2013–7059

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERISE CHECO,

Claimant-Appellant,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for
Veterans Claims in case no. 11–3683,
Per Curium.

CORRECTED BRIEF AS *AMICUS CURIAE* FOR THE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF APPELLANT, CERISE CHECO

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CERTIFICATE OF INTEREST

Counsel for the Federal Circuit Bar Association certifies the following:

1. The full name of every party represented by us is:

Federal Circuit Bar Association

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 us is:

N/A

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

None

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a) and Federal Circuit Rule 29(c), all parties have consented to the filing of this brief.[1]

[1] The government members of the FCBA had no involvement in the decision to file or preparation of the amicus brief.

STATEMENT OF INTEREST

The Federal Circuit Bar Association ("FCBA") submits this brief as *amicus curiae* in support of Claimant-Appellant, Cerise Checo, to urge the court to reverse the order of the United States Court of Appeals for Veterans Claims ("Veterans Court") dismissing Ms. Checo's appeal. The FCBA is a national bar organization with nearly 2,500 members from all geographic areas of the country. The FCBA offers a forum for discussion of common concerns between the bar and courts. One of the FCBA's purposes is to render assistance to the courts in appropriate instances, both in procedural and substantive practice areas, including veterans' affairs.

Pursuant to Federal Circuit Rule 29 and Federal Rule of Appellate Procedure 29(c)(5), counsel for the FCBA certifies that:

- No party's counsel authored this brief in whole or in part;
- No party's counsel contributed money that was intended to fund the preparation or submission of this brief; and
- No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

The Federal Circuit Bar Association ("FCBA") as *amicus curiae* supports reversal of the Veterans Court's decision dismissing Ms. Checo's appeal from the Board of Veterans' Appeals ("BVA" or the "Board"). *Checo v. Shinseki*, 26 Vet. App. 130 (2013). The FCBA supports reversal based on two important issues of law raised by Ms. Checo's appeal.

First, the Veterans Court exceeded its authority when it *sua sponte* raised whether Ms. Checo's appeal was timely under 38 U.S.C. § 7266(a) based on the incorrect premise that § 7266(a) provides a non-waivable statutory time period for filing an appeal. The timeliness of filing an appeal is a waivable defense which an opposing party may waive or forfeit. When a party fails to raise a timeliness issue, the court should not consider whether the pleading was timely filed. Following its decision in *Bove v. Shinseki*, however, the Veterans Court has routinely issued show cause letters to veterans filing late appeals before the Secretary chooses whether to pursue a timeliness defense. The Veterans Court erred in raising the defense *sua sponte* on behalf of the Secretary and exceeded its authority by violating the principle of party presentation.

Second, the Veterans Court should have applied the "stop-clock" approach for equitable tolling when determining whether Ms. Checo's appeal was timely filed. The Veterans Court should apply the stop-clock approach because this is the

conventional approach to equitable tolling when the tolling period has fixed and definitive start and stop dates.

I. The Veterans Court Exceeded Its Authority When It *Sua Sponte* Raised the 120-Day Limitations Period Under 38 U.S.C. § 7266(a)

The Veterans Court erred when it *sua sponte* raised the applicability of the 120-day limitations period for filing an appeal under 38 U.S.C. § 7266(a). The limitations period under § 7266(a) is a waivable defense that must be presented by the parties before it can be considered by the Veterans Court. Neither Ms. Checo nor the Secretary raised the 120-day limitations period under § 7266(a). As a result, the applicability of this defense was not before the Veterans Court for consideration. Therefore, the Veterans Court improperly raised the defense on behalf of the Secretary and erred when it dismissed Ms. Checo's appeal on this basis. *See generally Checo*, 26 Vet. App. 130.

The Veterans Court's dismissal was premised on its decision in *Bove v. Shinseki*, 25 Vet. App. 136 (2011), that the 120-day limitations period is a non-waivable defense that the Veterans Court may raise *sua sponte*. *Checo*, 26 Vet. App. at 132. In *Bove*, the Veterans Court held that the limitations period under § 7266(a) is a non-waivable statutory period and announced that it would instruct the Clerk of the Court to issue show cause letters to veterans for appeals filed after the 120-day limitations period in all cases. *Bove*, 25 Vet. App. at 143. The Clerk has been issuing such letters as a matter of course ever since.

This case presents an opportunity for the Federal Circuit to review the *Bove* decision, which erroneously conflicts with two well-settled legal principles: (1) that a party can waive a non-jurisdictional claim-processing rule, and (2) that a court should not consider a waivable defense unless a party has presented the defense. In effect, *Bove* violates both general principles and eradicates the parties' power to control the claims and defenses raised during appeal. As a result, the Federal Circuit should overrule *Bove*.

The Supreme Court recently held that the 120-day filing period under 38 U.S.C. § 7266(a) is non-jurisdictional. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011). Neither the parties in this appeal nor the Veterans Court appears to dispute this conclusion. It is also well settled that a party who fails to raise a non-jurisdictional rule as a defense forfeits or waives the protections of the rule. *See, e.g.*, *Dolan v. U.S.*, 130 S. Ct. 2533, 2538 (2010); *Eberhart v. U.S.*, 126 S. Ct. 403, 407 (2005) (failure to object to a claims processing rule constitutes a waiver of the objection). Although the Supreme Court has not decided whether equitable tolling applies to § 7266(a), *Henderson*, 131 S. Ct. at 1206 n.4, the Veterans Court recently held that equitable tolling applies to § 7266(a), *Bove*, 25 Vet. App. at 140.

The Veterans Court, however, incorrectly concluded that the protections of § 7266(a) cannot be waived and that the Veterans Court may *sua sponte* raise the defense on behalf of the Secretary. *Id.* at 142-43. These incorrect conclusions

raise two important issues in this appeal: (1) whether the 120-day limitation is a waivable claim-processing rule, and (2) whether the Veterans Court can raise the defense *sua sponte*. The Supreme Court has issued clear guidance on both questions. First, the 120-day limitation is waivable. Second, the Veterans Court cannot raise the defense *sua sponte*.

A. Section 7266(a) Is a Waivable Defense

Section 7266(a) is a non-jurisdictional claim-processing rule. *Henderson*, 131 S. Ct. at 1206. Claim-processing rules, including those relating to filing deadlines, are generally waived or forfeited if the opposing party does not raise the rule's protection as a defense. *Dolan*, 130 S. Ct. at 2538 ("Unless a party points out to the court that another litigant missed such a deadline, the party forfeits the deadline's protection."); *Eberhart*, 126 S. Ct. 403, 407 ("These claim-processing rules thus assure relief to a party properly raising them, *but do not compel the same result if the party forfeits them*." (emphasis added)).

The Veterans Court *sua sponte* raised the limitations period as a defense and dismissed Ms. Checo's appeal based on the Veterans Court's decision in *Bove*. *Checo*, 26 Vet. App. at 132. *Bove* relied on the Supreme Court's dictum in *Henderson* that § 7266(a) is an "important procedural rule" to erroneously conclude that § 7266(a) cannot be waived. *Bove*, 24 Vet. App. at 139, 143. However, *Henderson* and the weight of precedent from the Supreme Court do not

support this result. In fact, the Veterans Court acknowledged in *Bove* that "nonjurisdictional statutory time limitations subject to equitable tolling generally are subject to waiver and forfeiture" and that whether litigation "has been initiated in a timely manner generally is an affirmative defense raised by an opposing party, as opposed to a matter sua sponte raised by the Court." *Id.* at 141.

Nevertheless, *Bove* determined that these general waiver rules should not apply in the context of Veterans Claims. *Id.* The Veterans Court relied on two principles to reach this conclusion. First, the court suggested that because the appellee would always be the same party, *i.e.*, the Secretary of the Department of Veterans Affairs, allowing waiver or forfeiture would give the Secretary unprecedented power over the Veterans Court's docket. *Id.* Second, the court believed that *sua sponte* review by the court would promote judicial efficiency. *Id.* at 142. However, these assertions, even if true, do not justify either the Veterans Court's holding that § 7266(a) is not waivable or its departure from controlling precedent.

Veterans claims are not the only appeals where the appellee is always the same. For example, in appeals relating to Social Security benefits—which have been compared to appeals relating to veterans benefits—the appellee will always be the Social Security Administrator. Yet, the 60-day time period under 42 U.S.C. § 405(g) for filing a review of a Social Security decision is non-jurisdictional and

waivable. *Henderson*, 131 S. Ct. at 1204; *see also Weinberger v. Salfi*, 95 S. Ct. 2457, 2468 (1975) (determining that because the Secretary did not challenge the sufficiency of the petitioner's appeal under § 405(g), the Secretary had waived the protections of that section). Veterans benefits and social security benefits proceedings have frequently been compared to one another. *See, e.g.*, *Henderson*, 131 S. Ct. at 1204. Given these acknowledged similarities, the Veterans Court has not adequately explained why a statutory time period for filing an appeal in the Social Security context can be waived, but in the veterans context it cannot. In fact, the Veterans Court does not appear to have identified any precedential authority under which a non-jurisdictional timeliness statute cannot be waived. *See generally Bove*, 25 Vet. App. 136. The Veterans Court's justification that veterans' affairs are somehow "different" from other administrative appeals simply because the appellee is always the same is unconvincing. The acknowledged similarities between veterans appeals and Social Security appeals requires this Court to reach the opposite conclusion, namely that § 7266(a) *is waivable*.

The Veterans Court also asserts that allowing the Secretary to waive the limitations period would result in the Secretary picking and choosing which cases to "waive" in order to have them addressed by the Veterans Court. Yet, the Veterans Court does not assert that the Secretary has ever made such a deliberate waiver, or that it has reason to believe that the Secretary will make such waivers in

the future. Furthermore, the Veterans Court seems concerned that a flood of untimely filings might overburden its docket. Because the Secretary must address *every* appeal filed in the Veterans Court, it is in the Secretary's interest to dismiss such cases on procedural grounds—such as untimely filings under § 7266(a)—where this remedy is available. Therefore, the Secretary's interests would generally align with those of the Veterans Court to enforce the statutory deadlines. Viewed in this light, the Veterans Court erred when it held that § 7266(a) cannot be waived by the Secretary.

B. The Veterans Court Erred by *Sua Sponte* Raising and Considering a Waivable Defense That Was Not Raised by the Parties

The Veterans Court erred when it decided a waivable procedural issue that had not been raised by either party. The Supreme Court has stated that courts generally should not decide non-jurisdictional issues that have not been presented by the parties. *Wood v. Milyard*, 132 S. Ct. 1826, 1833 (2012). In fact, the Supreme Court has held that it is generally "an abuse of discretion . . . for a court to override a State's deliberate waiver of a limitations defense." *Id.* at 1834.

In *Bove*, the Veterans Court erred when it held that it could *sua sponte* raise a timeliness defense under § 7266(a), irrespective of the Secretary's desire to enforce or waive the defense. *Bove*, 25 Vet. App. at 143. The Veterans Court directed the Clerk of the Court to issue show cause letters for *every* late-filed appeal as a matter of course, whether or not the Secretary raised a timeliness

defense. This ruling was premised on the erroneous conclusion that the timeliness defense cannot be waived. *Id.* As explained above, however, such a defense *can be waived* by the Secretary because it is a non-jurisdictional, procedural limitations defense. When the Secretary fails to raise the defense, the Veterans Court generally does not have the power to consider the unpresented issue. *Wood,* 132 S. Ct. at 1833; *Mason v. Shinseki*, 25 Vet. App. 83, 95 (2011). *Cf. Bove*, 25 Vet. App. at 141 (acknowledging that the general rule is that courts cannot address an affirmative defense that is not raised by a party).

In fact, the Veterans Court itself has recognized that parties have many reasons for deciding which issues to present in a case, and it is also in the court's interest that parties selectively present their issues. *Mason*, 25 Vet. App. at 95. When a party does not raise an argument—in this case, the 120-day limitation—a court should not decide the issue unless it goes to subject matter jurisdiction. *Wood*, 132 S. Ct. at 1833; *Dolan*, 130 S. Ct. at 2538; *Eberhart*, 126 S. Ct. 403, 407. The 120-day limitation under § 7266 does not implicate the Veterans Court's subject matter jurisdiction because it is not jurisdictional. *Henderson*, 131 S. Ct. at 1206. Therefore, the Veterans Court should not consider the timeliness of a filing, unless the Secretary first raises the defense.

Notwithstanding this general principle, the Supreme Court has observed that, in limited cases, an appellate court may raise a forfeited timeliness defense on its

own initiative. *See Wood*, 132 S. Ct. at 1834. However, the Court also observed that appellate courts should show "restraint" in applying *sua sponte* review, especially where the waiving party is aware of the defense. *Id.* This call for appellate restraint in *sua sponte* raising new defenses aligns with the Court's statement in that case that "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Id.* at 1833.

The Veterans Court's policy of issuing show cause letters for *all* late-filed appeals contradicts the Supreme Court's call for appellate court restraint. The Veterans Court's policy is not only unrestrained in its application, but it also denies the Secretary *the option* to waive the statutory time period under § 7266(a), "essentially wrest[ing] control of the litigation away from the parties." *Mason*, 25 Vet. App. at 95. This sweeping and broad instruction exhibits the very lack of appellate restraint that the Supreme Court cautioned against in *Wood*. There is little doubt that the Secretary, as the appellee in *every* appeal to the Veterans Court, knows that § 7266(a) provides a procedural defense. As such, the Secretary has every incentive to dispose of the issue under procedural grounds rather than substantive grounds. *See Wood*, 132 S. Ct. at 1834-35. However, the Secretary may "for any number of reasons, [choose] not to advance such arguments."

Mason, 25 Vet. App. at 95. The Veterans Court's ruling in *Bove* deliberately denies the Secretary these strategic options.

The Veterans Court's concern that the Secretary will have overwhelming control of the court's docket is unfounded. In *Wood*, the Supreme Court appeared unconcerned that the State in that case twice admitted it was aware of a limitations defense but refused to assert the defense. *Id.* Contrary to the Veterans Court's conclusion in *Bove*, the Court in *Wood* determined that deliberate waiver should restrain an appellate court from *sua sponte* asserting a timeliness defense in favor of one party. *Id.* at 1834. The Veterans Court's opposite conclusion to raise the defense *sua sponte* in *every case* of a late-filed appeal runs contrary to the Court's guidance to exercise restraint. *Id.* at 1834-35 (reversing the Tenth Circuit's *sua sponte* dismissal of an untimely habeus petition).

The *Bove* court also used the routine issuance of show cause letters as a justification to gather additional facts of its own volition. *Bove*, 25 Vet. App. at 143. The Veterans Court relied on cases stating that the determination of timeliness necessarily involves fact finding by the court. *Id.* (citing *Leonard v. Gober*, 223 F.3d 1374, 1376 (Fed. Cir. 2000) and *McCreary v. Nicholson*, 19 Vet. App. 324, 332-34 (2005)). Neither of these cases stands for the proposition that the Veterans Court may raise the timeliness defense *sua sponte* and also seek facts in support of the defense. Rather, they stand for the proposition that the Court may

seek new factual evidence when the *Secretary* has raised a timeliness defense under § 7266(a).

The Veterans Court's suggestion that failure to issue show cause letters will result in a flood of cases hand-picked by the Secretary for appellate review is unsubstantiated. The Veterans Court did not identify any cases in which the Secretary has made such determinations or selectively chosen to defend late-filed appeals. Similarly, any increase in the Veterans Court's docket also creates additional burdens on the Secretary to address the merits of those appeals. *See Bove*, 25 Vet. App. at 141 (recognizing that the Secretary is always the appellee). Attributing such motivations to the Secretary implies that the Secretary may be acting in bad faith. However, government officials are presumed to act in good faith in the fulfillment of their duties and in their representations. *Savantage Fin. Servs. v. United States*, 595 F.3d 1282, 1288 (Fed. Cir. 2010) ("government officials are presumed to act in good faith").

The Veterans Court has not provided any compelling ground to deviate from the general principle that a timeliness defense must be asserted by a party before the court can consider the merits of the defense. The Veterans Court erred by raising the defense for the Secretary *sua sponte*.

II. The Stop-Clock Approach to Equitable Tolling Should Apply to Ms. Checo's Appeal Period

Assuming the Veterans Court has the power to *sua sponte* raise timeliness defenses on behalf of the Secretary (which is does not), the Veterans Court should have applied the stop-clock approach when determining equitable tolling for Ms. Checo's case.

Under the stop-clock approach, the 120-day filing period for Ms. Checo's appeal would toll during Ms. Checo's homelessness, from July 6, 2011, when the Board first mailed its decision, until October 6, 2011, when it mailed the second copy of the decision to Ms. Checo. Because the October 6, 2011, mailing marks a definite end date for tolling, the stop-clock approach should apply. This approach requires that "the remaining time on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped." *U.S. v. Ibarra*, 112 S. Ct. 4, 5 n.2 (1991).

To satisfy the equitable tolling requirements under the stop-clock approach, Ms. Checo would need to show diligence only for the period to be tolled (*i.e.*, July 6, 2011, to October 5, 2011). *Harper v. Ercole*, 648 F.3d 132, 139 (2d Cir. 2011); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1195 (9th Cir. 2001). Consequentially, Ms. Checo would not need to show diligence between the end of the tolling period (*i.e.*, October 6, 2011) and the filing of the appeal. *Id*.

The Veterans Court should apply the stop-clock approach to Ms. Checo's appeal because the tolling period has a fixed and definitive end date. *See Ibarra*, 112 S. Ct. at 5 n.2; *Harper*, 648 F.3d at 139. First, the stop-clock approach is the "conventional rule" for equitable tolling when the tolling period has a definitive end date. *Harper*, 648 F.3d at 139; *Socop-Gonzalez*, 272 F.3d at 1195. The stop-clock approach also provides a straightforward application and conserves judicial and party resources because it does not require unnecessary showings of diligence after tolling. Second, veterans law is an unusually paternalistic and pro-claimant field, in which provisions for the veteran's benefit "are to be construed in the beneficiaries' favor." *Henderson*, 131 S. Ct. at 1206. A logical extension of this canon is that the more beneficial rule, *i.e.*, the stop-clock approach, should be applied when the Court is able to do so.

A. The Veterans Court Should Apply the Stop-Clock Approach to Ms. Checo's Case Because There Is an Undisputed, Defined 91-Day Period to Be Tolled

With regard to which tolling approach to apply, there are two lines of authority, each requiring different exercises of due diligence. *See Socop-Gonzalez*, 272 F.3d at 1194-95 (determining that the stop-clock approach employs the conventional rule for tolling a statutory period, and rejecting the 7th Circuit's requirement to show diligence after the tolling period); *Harper*, 648 F.3d at 140-41 (distinguishing diligence requirements in circumstances where the tolling period is

fixed and defined from circumstances where the tolling period does not have a defined end date); *see also Valverde v. Stinson*, 224 F.3d 129, 134, 134 n.4 (2d Cir. 2000) (discussing requirements for establishing diligence from the several circuit courts of appeal).

The first line of authority supports the stop-clock approach, which courts have applied when there is a definitive end date for the tolling period. Under this approach, courts "assume[] that the event that 'tolls' the statute simply *stops the clock* until the occurrence of a later event that permits the statute to resume running." *Socop-Conzalez*, 272 F.3d at 1195 (emphasis in original). The stop-clock approach requires a party seeking to toll a statutory period to show due diligence only for the tolled period, not the remainder of the original filing period or the "extended" filing period. *Harper*, 648 F.3d at 139; *see also Socop-Gonzalez*, 272 F.3d at 1195 (rejecting the 7th Circuit cases requiring a party to show diligence through filing).

The second line of authority would apply when the period to be tolled does not have a definitive end date. When there is no definitive end to the tolling period, the court would determine whether the late-filing party exercised due diligence throughout the period to be tolled and up to the time when the party ultimately filed the notice of appeal. *See McCreary*, 19 Vet. App. at 332; *Checo*, 26 Vet. App. at 134-35 (applying *McCreary*); *Valverde v. Stinson*, 224 F.3d 129,

134 (2d Cir. 2000) (requiring diligence through the entire period through filing of a notice of appeal); *Harper*, 648 F.3d at 140-41 (distinguishing *Valverde* because Harper's tolling period had a definitive end date).

Ms. Checo's equitable tolling period has a clearly-defined and undisputed 91-day tolling period from July 6 to October 6. The simplicity of applying the stop-clock approach, and its pro-claimant effects, compels its application to Ms. Checo's case. *See Socop-Gonzalez*, 272 F.3d at 1194-95 (explaining that the stop-clock approach leads to a more consistent application of limitations period without being "needlessly difficult to administer"). The stop-clock approach is the generally-accepted "conventional rule" for equitable tolling and aligns with the policies regarding the filing of a Notice of Appeal. *Socop-Gonzalez*, 272 F.3d at 1195; *Harper*, 648 F.3d at 136, 139.

A veteran should have an unprejudiced period within which to file an appeal. *McCreary*, 25 Vet. App. at 331 ("we will not adopt an explicit requirement that an appellant attempt to file an NOA early in the judicial-appeal period in order to obtain the benefit of the doctrine of equitable tolling"); *see also Socop-Gonzalez*, 272 F.3d at 195 (stating that statutory filing periods are supposed to provide all litigants the same amount of time to file a claim). However, the Veterans Court has adopted an equitable tolling scheme that is both difficult to administer and leads to inconsistent results. Specifically, the Veterans Court requires an Appellant

to "exercise 'due diligence' in preserving his appellate rights, meaning that a reasonably diligent appellant, under the same circumstances, would not have filed his appeal within the 120-day judicial-appeal period." *McCreary*, 19 Vet. App. at 332. In effect, the Veterans Court's universal application of what is usually an exception to the conventional rule, *see Socop-Gonzalez*, 272 F.3d at 1195; *Harper*, 648 F.3d at 136, 139, forces veterans to file very soon after the tolling period ends to avoid potential prejudice. By requiring a veteran to show diligence through the tolling period *and* up to the filing of a notice of appeal, the Veterans Court denies veterans full enjoyment of the 120-day statutory period established by statute. *See Socop-Gonzalez*, 272 F.3d at 1194-95 (stating that requiring diligence outside of the tolled period undermines the "relative certainty and uniformity" that statutory periods are supposed to provide).

A simple comparative example illustrates the error of the Veterans Court's application of tolling and why it is manifestly unfair to veterans to unilaterally impose a higher burden to establish diligence. Assume that a veteran's adverse decision from the Board is mailed on January 1. Under § 7266(a), the veteran would have until May 1 (120 days) to file a claim. Assume that, also on January 1, the veteran begins experiencing an extraordinary event, such as a car accident leaving the veteran in a coma that prevents the veteran from filing a notice of

appeal or communicating with anyone until exiting the coma 119 days later, on April 30, one day before the statutory period expires.

Under the stop clock approach, the veteran would have to show diligence in attempting to file an appeal while the veteran was in the coma, and would then have one day (until May 1), plus 119 days (the tolled period) to file a notice of appeal—thereby enjoying the entirety of the prescribed 120-day filing period under § 7266(a). In essence, the only question for the court is "whether [the veteran] filed within the limitations period after tolling is taken into account." *Socop-Gonzalez*, 272 F.3d at 1196.

Under the Veterans Court's approach, the veteran must show diligence during the period in the coma *and during the single day when the veteran awakens from the coma through filing*. As a result, the veteran would not enjoy the full 120-day period set forth by statute, but would instead only enjoy the period in which the veteran was diligent in acting to file a notice of appeal. *See Checo*, 26 Vet. App. at 135. In essence, this rule denies the veteran part of the promised statutory filing period.

Furthermore, the Veterans Court's approach leads to inconsistent results. Assume that two veterans had their Board decisions mailed on January 1, and each suffered an accident the same day causing them to enter a coma until April 30. If both veterans file 60 days after waking from the coma, the Veterans Court may

accept one appeal and deny the other depending on which veteran can prove that they acted "diligently" after waking from the coma.

Under the stop-clock approach, both veterans would have timely filed because the coma would simply have "stopped the clock" on January 1 and restarted it again on April 30. Therefore, the stop-clock approach reaches a uniform result in determining whether a veteran has timely filed an appeal, which promotes uniformity and consistency in the appeals process. The stop-clock approach also promotes judicial efficiency because the Veterans Court must only determine diligence during the tolled period, not the period through filing. This simplifies the Veterans Court's inquiry and avoids a "needlessly difficult to administer" diligence inquiry that improperly denies some veterans the full 120-day statutory period. *Socop-Gonzalez*, 272 F.3d at 1195.

The Second Circuit has criticized the Veterans Court's approach as a "mistake of law" because when a party shows diligence "throughout the period he seeks to toll," a court will "suspend the statute of limitations for the period of extraordinary circumstances and determine timeliness by reference to the total untolled period *without requiring a further showing of diligence through filing*." *Harper*, 648 F.3d at 139 (emphasis added). This application properly conforms to the Supreme Court's guidance that the time bar begins to run again when the event ending the tolling period occurs. *See Ibarra*, 112 S. Ct. at 5 n.2

However, as acknowledged by the Second Circuit, there are circumstances where there is no discernible end date for the tolling period. *See Harper*, 648 F.3d at 140; *Valverde*, 224 F.3d at 135 (remanding to the district court to develop facts relating to tolling). This appeal does not require this court to outline a process for determining diligence for an undefined tolling period. In Ms. Checo's case, the parties do not dispute that the tolled period began on July 6, 2011, and ended on October 6, 2011. As such, there is a well-defined and undisputed 91-day period that Ms. Checo seeks to toll. Under such circumstances, the application of the conventional stop-clock approach is warranted. By adding the tolled 91 days to the end of the original filing period, it is apparent that Ms. Checo timely filed her notice of appeal within her allotted 120 days.

B. Applying the Stop-Clock Approach Conforms With the Equitable Canon of Veterans Law That Ambiguous Provisions Should Be Construed In the Beneficiaries' Favor

The stop-clock approach also conforms to the general canon in veterans cases that provisions for a veteran's benefit should "be construed in the beneficiaries' favor." *Henderson*, 131 S. Ct. at 1206. The Supreme Court noted that this canon weighed in favor of determining that § 7266(a) is a non-jurisdictional filing period. *Id.* (holding that the 120-day limitations period is non-jurisdictional and remanding for consideration of whether the period may be subject to equitable tolling). Because there are two equitable tolling approaches

that could apply, the court should adopt the one that tips the scales in the veteran's favor.

The stop-clock approach benefits veterans because it requires veterans to establish diligence only throughout the period to be tolled, not the entire period up until filing. Therefore, the Veterans Court should apply the stop-clock approach for a well-defined tolling period, as in Ms. Checo's case.

III. Conclusion

For the reasons set forth above, § 7266(a) is waivable because it is a non-jurisdictional claim-processing rule. The Veterans Court erred when it held otherwise. The Veterans Court also abused its discretion when it *sua sponte* raised the timeliness defense under § 7266(a). The Veterans Court's policy of routinely issuing show cause letters to veterans lacks the appellate restraint urged by the Supreme Court and denies the Secretary the opportunity to choose whether to raise the limitations defense. Because both of these errors were premised on the faulty reasoning in *Bove*, this court should overrule *Bove* and hold that (1) the 120-day limitations period under § 7266(a) can be waived, and (2) the Veterans Court may not *sua sponte* raise the limitations defense because the Secretary has the power to waive § 7266(a)'s protections.

If the Court reaches the merits of the equitable tolling issue, it should hold that the stop-clock approach should apply to Ms. Checo's appeal because the

tolling period has a fixed, well-defined length. This Court should also hold that Ms. Checo timely filed her appeal within the statutory period once the tolled 91-days are added to the end of the original tolling period.

Respectfully submitted,

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Dated: August 16, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2013, true and correct copies of the foregoing CORRECTED BRIEF AS *AMICUS CURIAE* FOR THE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF APPELLANT, CERISE CHECO were served via the Court's CM/ECF system as well as by Federal Express on counsel.

/s/ James R. Barney

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing CORRECTED BRIEF AS *AMICUS CURIAE* FOR THE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF APPELLANT, CERISE CHECO includes 5088 words as specified by the rules of this Court.

Dated: August 16, 2013

Respectfully submitted,

/s/ James R. Barney

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