

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, Before Chief Judge Bruce E. Kasold
and Judges Mary J. Schoelen and William S. Greenberg.

CORRECTED BRIEF OF APPELLANT

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CERTIFICATE OF INTEREST

Counsel for the appellant certifies the following:

1. The full name of every party or *amicus* represented by me is:

Emilio T. Palomer

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

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4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are:

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Dated: July 7, 2015

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STATEMENT OF RELATED CASES

Under Federal Circuit Rule 47.5, counsel for appellant Emilio T. Palomer states that (a) no other appeal in or from the same civil action in the Veterans Court was previously before this or any other appellate court, and (b) counsel knows of no other case pending in this or any other court that will directly affect or be directly affected by this Court's decision in this appeal.

STATEMENT OF JURISDICTION

Emilio T. Palomer appeals a dismissal by the United States Court of Appeals for Veterans Claims (Veterans Court) for lack of jurisdiction. He filed his Notice of Appeal in that court on April 7, 2014, appealing a BVA decision under 38 U.S.C. § 7252. A2; Notice of Appeal (Apr. 7, 2014). That court dismissed the appeal in a per curiam order on March 18, 2015, made final in a judgment on April 9, 2015. A59; Judgment (Apr. 9, 2015). This appeal, noticed on April 29, 2015, is timely. Fed. R. App. P. 4.; 28 U.S.C. § 2107.

Title 38 U.S. Code § 7292 gives this court jurisdiction to hear Mr. Palomer's appeal. That section provides that "[a]fter a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." 38 U.S.C. § 7292.

This Court has treated the availability of equitable tolling as a matter of law. In *Bailey v. Principi*, this Court held that it may address the question of whether equitable tolling applies when (a) the material facts are not in dispute and (2) adopting a particular legal standard would dictate the result. 351 F.3d 1381, 1384

(Fed. Cir. 2003) (emphasis added); *accord Bradenburg v. Principi*, 371 F.3d 1362, 1363 (Fed. Cir. 2004); *Wood v. Peake*, 520 F.3d 1345, 1349 (Fed. Cir. 2008).

Here, the material facts are not in dispute. And Mr. Palomer challenges the legal standard applied by the court, when considering the statutory language and legislative history regarding “mailing” in Sections 7266 and 7104, Mr. Palomer’s out-of-country status, and the congressional intent underlying his FVEC claim.

This Court has reviewed a number of equitable tolling claims under the *Bailey* standard. In *Bailey, supra*, this Court reviewed whether equitable tolling applied when the notice of appeal was filed on an incorrect form. 351 F.3d at 1381. In *Mapu v. Nicholson*, this Court reviewed whether equitable tolling applied when the notice of appeal was sent by FedEx. 397 F.3d 1375, 1381 (Fed. Cir. 2005). In *Nelson v. Nicholson*, this Court reviewed whether equitable tolling applied in a case of excusable neglect. 489 F.3d 1380, 1383 (Fed. Cir. 2007). This Court is authorized to address Mr. Palomer's equitable tolling claim on the same basis that it addressed the equitable tolling claims in these three cases.

Put another way, this Court has jurisdiction to determine whether there was an error of law below: “whether the legal requirement of the statute or regulation has been correctly interpreted in a particular context where the relevant facts are not in dispute[.]” *Szemraj v. Principi*, 357 F.3d 1370, 1375 (Fed. Cir. 2004).

Recently, in *Checo v. Shinseki*, this Court reviewed the due diligence and causation prongs of an equitable tolling decision to determine whether the Veterans Court erred as a matter of law by using an improper standard. 748 F.3d 1373, 1380 (Fed. Cir. 2014).

Mr. Palomer seeks this court's jurisdiction to determine whether the legal requirement of 38 U.S.C. § 7266(a) was correctly interpreted in the particular context of an out-of-country FVEC claimant. This Court has jurisdiction to decide whether equitable tolling applies in this particular context, as in *Bailey, Mapu, Nelson*, and *Checo, supra*.

In sum, "consideration of equitable tolling presents an inquiry into the interpretation of the Veterans Court's jurisdictional statute and thus is within the scope of [this Court's] jurisdiction[.]" *Nelson*, 489 F.3d at 1382. Here, this Court will have to consider whether, in view of all the undisputed facts in this case, Mr. Palomer meets the diligence standard required for equitable tolling of his FVEC claim. The application of the diligence standard to the undisputed facts of this case presents a question of law that this Court will review de novo. *Former Employees of Sonoco Products Co. v. Chao*, 372 F.3d 1291, 1294-96 (Fed. Cir. 2004).

Therefore, it is respectfully submitted that the question of equitable tolling is one this Court should review. *See Bailey*, 351 F.3d at 1384.

STATEMENT OF ISSUES

1. Whether the Veterans Court properly interpreted 38 U.S.C. § 7266(a) in dismissing a Filipino Veterans Equity Compensation appeal as untimely when the Filipino claimant, who requires a third party to read and write, only receives mail from the United States after a two- to three-week delay and filed within 120 days when accounting for this delay.

STATEMENT OF THE CASE

Appellant Emilio T. Palomer was a member of the Philippine guerilla service during World War II. A32; Mtn. of Appellee to Dismiss Case (Jan. 23, 2015), at 16. He still lives in the Philippines. *Id.* Now ninety-two years old, his eyesight and hearing are failing. His body is weak. A39; Resp. to Mtn. to Dismiss (July 10, 2015). He is unable to read and write because of sensory deterioration and requires third-party assistance on all paperwork. *Id.*

Following the creation of the Filipino Veterans Equity Compensation Fund in 2009, Mr. Palomer filed a claim for a one-time payment from that Fund. A7-8; Copy of BVA decision (May 8, 2014), at 4-5; 38 U.S.C. §§ 101, 107; American Recovery and Reinvestment Act § 1002, 123 Stat. 115, Pub. L. No. 111-5 (Feb. 17, 2009); 38 C.F.R. §§ 3.1, 3.40, 3.41, 3.203 (2012).

As a part of the claims process, the Manila Regional Office (RO) sent requests to the National Personnel Records Center (but not the Department of the Army) for verification of Mr. Palomer's service. A4-5, 12; Copy of BVA decision (May 8, 2014), at 1-2, 9. The NPRC was unable to find Mr. Palomer's records. *Id.* The RO therefore denied Mr. Palomer's claim in May 2010. A7-8; Copy of BVA decision (May 8, 2014), at 4-5. He appealed this denial to the BVA, which

affirmed the RO's denial on July 10, 2013. *Id.* The BVA mailed its decision to Mr. Palomer the same day. *Id.*

Based on the pattern of mailing, Mr. Palomer would have received the international correspondence from BVA after an approximate two-week delay. *See, e.g.,* A2-3; Notice of Appeal (Apr. 7, 2014). One hundred thirty-three days after the initial BVA mailing date of July 10, 2013, but within 120 days of a typical, two-weeks-later receipt date, Mr. Palomer postmarked his request for reconsideration. A32-33; Mtn. of Appellee to Dismiss Case (Jan. 23, 2015), at 16-17. The BVA received it fifteen days later, on December 5, 2013. *Id.*

The BVA considered this request but ultimately denied it on December 26, 2013. A4-5; Copy of BVA decision (May 8, 2014), at 1-2. Mr. Palomer filed his notice of appeal in the Veterans Court within 120 days of the BVA's denial of the motion for reconsideration, on April 7, 2014. A2-3; Notice of Appeal (Apr. 7, 2014). Mr. Palomer's Notice of Appeal was postmarked on March 18, 2014, but was received 20 days later, on April 7, 2014. *Id.*

The Secretary filed a motion to dismiss, arguing that the underlying motion for reconsideration was filed out of time and therefore did not abate the finality of the original July 2013 denial. A17-20; Mtn. of Appellee to Dismiss Case (Jan. 23, 2015), at 1-4. Mr. Palomer sought equitable tolling for that underlying motion for

reconsideration, but the Veterans Court dismissed the appeal as untimely. *Palomer v. McDonald*, 27 Vet. App. 245 (2015). Even though it acknowledged principles of equitable tolling could apply, it held that they do not apply to Mr. Palomer's situation. *Id.* Mr. Palomer now appeals to this court.

SUMMARY OF ARGUMENT

Congress enacted the Filipino Veterans Equity Compensation Act as equitable reparation for rescinding benefits promised to Filipino WWII Veterans. The Veterans Court wrongfully dismissed Mr. Palomer's appealed claim under that Act as untimely.

Mr. Palomer's appeal warrants equitable tolling because the jurisdictional statute is premised on domestic, first-class mailing, not international mailing. There is a considerable mailing delay between the United States and the Philippines, and it would be an injustice to penalize Mr. Palomer for the mailing delay wholly outside of his control. The Veterans Court looked to other instances where Mr. Palomer filed timely to determine that this mailing delay was not an extraordinary circumstance. But reasonable diligence would demand only that Mr. Palomer file within the 120-day limit, not within a shortened limit. When accounting for the mailing delay between the United States and the Philippines, Mr. Palomer's filing was within 120 days of when he would have received the decision in question.

Additionally, the equitable nature of the underlying claim contributes to the inequity of dismissing Mr. Palomer's claim. Finally, Mr. Palomer's physical

frailties support equitably tolling his claim. The Veterans Court thus wrongly excluded a diligent appellant from making his case on the merits.

ARGUMENT

Introduction

At a critical juncture in World War II, President Franklin D. Roosevelt called all of the organized military forces of the Commonwealth of the Philippines into active service of the United States Armed Forces. 6 FR 3825-02 (July 26, 1941). War with Japan threatened, and more than 250,000 courageous Filipino soldiers answered President Roosevelt's call to arms.¹ They were promised full benefits and U.S. naturalization as rewards for their service.²

But although these Filipino soldiers sacrificed and served just like their American brothers-in-arms—with many making the ultimate sacrifice³—once Congress and the American people no longer needed them, Congress rescinded Filipinos' eligibility for full veterans' benefits.⁴ It did so via the so-called

¹ White House Initiative on Asian Americans and Pacific Islanders, *Filipino World War II Veterans*, <http://www.ed.gov/edblogs/aapi/filipino-world-war-ii-veterans/> (last visited July 2, 2015).

² See HR Comm. Veterans Affairs, *Benefits for Filipino Veterans* (July 22, 1998), Pub. L. 105-44, available at <http://commdocs.house.gov/committees/vets/hvr072298.000/> (last visited July 2, 2015); 93 Cong. Rec. A1835, A1837 (1947); Michael A. Cabotaje, *Equity Denied: Historical and Legal Analyses in Support of the Extension of U.S. Veterans' Benefits to Filipino World War II Veterans*, 6 ASIAN L.J. 67, 97 (1999)

³ HR Comm. Veterans Affairs, *supra* note 2.

⁴ “Service before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines . . . shall not be deemed to have been

Rescissions Acts of 1946.⁵

These Acts statutorily deemed the service of certain Filipino veterans as not “active” military service. American Recovery and Reinvestment Act § 1002, 123 Stat. 115, Pub. L. No. 111-5 (Feb. 17, 2009). The Rescissions Acts took away the very benefits President Roosevelt gave to the Filipino Soldiers when he enlisted their aid in World War II. *Id.*⁶

More than half a century later, Congress sought to correct the inequity caused by the Acts. It enacted provisions in 2009 to compensate Filipino soldiers who fought under U.S. Command in World War II but did not receive recognition

active military, naval, or air service for the purposes of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person or the service of any other person in the Armed Forces[.]” 38 U.S.C. § 107; Pub.L. 103-446, Title V, § 507(a).

⁵ American Recovery and Reinvestment Act § 1002, 123 Stat. 115, Pub. L. No. 111-5 (Feb. 17, 2009).

⁶ When President Truman signed these Rescission Acts, he foresaw its inequity:

The passage and approval of this legislation do not release the United States from its moral obligation to provide for the heroic Philippine veterans who sacrificed so much for the common cause during the war. Philippine Army veterans are nationals of the United States and will continue in that status until July 4, 1946. They fought, as American nationals, under the American flag, and under the direction of our military leaders. They fought with gallantry and courage under most difficult conditions during the recent conflict . . . [.]

Harry S. Truman, *Statement by the President Concerning Provisions in Bill Affecting Philippine Army Veterans* (February 20, 1946), available at <http://www.trumanlibrary.org/publicpapers/index.php?pid=1480&st=&st1=> (last visited July 2, 2015).

or benefits at the level of other veterans. *Id.* Called the Filipino Veterans Equity Compensation Act (FVEC), this law provided that if a living Filipino veteran filed a claim within one year of the FVEC's enactment, he was entitled to a one time lump sum payment of either \$9,000 or \$15,000, depending upon residence. *Id.*⁷

Although few Filipino WWII Veterans survive now, they are, at last, entitled to a one-time, lump-sum payment to remedy the decades of injustice.⁸ This payment does not represent the exact value of benefits lost for these veterans. Rather, it is an equitable remedy designed to honor Filipino veterans' service.

Mr. Emilio T. Palomer, as a Filipino World War II veteran, sought this equitable remedy. At that time, the VA was only required to check for Filipino veterans' records with the National Personnel Records Center—though they now must also check with the Department of the Army. *Tagupa v. McDonald*, 27 Vet. App. 95, 98 (2014).⁹ The VA was not able to verify Mr. Palomer's service in this

⁷ These payments were based upon certain Findings, including a recognition that Filipino soldiers were pressed into service in WWII and received only 50 cents on the dollar for those limited veterans' benefits ultimately received, because of the Rescission Acts of 1946. American Recovery and Reinvestment Act § 1002, 123 Stat. 115, Pub. L. No. 111-5 (Feb. 17, 2009).

⁸ *Id.*

⁹ And, in Mr. Palomer's case, the VA only checked the NPRC and did not check for records with the Army. A4-5, 12; Copy of BVA decision (May 8, 2014), at 1-2, 9.

limited search, and they denied his claim. A4-5, 12; Copy of BVA decision (May 8, 2014), at 1-2, 9.

When Mr. Palomer's appeals of this denial finally reached independent judicial review in the Veterans Court, his claim was dismissed as untimely. Mr. Palomer's decades-long wait for benefits was cut short by a system that couldn't be kept waiting. And his hope for the equitable remedy intended by Congress was not afforded equitable tolling.

Courts are bound by the law. But equity does not replace the law. Rather, it supports its intent. An equitable result may disregard mere technicalities in order to effect the spirit of the law. "Equity regards substance, not form, and will not allow technicalities of procedure to defeat that which is eminently right and just."¹⁰

The Veterans Court wrongfully dismissed Mr. Palomer's appealed claim by enforcing the letter of the law while ignoring its spirit. Mr. Palomer's appeal warrants equitable tolling for three reasons. First, the Veterans Court's jurisdictional statute contemplates only first-class mail in the United States, while Mr. Palomer lives in the Philippines. Relatedly, the Veterans Court applied the wrong standard when considering the substantial mailing delay between the United

¹⁰ 30A C.J.S. Equity § 133; *See also, e.g., Young v. Higbee Co.*, 324 U.S. 204, 209 (1945) ("Equity looks to the substance and not merely to the form.").

States and the Philippines. That court looked to whether Mr. Palomer “could” have filed within a shortened appeals period, rather than whether he filed timely, except for his extraordinary circumstances. Second, the equitable nature of the underlying claim demands the application of equitable relief in the form of equitable tolling. Finally, Mr. Palomer’s reliance on a third party for all communications, because of his physical frailties, supports his equitable tolling claim.

I. The Standard of Review

In reviewing a decision of the Veterans Court, this Court must decide “all relevant questions of law, including interpreting . . . statutory provisions.” 38 U.S.C. § 7292(d)(1). This Court will review the construction of a statute or regulation de novo. *Boggs v. Peake*, 520 F.3d 1330, 1333-34 (Fed. Cir. 2008) (citing *Summers v. Gober*, 225 F.3d 1293, 1295 (Fed.Cir.2000)).

II. Equitable Tolling Applies When an FVEC Claimant’s Filing was Timely if Not for a Mailing Delay

The Supreme Court has declared that the 120-day deadline relating to the filing of a Notice of Appeal with the Veterans Court is *not* jurisdictional.

Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197 (2011).¹¹ Treating this deadline as a rigid jurisdictional limit would clash sharply with Congress’ clear

¹¹ Indeed, in *Henderson*, the veteran had missed the 120 day deadline by 15 days. 131 S. Ct. at 1198. Here, Mr. Palomer’s Motion for Reconsideration missed 120 days by an even narrower margin of only 13 days.

intent to treat veterans with solicitude and to construe veterans benefits provisions in veterans' favor. *Id.* at 1205-06. As such, the Veterans Court wrongfully dismissed Mr. Palomer's claim as 13 days out of time under 38 U.S.C. § 7266(a), because it failed to properly apply equitable tolling. *Bove v. Shinseki*, 25 Vet. App. 136, 139 (2011).

Equitable tolling is necessary when circumstances preclude a timely filing despite the exercise of due diligence. *Sneed v. Shinseki*, 737 F.3d 719, 723 (Fed. Cir. 2013). Equitable tolling is based upon three elements: (1) extraordinary circumstance; (2) due diligence; and (3) causation. *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014).

Federal courts of appeal generally recognize that an "extraordinary circumstance" is "both beyond [a claimant's] control and unavoidable even with diligence[.]" *McCreary v. Nicholson*, 19 Vet. App. 324, 329 (2005) (quoting *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir.1999)). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citations omitted).

The Veterans Court applied the wrong standard when considering Mr. Palomer's circumstances. Its analysis was premised on Mr. Palomer exercising

more than reasonable diligence. Instead, Mr. Palomer exercised reasonable diligence, and his circumstances warrant equitable tolling.

A. Section 7266(a) Is Premised on First-Class Mail Timelines within the United States¹²

Mr. Palomer's correspondence with the Veterans Court is sent internationally. But the jurisdictional statute is premised on a domestic mailing system. Section 7266(a) states that in order to obtain review by the Veterans Court, "a person adversely affected by [the BVA's] 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.*" 38 U.S.C. § 7266 (emphasis added).

Section 7104(e) requires the Board to promptly mail the claimant a copy of its written decision. Additionally, if the claimant has an authorized representative, the Board may send that representative a copy "within the same time a copy would be expected to reach the authorized representative if sent by first-class mail." 38

¹² This is a more specific argument than the one raised below, but not a new claim. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382-83 (1995) ("Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (quoting *Yee v. Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992)).

U.S.C. § 7104. Congress allows this alternative method of delivery only if it would not take longer than would be expected with first-class mail delivery.

What is more, the Senate Report accompanying this section refers only to the U.S. Postal Service and, in its illustrations of the section in action, describes only mail sent between two domestic locations. S. REP. 104-371, 44; 1996 U.S.C.C.A.N. 3762, 3795.

The legislative history and text of Section 7104(e) suggest that the time limits intended by Congress are premised on first-class mail timelines within the United States. Therefore, in interpreting Section 7266's conferral of jurisdiction, equitable tolling should apply when international mailings fall outside of what would be expected under the first-class mail system of the United States. These international mailings would be timely *if not for* the mailing delay.

B. Mr. Palomer's Filing was Timely if Not for a Mailing Delay

The considerable mailing delay between the Philippines and the United States is reflected in the pattern of correspondence in the record. When this mailing delay is accounted for, Mr. Palomer's motion for reconsideration was filed within 120 days of receiving the BVA decision.

In *Checo v. Shinseki*, the Federal Circuit held that a delay in the veteran's receipt of the BVA decision due to her living situation warranted tolling the appeal

clock until the date that she received a copy of the decision. 748 F.3d 1373, 1378-79 (Fed. Cir. 2014). Similarly, here, Mr. Palomer's living situation is not typical of most U.S. veterans. He is a native Filipino living in the Philippines and therefore does not enjoy the reliability of postal communications that domestic U.S. veterans do. Mr. Palomer is subject to a considerably longer wait in order to send and receive communications through the mail. Mr. Palomer's living situation, as in *Checo*, should be considered an extraordinary circumstance precluding his timely filing of the Motion for Reconsideration.

Any diligence on Mr. Palomer's part could not have overcome the delay necessitated by his living conditions. This living situation caused him to receive the BVA decision at a later date than any other veteran living in the United States. At the earliest, it can be expected to have arrived 14 days after it was postmarked. Per *Checo*, equitable tolling would stop the clock until that time. *Id.* As the BVA's decision was mailed on July 10, it would be July 24, 2013, at the earliest, before Mr. Palomer could be expected to have actually received a copy of the decision. The date he submitted his Motion for Reconsideration, November 20, 2013, is 120 days after July 24 and thus timely under § 7266(a).

As in *Checo*, it is unclear what standard the Veterans Court used here for due diligence. While its analysis stops at the "extraordinary circumstance" prong

of equitable tolling, holding that the excessive mail time for mail from the United States to the Philippines is not extraordinary, this prong is intertwined with the diligence standard. *See, e.g., Mc Creary v. Nicholson*, 19 Vet. App. 324, 329 (2005) (Noting that “[a]t least eight Federal courts of appeal . . . generally recognize that ‘extraordinary circumstances . . . are both beyond [a claimant's] control and unavoidable even with diligence . . . [.]’” (quoting *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir.1999))).

In *Checo*, the Veterans Court wrongly concluded that Ms. Checo, by stating she was homeless and unable to receive mail, had failed to even assert that she acted diligently. *Checo*, 748 F.3d at 1380. Similarly, here, the Veterans Court concluded that Mr. Palomer, by stating that the Filipino mail system gave him two weeks less than the 120 days allotted to veterans, “fail[ed] to assert, let alone demonstrate, that he had an inadequate amount of time to consider his options and timely mail his request for reconsideration.” *Palomer v. McDonald*, 27 Vet. App. 245, 252 (2015).

But just as this court held in *Checo* that the Veterans Court had failed to use a cognizable standard by arriving at its conclusion, the Veterans Court similarly erred here. Essentially, the Veterans Court concluded that Mr. Palomer could overcome the mailing delay with diligence, which meant it is not an extraordinary

circumstance. *Palomer v. McDonald*, 27 Vet. App. 245, 252 (2015). This is legal error for two reasons: (1) it imposes a higher standard of diligence than that required by law and (2) it demands compliance with a shorter filing period than the statutorily-mandated 120 days.

The Veterans Court reasoned that because Mr. Palomer was able to make other responsive filings within 120 days,¹³ the fact that he did not make his first responsive filing within that time period renders his claim dead aborning. But just because Mr. Palomer became *exceptionally* diligent in subsequent filings does not mean he was not simply diligent in the first filing.

“The diligence required for equitable tolling purposes is ‘reasonable diligence,’ not ‘maximum feasible diligence.’” *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citations omitted). Despite his extraordinary physical circumstances, Mr. Palomer exercised reasonable diligence in preparing and submitting his Motion for Reconsideration in the time that he did.

While Mr. Palomer pointed the Veterans Court’s attention to the record to illustrate the inefficiencies in the delivery of mail between the United States and the Philippines, the Veterans Court relied on these very filings to dismiss his claim.

¹³ The Veterans Court notes in support of this reasoning that Mr. Palomer’s response was filed 38 days after the Secretary’s Motion to Dismiss--but this was prepared and filed *after* Mr. Palomer was represented by counsel for the first time.

The relevant legal standard does not consider maximum feasible diligence, or whether the claimant could have timely filed based on the timeliness of another filing. Instead, the standard looks to reasonable diligence, and whether the circumstances warrant equitable tolling despite the exercise of that diligence.

When accounting for the considerable mailing delay between the United States and the Philippines, Mr. Palomer would not have received the statutorily mandated 120 days to file a motion for reconsideration. The record establishes a pattern of a significant mailing delay between the United States and the Philippines: Mr. Palomer's motion for reconsideration was postmarked by the Philippine Postal Corporation on November 20, 2013, but was received by the VA 15 days later, on December 5, 2013. A32-33; Mtn. of Appellee to Dismiss Case (Jan. 23, 2015), at 16-17. Additionally, Mr. Palomer's Notice of Appeal was postmarked on March 18, 2014, but was received 20 days later, on April 7, 2014. A2-3; Notice of Appeal (Apr. 7, 2014). The time for delivery for these filings exceeds the 13 days by which Mr. Palomer missed the 120-day appeal period from the Board decision.

Using the pattern of mailing evident in this case, Mr. Palomer would have received the letter two weeks after it was sent, and would have only had 106 days to file his motion for reconsideration. The question was whether Mr. Palomer,

except for his extraordinary circumstances, filed timely. But the Veterans Court instead asked whether Mr. Palomer “could have” filed his motion within this shortened appeal period. This is the wrong standard. Mr. Palomer’s diligent filing was untimely because of the mailing delay in receiving the Board’s decision--not in addition to it. Equitable tolling is therefore appropriate.

III. The Court Should Apply Equitable Tolling More Freely to an FVEC Claim

As discussed in the motion to expedite below,¹⁴ The FVEC is equitable in nature, and its class of possible claimants is increasingly limited. “Equitable tolling” allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances. *Valverde v. Stinson*, 224 F.3d 129 (2d Cir. 2000). “[T]his Court is free to extend the principles of equitable tolling to new situations when warranted[.]” *Nelson v. Nicholson*, 19 Vet.App. 548, 551 (2006).

A claim under the Filipino Veterans Equity Compensation Act presents such a situation. Necessarily, claimants under the FVEC are considerably elderly, subject to language barriers, and very often live out of the country in the

¹⁴ This argument was only mentioned in the motion to expedite, not the response to the motion to dismiss. However, this is a purely legal issue and requires no further development of facts, so the argument should not be waived here. *See, e.g., Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5, (D.C. Cir. 1992).

Philippines. Indeed, the Act explicitly recognizes and creates a separate remedy for out-of-country applicants. American Recovery and Reinvestment Act § 1002(e), 123 Stat. 115, Pub. L. No. 111-5 (Feb. 17, 2009). These factors support the application of equitable tolling to filings within the mail-delay window.

As Judge Greenberg argued in his dissenting opinion below: “[t]hat this appellant's circumstances do not conform to a narrow interpretation of the Court's precedent should only hasten the [Veteran] Court's expansion of its equity jurisprudence. That jurisprudence must be more inclusive so as to properly discharge the essential duty of equity: to provide relief in light of diverse and infinite circumstances for which fixed laws cannot account.” *Palomer v. McDonald*, 27 Vet. App. 245, 257 (2015).

Indeed, equitable remedies exist to protect against the failures of strictly prescribed rules. The nature of Mr. Palomer's unique underlying claim further compels the application of equitable tolling to his case.

Throughout the duration of World War II, Filipino soldiers continued to be encouraged by the prospect of post-war benefits. Despite what they might experience, in the end their service would mean they would be taken care of. In

October 1945, the Administrator of the VA reaffirmed that these Filipino soldiers would receive full benefits.¹⁵

But these promises became a bait-and-switch. With the Rescission Acts, America took away the very benefits President Roosevelt gave to the Filipino Soldiers when he enlisted their aid in World War II. American Recovery and Reinvestment Act § 1002, 123 Stat. 115, Pub. L. No. 111-5 (Feb. 17, 2009). Congress enacted the FVEC to remedy this wrong and to fulfil those promises swept under the rug more than half a century earlier. *Id.*

Necessarily, the class to whom the FVEC applies is diminishing quickly. The average age of Filipino veterans is above 90 and most have died or are on their deathbeds. 155 Cong. Rec. S1617-02, S1627. These Filipino veterans died for the United States, were wounded for the United States, and yet were denied recognition from the United States for their service. *Id.* Therefore, the FVEC was designed to honor the promises made to these veterans so long ago. It is by definition an *equitable* act to make reparations. American Recovery and Reinvestment Act § 1002, 123 Stat. 115, Pub. L. No. 111-5 (Feb. 17, 2009).

¹⁵ Congressional Record Volume 154, Number 71 (May 1, 2008), available at <http://www.gpo.gov/fdsys/pkg/CREC-2008-05-01/html/CREC-2008-05-01-pt1-PgE807.htm> (last visited July 3, 2015).

The fact the FVEC is equitable by its very nature and the fact that it is, unquestionably, a result of extraordinary circumstances in our nation's veterans benefits history should factor in to the extraordinary circumstances analysis. Put another way, when considering FVEC claims in particular, the Veterans Court should apply equitable tolling more freely—in the spirit of righting the wrong done to Filipino veterans, and at the risk of otherwise perpetuating the bait and switch.

IV. Mr. Palomer's Physical Condition Supports Equitable Tolling

In *Barrett v. Principi*, the Federal Circuit held that equitable tolling may be warranted if an untimely filing is the direct result of a disability “that rendered [a claimant] incapable of rational thought or deliberate decision making, or *incapable of handling [a claimant's] own affairs* or unable to function in society.” 363 F.3d 1316, 1321 (Fed. Cir. 2004) (emphasis added). Mr. Palomer provided a letter, filed July 10, 2014, attesting that “[his] eyes and [his] sense of hearing have already deteriorated.” A39; Resp. to Mtn. to Dismiss (July 10, 2015). Mr. Palomer is ninety-two years old. *Id.* He must “ask somebody to assist [him] to write [his] letter and file [his] appeal.” *Id.*

Mr. Palomer is thus incapable of handling his own affairs. He requires the assistance of a third party to understand any communications related to his claim—

let alone compose responses to these communications. Mr. Palomer attests that he was unaware of a 120-day limit on the appeal. *Id.*

This limit was described in the Form 4597 that accompanied BVA's decision.¹⁶ While the Veterans Court may not have found the language in this form confusing, this ninety-two year old veteran, who can't read, could only hear what the letter said. As his eyes and ears are "deteriorated", he relies on a third party to apprise him of the contents of BVA communications. Mr. Palomer stated to the Veterans Court that "I have [sic] no idea that I have to file it within 120 days." *Id.*

This means that either the person who assisted Mr. Palomer failed to give Mr. Palomer all of the information he needed, or Mr. Palomer misheard the information. In either event, Mr. Palomer was incapable of receiving this information via typical means and thus, under equitable tolling principles, should not be penalized. When considered with his other circumstances, Mr. Palomer's physical frailties support his claim to equitably toll his motion for reconsideration.

* * * * *

¹⁶ Form 4597 states clearly and with emphasis in the original, "there is *no* time limit for filing a motion for reconsideration" in its fourth paragraph. A14-15; Copy of BVA decision (May 8, 2014), at 11-12. It is only when one reads further into the form, under the section "How long do I have to start my appeal to the Court?" that there is mention of the 120-day deadline. *Id.*

“[E]quitable tolling is not limited to a small and closed set of factual patterns[.]” *Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005). Instead, the Veterans Court must decide matters of equitable tolling on a case-by-case basis. *Id.* In Mr. Palomer’s case, multiple factors coalesce to create an extraordinary circumstance. Mr. Palomer’s age and physical infirmities, the fact that BVA decided his motion for reconsideration, the confusing notice on appeal—these are all difficult circumstances. But when added to the extraordinary circumstances of the unavoidable mailing delay from the United States to the Philippines and the equitable reparations act underlying Mr. Palomer’s appeal, they echo the bait-and-switch that gave rise to the FVEC in the first place.

“The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.” *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). The benefits due to Filipino veterans under the FVEC have been so long coming, they warrant an even more particular beneficence. Congress’ intent as to the FVEC was to create a unique, compensatory act to honor the United States’ decades-old promises.

In its opinion, the Veterans Court noted William Blackstone’s concern that “the liberty of considering all cases in an equitable light must not be indulged too

far[.]” N. 4 at P. 5. Mr. Palomer agrees. But the Court does not appear to have considered the narrow—and ever-diminishing—class to which Mr. Palomer belongs when it voiced this concern. Nor does it seem to have considered the equitable nature of Mr. Palomer’s very claim. The danger here is not overindulgence, but rather inequity.

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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¹⁷ I must acknowledge and thank student Angela B. Kennedy, in her third year of law school, for her enormous contributions to this brief and those below.

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 30 pages and this entire document contains 6925 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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July 7, 2015

CERTIFICATE OF SERVICE

I hereby certify, that on this 7th day of July, 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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