

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0044
)	
CHRISTOPHER O. MOORE,)	DECISION
Appellant)	
_____)	September 5, 1997

STATEMENT OF THE CASE

Appellant Christopher O. Moore filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on January 9, 1995. The IAD denied Mr. Moore's application for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because it was not filed by July 15, 1994, the application filing deadline. Mr. Moore has shown that his interest is directly and adversely affected by the IAD.

An oral hearing was held on June 3, 1997, before the Appeals Officer Rebekah R. Ross. The sole issue considered at the hearing was whether the application filing deadline should be tolled for Mr. Moore based on the doctrine of equitable tolling.

ISSUE

Whether NMFS should accept the Appellant's application as timely filed.

BACKGROUND

Division records indicate that request for application [RFA] forms were sent to Christopher Moore on December 20, 1993, and on June 15, 1994, but were not returned. On December 12, 1994, Mr. Moore asked to receive the RFA form, and the Division faxed it to him on December 13, 1994. The Division told Mr. Moore that he needed to submit a notarized statement explaining why he did not file before July, 15 1994. On December 19, 1994, the Division received Mr. Moore's RFA, which was postmarked December 17, 1994. Mr. Moore included a notarized letter explaining why the application was not timely filed, as set forth in more detail below.

This decision discusses certain matters pertaining to criminal and civil lawsuits involving Mr. Moore's mother, Diane Wyatt, and her estate. It should be noted that these matters were not directly before this Office, except as the events described herein impacted Mr. Moore's ability to timely file his IFQ application.

The death of Diane Wyatt

In October 1992, Diane Wyatt was reported missing. After a several-day search, her body was found.

She had been the victim of a brutal murder. Her second husband, Ronald Wyatt, was arrested. In addition to the murder, which appeared to be premeditated, it appeared that Ronald Wyatt had taken considerable property from his wife prior to the murder. Diane Wyatt's estate filed a lawsuit to prevent Ronald Wyatt from taking more assets.

Mr. Moore's entire family was deeply involved in the criminal investigation and trial, as well as the civil lawsuit and matters pertaining to Diane Wyatt's estate. The issues were interwoven, in that the Wyatt home contained evidence of the crime, and therefore could not be released to the family for some time. Christopher Moore and his wife, Laura, moved into his mother's home to take care of it when they were permitted to do so. They had to continue to show the home to Ronald Wyatt's attorneys and the investigators. They later moved to a small cabin and then into the Homestead Apartments, which are owned by Laura Moore's mother.

Ronald Wyatt denied murdering Diane Wyatt. He was convicted of the murder and of tampering with evidence after a six-week trial, and he was sentenced to 104 years imprisonment on March 6, 1994. Newspaper accounts quote the judge in the criminal trial characterizing Mr. Wyatt as "diabolical and manipulative." Under the terms of a settlement agreement with Ronald Wyatt, the estate's civil lawsuit was not pursued pending the criminal trial and exhaustion of Mr. Wyatt's appeals. Mr. Wyatt's last appeal was ultimately denied only days before the June 3, 1997 hearing in this matter.

Lay testimony regarding Mr. Moore

In addition to documentary evidence, Christopher Moore presented the testimony of himself; his wife, Laura Moore; his father, Patrick Moore; Laura Moore's mother, Jean Walker; and a family friend, Teddy Mae Brown. Each of the lay witnesses testified credibly and sincerely. With the exception of some differing recollections about dates, the testimony was generally consistent and credible.

Mr. Moore has been a fisherman since the age of 13, and owns and manages his own construction business. Prior to 1992, Mr. Moore fished part of the year and did construction work in the winter. The Moores sold their boat in 1992, hoping to purchase a larger boat. Prior to the Fall of 1992, Mr. Moore related well to others, was a loving husband, and competently and responsibly managed his affairs.

After the murder of his mother, there was a dramatic change in Mr. Moore. After the initial period of disbelief that his mother had been murdered, Mr. Moore became very depressed and extremely angry. Mr. Moore had little ability to channel his anger in appropriate ways. It appears that his inability to channel the anger resonated through all aspects of Mr. Moore's life and relationships. There was friction with members of his family, and with his wife, Laura.

It was not possible for Mr. Moore to escape from constant reminders about the murder and the trial because the events were constantly in the news media, as evidenced by news clippings in the

record. Although Mr. Moore had been advised not to read the clippings, he was told of the developments by members of his family. Mr. Moore would frequently be approached by acquaintances who would ask him questions, such as whether he wished to kill his mother's murderer.

Mr. Moore was unable to sleep well after the murder of his mother. His sleep disorder caused him to have accidents with his vehicles due to his inability to pay proper attention. On two occasions he neglected to set the brakes when he left his vehicles. One of the vehicles was an 18-wheeler truck. On another occasion he nodded off at a stop sign and ran over a Mercedes Benz in front of him, causing \$9,000 in damage. His insurance was cancelled after that incident.

Mr. Moore failed to manage many of his responsibilities. He continued to perform construction work, but neglected to prepare bills even when reminded. His business fell into debt. He could not concentrate on his business, and one friend recommended to him that he cease working. In fact, after one of the vehicle accidents, Mr. Moore did cease to work for a short time. Witnesses testified that during the period following the murder of his mother, Christopher Moore generally failed to perform his various responsibilities and that he became forgetful.

Laura Moore testified that after the Fall of 1992, her husband was not able to deal with life in general. At times he was so depressed he did not want to get out of bed. He lost weight and his hair began to fall out. He could not sleep at night.

From March through July or August of 1994, Laura Moore was very ill. She had a pregnancy and miscarriage that involved serious complications, requiring her to travel to Seattle for care. She was in extreme pain. Laura Moore's illness, Mr. Moore's inability to help her or cope with her pain, and the loss of their child caused an additional great strain on the couple. The Moores separated several times.

Mr. Moore had other troubles stemming from his depression, anger, and sleep deprivation. He became very angry at the investigation, which apparently resulted in a violent altercation with state troopers. He made a threat against his mother's murderer, which resulted in strain with the attorneys and his being barred from testifying at the trial.

Other troubles of Mr. Moore and his family included attempted suicides by Mr. Moore's sister, and Laura Moore's father having a severe heart attack. Laura Moore went to Seattle when her father was undergoing a heart bypass operation there.

Chris and Laura Moore testified that his difficulties in coping with this series of events were at their worst from 1993 through the first half of 1994. Mr. Moore testified that much of that time period remains a blur, and he can not recall things that occurred. He testified that it was similar to waking up after a long sleep. Mr. Moore testified that he started being able to cope with day to day business in late 1995. Laura Moore testified that the situation improved in 1996-97. Although the situation has

significantly improved for Mr. Moore, he continues to be greatly impacted by the events discussed above.

Testimony of counselor

Cara Thomson has practiced as a counselor at the Gateway Center for Human Services [Gateway] in Ketchikan, Alaska, since 1975. She has been a therapeutic counselor for 21 years, holds a bachelor's degree in psychology, and has participated in continuing education in her field. Ms. Thomson testified at the hearing in this matter that Christopher and Laura Moore initially went to Gateway with respect to their marriage and to address the impact of the murder of Mr. Moore's mother on Mr. Moore.

Ms. Thomson testified that her treatment of the Moores, both as a couple and as individuals, lasted from April 1993 to December 1995. It was very difficult for Mr. Moore to come to Gateway. She noted that the issue of his mother's murder was "extremely devastating." Communications with his wife had broken down.

Ms. Thomson found that Mr. Moore's "functioning level was very low" and that he was "disabled" in many areas of his life. Several factors, in addition to the murder of his mother and the constant publicity surrounding that event, contributed to this. Mr. Moore felt he had responsibilities from his position as the oldest son, yet he was helpless with respect to the investigation and trial. Mr. Moore felt responsible to his wife, but he could not help her in her illness, and his marriage seemed to be falling apart. Mr. Moore's business was also in trouble.

Ms. Thomson testified that Mr. Moore met the criteria for a diagnosis of clinical depression, although the charts reflect a "stage of life" problem relating to the death of his mother. She testified that she made the diagnosis by considering Mr. Moore's symptoms in light of the symptoms set forth in the DSM Diagnostic Criteria manual. Those symptoms included Mr. Moore's sleeplessness, loss of appetite, confusion, and withdrawal. Mr. Moore's depression stemmed from his feeling of anger, helplessness and hopelessness that turned inward. Ms. Thomson had considered whether medication would benefit Mr. Moore, but said that Mr. Moore opposed taking medication.

DISCUSSION

NMFS established July 15, 1994, as the application filing deadline for this IFQ Program.¹ NMFS accepted as timely any RFAs postmarked by July 15, 1994. Mr. Moore's application was postmarked December 17, 1994, more than five months after the deadline.

¹"Applications must be received during the application period beginning January 17,1994, and ending at close of business on July 15,1994.... Applications for initial allocation of QS received after the close of business on July is, 1994, will not be considered." 59 Fed. Reg. 701,702(1994).

This Office recognized that an application may be accepted as timely filed if there is sufficient evidence to support the application of the doctrine of equitable tolling. The first decision to grant relief to an appellant under the equitable tolling doctrine was John T. Coyne.² More recently, the doctrine was applied to grant relief to the appellant in Estate of Marvin C. Kinberg.³ In no other case has an appellant satisfied the rigorous requirements for application of the equitable tolling doctrine.

In Estate of Kinberg, at 2, this Office stated:

The widely recognized doctrine of equitable tolling permits an administrative agency, under limited circumstances, to toll the running of a federal application period while an applicant is suffering from a disability or incompetency that prevents the person from complying with the application deadline requirements. In our decision in John T. Coyne, we concluded that the doctrine of equitable tolling can be applied to the IFQ application period. We stated that to obtain relief under this doctrine, an appellant must show three things: (1) extraordinary circumstances beyond the applicant's control prevented the applicant from filing in a timely manner; (2) the applicant was diligent in submitting an application after learning of the filing deadline [and after the disability to filing was removed], and (3) implementation of the IFQ program would not have been harmed or frustrated if the application had been processed by the Division when it was submitted. [Footnotes omitted].

Each of the three elements of the equitable tolling doctrine is addressed below in turn.

1. Extraordinary circumstances

The first question is whether the Mr. Moore's unique circumstances support the tolling of the application period in this case. This Office stated in Estate of Kinberg, at 3:

Courts have used a variety of formulations to describe the nature of the circumstances that trigger equitable tolling. Usually the courts require extraordinary circumstances beyond the applicant's control that prevented the applicant from filing in a timely manner. These include circumstances such as mental incompetence, chronic alcoholism, minority, war, acts of god, misconduct by an opposing party, and the failure of a government agency to provide statutorily required individual notice. What all of these types of circumstances have in common is that they cause the applicant, for all or part of the application period, to be physically, mentally, emotionally, or legally unable

²Appeal No. 94-0012 (Decision on Reconsideration), May 24, 1996, at 13.

³Appeal No. 95-0035, August 1, 1997, *aff'd*, August 13, 1997.

to apply, or to be ignorant of the right or requirements of application and, thereby, effectively unable to apply.

An applicant need not be totally incapacitated for equitable tolling to apply; rather, a substantial incapacity or impairment can qualify if in fact it was sufficient prevent the applicant from timely filing the application. In addition, the effects of the extraordinary circumstances on an applicant are not to be measured by the standard of a reasonable person, but by whether the particular applicant was in fact so affected.

In determining whether an applicant's mental condition during the relevant time period justifies application of the equitable tolling doctrine, it is appropriate to consider the applicant's actual subjective mental state. Every individual reacts differently to life's events. The critical issue is whether the applicant suffered from a disability that effectively prevented the applicant from meeting the deadline at issue, not whether other persons would be so prevented had they suffered the same events in their lives.

Here, the evidence uniformly established that Mr. Moore's life was enormously impacted by the tragic events that occurred during the relevant time period. Following the murder of his mother, and the other tragic and unhappy events discussed above, Mr. Moore changed from a person who related well to others and competently managed his affairs, to a person who could not cope with his day-to-day affairs. He was sleep-deprived and, according to his counselor, met the criteria for a diagnosis of clinical depression.

This is not a case of a person handling other matters competently and neglecting only the IFQ application process. The evidence establishes that Mr. Moore was unable to cope with day-to-day life in general for a stretch of time that coincided with the application period for the IFQ program. Mr. Moore attempted to continue with his business, but could not effectively do so. Although he did jobs, he neglected to send out or pay bills, and his sleep deprivation and inability to pay attention caused three vehicle accidents.

Mr. Moore's situation during the relevant time periods is comparable to that of the appellant in Estate of Kinberg. In that case, the appellant was able to go to work, but her job performance was greatly reduced and she was unable to handle other transactions, despite the fact that she had been appointed the personal representative of her husband's estate. In neither this case nor Estate of Kinberg has the appellant shown a *total* disability in functioning capacity. However, there is such a reduction in functioning capacity that the failure to file the RFA can be attributed to the appellant's unique mental condition during the relevant time frame, rather than simple inattention to the requirements of the IFQ program.

I find that Mr. Moore's mental state during the relevant time periods effectively prevented him from filing his IFQ application by the July 15, 1994 deadline. It is difficult to pin-point a specific date when

Mr. Moore's mental state was sufficiently restored so that the doctrine of equitable tolling would no longer apply. The witnesses generally testified that Mr. Moore's condition improved with time. Although Mr. Moore filed his RFA in December, 1994, it would appear that it was not until 1995 that Mr. Moore was no longer suffering from a disability that effectively prevented him from fully attending to his business affairs. That is the year Mr. Moore and Teddy Mae Brown gave as the approximate ending of the period of extreme stress and improvement in his ability to cope with day-to-day affairs. Mr. Moore last saw his counselor, Cara Thomson, in 1995.⁴

Fortunately, it is not necessary to pinpoint an exact date for Mr. Moore's recovery. I find that at least until the end of 1994, when Mr. Moore filed his RFA, Mr. Moore had effectively been unable to apply due to his functional incapacity stemming from the extraordinary circumstances discussed in this decision.

2. The applicant's diligence

The record shows that the Division had included the Appellant in its database and mailed an RFA form to him in late December 1993. The RFA mailing was sent by bulk rate, which is not forwarded by the U.S. Postal Service. As noted in Coyne, at 4, each envelope that the Division sent in that mailing was marked "Return Postage Guaranteed," which directs the Postal Service to return undelivered envelopes and provide a forwarding address, if available, and an explanation for non-delivery. The record indicates that this first RFA mailing to the Appellant was not returned to the Division. A second RFA was sent to the Appellant in June 1994. The second RFA packet was sent by first-class mail. *See, Coyne*, at 4. The second RFA packet was not returned to the Division. However, neither of the Moores recall seeing the RFA application package.

Laura Moore testified that she generally received the mail and handled the books for Mr. Moore's business. Due to the couples' several separations, Laura's travel to Seattle for medical reasons, and the couples' moves — first to care for Dianne Wyatt's home, then to a smaller cabin, and then to the Homestead Apartments — it is credible that Mr. Moore never saw the application materials, despite the fact that he had been anticipating them.

Mr. Moore was generally aware of the IFQ program, and expected that he would receive application materials from the Division. Mr. Moore testified that he first became aware that the deadline to file his RFA had passed during a conversation with his brother in the late fall of 1994, when brother asked him if he had received quota shares. During that conversation, Mr. Moore learned that he had missed the

⁴Although Cara Thomson testified that she saw Christopher Moore through December, 1995, the last procedure noted in the Gateway records in the file that clearly relates to Christopher Moore is dated July 28, 1995. Ms. Thomson testified that the procedure code ending in "05" indicates a visit by Christopher Moore. There is no such procedure code listed after July 28, 1995.

July 15, 1994 deadline for submitting his application. Shortly after that conversation, Mr. Moore called the Division. The Division's records show that Mr. Moore requested an RFA packet on December 12, 1995. The RFA was mailed to Mr. Moore on December 13, 1994. Mr. Moore's RFA was received by the Division on December 21, 1994, and it was in an envelope postmarked December 17, 1994.

This case is similar to Coyne and Estate of Kinberg, in that in each of these cases the appellant had general information about the IFQ program. In Coyne the appellant had been involved in hearings related to the possible IFQ program, but then did not follow the developments of the program due to his heroin addiction. Coyne, at 5. The Federal Register notice was published one week before Mr. Coyne entered a drug treatment program. *Id.*, at 6. In Coyne, this Office noted that the critical issue is not whether the appellant generally knew of the IFQ program:

But the question is not what the Appellant knew about the IFQ program generally, rather, the question is, when did he learn of the application period and deadline, or when did he have sufficient information so as to impose on him a duty to inquire about the application period and deadline.

Coyne, at 6. Similarly, in Estate of Kinberg, the appellant had received application materials, but did not understand their importance due to her depression and the medication she was receiving, as well as the fact that she had not been directly involved in her late husband's affairs. Estate of Kinberg, at 6.

Here, Mr. Moore was generally aware of the IFQ program, and the need to file an application once the application period was underway. He testified that he had discussed the program with a friend, and Laura Moore testified that he had discussed the program with her. However, Mr. Moore wrongly believed that the time had not yet come to file his application, and he did not recall ever seeing the RFA that was sent to him. I find that Mr. Moore's failure to more closely trace developments in the IFQ program and to file his RFA is attributable to the circumstances discussed in the previous section. I find that Mr. Moore was diligent in submitting an application after learning from his brother that the deadline for filing IFQ applications had passed.

As noted above, I find that Mr. Moore's disability in managing his affairs had not been entirely removed by December 1994, when he filed his RFA. Despite his continuing disability, he took prompt and appropriate steps to obtain application materials and to file his application. Accordingly, I find that Mr. Moore was reasonably diligent.

3. Effects on implementation of the IFQ program

In Estate of Kinberg, this Office held that an application filed approximately eight months after the July 15, 1994 deadline would not have harmed or frustrated implementation of the IFQ program. This Office noted:

[T]he fact that Mrs. Kinberg's application was not submitted in time for participation in the first fishing season under the IFQ program does not mean that processing her application would have harmed or frustrated implementation of the program. The Division accepted and processed numerous applications received after the filing deadline (but postmarked by the deadline) without apparent delay or disruption of program implementation. Likewise, the applications of several persons who were granted relief on appeal have been processed for the first time long after the filing deadline with no noticeable harm to the implementation of the program. Processing one more application, with at least 10 months' time to complete it before IFQs for the next fishing season would be issued, would not have been a serious imposition on the Division. Therefore, I find that implementation of the IFQ program would not have been harmed or frustrated if Mrs. Kinberg's application had been processed by the Division when it was submitted.

Estate of Kinberg, at 8. [Footnotes omitted].

Here, Mr. Moore's application was submitted approximately five months after the July 15, 1994 application filing deadline. In contrast to the application in Estate of Kinberg, Mr. Moore's application was submitted before the record was established for the first annual IFQ calculation as required under 50 C.F.R. § 679.40(c) [formerly § 676.20(f)]. Because the application of Mrs. Kinberg has been found not to harm or frustrate the IFQ program, *a fortiori*, the same may be said of Mr. Moore's application.

Having found that Mr. Moore has established the three elements necessary for application of the equitable tolling doctrine, I conclude that the doctrine applies to the IFQ application period in this case; that the period for filing an application in this case was tolled until at least the end of 1994; and that Mr. Moore's application was timely filed as a matter of law.

FINDINGS OF FACT

1. Mr. Moore suffered from a mental condition, stemming from extreme tragedies and misfortunes in his life, that lasted from fall 1992 until some time in 1995, and that prevented him from effectively coping with day-to-day life and business affairs.
2. Mr. Moore's ability to become informed about the rights and requirements of IFQ application and to submit an application before December 1994 was substantially impaired as a result of his condition.
3. Mr. Moore's mental and emotional condition constitute extraordinary circumstances beyond his control that prevented him from submitting an IFQ application in a timely manner.

4. Mr. Moore was diligent in submitting an application after learning of the filing deadline and even before his disability was entirely removed.
5. Implementation of the IFQ program would not have been harmed or frustrated if Mr. Moore's application had been processed by the Division when it was submitted.

CONCLUSIONS OF LAW

1. The doctrine of equitable tolling applies to the IFQ application period in this case.
2. The period for filing an IFQ application was tolled for the appellant until December 19, 1994, the date his RFA was received by the Division.
3. The appellant's application (RFA) was timely filed as a matter of law.

DISPOSITION AND ORDER

The Division IAD denying the Appellant's application as untimely filed is VACATED. The Division is ORDERED to process the application as if it had been timely filed. This Decision takes effect on October 6, 1997, unless by that date the Regional Administrator orders review of the Decision.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, September 15, 1997. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Rebekah R. Ross
Appeals Officer

I concur in the factual findings, legal analysis, and conclusions of law of this Decision. I have reviewed this Decision and the accompanying administrative record to verify the substantive accuracy of the Decision and to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other Appeals Decisions of this Office.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding

IFQ for the 1997 fishing season, I recommend that the Regional Administrator expedite review of this Decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Edward H. Hein
Chief Appeals Officer