

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Misc. No. 18-19

IN RE: RULES OF PRACTICE AND PROCEDURE

O R D E R

Pursuant to the authority of 38 U.S.C. § 7264(a) and consistent with 28 U.S.C. § 2071(b), the Court has determined that Rule 41 (MANDATE), Rule 42 (VOLUNTARY TERMINATION OR DISMISSAL), and Rule 36 (ENTRY OF JUDGMENT) of its Rules of Practice and Procedure (Rules) should be revised. Specifically, the decision of the U.S. Court of Appeals for the Federal Circuit in *Bly v. Shulkin*, 883 F.3d 1374 (Fed. Cir. 2018), created the need for the Court to revise its Rules as they relate to issuance of mandate. The revisions were developed in collaboration with the Court's Rules Advisory Committee.

Accordingly, it is

ORDERED that the attached proposed revisions to the Court's Rules are hereby published for public comment for a period of 30 days. Comments must be submitted to the Clerk of the Court by January 17, 2020, at comments@uscourts.cavc.gov or 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004.

DATED: December 18, 2019

FOR THE COURT:

/s/Gregory O. Block
GREGORY O. BLOCK
Clerk of the Court

Attachments:

1. Proposed Revised Rules
2. Proposed Revised Rules with Changes Shown

Rule 41: Mandate

(a) Mandate. Mandate is when the Court's judgment becomes final and is effective as a matter of law pursuant to 38 U.S.C. § 7291.

(b) Date of Mandate: Dispositive Adjudications. Mandate generally is 60 days after judgment unless—

(1) a timely notice of appeal to the U.S. Court of Appeals for the Federal Circuit is filed with the Clerk, see 38 U.S.C. § 7291(a) et seq., or

(2) the Court directs otherwise.

(c) Date of Mandate: Uncontested Dispositions. Mandate generally is 60 days after the date of a Court order (i) granting the parties' joint motion to dismiss, terminate, or remand a case, or (ii) granting or dismissing an uncontested application for attorney fees and expenses unless—

(1) a timely notice of appeal to the U.S. Court of Appeals for the Federal Circuit is filed with the Clerk, see 38 U.S.C. § 7291(a) et seq., or

(2) the parties agree in writing to waive further Court review as well as any appeal to the U.S. Court of Appeals for the Federal Circuit, and the parties request that mandate be entered prior to the expiration of the 60 days, or

(3) the Court directs otherwise.

Practitioner's Note: Because entry of mandate on the docket is a ministerial act and may not occur on the date of mandate, practitioners are cautioned to use diligence when calculating time periods so as to ensure timely filings. See Rule 36. Requests to enter mandate prior to the expiration of 60 days pursuant to Rule 41(c)(2) and Rule 42 should be incorporated in the parties' joint motion or set forth in a separate motion.

Rule 42: Voluntary Termination or Dismissal

If the parties file with the Clerk a motion to terminate a matter (other than an application for attorney fees and expenses) based upon a settlement agreement to be effective upon the Court's termination of the case, the Clerk may enter the case terminated. On motion of the appellant or petitioner for dismissal, the Clerk may dismiss an appeal, petition, or application for attorney fees and expenses on terms requested by the appellant or petitioner, agreed upon by the parties, or previously fixed by the Court.

Practitioner's Note: The parties should consider waiving further Court review or appeal to the U.S. Court of Appeals for the Federal Circuit in their joint motion for remand or voluntary dismissal. See Rule 41(c)(2).

Rule 36: Entry of Judgment

(a) Judgment. Judgment begins the 60-day time period for appealing to the U.S. Court of Appeals for the Federal Circuit.

(b) Date of Judgment.

(1) Judgment is effective on

(A) the date prescribed in a Court order or decision, or

(B) the date of a Court order (i) granting the parties' joint motion to dismiss, terminate, or remand a case, or (ii) granting or dismissing an uncontested application for attorney fees and expenses.

(2) Unless the Court orders otherwise, judgment is effective when entered on the docket, which will be after the later of

(A) the date on which the time allowed in Rule 35(d) (Time for Motion) has expired, or

(B) the date on which the Court renders a decision on any motion(s) filed pursuant to Rule 35 (Motions for Reconsideration, Panel Decision, or Full Court Review) when no further motion under Rule 35 is permitted to be filed.

Practitioner's Note: Judgment is relevant to determining the expiration of time in which to file an appeal of a decision of the Court or file an application pursuant to 28 U.S.C. § 2412(d). Because entry of mandate on the docket is a ministerial act and may not occur on the date of mandate, practitioners are cautioned to use diligence when calculating time periods so as to ensure timely filings. See Rule 41.

Rule 41: Mandate

(a) **Mandate.** Mandate is when the Court's judgment becomes final and is effective as a matter of law pursuant to 38 U.S.C. § 7291.

(b) **Date of Mandate: Dispositive Adjudications.** Mandate generally is 60 days after judgment entered—unless—

(1) a timely notice of appeal to the U.S. Court of Appeals for the Federal Circuit is filed with the Clerk, ~~See~~ 38 U.S.C. § 7291(a) et seq., or

(2) ~~mandate was issued as part~~ the Court directs otherwise.

(c) **Date of an Mandate: Uncontested Dispositions.** Mandate generally is 60 days after the date of a Court order ~~on consent~~ (i) ~~dismissing, terminating~~ granting the parties' joint motion to dismiss, terminate, or remanding a case, or (ii) granting or dismissing an uncontested application for attorney fees and expenses ~~(unless—~~

(1) a timely notice of appeal to the U.S. Court of Appeals for the Federal Circuit is filed with the Clerk, see Rule 36(b)(1)(B), 38 U.S.C. § 7291(a) et seq., or

(2) the parties agree in writing to waive further Court review as well as any appeal to the U.S. Court of Appeals for the Federal Circuit, and the parties request that mandate be entered prior to the expiration of the 60 days, or

(3) the Court directs otherwise.

Practitioner's Note: ~~Mandate is relevant to determining the expiration of time in which to file an appeal of a decision of the Court or file an application pursuant to 28 U.S.C. § 2412(d).~~ Because entry of mandate on the docket is a ministerial act and may not occur on the date of mandate, practitioners are cautioned to use diligence when calculating time periods so as to ensure timely filings. See Rule 36. Requests to enter mandate prior to the expiration of 60 days pursuant to Rule 41(c)(2) and Rule 42 should be incorporated in the parties' joint motion or set forth in a separate motion.

Rule 42: Voluntary Termination or Dismissal

If the parties file with the Clerk a motion to terminate a matter (other than an application for attorney fees and expenses) based upon a settlement agreement to be effective upon the Court's termination of the case, the Clerk may enter the case terminated. On motion of the appellant or petitioner for dismissal, the Clerk may dismiss an appeal, petition, or application for attorney fees and expenses on terms requested by the appellant or petitioner, agreed upon by the parties, or previously fixed by the Court.

Practitioner's Note: The parties should consider waiving further Court review or appeal to the U.S. Court of Appeals for the Federal Circuit in their joint motion for remand or voluntary dismissal. See Rule 41(c)(2).

Rule 36: Entry of Judgment

(a) **Judgment.** Judgment begins the 60-day time period for appealing to the U.S. Court of Appeals for the Federal Circuit.

(b) **Date of Judgment.**

(1) Judgment is effective on-

(A) the date prescribed in a Court order or decision, or-

(B) the date of a Court order ~~on consent~~ (i) ~~dismissing, terminating~~ granting the parties' joint motion to dismiss, terminate, or remanding remand a case, or (ii) granting or dismissing an uncontested application for attorney fees and expenses, ~~when the order states that it constitutes the mandate of the Court.~~

(2) Unless the Court orders otherwise, judgment is effective when entered on the docket, which will be after the later of

(A) the date on which the time allowed in Rule 35(d) (Time for Motion) has expired, or

(B) the date on which the Court renders a decision on any motion(s) filed pursuant to Rule 35 (Motions for Reconsideration, Panel Decision, or Full Court Review) when no further motion under Rule 35 is permitted to be filed.

Practitioner's Note: Judgment is relevant to determining the expiration of time in which to file an appeal of a decision of the Court or file an application pursuant to 28 U.S.C. § 2412(d). Because entry of mandate on the docket is a ministerial act and may not occur on the date of mandate, practitioners are cautioned to use diligence when calculating time periods so as to ensure timely filings. See Rule 41.