

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MISC. NO. 04-12

IN RE: TIMELINESS OF APPEALS AND *BOVE V. SHINSEKI*, __ VET.APP. __, NO. 08-1468, 2011 WL 6364587 (PER CURIAM ORDER DEC. 20, 2011).

Before KASOLD, *Chief Judge*, and HAGEL, MOORMAN, LANCE,
DAVIS, and SCHOELEN, *Judges*.

ORDER

Pursuant to 38 U.S.C. § 7264 (investing rule-making authority in the Court) and Rule 2 of the Court's Rules of Practice and Procedure (Rules) (Court may suspend its Rules), the Court has determined the need to issue a general order in light of two recent decisions fundamentally and uniquely affecting the Court's treatment of the 120-day filing period in which to file an appeal at the Court, as required by 38 U.S.C. § 7266(a). First, the U.S. Supreme Court determined in *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (*Henderson III*), that the 120-day filing period is not a jurisdictional prerequisite to an appeal but rather an "important procedural rule." Second, this Court determined in *Bove v. Shinseki*, __ Vet.App. __, No. 08-1468, 2011 WL 6364587 (per curiam order Dec. 20, 2011), that the 120-day filing period is subject to equitable tolling within the parameters of the precedential decisions on equitable tolling that predated this Court's now-overruled decision in *Henderson v. Peake*, 22 Vet.App. 217 (2008) (*Henderson I*) (relying on *Bowles v. Russell*, 551 U.S. 205 (2007), and holding that the 120-day filing period was jurisdictional and not subject to equitable tolling), *aff'd sub nom.*, *Henderson v. Shinseki*, 589 F.3d 1201 (Fed.Cir. 2009) (en banc) (*Henderson II*), *rev'd*, *Henderson III*.

Subsequent to *Henderson I* and prior to *Bove*, a number of appeals were dismissed for untimely filing and lack of jurisdiction, without consideration of the appellants' equitable tolling arguments. Mandate has entered in many of those decisions. In the interests of justice, for any such appellant the Court will consider a motion to recall mandate premised on an argument that the time to file the Notice of Appeal in such case warrants equitable tolling under *Bove*, provided such motion and argument are filed within 120 days of this order. The appeals affected by this order were all dismissed by the Court between July 24, 2008, and December 20, 2011.

Accordingly, it is

ORDERED that, not later than 120 days after the date of this order, any appellant whose appeal was dismissed pursuant to *Henderson I* may move the Court to recall mandate premised on an argument that the time to file the Notice of Appeal in such case warrants equitable tolling under *Bove*. It is further

ORDERED that, not later than 14 days after the filing of any motion pursuant to this order, the Secretary may file a response.

DATED: February 7, 2012

PER CURIAM.

[Clerk's Note: Motions to recall mandate should conform to Rule 27 of the Court's Rules of Practice and Procedure, and should be submitted via: (1) mail, personal delivery, or other delivery service; (2) fax to (202)501-5848; or (3) email to efiling@uscourts.cavc.gov.]