

Equitable Tolling of Filing Deadlines in Veterans Benefits Cases

By Nicholas L. Phinney

Reporting on *Checo v. Shinseki*, ___ F.3d ___, 2014 WL 1613885 (Fed. Cir. Apr. 23, 2014)

Veterans seeking benefits for injuries and diseases incurred while serving on active duty in the military enjoy the benefit of a system that is uniquely pro-claimant, unlike other systems that are set up to handle different types of claims. See 38 U.S.C. § 5107(b); see also *Forshey v. Principi*, 284 F.3d 1335, 1354-55 (Fed. Cir. 2002). However, once a veteran appeals the denial of a Board decision to the Court of Appeals for Veterans Claims, he or she has entered an adversarial system, which is not so pro-claimant. *Bobbitt v. Principi*, 17 Vet. App. 547, 552 (2004).

In *Checo v. Shinseki*, the Federal Circuit grappled with the question of how the concept of equitable tolling applies with regard to filing appeals at the CAVC. The veteran filed a claim for a higher rating for her service-connected back disorder. *Id.* at 1. The Board denied her claim in a July 6, 2011, decision. At the time, the veteran was homeless and not able to receive mail. *Id.* On September 27, 2011, she provided VA with her new address. *Id.* She then received a copy of the decision on October 6, 2011, 91 days after the Board issued it. *Id.* The veteran filed an appeal on December 7, 2011, 33 days after the 120-day deadline to appeal the decision expired. *Id.* She noted that she had been homeless and did not receive a copy of the Board's decision until October 2011. *Id.* The CAVC found her ineligible for equitable tolling and dismissed her case. *Id.*

On appeal, the Federal Circuit addressed several issues regarding equitable tolling. It noted that the 120-day deadline is non-jurisdictional and therefore capable of being waived. *Id.* at 2. The Federal Circuit also held that the CAVC could, *sua sponte*, raise the issue of whether a claimant filed a timely appeal, as it did in her case. *Id.*

The Federal Circuit then considered what the proper test was for equitable tolling. *Id.* at 3. The court noted how, in *McCreary v. Nicholson*, 19 Vet. App. 324, 332 (2005), *adhered to on reconsideration*, 20 Vet. App. 86 (2006), the CAVC required a claimant to demonstrate (1) extraordinary circumstance, (2) due

diligence, and (3) causation. *Checo*, 2014 WL 1613885 at 3. VA conceded that the veteran's homelessness qualified as an extraordinary circumstance. *Id.* at 4.

As for due diligence, the Federal Circuit noted that the CAVC required a showing of due diligence throughout the entire appeal period. *Id.* (citing *McCreary*, 19 Vet. App. at 333). The Federal Circuit rejected this view and instead adopted what the parties characterized as a "stop clock" approach. *Checo*, 2014 WL 1613885 at 4. Under its interpretation of the second prong of the test, when the extraordinary circumstance has a definite end date—in this case, when the veteran was no longer homeless—the claimant need only show due diligence during the period of the extraordinary circumstance. *Checo*, 2014 WL 1613885 at 4-5. The Federal Circuit held that the CAVC needed to consider how the facts would be found under the new test in the first instance, and remanded the case to the CAVC in order for it to do so.

With regard to the causation prong of the test, the Federal Circuit held that the veteran needed to show only that the extraordinary circumstance prevented her from filing an appeal during the period of the extraordinary circumstance. *Id.* at 6. Therefore, it held that the CAVC erred in finding that equitable tolling was not warranted because the veteran failed to show that the extraordinary circumstance prevented her from appealing the Board's decision in the period between the end of her extraordinary circumstance and the end of the 120-day appeal period. *Id.* If the extraordinary circumstance prevented an appeal during the period of said circumstance, then the clock would stop at the point the circumstance began and would not start again until it resolved. If an appeal were then filed in the time between the end of the circumstance and the time left in the period, it would be considered timely.

The most important points to take away from *Checo* are its discussion of the second and third pieces of the test for equitable tolling. In order for an appeal deadline to be equitably tolled, a veteran need only show--besides the extraordinary circumstance which gave rise to an inability to file an otherwise timely appeal--due diligence during the period of the extraordinary circumstance and that such circumstance prevented an appeal from being filed during this period.