

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

THOMAS E. NEWBERRY,
Claimant-Appellant,

v.

**ERIC K. SHINSEKI, SECRETARY OF VETERANS
AFFAIRS,**
Respondent-Appellee.

2011-7042

Appeal from the United States Court of Appeals for
Veterans Claims in case no. 10-2010, Chief Judge Bruce
E. Kasold.

ON MOTION

Before GAJARSA, MAYER, and PROST, *Circuit Judges.*
GAJARSA, *Circuit Judge.*

O R D E R

Thomas E. Newberry moves without opposition for re-
consideration of this court's order dismissing his appeal
for failure to file a brief, to vacate the judgment of the

United States Court of Appeals for Veterans Claims, and to remand for further proceedings in light of the United States Supreme Court's decision in *Henderson ex rel. Henderson v. Shinseki*, 131 S.Ct. 1197 (U.S.,2011).

The appellant filed a notice of appeal with the Court of Veterans Claims more than 120 days after the Board of Veterans' Appeals mailed its decision in his case. The Court of Appeals for Veterans Claims dismissed the appellant's appeal as untimely, concluding that there is no equitable tolling exception to the 120-day judicial appeal period established by 38 U.S.C. § 7266(a) for appealing Board of Veterans' Appeals decisions.

In *Henderson*, the Supreme Court reversed this court's decision in *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), concluding that the 120-day deadline for filing an appeal with the Court of Appeals for Veterans Claims does not have jurisdictional consequences. We reinstate Newberry's appeal, vacate the Court of Appeals for Veterans Claims' judgment, and remand for further proceedings.

Accordingly,

IT IS ORDERED THAT:

(1) The motion for reconsideration is granted. The mandate is recalled, this court's dismissal order is vacated, and the case is reinstated.

(2) The motion to remand is granted. The judgment is vacated and the case is remanded for further proceedings.

(3) All sides shall bear their own costs.

FOR THE COURT

MAY 27 2011

Date

/s/ Jan Horbaly

Jan Horbaly

Clerk

cc: Lawrence T. Kass, Esq.
Lauren S. Moore, Esq.

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Issued As A Mandate: MAY 27 2011

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

MAY 27 2011

JAN HORBALY
CLERK