

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Misc. No. 04-19

IN RE: RULES OF PRACTICE AND PROCEDURE

O R D E R

Pursuant to the authority of 38 U.S.C. § 7264(a) and consistent with 28 U.S.C. § 2071(b), the Court has determined that Rule 4 (FILING OF APPEAL; DOCKETING; COPY OF BOARD DECISION) of its Rules of Practice and Procedure (Rules) needs to be revised. The proposed revised rule, in new subsections to paragraph 4(a), incorporates the interim requirement regarding the timeliness of Notices of Appeal and the filing of the Secretary's motions to dismiss (*see* Misc. No.15-17 (Timeliness of Notices of Appeal), December 20, 2017); clarifies that "good cause or excusable neglect" may be considered under certain circumstances; and includes a provision regarding equitable tolling.

In addition to the substantive changes highlighted above, administrative updates to Rules referencing Rule 4, (i.e., Rule 3 and Rule 26) are also being proposed. Further, when the changes to Rule 4 are finalized, the Court proposes to revise the Instructions section of its standard Notice of Appeal (Form 1) to reflect the changes to Rule 4.

Accordingly, it is

ORDERED that the attached proposed revisions to the Court's Rules are hereby published for public comment for a period of 30 days. Comments must be submitted to the Clerk of the Court by February 28, 2019, at comments@uscourts.cavc.gov or 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004.

DATED: January 29, 2019

FOR THE COURT:

/s/Gregory.O. Block
GREGORY O. BLOCK
Clerk of the Court

Attachments

1. Proposed Revised Rules
2. Proposed Revised Rules with Changes Shown

RULE 4. FILING APPEAL; DOCKETING; COPY OF BOARD DECISION

(a) (1) Time for Appeal. A Notice of Appeal must be received by the Clerk not later than 120 days after the date on which the Board mailed notice of the decision to the last known address of the appellant and the appellant's authorized representative, if any. *See also* Rule 25 (Filing and Service).

(2) Deemed Receipt. A Notice of Appeal is deemed received-

(A) on the date of its legible postmark, affixed by the U.S. Postal Service (not including a postage-metered date imprint other than one affixed by the U.S. Postal Service) on the cover in which the Notice of Appeal is posted, if the mailing is properly addressed to the Court and is mailed; or

(B) on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the U.S. Postal Service, or if it is delivered or sent by means other than U.S. mail. *But see* Rule 25(b)(1)(B) (filing and service for appellant confined in an institution).

(3) Timeliness; Good Cause or Excusable Neglect; Equitable Tolling

(A) If the Secretary does not within 45 days after the filing date of the Board decision (pursuant to Rule 4(c)) file a motion to dismiss an appeal for failure to timely file a Notice of Appeal within the 120-day appeal period, the Notice of Appeal will be treated as timely regardless of the date it was received.

(B) If the Secretary within 45 days after the filing date of the Board decision moves to dismiss an appeal for failure to file a Notice of Appeal within the 120-day appeal period, an untimely Notice of Appeal will be treated as timely if

(i) the Notice of Appeal is received within 30 days after the expiration of the filing deadline and the appellant demonstrates good cause or excusable neglect for failure to file the Notice of Appeal within the 120-day period; or

(ii) the Notice of Appeal is received more than 30 days after the expiration of the filing deadline but equitable tolling is warranted because the appellant demonstrates an extraordinary circumstance that prevented timely filing and the exercise of reasonable due diligence in attempting to file a timely Notice of Appeal.

(b) Docketing.

- (1) *Docketing the appeal.* Upon receipt of the Notice of Appeal, the Clerk will docket the appeal, identifying the appellant by name, unless otherwise ordered by the Court.
- (2) *Designation of public official.* The Secretary shall be described as the "appellee" by name and official title.
- (3) *Notice of docketing.* The Clerk shall send a notice of docketing to all parties advising them of the date the Clerk received the Notice of Appeal.

(c) Copy of Board Decision. Not later than 30 days after the date the Clerk issues a notice of docketing (*See* subsection (b)(3)), the Secretary shall file with the Clerk under separate docket entries and serve on the appellant a copy of the Board's decision, showing-

- (1) the date on which notice of the decision was mailed, with any personal identifiers redacted except the name of the appellant (*See* E-Rule1(a)(10) (definition of "personal identifier"));
- (2) a reference transmittal identifying the Board decision with any necessary personal identifiers, which when electronically filed will be locked (*See* E-Rule 4(d)); and
- (3) if applicable, the filing date of any motion for reconsideration or vacatur of the Board decision, and the date and nature of any action on such a motion.

RULE 3: APPELLATE PROCEDURE

(a) Filing. To appeal a Board of Veterans' Appeals (Board) decision, a person adversely affected by the decision must file a Notice of Appeal with the Clerk, within the time allowed by law. See Rule 4(a). Because the Notice of Appeal will likely contain personal identifiers, that electronic record will be locked and accessible through CM/ECF only to CM/ECF Users in that case. See E-Rule 4(b). Failure to timely file a Notice of Appeal in accordance with law will result in dismissal of the appeal. See also Rule 38(b) (Failure to Act).

RULE 26: COMPUTATION AND EXTENSION OF TIME

(b) Extension of Time. The Court, on its own initiative or on a party's motion for good cause shown, may extend the time set by these Rules for doing any act, or may permit an act to be done after the expiration of such time, but the Court may not extend the time for filing a Notice of Appeal except as provided by Rule 4, or an application for attorney fees and expenses. See also Rule 5(a) (Stay of Appellate Proceedings). The Court may grant an extension of time not to exceed a total of 45 days for any particular filing for good cause. Any motion to extend the time set by these Rules or by an order or notice of the Court beyond a total of 45 days for a particular filing will be granted only for extraordinary circumstances.

RULE 4. FILING APPEAL; DOCKETING; COPY OF BOARD DECISION

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(1) **(A)** on the date of its legible postmark, affixed by the U.S. Postal Service (not including a postage-metered date imprint other than one affixed by the U.S. Postal Service) on the cover in which the Notice of Appeal is posted, if the mailing is properly addressed to the Court and is mailed; or

(2) **(B)** on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the U.S. Postal Service, or if it is delivered or sent by means other than U.S. mail. *But see* Rule 25(b)(1)(B) (filing and service for appellant confined in an institution).

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(ii) the Notice of Appeal is received more than 30 days after the expiration of the filing deadline but equitable tolling is warranted because the appellant demonstrates an extraordinary circumstance that prevented timely filing and the exercise of reasonable due diligence in attempting to file a timely Notice of Appeal.

[No changes to current subsections (b) and (c)]

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(2) a reference transmittal identifying the Board decision with any necessary personal identifiers, which when electronically filed will be locked (*See* E-Rule 4(d)); and

(3) if applicable, the filing date of any motion for reconsideration or vacatur of the Board decision, and the date and nature of any action on such a motion.

Proposed Related Revisions to Rules 3 and 26 with Changes Shown

RULE 3: APPELLATE PROCEDURE

(a) Filing. To appeal a Board of Veterans' Appeals (Board) decision, a person adversely affected by the decision must file a Notice of Appeal with the Clerk, within the time allowed by law. See Rule 4(a) (~~Time for Appeal~~). Because the Notice of Appeal will likely contain personal identifiers, that electronic record will be locked and accessible through CM/ECF only to CM/ECF Users in that case. See E-Rule 4(b). Failure to timely file a Notice of Appeal in accordance with law will result in dismissal of the appeal. See also Rule 38(b) (Failure to Act).

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