

No. 15-7082

IN THE
UNITED STATES COURT of APPEALS
For The FEDERAL CIRCUIT

EMILIO T. PALOMER,
Claimant - Appellant
v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,
Respondent - Appellee

Appeal from the United States Court of Appeals
for Veterans Claims, Case No. 14-1017

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. Congress Enacted 38 U.S.C. § 7266 Specifically in the Context of Domestic Mailing	2
II. The Veterans Court Imposed a Higher Standard of Diligence than that Required by Law	5
III. The Veterans Court Failed to Consider Mr. Palomer’s Underlying Equitable Claim	6
IV. This Court Has Jurisdiction to Decide these Issues	9
CONCLUSION	11
CERTIFICATE OF COMPLIANCE	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

Cases

<i>Bailey v. Principi</i> 351 F.3d 1381 (Fed. Cir. 2003)	9
<i>Brown v. Allen</i> , 344 U.S. 443 (1953)	4, 8
<i>Calderon v. United States Dist. Ct.(Beeler)</i> , 128 F.3d 1283 (9th Cir. 1997)	7
<i>Checo v. Shinseki</i> , 748 F.3d 1373 (Fed. Cir. 2014)	4, 5
<i>CTS Corp. v. Waldburger</i> , 134 S. Ct. 2175 (2014)	1
<i>Fahy v. Horn</i> , 240 F.3d 239 (3d Cir. 2001)	7, 9
<i>Henderson v. Shinseki</i> , 131 S. Ct. 1197 (2011)	7
<i>Linville v. West</i> , 165 F.3d 1382 (Fed. Cir. 1999)	2
<i>Sneed v. Shinseki</i> , 737 F.3d 719 (Fed. Cir. 2013)	7
<i>Spitsyn v. Moore</i> , 345 F.3d 796 (9th Cir. 2003)	7
<i>Tagupa v. McDonald</i> , 27 Vet. App. 95 (2014)	7

Statutes

38 U.S.C. § 7104	3
38 U.S.C. § 7266	2-3
American Recovery and Reinvestment Act § 1002, 123 Stat. 115, Pub. L. No. 111-5 (2009)	8

Legislative History

156 Cong. Rec. S4491	8
House Committee on Veterans' Affairs, "Filipino Veterans Equity Compensation Fund: Inquiry into the Adequacy of Process in Verifying Eligibility" (Nov. 20, 2014 Hearing)	7
S. Rep. 103-232	2

ARGUMENT

The Supreme Court has explained that the purpose of time limitations is to “promote justice,” by encouraging plaintiffs to diligently pursue their claims. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2179 (2014). Equitable tolling accomplishes the same purpose for actions that are untimely because of extraordinary circumstances.

The purpose of time deadlines is not furthered by barring diligent claimants who would otherwise be defeated by technical requirements. *Id.* Mr. Palomer is such a claimant. The statute regarding time limits on notices of appeal is premised on only local, inter-state mail, not international mail. As a claimant on the other side of the world, Mr. Palomer’s claim should not be defeated by the technical requirements of a statute based on a domestic mailing regime.

Additionally, contrary to the Secretary’s arguments, the Veterans Court legally erred by looking to whether Mr. Palomer “could” have filed within a shortened appeals period, when it should have looked to whether he filed timely, except for his circumstances. It also erroneously ignored the underlying equitable nature of Mr. Palomer’s FVEC claim.

I. Congress Enacted 38 U.S.C. § 7266 Specifically in the Context of Domestic Mailing

Respondent asserts Mr. Palomer's equitable tolling request contravenes congressional intent for the time claimants have to notice up their appeals to the Veterans Court. But this is not the case. Mr. Palomer's unique circumstances were beyond the contemplation of Congress in its enactment of, and amendments to, the jurisdictional statute at issue here: 38 U.S.C. § 7266. This statute should not then bar Mr. Palomer's notice,¹ which was timely if not for international mailing delay.

Specifically, Section 7266 contemplates only first-class mail in the United States, not international mail two to three times slower than inter-state mail times. As the Respondents' brief notes, when Congress amended this statute in 1994, it explained:

It is likely that a claimant in a *state* distant from Washington, D.C.—such as Arizona, Hawaii, or Alaska — . . . would receive notice of a BVA decision after a claimant in a *state* near Washington, D.C. — such as Maryland, West Virginia, or North Carolina — whose notice was sent the same day[.]

S. Rep. 103-232 (emphasis added). Congress does not refer to claimants in “locations” distant from Washington, D.C.—only “states.” *Id.* Mr. Palomer's distant home in the Philippines is not the ordinary situation considered by

¹ If applied, Mr. Palomer's notice of appeal would be considered timely because his motion for reconsideration would be considered filed within the 120-day appeal window, stopping the clock for the eventual notice of appeal of the board decision to the Veterans Court. *Linville v. West*, 165 F.3d 1382, 1386 (Fed. Cir. 1999).

Congress when it enacted and amended this statute. Rather, it is an extraordinary circumstance.

The relief that Mr. Palomer requests is not, then, inconsistent with congressional intent. Congress' statutory scheme, comprised of Sections 7266 and 7104, is premised on mail timelines only within the United States. Mr. Palomer sent his notice within the same timeline as a *timely* filing, had his address been in the United States. The only difference was the board decision's nearly month-long journey *to* Mr. Palomer. Equitable tolling should therefore apply.

This is hardly the enactment of a categorical rule, as equitable tolling must be considered on a case-by-case basis, as precedent instructs. For example, a similar claimant in the Philippines who filed 200 days after the Board sent notice, rather than 133, as here, likely could not attribute his tardiness to the delay of the international mailing system. Granting relief for Mr. Palomer would not establish a "rule" for international residents. Instead, it would address Mr. Palomer's unique, individual circumstances. He is a World War II, Filipino veteran, still living in the Philippines and claiming equitable relief under the FVEC, who filed his notice of appeal within 120 days of receiving the Board's decision but not 120 days of the Board's sending notice. Given Congress' contemplation of only local, stateside recipients, Mr. Palomer's circumstances warrant individual relief.

Furthermore, Respondent ignores the issue when he says that Congress intended the limitation period to include the time it took to reach the veteran, arguing that “equitable tolling cannot be used to overcome congressional intent.” Resp. Br. 13. But the core purpose of equitable tolling is to do just that: overcome this kind of strict, technical rule when it would bar an otherwise diligent applicant who has experienced extraordinary circumstances. And there is precedent for equitable tolling to overcome this very element of the statute: in *Checo v. Shinseki*, this Court tolled the appeal clock of a veteran in consideration of the date she *received* a copy of the decision. 748 F.3d 1373, 1378-79 (Fed. Cir. 2014).

Mr. Palomer simply alleges that when the time limitation is premised on mail timelines within the United States, the court should take this into consideration in its analysis of whether a mail timeline outside of and significantly longer than the one in the United States constitutes an “extraordinary” circumstance.

Equitable tolling allows the court to weigh the purpose of the statutory provision, and the abuses it is designed to prevent, against the abuses that enforcing the rule might bring about. *Brown v. Allen*, 344 U.S. 443, 498 (1953) (Frankfurter, J., concurring). Mr. Palomer alleges that his circumstances were not

contemplated in the enactment and amendment of the statute: they were extraordinary, as outside of the ordinary situation contemplated by Congress.

Finally, Respondent argues that Congress declined to create a special timing rule when it enacted the FVEC. But this hardly defeats Mr. Palomer's claim. Congress referred to the general Veterans benefits scheme in creating the FVEC, and the general Veterans benefits scheme allows for equitable tolling.

II. The Veterans Court Imposed a Higher Standard of Diligence than that Required by Law

The Veterans Court erroneously asked if Mr. Palomer could have filed within a shortened appeals period. Respondent suggests that Mr. Palomer's arguments related to this standard are a veiled request that the Court compute the time for appeals differently when a veteran resides in a foreign country. Resp. Br. 5. This is not so. Mr. Palomer appeals because the Veteran Court demanded compliance with a shorter filing period, simply because it was "possible" for Mr. Palomer to file timely on *other* occasions.

This is not the analysis undertaken in equitable tolling cases. For example, in *Checo*, the Federal Circuit did not ask whether it was possible for Ms. Checo to file in the 30-odd days she had after receiving the document. 748 F.3d 1373, 1378-79 (Fed. Cir. 2014). Instead, it asked whether Ms. Checo's circumstances rendered her

appeals period statutorily insufficient, and whether her filing was otherwise timely when accounting for those circumstances.

So here: the question should have been whether Mr. Palomer's circumstances rendered his appeals period statutorily insufficient, and whether his filing was otherwise timely when accounting for these circumstances. It should have been irrelevant to the Veteran Court's evaluation of diligence that Mr. Palomer *could* have filed his motion within a shortened appeal period of 106 days. Where Mr. Palomer's filing was untimely *because* of the mailing delay, not *in addition* to it, equitable tolling is appropriate.

III. The Veterans Court Failed to Consider Mr. Palomer's Underlying Equitable Claim

The Veterans Court also erred in not considering the equitable nature of Mr. Palomer's underlying claim. Again, this argument is hardly a request that the court compute time differently when the claimant resides in a foreign country. Mr. Palomer simply argues that, in viewing his circumstances in their entirety, the nature of his underlying claim can and should have been considered.

Equitable tolling precedent supports this. In the habeas corpus context, for example, when reviewing challenges under the Antiterrorism and Effective Death Penalty Act (AEDPA), courts have applied equitable tolling more liberally, to "less

than ‘extraordinary’ circumstances,” when it would be unfair to rigidly apply the statute of limitations and when the petitioner has been diligent. *Spitsyn v. Moore*, 345 F.3d 796, 800 n. 1 (9th Cir. 2003); *Fahy v. Horn*, 240 F.3d 239 , 244 (3d Cir. 2001); *Calderon v. United States Dist. Ct.*, 128 F.3d 1283, 1289 (9th Cir. 1997).

This Court has held that the equitable principles in habeas cases apply just as strongly to veteran cases. “Although benefits cases may not threaten veterans’ liberty or persons, veterans risked both life and liberty in their military service to this country. . . . The special treatment Congress reserved for veterans requires that courts lend veterans at least the same degree of solicitude as that bestowed on habeas petitioners.” *Sneed v. Shinseki*, 737 F.3d 719, 727-28 (Fed. Cir. 2013) (citing *Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011) (noting Congress’ “long standing” solicitude for veterans)).

If the time period is not tolled in this case, Mr. Palomer will be denied all federal review of his claims² and any chance to recover the equitable reparations due to him. The FVEC is the only avenue that Filipino WWII veterans have to redress their claims, and it was only open for a single year following its enactment.

² There are problems with the verification process used when Mr. Palomer made his application. See, e.g., *Tagupa v. McDonald*, 27 Vet. App. 95 (2014); House Committee on Veterans’ Affairs, “Filipino Veterans Equity Compensation Fund: Inquiry into the Adequacy of Process in Verifying Eligibility” (Nov. 20, 2014 Hearing), available at <http://veterans.house.gov/hearing/filipino-veterans-equity-compensation-fund-inquiry-into-the-adequacy-of-process-in-verifying>

American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, s. 102, 12 Stat. 115, 200 (2009). That Act is specifically equitable in nature and designed to right years of wrongs. Its purpose is to honor the United States' WWII promises inducing Filipinos to serve, and equitably repair the fact that Filipinos have been denied full benefits since 1946. *Id.*³

This Court, then, may exercise its equitable powers without frustrating Congress's direct purposes. On the contrary, denying the possibility of recompense after sixty years of waiting and finally being told of entitlement is too harsh a consequence for a claim filed within 120 days of receipt of the board's decision.

As Justice Frankfurter noted, sometimes "simple rigid rules, . . . by avoiding some abuses, generate others." *Brown v. Allen*, 344 U.S. 443, 498 (1953) (Frankfurter, J., concurring). Applying equitable tolling to Mr. Palomer's claim is well within judicial discretion; equitable tolling is a permissible tradeoff between honoring Congress' promises to Filipino veterans and efficient resolution of veterans benefit judicial review.

Because the consequences are so grave and the act under which Mr. Palomer is making his claim was expressly designed to remedy Congress' own, sixty-year-

³ See also 156 Cong. Rec. S4491, S4502 ("I just wanted the record to be clear this is a matter of honor. We should uphold our promises.").

long bait-and-switch, the court should apply equitable tolling liberally, just as is done in the habeas context. *See Fahy*, 240 F.3d at 244. Rigid application of the time limitation would be especially unfair in this context, and Mr. Palomer was diligent but for his circumstances.

IV. This Court Has Jurisdiction to Decide these Issues

To address Respondent's final claim, this Court has jurisdiction to determine legal questions related to equitable tolling; not factual ones. *Bailey v. Principi* 351 F.3d 1381 , 1384 (Fed. Cir. 2003). Mr. Palomer seeks review of this Court to determine, as a matter of law, whether the equitable tolling standard looks to whether a claimant "could" possibly file in a limitations period or did file timely but for their circumstances; whether the underlying equitable action should have bearing on the required standard; and whether congressional intent should be factored into the equitable tolling analysis when Mr. Palomer's international mailing address is not the ordinary circumstance Congress considered in enacting the statute of limitations.

Mr. Palomer is not asking this Court to review factual findings. The material facts are not in dispute. Instead, he seeks review as to the aforementioned issues of law. Each of these issues "would dictate the result," and so this Court is authorized

to address them. *Brandenburg v. Principi*, 371 F.3d 1362 , 1363 (Fed. Cir. 2004);
Wood v. Peake, 520 F.3d 1345 , 1349 (Fed. Cir. 2008).

CONCLUSION

For the foregoing reasons, Mr. Palomer respectfully requests this Court to remand with instructions to apply equitable tolling so that his diligent appeal may be heard on the merits.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it is less than 15 pages and this entire document contains 2015 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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October 22, 2015

CERTIFICATE OF SERVICE

I hereby certify, that on this 22nd day of October, 2015, a true and correct copy of the foregoing Brief was timely filed electronically with the Clerk of the Court using CM/ECF, which will send notification to all counsel registered to receive electronic notices.

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