2015-7082

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 in case no. 14-1017

BRIEF FOR RESPONDENT-APPELLEE

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that respondent-appellee's counsel is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent-appellee's counsel is unaware of any other case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

BRIEF FOR RESPONDENT-APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2015-7082

EMILIO T. PALOMER,
Claimant-Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Respondent-Appellee.

STATEMENT OF THE ISSUES

1. Whether, contrary to the plain language of the statute and the clear congressional intent, the time it takes for mail to travel from Washington, DC to the Philippines should be excluded when calculating the time for Mr. Palomer's appeal.

2. Whether this Court has jurisdiction to review whether the United States Court of Appeals for Veterans Claims (Veterans Court) erred in concluding that the circumstances of this case did not satisfy the requirements for equitable tolling.

STATEMENT OF THE CASE

I. Nature Of The Case

Claimant-appellant, Emilio T. Palomer, appeals the order of the Veterans Court in *Emilio T. Palomer v. Robert A. McDonald, Secretary of Veterans Affairs*, No. 14-1017 (Vet. App. Mar. 18, 2015), which dismissed his appeal as untimely. *Palomer v. McDonald*, 27 Vet. App. 245, 249 (2015).

II. Statement Of Facts And Course Of Proceedings Below

Mr. Palomer seeks to appeal a July 10, 2013 Board of Veterans Appeals (board) decision denying him entitlement to a one-time payment from the Filipino Veterans Equity Compensation Fund (FVEC). *Palomer*, 27 Vet. App. at 249.

Before the Veterans Court, Mr. Palomer conceded the following facts: (1) Mr. Palomer mailed his request for reconsideration of the board decision on November 20, 2013, 133 days after the decision was issued; (2) the board denied his motion for reconsideration on December 26, 2013; (3) Mr. Palomer mailed his notice of appeal to the Veterans Court on March 18, 2014, 82 days after the board denied his motion, and (4) Mr. Palomer's notice of appeal was received by the Veterans Court on April 7, 2014, 102 days after the board denied his motion. *Id.*

Mr. Palomer argued, in relevant part, that the time for filing his notice of appeal before the Veterans Court should be equitably tolled because (1) mail takes longer to reach the Philippines than it does to reach locations within the continental

United States, (2) his deteriorating eyesight renders him unable to read and write and he was either misinformed by or, due to his deteriorating hearing, misunderstood the third party who read the material to him, and (3) the Notice of Appellate Rights was confusing. *Id.*

The Veterans Court rejected Mr. Palomer's arguments. *Id.* at 256. As an initial matter, the court noted that Mr. Palomer's tolling argument implicated the principle of *Rosler v. Derwinski*, 1 Vet. App 241, 249 (1991), under which a motion for reconsideration by the board, if filed within the 120-day period for appealing to the Veterans Court, abates that appeal period until the board has decided the motion for reconsideration. *Id.* at 250-51. Citing *Jaquay v. Principi*, 304 F.3d 1276, 1286-87 (Fed. Cir. 2002), the Veterans Court held that "the finality of a Board decision may be abated even when a request for reconsideration is filed beyond the 120-day appeal period, provided the circumstances surrounding such a filing warrant equitable tolling." *Id.* However, in examining the facts surrounding Mr. Palomer's request for equitable tolling, the Veterans Court concluded that equitable tolling was not warranted in this case. *Id.* at 252.

First, the court "[a]cknowledg[ed] . . . that it takes longer for mail to travel between the United States and the Philippines than it does for mail to travel within the United States," but found that Mr. Palomer had not shown that such delays constituted the kind of extraordinary circumstance that could warrant equitable

tolling. *Id.* Second, with respect to Mr. Palomer's claims based on physical disability, the court found that, "other than vague assertions of physical infirmity, Mr. Palomer offers no evidence demonstrating that his physical condition rendered him *incapable* of handling his affairs." *Id.* at 253. Third, the court found that "Mr. Palomer fails to demonstrate that the Notice of Appellate Rights is inadequate or confusing" so as to warrant equitable tolling. *Id.* at 254. Based on these findings, the Veterans Court determined that the appeal period could not be tolled, and that Mr. Palomer's appeal was therefore untimely. *Id.* Accordingly, the Veterans Court dismissed the appeal.

This appeal followed.

SUMMARY OF THE ARGUMENT

Mr. Palomer does not challenge the basic framework that the Veterans Court used to analyze his request for equitable tolling. Indeed, he concedes that, to benefit from tolling, he must establish three separate elements—namely, extraordinary circumstance, due diligence, and causation. *See* Palomer Br. at 16; *see also Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014). However, he claims that, as a matter of law, the court should toll the time to appeal a board decision where, as here, the veteran resides abroad and notice of the board's decision has to be mailed internationally. Although Mr. Palomer styles this claim as a challenge to the standard used by the Veterans Court to analyze equitable

tolling, it is, in reality, a request that the Court compute the time for appeals differently when a veteran resides in a foreign country. The court should deny Mr. Palomer's request.

As this Court has previously explained, equitable tolling cannot be used to create relief that is inconsistent with Congressional intent. Here, the structure of the statute and its legislative history demonstrate that Congress was aware that varying patterns of mail delivery could affect how long a veteran has to file his notice of appeal—but declined to adopt the type of curative measure that Mr. Palomer seeks. Creating such a measure judicially would therefore be improper.

As an alternative to his principal claim, Mr. Palomer also insists that the Veterans Court did not properly consider the evidence of the mailing delay and his physical condition in denying him equitable tolling. However, his arguments on these grounds reduce to a challenge to how the Veterans Court weighed the evidence in the record. This Court lacks jurisdiction to review such challenges. It should therefore affirm the Veterans Court's opinion.

ARGUMENT

I. Standard And Scope Of Review

Pursuant to 38 U.S.C. § 7292(a), this Court possesses jurisdiction to review a decision of the Veterans Court "with respect to the validity of a decision of the [Veterans 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 [Veterans Court] in making the decision." *Id.* The Court reviews such legal questions under a *de novo* standard. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991); *see also Smith v. Brown*, 35 F.3d 1516, 1517 (Fed. Cir. 1994). However, absent a constitutional question, this Court does not possess jurisdiction "to review any challenge to a factual determination or the application of a law or a regulation to the facts of a particular case." *Guillory v. Shinseki*, 603 F.3d 981, 986 (Fed. Cir. 2010) (citing 38 U.S.C. § 7292(d)(2)).

Applying this standard in the context of equitable tolling cases, this Court has explained that, "when the material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome of the equitable tolling claim, this court has treated the question of the availability of equitable tolling as a matter of law that we are authorized by statute to address." *Bailey v. Principi*, 351 F.3d 1381, 1384 (Fed. Cir. 2003). However, the Court does not possess jurisdiction to determine whether the Veterans Court properly applied an established legal standard to the evidence in the record. *See Toomer v. McDonald,* 783 F.3d 1229, 1239–40 (Fed. Cir. 2015).

II. The Tolling Rule Mr. Palomer Advocates Should Be Rejected Because It Contravenes Congressional Intent

Mr. Palomer urges this Court to create a new rule for veterans that reside in foreign countries—he asks that, as a matter of law, the Court toll the 120-day deadline to appeal a board decision when notice of that decision is sent internationally.[1] Mr. Palomer insists that such a rule is necessary because international mail delivery takes longer than its domestic counterpart: absent tolling, he explains, a veteran residing abroad has less time to file an appeal than what Congress intended to provide. *See* Palomer Br. at 15–18, 20–21.

Mr. Palomer may be correct that the vagaries of international mail can detract from a veteran's time to appeal a board decision. However, starting the appeal period from the time the veteran actually receives notice of the board's decision, as Mr. Palomer wants, would be improper, because it would contravene Congress's stated intent, and therefore improperly expand the scope of Congress's waiver of sovereign immunity.

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[1] If the tolling Mr. Palomer requests were applied here, Mr. Palomer's notice of appeal could be considered timely either because: (1) the 120-day day appeal deadline would be extended by tolling; or (2) his motion for reconsideration would be considered filed within the 120-day appeal window, and the clock for the eventual appeal of the board decision to the Veteran Court would be stopped during the time the board considered the motion. *See, e.g.*, *Linville v. West*, 165 F.3d 1382, 1386 (Fed. Cir. 1999) (citing *Rosler*, 1 Vet.App. at 249). Because the actual mechanics of tolling in this case are irrelevant to the substance of Mr. Palomer's argument—and irrelevant to our response—we do not address them further. Instead, for the sake of simplicity, we discuss tolling in the context of the 120-day deadline to file a notice of appeal.

A. Congress Intended The Time It Takes Mail To Reach A Veteran To Be Included In The 120-Day Appeal Period

The time and procedure for obtaining review of a board decision in the Veterans Court is prescribed in 38 U.S.C. § 7266. This provision reflects the conditions that Congress attached to its waiver of sovereign immunity. *Cf. Mapu v. Nicholson*, 397 F.3d 1375, 1381 (Fed. Cir. 2005).

Under the terms of section 7266, a veteran wishing to obtain review of a board decision must "deliver[] or mail[]" a notice of appeal to "the [Veterans] Court within 120 days after the date on which notice of the [board] decision is mailed" to the veteran. 38 U.S.C. § 7266(a)–(b).[2] The section then defines how that requirement can be satisfied. It states that a "notice of appeal shall be deemed to be received by the [Veterans] Court . . . (1) [o]n the date of receipt by the Court if the notice is delivered [or] (2) [o]n the date of the . . . postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed." *Id.* § 7266(c) (emphasis added).

In other words, section 7266 explicitly *omits* the time it takes mail to travel *from* the veteran *to* the Veterans Court from the 120-day appeal period: a notice of appeal is deemed timely so long as it is postmarked before the period to appeal

[2] By statute and regulation, the "VA is required to mail a date-stamped, signed copy of the VA's decision to the [claimant] . . . . [and] VA is entitled to the presumption that it mails a decision on the date it issues." *Toomer v. Shinseki*, 524 Fed. App'x. 666, 668 (Fed. Cir. 2013) (citing 38 U.S.C. § 7104(e); 38 C.F.R. § 20.1110(a)) (unpublished decision).

expires. *Id.* § 7266(c). By contrast, the section explicitly *includes* the time it takes the board decision to *reach* the veteran in the 120 days by providing that the clock for appeal starts to run when the board "mail[s]" its decision, not when the veteran receives it. *Id.* § 7266(a)–(b).

It is an established tenet of statutory construction that Congress acts purposely when it establishes disparate treatment of parallel statutory provisions. As the Supreme Court has explained, "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008) (internal quotation marks omitted); *see also Russello v. United States*, 464 U.S. 16, 23, (1983). Here, the fact that Congress explicitly *excluded* mailing time from the appeal period when the mail is traveling *from* the veteran to the Veterans Court—yet *did not* provide a similar exclusion when mail travels *to* the veteran from the board—suggests that it was Congress's affirmative intention to include the latter in the 120-day appeal period.

The legislative history of section 7266 confirms this interpretation. When Congress originally defined the 120-day period to appeal a board decision, it did not provide any exceptions for mailing times: the appeal period started to run when the board sent the veteran its decision, and was only satisfied when the

Veterans Court received the veteran's notice of appeal. *See* Veterans Judicial Review Act, Pub. L. 100-687, § 30, 102 Stat. 4105, 4116-17 (1988). In 1994, when Congress revisited this provision, it acknowledged that, under the existing rule, a veteran's time to appeal a board decision could be affected by his or her geographic location. As Congress explained,

> [i]t is likely that a claimant in a state distant from Washington, D.C.–such as Arizona, Hawaii, or Alaska–not only would receive notice of a [board] decision after a claimant in a state near Washington, D.C.–such as Maryland, West Virginia, or North Carolina–whose notice was sent the same day, but also, under the [Veterans] Court's current rule [that NOAs were considered filed *only* on the date of receipt], would need to mail the [NOA] to the Court earlier in order to increase the likelihood of a timely filing of the [NOA].

S. Rep. 103-232, *6. In other words, Congress recognized that the 120-day period to appeal was effectively being shortened by (1) the time it takes for the board decision to reach the veteran *and* (2) the time the veteran's notice of appeal takes to reach the Veterans Court. Yet Congress elected to amend the statute to eliminate only the *second* period—that is, it permitted a notice of appeal to be deemed filed on the date the claimant mailed the notice, but retained the rule that starts the 120-day appeal clock on the date the board's decision is sent. *Compare* Veterans Judicial Review Act, Pub. L. 100-687, § 30, 102 Stat. 4105, 4116-17 (1988) *with* Veterans Benefits Improvements Act of 1994, Pub. L. No. 103-446, §

511(a), 108 Stat. 4645, 4670 (1994); *see also Mapu*, 397 F.3d at 1381 (discussing the legislative history of section 7266). Doing so sent a clear message.

As the Supreme Court has explained, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 174-175 (2009). Indeed, "negative implications raised by disparate provisions are strongest" when the provisions were "considered simultaneously when the language raising the implication was inserted." *Id.* (internal quotes and citations omitted). Here, Congress clearly and explicitly demonstrated awareness of the potential options, and chose a very specific remedy. Congress's decision not to change when the appeal clock starts—while changing when it stops—demonstrates that Congress acted with a deliberate purpose. Congress's action indicates that it was Congress's intent that the time it takes a board decision to reach a veteran *not* be excluded from the 120-day appeal period. Not only is Congress's intent clear, but the rule it enacted is sensible, because it brings consistency to the timing requirements: under Congress' adopted regime, deadlines start and stop on the date of mailing, not the date of receipt. Had Congress wanted the regime to be different, it knew how to accomplish that.

Mr. Palomer suggests that this statutory structure and legislative history is not dispositive of Congressional intent because Congress only discussed the operation of *domestic* mail; international mail, he claims, is sufficiently different to

warrant its own rule. *See* Palomer Br. at 17–18. In a related argument, he insists that the timing rules should be more liberally administered under the FVEC, pursuant to which he seeks compensation, because the FVEC is a special compensatory scheme that restores equity to a select group of veterans. *See Id.* at 23–26. But the terms of the Act that created the FVEC defeat both lines of argument.

In creating the FVEC, Congress directed the VA to "administer [its] provisions . . . in a manner consistent with applicable provisions of title 38, United States Code, and other provisions of law, and . . . apply the definitions in section 101 of such title in the administration of such provisions, *except to the extent otherwise provided in this section*." American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, § 102(j), 123 Stat. 115, 200 (2009) (emphasis added). In other words, Congress specifically stated that existing statutory rules should be followed unless specifically displaced by the FVEC Act's terms. Yet the text of the FVEC Act contains no reference to sections 7104(e) or 7266(a) specifically, or to the timing for appeals generally.

Put simply—although Congress was presumably aware that FVEC claimants are likely to reside abroad, and therefore potentially subject to a longer mail-delivery period—it declined to create a special timing rule to account for that possibility. In doing so, it demonstrated its intent that FVEC claimants not receive

any special timing rules, and instead required that the 120-day time to appeal a board decision *include* the time it takes the decision to reach the claimant. The various equity concerns associated with the FVEC that Mr. Palomer highlights are therefore irrelevant: although Mr. Palomer believes Congress should have acted in a different manner to better account for concerns, the fact is that Congress did not do so, and equity concerns cannot displace Congress's clearly demonstrated intent.

B. Equitable Tolling Cannot Be Used To Overcome Congressional Intent

Given Congress's demonstrated intent to include mail delivery time within the 120-day appeal period, it would be improper for the Court to create the kind of categorical tolling rule that Mr. Palomer requests.

The Supreme Court has expressly cautioned against using equitable tolling to disregard "[p]rocedural requirements established by Congress for gaining access to the federal courts . . . out of a vague sympathy for particular litigants." *Baldwin Co. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (internal quotes and citations omitted). As the Court noted, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.*

This Court's equitable tolling cases confirm that equitable tolling cannot be used to contravene the clearly expressed intent of Congress. For example, in *Mapu v. Nicholson*, the Court considered whether equitable tolling could be used to find

that an appeal was timely when sent on the last day of the appeal period using commercial FedEx delivery. 397 F.3d at 1377. The appellant argued that equitable tolling was an appropriate way to extend the benefit of section 7266's postmark rule—he claimed that although he did not follow the statute's literal provisions by not using the Postal Service, his notice of appeal should still be deemed filed on the date it was deposited in the mail. *Id.* at 1381.

In examining this claim, the Court looked to the legislative history of section 7266. As the Court noted, when Congress amended the provision, it made "clear that [it] wanted the postmark rule to apply only to a notice of appeal that was mailed using the Postal Service." *Id.* The Court explained that this interpretation was supported both by the structure of the statute and the legislative history. *Id.* (citing 140 Cong. Rec. 28,849 (1994)). Indeed, as the Court detailed, both sources suggested that "notices of appeal delivered by [] means [other than the Postal Service] were specifically excluded from the application of the new statute." *Id.* Under these circumstances, the Court held, it would be improper to "use equitable tolling to broaden the waiver of sovereign immunity in exactly the way that Congress refused to-by in effect extending the postmark rule to a package sent using FedEx." *Id*. As the Court stated, "Congress's explicit decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump any extension of equitable tolling to this case." *Id.*

Like the appellant in *Mapu*, Mr. Palomer asks the Court to use equitable tolling to broaden the mailing provisions of section 7266. Specifically, he requests that the Court toll the 120-day appeal period for the amount of time it probably took the notice of the board's decision to reach him in the Philippines. *See* Palomer Br. at 22–23. Under this proposed rule, the clock for the 120 day appeal would start not when the decision is mailed, as section 7266(a) requires, but rather when Mr. Palomer *received* the decision. Like in *Mapu*, this request runs counter to both the letter of the statute and the legislative history of section 7266(a). Granting this request would improperly expand the scope of sovereign immunity contrary to Congressional intent. Accordingly, it should be rejected.

Moreover, like the rule the appellant advocated in *Mapu*, Mr. Palomer's desired rule improperly seeks to use equitable tolling to solve a common and well-known problem: the normal delay associated with international mail. The Supreme Court has cautioned that using equitable tolling in this way is improper. As it has explained, "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007). In different circumstances, the United States Court of Appeals for the Fourth Circuit recognized that "the ordinary time that it takes to deliver the mail can[not] be regarded as a circumstance[ ] external to [a] party's own conduct within the contemplation of the equitable tolling doctrine."

Spencer v. Sutton, 239 F.3d 626, 630 (4th Cir. 2001) (citing *Sandvik v. United States*, 177 F.3d 1269 (11th Cir.1999); internal quotes omitted). As the Court explained, "[o]rdinary delivery time is not a rarity, nor is the charge of knowledge of such to the [appellant] unconscionable." *Id.* (internal quotes omitted). To find otherwise, the Court noted, "effectively would be nothing short of to extend judicially the legislatively-prescribed [] statute of limitations"—something that should not be done. *Id.*

In sum, although Mr. Palomer is correct that "[e]quitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances," Palomer Br. at 23, the doctrine cannot be used to craft a categorical rule that overcomes the clearly stated intent of Congress. In creating both section 7266 and the FVEC, Congress determined that that the time it takes mail to reach a veteran be included in 120-day period to appeal a board decision. Regardless of the equity concerns that Mr. Palomer highlights, Congress's deliberate choice precludes this Court from creating the rule that Mr. Palomer seeks.

III. The Court Does Not Possess Jurisdiction To Review The Veterans Court's Determination That The Requirements For Equitable Tolling Were Not Met In This Particular Case

As an alternative to his principal claim, Mr. Palomer also argues that the Veterans Court's denial of equitable tolling was improper because it did not give due account to the facts of his specific case. *See* Palomer Br. at 18–23, 26–29. This alternative challenge, however, is not one this Court possesses jurisdiction to address.

The confines of this Court's jurisdiction to review determinations of the Veterans Court are well established. Pursuant to 38 U.S.C. § 7292, this Court "has jurisdiction to review the legal determinations of the Veterans Court." *Singleton v. Shinseki*, 659 F.3d 1332, 1334 (Fed. Cir. 2011). The Court may *not*, however, "review the Veterans Court's factual findings or its application of law to facts absent a constitutional issue." *Id.*; 38 U.S.C. § 7292. In practice, this standard means that when the Veterans Court does not articulate any interpretation of a legal standard—and, instead, merely applies an established legal standard to the facts of a particular case—its decision is not subject to review. *See, e.g.*, *Ferguson v. Principi*, 273 F.3d 1072, 1075 (Fed. Cir. 2001) (holding that the court did not interpret the statute where it merely applied the statute's plain language).

Here, the Veterans Court did not interpret or opine on the legal standard for equitable tolling. *See Palomer*, 27 Vet. App. at 251. Rather, the court evaluated

the evidence that Mr. Palomer presented to determine whether it satisfied the three established criteria for applying equitable tolling: extraordinary circumstance, due diligence, and causation. *See id.*; *see also Checo*, 748 F.3d at 1378 (describing these factors). Noting that "it is the appellant's burden to demonstrate entitlement to equitable tolling and to produce any evidence supporting his claim for equitable tolling," the Veterans Court considered whether Mr. Palomer had, in the first instance, established that extraordinary circumstances prevented him from filing his appeal. *Palomer*, 27 Vet. App. at 251–54. Finding that Mr. Palomer had not made this threshold showing, the Veterans Court determined that equitable tolling was not warranted. *See id.*

First, the Veterans Court explained, the delay Mr. Palomer experienced in receiving the board decision could not amount to extraordinary circumstances. As the Court noted, Mr. Palomer had not actually provided evidence that his receipt of the board decision *was* delayed; rather, he only provided evidence that other correspondence arrived with a two-week delay. *See id.* Nor did Mr. Palomer provide evidence that the amount of time he actually had after receipt of the decision was shorter than normal or insufficient. Indeed, the Court observed, Mr. Palomer was able to submit his other filings in a timely manner, and there was no evidence showing why he could not do that in this case. *See id.* Second, the Veterans Court determined that Mr. Palomer's weak physical condition did not rise

to the level of extraordinary circumstance because the facts indicated that it was not so severe that it "rendered him *incapable* of handling his affairs"—the established standard for when equitable tolling is appropriate. *Id.* at 254 (citing *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004)) (emphasis in original). Both of these determinations consist of nothing more than the application of law to the facts of the case and a weighing of competing evidence in the record—something that is beyond this Court's limited grant of jurisdiction to review. *See Guillory*, 603 F.3d at 986 (citing 38 U.S.C. § 7292(d)(2)); *see also Dixon v. Shinseki*, 741 F.3d 1367, 1377–78 (Fed. Cir. 2014) ("This court is precluded from reviewing factual determinations bearing on a veteran's equitable tolling claim.").

Mr. Palomer claims that the Veterans Court's factual analysis implicates a legal question because the Veterans Court, in effect, imposed an improperly high standard for diligence: in his view, by expecting him to compensate for the mailing time between the United States and the Philippines, the Veterans Court required him to be "*exceptionally* diligent," something that is not required by law. *See* Palomer Br. at 20–21 (emphasis in original). But this argument misreads the Veterans Court's decision. The Veterans Court did not determine that Mr. Palomer had not been diligent—in fact, it did not even reach that issue. *See Palomer*, 27 Vet. App. at 251–52. Rather, it determined that Mr. Palomer had not demonstrated that his foreign residence constituted *extraordinary circumstances*. *See id.*

Contrary to Mr. Palomer's argument, this finding had nothing to do with diligence; rather, it was a separate finding that properly applied this Court's guidance that extraordinary circumstances must be shown any time equitable tolling is to be applied. *See* Palomer Br. at 19–20; *Toomer*, 783 F.3d at 1237 (explaining that "'to benefit from equitable tolling' . . . due diligence must be shown '[i]n addition to an extraordinary circumstance.'" (quoting *Checo*, 748 F.3d at 1378)). In other words, the Veterans Court's decision does not implicate the legal question that Mr. Palomer claims it does.[3]

Mr. Palomer also claims that the Veterans Court did not properly consider the evidence related to the mailing delay. *See* Palomer Br. at 21–23. But this argument also does not implicate a legal question. As the Court explained, there were simply no facts in the record showing why the circumstances of Mr. Palomer's foreign residence (and purported mailing delay) during the appeal period were different than his circumstances during any other period. *See id.* Though Mr. Palomer contends that the Veterans Court should not have given as much regard as it did to the fact that his *other* filings were timely, see, e.g.,

[3] Mr. Palomer's suggestion that this case presents a question similar to that examined in *Checo* fails for the same reason. *See generally* Palomer Br. at 18–21. *Checo* dealt with the standard to be used when determining whether an appellant had been *diligent*. *See Checo*, 748 F.3d at 1378–79. Indeed, in *Checo*, the Secretary *conceded* that a proper showing of extraordinary circumstances had been made. *See id*. Here, the Secretary made no such concession, and the Veterans Court's analysis turned on the question of extraordinary circumstance—not on the question of diligence.

Palomer Br. at 21–22, that is ultimately a disagreement with how the Veterans Court weighed the evidence. The manner in which the Veterans Court weighs competing evidence is a factual matter, which this Court lacks jurisdiction to review. *See, e.g.*, *Maxson v. Gober,* 230 F.3d 1330, 1332 (Fed. Cir. 2000) ("The weighing of [medical] evidence is not within our appellate jurisdiction."); *see also Toomer*, 783 F.3d at 1239–40 (rejecting, in the context of an equitable tolling appeal, a request to review the Veterans Court's factual findings surrounding whether or not filings were misleading or confusing).

Mr. Palomer next protests that the Veterans Court did not give due regard to his physical condition in its equitable tolling analysis. In particular, he claims that he provided evidence supporting his claim that he was "incapable of handling his own affairs" and argues that the Veterans Court was wrong not to accept that representation. However, this argument is, again, a request that this Court re-consider the evidence in the record to determine whether it supports the Veterans Court's conclusion. This is something this Court may not do. *See Leonard v. Gober*, 223 F.3d 1374, 1376 (Fed. Cir. 2000) (explaining that this Court lacks jurisdiction to "judge the accuracy of the facts found by the [Veterans C]ourt").

In any event, even if this Court finds jurisdiction to review the Veterans Court's analysis of the record facts on both of these issues, it should affirm the Veterans Court's decision. As an initial matter, there is no evidence to show the

extent of the mailing delay that Mr. Palomer actually experienced in receiving the board's decision. *Palomer*, 27 Vet. App. at 252. Instead, there is merely evidence about *other* mailing delays from which Mr. Palomer asks this Court to discern a "pattern of mailing" and to assume that his receipt of the board's decision was consistent with that pattern. *See id.*; *see also* Palomer Br. at 21–23. But evidence of those other delays demonstrates that any delay associated with Mr. Palomer's receipt of the board's decision would be in no way extraordinary; rather, a delay would have been normal and expected. Indeed, the evidence suggests that general mailing delay is something that Mr. Palomer was aware of and anticipated, and had been able to successfully overcome in analogous instances. It is therefore evident that the purported general mailing delay does not constitute an extraordinary circumstance that prevented Mr. Palomer from timely filing his notice of appeal. *Cf. Spencer*, 239 F.3d at 630 (noting that "the ordinary time that it takes to deliver the mail can[not] be regarded as a circumstance[ ] external to [a] party's own conduct within the contemplation of the equitable tolling doctrine").

Similarly, the evidence in the record does not show that Mr. Palomer's physical condition was an extraordinary circumstance that rendered him *incapable* of handling his affairs. Rather, the evidence provided by Mr. Palomer shows that he is weak and requires assistance. However, there was also evidence showing that Mr. Palomer *had* successfully managed his affairs in other instances. It was proper

for the Veterans Court to conclude that this latter set of facts showed that Mr. Palomer *was* capable of conducting his business. Indeed, doing so was consistent with this Court's conclusion that "a medical diagnosis alone or vague assertions of me[dic]al problems will not suffice" to show that a claimant was incapable of handling his affairs. *Barrett*, 363 F.3d at 1321.

In the end, Mr. Palomer has failed to identify any legal error in the Veterans Court's decision. Accordingly, that decision should be sustained.

CONCLUSION

For these reasons, this Court should affirm the Veterans Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)(B)

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, defendant-appellee's counsel certifies that this brief complies with the Court's type-volume limitation rules. According to the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 5,764 words.

s/ Alexander V. Sverdlov

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 5th day of October, 2015, a copy of the foregoing "BRIEF FOR RESPONDENT-APPELLEE" was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

s/ Alexander V. Sverdlov