Supreme Court, U.S.
FILED
MAR 26 2010
OFFICE OF THE CLERK

No. 09-1036

In The
Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE AMICI CURIAE NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., THE FEDERAL BAR ASSOCIATION, VETERANS LAW SECTION AND VETERANS FOR COMMON SENSE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF THE AMICI

This brief is presented on behalf of the National Organization of Veterans' Advocates, Inc., The Federal Bar Association, Veterans Law Section and Veterans for Common Sense ("VCS"), in support of the petition of David L. Henderson, for a writ of certiorari.[1]

The National Organization of Veterans' Advocates, Inc. ("NOVA") is a not for profit section 501(c)(6) educational organization incorporated in 1993. It is dedicated to train and assist attorneys and non-attorney practitioners who represent veterans, their surviving spouses, and their dependants, before the Veterans Administration, the Board of Veterans' Appeals, the United States Court of Appeals for Veterans Claims ("Veterans Court"), the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and this Honorable Court.

The foundation of The Federal Bar Association was chartered by Congress as a 501(c)(3) organization in 1954. The missions of the foundation include promoting and supporting legal research and education,

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the Amici Curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

advancing the science of jurisprudence, facilitating the administration of justice, and fostering improvements in the practice of Federal Law.

The purposes of the Veterans Law Section of The Federal Bar Association include: 1) promoting and monitoring the development of Veterans Law; 2) adopting public positions on matters concerning Veterans Law and Military Law effecting veterans' status and dispute resolution in both the public and private sectors; 3) planning, participating, conducting, and publishing as appropriate, services, programs, publications and activities of interest to persons in the legal profession with respect to Veterans Law and Military Law (as the latter affects military service members transitioning from military to veteran status); and 4) promoting high standards of professional competence and ethical conduct.

The views expressed in this brief do not necessarily reflect those of The Federal Bar Association as a whole.

Veterans for Common Sense ("VCS") was formed in August 2002 as a non profit 501(a)(3) organization by war veterans who believe that the people of America are most secure when their country is free, strong, and responsibly engaged with the world. VCS' mission is to raise the unique and powerful voices of veterans so that the nation's military, veterans, freedom and national security are protected and enhanced for this generation and future generations.

In the decision below, *Henderson v. Shinseki*, 589 F.3d 1201 (2009), the Federal Circuit interpreted the opinion of this Court in *Bowles v. Russell*, 551 U.S. 205 (2007), as overruling precedent holding that the time to file an appeal to the Veterans Court in 38 U.S.C. § 7266(a) is subject to equitable tolling. NOVA, VCS and the Veterans Law Section of The Federal Bar Association, believe the *Henderson* decision below is incorrect as a matter of law, and could result in the denial of benefits to thousands of our nation's deserving veterans, particularly those suffering from mental health conditions such as posttraumatic stress disorder and Traumatic Brain Injury which preclude them from complying with the time limits contained within the statute.

In the absence of such equitable tolling, the doors to the Veterans Court will be closed to veterans, their spouses, and dependents, who fail to file their claims within the 120-day period specified in § 7266(a), even if the failure to timely file was due to no fault of their own or even due to the very disability for which benefits are sought in the first instance. The Federal Circuit's decision is expected to create a serious and unjust impediment for many veterans, their spouses, and dependents, in this and future cases, and NOVA, VCS, and the Veterans Law Section of The Federal Bar Association, hope to contribute to this Court's understanding of the issues.

NOVA, VCS, and the Veterans Law Section of The Federal Bar Association, have no interest in the

eventual outcome of the claims underlying Mr. Henderson's appeal.

STATEMENT

David Henderson was discharged from military service in 1952 after being diagnosed with paranoid schizophrenia, while on active duty. That mental disability was subsequently determined by the Department of Veterans Affairs ("the VA") to have rendered him 100 percent disabled. Pet. App. 3a. In August of 2001, proceeding *pro se*, Mr. Henderson, applied to his local VA Regional Office ("RO") for additional monthly compensation based on his need for in-home care because of his service-connected paranoid schizophrenia. The RO denied this claim and the Board of Veterans' Appeals ("the Board"), on August 20, 2004, affirmed the RO's decision. Pet. App. 3a.

On January 12, 2005, 135 days after the Board's decision, Mr. Henderson, still proceeding *pro se*, filed a notice of appeal with the U.S. Court of Appeals for Veterans Claims ("the Veterans Court or the CAVC"). Pet. App. 3a. That appeal was ultimately dismissed, as untimely, by a divided panel of the Veterans Court which relied on this Court's decision, in *Bowles v. Russell*, 551 U.S. 205 (2007), to conclude that the 120-day time limit contained in 38 U.S.C. § 7266(a) is jurisdictional and is not subject to equitable tolling. Pet. App. 76a-82a.

A majority of the United States Court of Appeals for the Federal Circuit ("the Federal Circuit"), affirmed, en banc, the dismissal of Mr. Henderson's appeal. Pet. App. 1a-73a. Although they joined in the majority opinion, the three concurring judges agreed with the three dissenting judges that the rigidity of the decision prohibiting equitable tolling leads to unfairness. Pet. App. 44a. Writing for the dissenters, Judge Mayer went further, characterizing the result as creating a "Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a.

Mr. Henderson is an example of one of those most deserving veterans whose appeal would have been heard if he was given the benefit of equitable tolling. His treating psychiatrist explained, that Mr. Henderson is "incapable of rational thought or deliberate decision-making" and "incapable of understanding and meeting deadlines." Amici App. 1a.

There are many deserving veterans who will need the benefit of equitable tolling. For example, there are over 227,000 veterans who served in the Global War on Terror ("GWOT") who are being treated by the VA for mental health issues with over 130,000 of them having been diagnosed with post traumatic stress disorder ("PTSD"). Amici App. 3a. It has been estimated that 770,000 veterans of the GWOT may have sustained PTSD. Amici App. 4a. Also almost 430,000 service members who were deployed in the GWOT have suffered some form of

traumatic brain injury ("TBI"). Amici App 4a. Ten to 15 percent of those with mild TBI report ongoing cognitive difficulties for years, post injury.[2] Three years *after completion of initial inpatient rehabilitation for* TBI many of these patients continue to have significant disabilities.[3] Moreover, specific attention to the long-term needs of those living with TBI is warranted in part because cognitive and emotional impairments compromise patients' capacity to seek help on their own.[4] In recognition of the cognitive impairments which may be experienced by veterans who have sustained a TBI, the VA in October 2008, published instructions for rating TBI which included guidance that the veterans may experience a decrease in executive functions such as in speed of information processing, goal setting, planning, organizing, prioritizing, self-monitoring, problem solving, judgment, decision making, spontaneity, and flexibility in changing actions when the actions are not productive.[5]

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[2] Belanger HG, Uomoto JM, Vanderploeg RD. The Veterans Health Administration System of Care for Mild Traumatic Brain Injury: Costs, Benefits and Controversies. J. Head Trauma Rehabil. 2009; 24(1):4

[3] VAOIG Report May 1, 2008, Rep. 08-01023-119 "Follow-up Health Care Inspection VA's Role in Ensuring Services for Operation Enduring Freedom/Operation Iraqi Freedom Veterans after Traumatic Brain Injury Rehabilitation," p.i

[4] *Ibid.*, p.2

[5] VBA Fast Letter 08-36, p.2, at http://www.tvc.state.tx.us/HTML%20Pages%20for%20Frames/VA_Fast_Letters.htm

Moreover, the statistics concerning our veterans returning from combat continue to rise. These statistics were secured by Veterans for Common Sense, pursuant to Freedom of Information Act requests.

SUMMARY OF ARGUMENT

The decision of the Federal Circuit has national significance potentially affecting thousands of disabled veterans. Applying the analysis recently utilized by this Court in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___ (2010), 2010 U.S. LEXIS 2202, section 7266(a), which sets forth the time to file an appeal in the Veterans Court, should be considered not "jurisdictional" and should be subject to equitable tolling. Other Circuits have continued to allow tolling of similar statutes of limitations.

ARGUMENT

POINT I

THE DECISION OF THE FEDERAL CIRCUIT WILL RESULT IN THE DENIAL OF VA BENEFITS TO THOUSANDS OF OUR NATION'S MOST DESERVING AND MOST IMPAIRED VETERANS

The decision of the Federal Circuit will result in the final denial of benefits which have been earned by

thousands of our nation's veterans who are suffering from the effects of PTSD or TBI.

Not only do many veterans' symptoms interfere with their ability to file timely appeals, but many impaired veterans handle their claims themselves. Between 53 and 70 percent of the veterans' claims filed since 2000, have been *pro se*. Henderson petition n.6. In fiscal year ("FY") 2008 only 8 percent of veterans receiving decisions from the BVA were represented by lawyers. The vast majority of veterans were represented by non-lawyer Veterans Service Officers and 12 percent, over 5,000, had no representation at all.[6] That pattern continues in the Veterans Court. In FY 2009, 3,213 appeals, representing 68 percent of the filed appeals, were filed by *pro se* appellants.[7]

Also, in FY 2009, of the appeals which were accepted by the Veterans Court, and which resulted in a merits decision, the Veterans Court found the VA's position to be not substantially justified over 70 percent of the time, resulting in the granting of EAJA fees.[8]

The Federal Circuit's holding that equitable tolling is not available to veterans who fail to file

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[6] Fiscal Year 2008 Report of the Chairman, Board of Veterans' Appeals, p.23 http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2008AR.pdf

[7] At decision there are only 30 percent *pro se* CAVC Annual Report, FY 2009, http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf

[8] *Ibid.*

their appeal in the Veterans Court, within the 120-day period provided by 38 U.S.C. § 7266(a), will deny thousands of badly injured veterans the benefits which they have earned in combat. This Court has the opportunity to prevent those veterans from suffering that great injustice.

POINT II

THE DECISION OF THE COURT BELOW WAS LEGALLY INCORRECT AND CONFLICTS WITH DECISIONS IN OTHER CIRCUITS

A. 7266(a) is not "Jurisdictional"

In deciding that the 120-day appeal period contained in 38 U.S.C. § 7266(a) may not be tolled, the Federal Circuit relied upon this Court's decision, in *Bowles v. Russell*, 551 U.S. 205, 214 (2007), that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and that courts "ha[ve] no authority to create exceptions to jurisdictional requirements." Applying that rule to its determination that 38 U.S.C. § 7266(a) "is a notice of appeal or time of review, provision in a civil case" it concluded that the statute is not subject to equitable tolling. Pet. App. 25a.

This Court's recent decision in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___ (2010), 2010 U.S. LEXIS 2202. demonstrates that the analysis utilized by the Federal Circuit to conclude that § 7266(a) is not subject to equitable tolling, was erroneous.

Reed Elsevier clarified the holding in *Bowles* by stating that a "statutory condition devoid of an express jurisdictional label should [not] be treated as jurisdictional simply because courts have long treated it as such" nor should "all statutory conditions imposing a time limit . . . be considered jurisdictional . . . [rather] context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." Slip opinion 12,13. Rather than relying, exclusively, upon historical treatment of the statute as "jurisdictional" *Reed Elsevier* utilized two tests derived from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), to conclude that the failure to comply with the copyright registration requirement, contained in 17 U.S.C.A. § 411(a), does not deprive a federal court of jurisdiction to adjudicate a copyright infringement claim which had been filed by a non registering copyright holder. Test one, a general approach, distinguishes "jurisdictional" conditions from claim-processing requirements or elements, of a claim by examining whether the Legislature "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." This Court's application of the first test to § 411(a) showed that the statute did not clearly state that the registration requirement is jurisdictional. Test two looks at whether § 411(a)'s registration requirement is located in a provision separate from those provisions granting federal courts subject matter jurisdiction over the respective claims. Applying the second test, this Court concluded that the registration requirement is located in a provision

separate from 28 U.S.C. §§ 1331 and 1338 which confer subject matter jurisdiction. The concurring opinion adds that application of the rule in *Bowles* is appropriate only where there is a long line of this Court's decisions finding a statute to be jurisdictional which has been left undisturbed by Congress.

Applying the *Reed Elsevier* tests to § 7266(a) leads to the conclusion that this statute is not jurisdictional. First, there is no undisturbed long line of cases finding the statute to be jurisdictional. Neither does § 7266(a) clearly state that the 120-day appeal filing requirement is jurisdictional. Also, as recognized by the Federal Circuit, in the twelve years since the determination in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), that § 7266(a) is subject to equitable tolling, "Congress has not amended that statute in a way which would disturb *Bailey*." Pet. App. 31a. Additionally, there are unique policy considerations which suggest that Congress never intended § 7266(a) to be utilized to close the courthouse door to impaired veterans whose impairments prevent them from filing a timely appeal in the Veterans Court. To the contrary, Congress created the Veterans Court in order to "ensure that veterans . . . receive all benefits to which they are entitled." S. Rep. No. 100-418, 100th Cong. 2d Sess. 29 (1988). For example, as this Court noted in *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009), the veterans' claims process "is not truly adversarial" and "the veteran is often unrepresented during the claims proceedings (citations omitted)." *Id.* at 1707. Also, "Congress has

made clear that the VA is not an ordinary agency" and that the "VA has a statutory duty to help the veteran develop his or her benefits claim (citations omitted)." *Id.* at 1707.

Applying the second *Reed Elsevier* test leads to the same conclusion. This statute is not jurisdictional. Thus, the time to appeal provision in § 7266(a) is located separate from the provisions enumerating the subject matter jurisdiction of the Veterans Court. These jurisdictional provisions are contained in § 7261. Accordingly, application of the *Reed Elsevier* analysis demonstrates that § 7266(a) is most properly viewed as a non-jurisdictional statute similar to 17 U.S.C. § 411(a) and 42 U.S.C. § 2000e(b).

Using the *Reed Elsevier* analysis, *Stone v. Immigration and Naturalization Service*, 514 U.S. 386 (1995) can be understood as a decision controlled by a long line of this Court's cases, undisturbed by Congress, and characterizing 8 U.S.C. § 1105a(1) as "jurisdictional" and not subject to tolling. Accordingly, *Stone* offers no guidance for whether § 7266(a) is jurisdictional and, to the extent that the Federal Circuit's decision in *Henderson* is based on *Stone*, its reliance is misplaced. Pet. App. 26a.

B. Other Federal Circuits Disagree with The Federal Circuit

Not only does the application of *Reed Elsevier* show that § 7266(a) is not jurisdictional, but the Federal Circuit's decision, in *Henderson*, conflicts with

decisions of other Circuit Courts, which hold that equitable extension to filing deadlines survive the *Bowles* decision. See, e.g., *Diaz v. Kelly*, 515 F.3d 149 (2d Cir. 2008) (28 U.S.C. § 2244(d) may be equitably tolled); *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009) (exception to time limit in 18 U.S.C. § 3731); and *United States v. Dolan*, 571 F.3d 1022 (10th Cir. 2009) (18 U.S.C. § 3664(d) may be tolled). Amici do not contend that the Federal Circuit committed error by failing to extend the deadline for Mr. Henderson to file his "notice of appeal" from the Board's decision. Rather, Amici contend that the Federal Circuit should have tolled the time for Mr. Henderson to file his appeal to the Veterans Court for the period during which his mental impairment precluded him from timely filing an appeal. As was noted by the Seventh Circuit in *United States v. Henderson*, there is a significant difference between tolling, which involves the question as to when a time limit begins to run, or is suspended, and an exception to a statutorily imposed time limit.

While *Bowles* did not address equitable tolling, this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), specifically held that equitable tolling is available with respect to the 30-day limitations period for the commencement of an action for wrongful discharge against the United States under 42 U.S.C. § 2000e-16(c). In *Irwin*, this Court reasoned that "time requirements in lawsuits between private litigants are customarily subject to

equitable tolling (citations omitted)" and held that "the same reputable presumption of equitable tolling applicable to suits against private defendants, should also apply to suits against the United States." *Irwin* at 95-96.

C. 7266(a) is a Statute of Limitations

Another reason while the Federal Circuit committed error in denying equitable tolling of § 7266(a) is that the 120-day time period contained § 7266(a) is like a "statute of limitations" discussed in *Bowen v. City of New York*, 476 U.S. 467 (1986), rather than a *Bowles* "time to file" requirement. A claimant who wishes to commence a lawsuit against the Secretary of Veterans Affairs to challenge a final denial of benefits by the VA must file a "notice of appeal," in the Veterans Court, within 120-days of the date that an adverse Board of Veterans' Appeals decision is mailed to that claimant. Calling this appeal document a "notice of appeal" distinguishes it from the "notice of disagreement" which is the document which a claimant must timely file to begin the administrative appellate review following an unfavorable rating decision. 38 U.S.C. § 7105(a). In contrast to commencing an administrative challenge, the filing of a "notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law." *Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (en banc).

This Court acknowledged in *Sanders*, at 1707, that the VA is not an ordinary agency and that "Congress has expressed special solicitude for the veterans' cause." Clearly, the VA claims adjudication system is intended to be even more protective of appellants than is the Social Security Disability system, which was the subject of *Bowen v. City of New York*, 476 U.S. 467 (1986). Yet, in *Bowen*, this Court held that the 60-day period contained in 42 U.S.C. § 405(g), for filing a federal court appeal challenging the denial of benefits by the Social Security Administration, is not jurisdictional and is subject to equitable tolling. The *Bowen* decision notes that the Social Security Act was designed by Congress, to be "unusually protective" of claimants, and that permitting equitable tolling of the 60-day period is fully consistent with the overall congressional purpose and was not eschewed by Congress. *Id.* at 480.

Like the appeal period in § 405(g), the appeal period in § 7266(a) is properly found to be subject to equitable tolling.

CONCLUSION

This Court should grant Mr. Henderson's petition for certiorari because the decision of the Federal Circuit conflicts with the decisions of other circuits and because that erroneous decision has the potential to deny thousands of veterans the benefits to which they are otherwise entitled.

Respectfully submitted,

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