

## UNITED STATES COURT OF VETERANS APPEALS

No. 95-402

MARY ANN FAULK,

APPELLANT,

v.

VA FILE NO. 16 350 788

JESSE BROWN,

SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before NEBEKER, *Chief Judge*, and IVERS and STEINBERG, *Judges*.

### ORDER

The appellant filed with this Court on April 24, 1995, a Notice of Appeal (NOA) from a Board of Veterans' Appeals (Board or BVA) decision. The BVA decision at issue contains two cover pages certifying that the document is a true and correct copy of the Board's decision, one dated February 28, 1994, and the second dated March 3, 1994. The NOA was filed more than 120 days after either of the two dates stamped on the BVA decision. The Board received the appellant's motion for BVA reconsideration on November 19, 1994, and denied it on February 7, 1995. The Secretary filed a motion to dismiss for lack of jurisdiction on the grounds that the appellant's NOA is untimely as to the February or March 1994 decision, and that the Court does not have jurisdiction over the Chairman's denial of the motion for reconsideration.

On July 26, 1995, the Secretary was directed by Court order to file a declaration addressing whether the BVA had mailed a copy of the February 1994 or March 1994 decision to the appellant's representative pursuant to 38 U.S.C. § 7104(e), and, if not, to provide evidence of actual receipt of the BVA decision. On September 26, 1995, the Secretary responded to the Court's order stating that the date of the actual BVA decision, according to the Administrative Service Division of the Board, was March 3, 1994, and that the Board did not mail a copy of the March 1994 decision to the appellant's representative, the Department of Veterans Services of the State of Georgia [hereinafter SDVS], in accordance with 38 U.S.C. § 7104(e). The Board forwarded a copy of the BVA decision by "flat" mail to the SDVS at the VA regional office (RO) in Atlanta, Georgia. *See Trammell v. Brown*, 6 Vet.App. 181, 182 (1994) (describing "flat mail" process).

The Secretary states that the BVA has no way of determining the exact date on which the Georgia SDVS received its copy of the BVA decision. The Secretary states, however, that a copy of the BVA decision was stamped received by the Savannah, Georgia, SDVS field office on May 22, 1995. The record does not indicate when the appellant received her copy of the BVA decision, but she apparently received it before filing her November 19, 1994, motion for BVA reconsideration.

The Court finds that the evidence is sufficient to rebut the presumption of regularity as to the mailing of the BVA decision to the appellant's representative, and holds that the Secretary has failed to comply with the provisions of 38 U.S.C. § 7104(e) requiring that the BVA mail a copy of its decision to the appellant and the appellant's representative (if any) at the last known address of the appellant and at the last known address of such representative. *See Davis v. Brown*, 7 Vet.App. 298, 303 (1994) (phrase "The [BVA] shall promptly mail" in section 7104(e) means that BVA decision must be correctly addressed, stamped with proper postage, and delivered by BVA into custody of U.S. Postal Service); *Trammell*, 6 Vet.App. at 183 ("[t]he best way to ensure that the representative receives notice is to comply with the statute and send the notice directly to the representative"); *Fluker v. Brown*, 5 Vet.App. 296, 298 (1993); *Piano v. Brown*, 5 Vet.App. 25, 27 (1993); *Ashley v. Brown*, 2 Vet.App. 307, 309 (1992) (citing *United States v. Roses, Inc.*, 706 F.2d 1563, 1567 (Fed.Cir. 1983) (where mailing appears to have been irregular, burden shifts to proponent to show the contrary)). Therefore, the Court holds that the appellant's 120-day filing period did not begin to run before the Court received the NOA on April 24, 1995, and the NOA was thus timely. *Davis, Trammell, and Ashley*, all *supra*.

On consideration of the foregoing, it is

ORDERED that the Secretary's motion to dismiss is denied. It is further

ORDERED that the Secretary, within 30 days after the date of this order, file with the Clerk and serve on the appellant the designation of the record on appeal.

DATED: December 22, 1995

PER CURIAM.