

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-5076

CHARLES VAN CLEAVE,

Plaintiff-Appellee,

v.

UNITED STATES

Defendant-Appellant.

ON MOTION

Before DYK, Circuit Judge.

ORDER

Charles Van Cleave moves to dismiss the United States' appeal from the United States Court of Federal Claims' judgment in Van Cleaves v. US, 03-CV-1765, for lack of jurisdiction. The United States opposes.

On November 21, 2006, the Court of Federal Claims entered its Original Judgment in favor of Van Cleave in the amount of \$0.00. On December 4, 2006, the United States moved without opposition for the Court of Federal Claims to correct its Original Judgment in order to specify that (1) zero balance was due to Cleaves based on offset of benefits, and (2) the Navy was directed to correct Cleaves' records to reflect a 30% disability-rating award, as previously decided on remand by the Navy. On December 14, 2006, the Court of Federal Claims issued an Amended Judgment

reflecting the above-mentioned corrections. On February 12, 2007, the United States filed its appeal.

Van Cleave contends that we lack jurisdiction to hear the United States' appeal because it was filed more than sixty days after the entry of the Original Judgment. The United States responds that the motion to correct the Original Judgment was timely, and therefore its December 4 motion tolled the United States' time to file its appeal under Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure (FRAP).

Rule 4(a)(4)(A)(vi) of FRAP provides that the time to file an appeal is tolled when a party files for relief under Rule 60 of the Federal Rules of Civil Procedure if such motion is filed no later than 10 days after entry of judgment. However, FRAP 4(a)(4)(A) does not refer specifically to Rule 60 of the Rules of the Court of Federal Claims. We have nonetheless assumed that a motion under Rule 60 of the Court of Federal Claims does toll the appeal period. Kraft, Inc. v. United States, 85 F.3d 602, 604-09 (Fed. Cir. 1996).

Under the circumstances, we believe this issue is best addressed by the merits panel.

Accordingly,

IT IS ORDERED THAT:

(1) Van Cleave's motion to dismiss is denied without prejudice to the parties addressing the jurisdictional issue in the briefs.

(2) The United States' brief is due within 45 days of the date of filing of this order.

April 19, 2007

Date

/s/ Timothy B. Dyk

Timothy B. Dyk
Circuit Judge

cc: Charles Van Cleaves
Domenique Kirchner, Esq.