AT&T, Inc.*, 782 F.3d 1311, 1314 (Fed. Cir. 2015). Whether and how that statement applies in these circumstances is a question on which the Court expresses no opinion. Ultimately, the proper arbiter of the Federal Circuit's jurisdiction is not this Court but the Federal Circuit.

Based on the foregoing, it is

ORDERED that Mr. Adeyi's July 30, 2020, motion is DENIED.

DATED: August 27, 2020

BY THE COURT:



JOSEPH L. TOTH
Judge

Copies to:

David A. Adeyi

VA General Counsel (027)