

SERVED: March 17, 2009

NTSB Order No. EA-5435

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)  
on the 17<sup>th</sup> day of March, 2009

_____	)	
APPLICATION OF	)	
	)	
TOMMY HUE NIX	)	
	)	
	)	Docket 337-EAJA-SE-17547
For an award of attorney	)	
fees and expenses under the	)	
Equal Access to Justice Act	)	
	)	
_____	)	

**ORDER DISMISSING APPEAL**

Applicant appeals the law judge's January 14, 2009 order<sup>1</sup> dismissing as late-filed his application for an award of attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA). We find that applicant has not provided good cause for the untimely filing of a notice of appeal with this Board of the law judge's order below dismissing applicant's EAJA application.

Title 49 C.F.R. § 826.24(a) states that an EAJA application must be filed no later than 30 days after the final disposition of the proceeding. This 30-day deadline is statutory; the Board has no authority to extend it.<sup>2</sup> The law judge appropriately

<sup>1</sup> A copy of the order is attached.

<sup>2</sup> See 5 U.S.C. § 504(a)(2).

dismissed the late-filed application. Different rules apply to our disposition of the instant matter, however.

Pursuant to § 821.47, a notice of appeal to the Board must be filed within 10 days after the date on which the appealable order was served. Applicant filed a notice of appeal on January 30, 2009, which is 16 days after service of the law judge's order, and, therefore, untimely. Applicant's counsel argues "that he had surgery for prostate cancer on December 19, 2008 and although he has not been cleared to return to practice law he did first see the Order on January 21, 2009." Had counsel filed a notice of appeal that day, or by Monday, January 26, 2009, his appeal would have been timely. Counsel argues, however, that he "is a solo practitioner and does not have any attorneys to assist him in the prosecution of this case, and suggests that his surgery and subsequent disability constitutes good cause for an extension of time." We disagree, noting that the pertinent portion of his notice of appeal is only four lines of text. The Office of Administrative Law Judges routinely advises those who request an extension of time that all they need do to preserve their right of appeal is file a one-sentence statement so indicating.

Further, when an applicant is aware that a filing deadline may be near, he must timely ensure that the Administrator, the Office of Administrative Law Judges, and/or the Office of General Counsel is aware of any circumstances that may affect or prevent correspondence regarding the proceeding, particularly when a decision is pending. See, e.g., Administrator v. McKinney, NTSB Order No. EA-5284 at 7 (2007). Respondent's counsel availed himself of none of these protections.

In the absence of a demonstration of good cause to excuse applicant's failure to file a timely notice of appeal of the law judge's order, Board regulations and precedent require the dismissal of applicant's appeal. See e.g., 49 C.F.R. 821.11(a); Administrator v. Hooper, 6 NTSB 559, 560 (1988).

**ACCORDINGLY, IT IS ORDERED THAT:**

Applicant's appeal is dismissed.

Gary L. Halbert  
General Counsel