

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 Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

**BRIEF OF THE NATIONAL VETERANS LEGAL
SERVICES PROGRAM AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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QUESTION PRESENTED FOR REVIEW

Whether the 120-day time limit under 38 U.S.C. § 7266(a) for a veteran to seek judicial review of an agency decision denying service-connected disability benefits restricts the subject-matter jurisdiction of the Veterans Court and therefore cannot be subject to equitable tolling.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE NATURE OF PROCEEDINGS IN THE BOARD IS SUCH THAT THE “AP- PEAL” TO THE VETERANS COURT IS UTTERLY UNLIKE THE ARTICLE III APPEAL AT ISSUE IN <i>BOWLES</i>	5
A. Proceedings In The Board Are Excep- tionally Informal.	7
B. Board Decisions Are Plagued By Error And Delay	10
II. MODERN COMBAT INCREASINGLY GIVES RISE TO INJURIES THAT IN- TERFERE WITH PURSUING DISABILI- TY CLAIMS, PARTICULARLY AT THE VETERANS COURT	12
A. Service Members Suffer Serious Physi- cal And Mental Injuries That Impair Their Ability To Manage Their Own Af- fairs	13
B. Most Veterans Appeal To The Veterans Court Without The Assistance Of Coun- sel	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
<i>Arbas v. Nicholson</i> , 403 F.3d 1379 (Fed. Cir. 2005).....	21
<i>Bailey v. West</i> , 160 F.3d 1360 (Fed. Cir. 1998), <i>overruled by Henderson v. Shinseki</i> , 589 F.3d 1201 (Fed. Cir. 2009).....	20
<i>Barrett v. Principi</i> , 363 F.3d 1316 (Fed. Cir. 2004).....	21
<i>Bowles v. Russell</i> , 551 U.S. 205 (2007).....	2, 3
<i>Boyer v. Derwinski</i> , 1 Vet. App. 531 (1991).....	10
<i>Brannon v. West</i> , 12 Vet. App. 32 (1998).....	10
<i>Constantino v. West</i> , 12 Vet. App. 517 (1999).....	9
<i>Jaquay v. Principi</i> , 304 F.3d 1276 (Fed. Cir. 2002), <i>overruled by Henderson v. Shinseki</i> , 589 F.3d 1201 (Fed. Cir. 2009).....	20
<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988) ...	11
<i>Santana-Venegas v. Principi</i> , 314 F.3d 1293 (Fed. Cir. 2002).....	20
<i>Shinseki v. Sanders</i> , 129 S. Ct. 1696 (2009).....	3, 22
<i>Talbot v. Shinseki</i> , No. 10-1518, 2010 U.S. App. Vet. Claims LEXIS 1554 (Vet. App. Aug. 20, 2010).....	20
<i>Walters v. Nat'l Ass'n of Radiation Survivors</i> , 473 U.S. 305 (1985).....	8, 22
<i>Zipes v. Trans World Airlines, Inc.</i> , 455 U.S. 385 (1982).....	6
STATUTES AND REGULATIONS	
28 U.S.C. § 2412(d)(1)(A)	11
38 U.S.C. § 1110	6

TABLE OF AUTHORITIES—continued

	Page
38 U.S.C. § 1115	6
§ 5101(a).....	6
§ 5103A.....	9
§ 5902	1, 9
§ 7104(a).....	10
§ 7105	6
§ 7107	7
§ 7266(a).....	19
38 C.F.R. § 3.103	9, 10
§ 19.29	6
§ 20.201	6
§ 20.700	7, 9
§ 20.702	7
§ 20.703	7
§ 20.710	9
§ 20.1304(c)	10

LEGISLATIVE HISTORY

<i>Legislative Hearing on H.R. 92, H.R. 315, H.R. 339, H.R. 463, H.R. 538, H.R. 542, H.R. 1426, H.R. 1470, H.R. 1471, H.R. 1527, H.R. 1944, and Discussion Draft of the “Rural Veterans Healthcare Act of 2007” Before the Subcomm. On Health of the H. Comm. On Veterans’ Affairs, 110th Cong. (2007).....</i>	13
S. Rep. No. 100-418 (1988).....	21, 22
H.R. Rep. No. 100-963 (1988)	10

TABLE OF AUTHORITIES—continued	
SCHOLARLY AUTHORITY	Page
James Ridgway, <i>Why So Many Remands?: A Comparative Analysis of Appellate Review by the Untied States Court of Appeals for Veterans Claims</i> , 1 Vet. L. Rev. 113 (2009), available at http://www.bva.va.gov/docs/VLR_VOL1/vlr1ridgway.pdf	9, 11
 OTHER AUTHORITIES	
Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), http://www.whitehouse.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq	4, 13
Bd. of Veterans' Appeals, <i>How Do I Appeal?</i> (Apr. 2002), available at http://www.bva.va.gov/docs/Pamphlets/010202A.pdf	7, 8, 19
Bd. of Veterans' Appeals, <i>Report of the Chairman: Fiscal Year 2009</i> (Mar. 2010), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf	8, 9, 11
Atul Gawande, <i>Casualties of War: Military Care for the Wounded from Iraq and Afghanistan</i> , 351 New Eng. J. of Med. 2471 (Dec. 2004).....	13

TABLE OF AUTHORITIES—continued

	Page
Gov't Accountability Office, GAO-10-213, <i>Veterans' Disability Benefits: Further Evaluation of Ongoing Initiatives Could Help Identify Effective Approaches for Improving Claims Processing</i> (Jan. 2010), available at http://www.gao.gov/new.items/d10213.pdf	4, 12
Laura Krishnan et al., <i>Prevalence of Dementia among Veterans Affairs Medical Care System Users</i> , 20 <i>Dement. Geriatr. Cogn. Disord.</i> 245 (2005).....	16
Nat'l Inst. of Mental Health, <i>Post-Traumatic Stress Disorder (PST)</i> , available at http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/nimh_ptsd_booklet.pdf	15
Nat'l Inst. of Neurological Disorders & Strokes, <i>Dementia: Hope Through Research</i> (May 21, 2010), http://www.ninds.nih.gov/disorders/dementias/detail_dementia.htm	16
Nat'l Veterans Legal Servs. Program, <i>Veterans Benefits Manual</i> (2009)	7, 8, 19
Paul. F. Pasquina, <i>DOD paradigm shift in care of servicemembers with major limb loss</i> , 47 <i>J. Rehab. Research & Dev.</i> (Apr. 20, 2010), available at 2010 WLNR 15008013	18
RAND Ctr. for Military Health Policy Research, <i>Invisible Wounds of War</i> (2008).....	13, 14, 15, 17, 18

TABLE OF AUTHORITIES—continued

	Page
U.S. Court of Appeals for Veterans Claims, Annual Reports 2000-2009, <i>available at</i> http://www.uscourts.cavc.gov/documents/ Annual_Report_FY_2009_October_1_ 2008_to_September_30_2009.pdf	10, 11, 19
Veterans Health Initiative, <i>Traumatic Brain Injury</i> (Jan. 2004).....	14, 15
Kristine Yaffe et al., <i>Posttraumatic Stress Disorder and Risk of Dementia Among US Veterans</i> , 67 Arch. Gen. Psychiatry 608 (2010).....	15, 16

INTEREST OF THE *AMICUS CURIAE*

The National Veterans Legal Services Program (NVLSP) is an independent nonprofit organization that has worked since 1980 to ensure that the United States government provides our Nation's 25 million veterans and active duty personnel with the federal benefits they have earned through their service to the country.¹ NVLSP has been instrumental in the passage of landmark veterans' rights legislation, and it has successfully challenged unfair practices by the Department of Veterans Affairs (VA) that deprived veterans and their families of hundreds of millions of dollars in benefits. It also serves as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates. NVLSP publications provide veterans, their families, and their advocates with the information necessary to obtain the benefits to which they are entitled under the law. For the last ten years NVLSP has published the *Veterans Benefits Manual*, which has become the leading guide for advocates and attorneys who help veterans and their families obtain benefits from the VA.

In addition, and of particular relevance here, NVLSP is a veterans' service organization recognized by the Secretary under 38 U.S.C. § 5902 to assist veterans in the preparation, presentation and prosecution of claims for benefits before the VA. In this capacity, NVLSP has directly represented hundreds of

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief in letters on file with the Clerk's office.

veterans in proceedings before the Board of Veterans' Appeals ("Board"). Given this experience and expertise, NVLSP is well-positioned to describe proceedings that occur in the Board—an understanding of which is critical to recognizing that an “appeal” of Board proceedings to the Court of Appeals for Veterans Claims (“Veterans Court”) is quite unlike an appeal in any Article III, jurisdictional sense.

NVLSP submits this *amicus curiae* brief on behalf of petitioner David Henderson because the rule adopted by the Federal Circuit ignores the reality of proceedings in the Board and will lead to gross injustice. If affirmed, the decision below will result in the dismissal of meritorious claims by disabled veterans who are not represented by counsel and who try but fail to obtain timely review in the Veterans Court, including veterans whose disabilities are so severe that they are unable to do so. This result is contrary to the purpose of the VA benefits system—which Congress designed to be pro-veteran, informal and non-adversarial—and the statute authorizing judicial review of final VA decisions, which Congress enacted to ensure that veterans receive the benefits to which they are entitled.

SUMMARY OF ARGUMENT

This brief elaborates on two specific issues that are critical to understanding the error of the decision below.

First, the relationship between proceedings in the Board (the highest level of review within the VA itself) and Article I review in the Veterans Court quite unlike the relationship between the federal district courts and federal courts of appeals that this Court addressed in *Bowles v. Russell*, 551 U.S. 205 (2007). *Bowles*, which the Federal Circuit found controlling,

dealt with the move from Article III federal district courts to Article III federal courts of appeals. *Id.* at 206-07. Proceedings in the Board, however, do not remotely resemble litigation in federal district court. Some of this is by design: In recognition of the fact that veterans have “performed an especially important service for the Nation,” Congress “has made clear that the VA is not an ordinary agency.” *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009). Instead of playing the role of adversary or neutral adjudicator, “the VA has a statutory duty to help the veteran develop his or her benefits claims.” *Id.* (citing 38 U.S.C. § 5103A). Therefore, proceedings in the VA Regional Offices (RO) and at the Board are informal and “not truly adversarial,” and “the veteran is often unrepresented” by counsel.

Moreover, proceedings within the VA are qualitatively different from those in federal district court. Whether because of the informality of proceedings in the RO and the Board, or because the VA is not doing its job adequately, the Board often reaches the wrong result. Unlike the federal courts of appeals, where reversal rates are low, the Veterans Court reversed or vacated Board decisions in 81% of the cases it reviewed on the merits in fiscal year 2009. Indeed, the performance of the Board is so deficient that attorneys’ fees were awarded in 73% of Veterans Court appeals. This simply confirms what is clear from the statutory structure: When a veteran files a so-called “notice of appeal” in the Veterans Court, this initiates court proceedings and litigation for the first time. It is initial review of agency decisionmaking—with a reversal rate to match—and it is altogether unlike the “notice of appeal” that an appellant files in a United States court of appeals.

Second, before this Court blesses a rule that equitable tolling is *never* permissible in this context—the undisputed result of the decision below—it should understand the practical consequence of that decision. Numerous veterans incur disabling injuries during their military service, and these numbers have risen sharply as hundreds of thousands of soldiers have served repeated and extended tours of combat duty in Iraq and Afghanistan. According to the VA itself, 35% of veterans who served in Iraq and Afghanistan have filed claims for disability benefits.²

Many of these veterans have suffered injuries that interfere with cognitive ability and decisionmaking—precisely the faculties that are necessary for litigation decisions, especially when, as often is the case, the veterans proceed *pro se*. These veterans commonly suffer from the “signature wounds” of the Iraq and Afghanistan conflicts—traumatic brain injury and post-traumatic stress disorder (PTSD).³ Such injuries typically interfere with attention, concentration, new learning, and memory. As a result, veterans with such disabilities often find it difficult to manage the activities of daily life, such as scheduling and keeping appointments—much less to understand the multitude of procedures and regulations that govern the VA’s benefits process in general, or appeal requirements in particular. To adopt a rule that equit-

² Gov’t Accountability Office, GAO-10-213, *Veterans’ Disability Benefits: Further Evaluation of Ongoing Initiatives Could Help Identify Effective Approaches for Improving Claims Processing* 11 (Jan. 2010), available at <http://www.gao.gov/new.items/d10213.pdf> [hereinafter “GAO Report”].

³ See Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), <http://www.whitehouse.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq>.

able tolling is jurisdictionally unavailable to such veterans is to guarantee that numerous meritorious claims will be denied.

ARGUMENT

I. THE NATURE OF PROCEEDINGS IN THE BOARD IS SUCH THAT THE “APPEAL” TO THE VETERANS COURT IS UTTERLY UNLIKE THE ARTICLE III APPEAL AT ISSUE IN *BOWLES*.

The decision below, in which the Federal Circuit held that the time for filing a “notice of appeal” in the Veterans Court is jurisdictional, was expressly “based on *Bowles*.” Pet. App. 2a. It noted, for instance, repeating the government’s arguments about *Bowles*, that “§ 7266(a) refers to the filing in the Veterans Court as a ‘notice of appeal,’ indicating that the Veterans Court does not commence litigation, *but rather continues litigation first brought before the Board.*” *Id.* at 24a (emphasis added). The suggestion that what occurs before the Board is “litigation” represents a fundamental misapprehension of that administrative process.

This is not only because “the Veterans Court is the first opportunity for a veteran to appear before a judicial body,” Pet. App. 26a, or even because of the “uniquely pro-claimant, non-adversarial nature of the veterans system,” *id.* at 41a. More fundamentally, it is because proceedings in the Board bear none of the hallmarks of “litigation” in any traditional sense. “[P]roceedings before the board are fundamentally unlike proceedings before a district court.” *Id.* at 54a (Mayer, J., dissenting). Those agency proceedings are non-adversarial and exceptionally informal. They are characterized by gross delay and inaccuracy. And, perhaps not unrelatedly, veterans typically proceed

in the Board without counsel. As this Court has recognized, it is “particularly inappropriate” to treat a deadline as jurisdictional “in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.” *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (internal quotations omitted).

Under these circumstances, the analogy between the “notice of appeal” that a veteran files to commence litigation in the Veterans Court, and the traditional appellate proceedings at issue in *Bowles*, does not withstand scrutiny. Rather, “[i]n the veterans’ adjudicatory system,” it is the “appeal from the Veterans Court to [the Federal Circuit]” that “is the procedural equivalent of an appeal from a district court to a court of appeals.” Pet. App. 51a (Mayer, J., dissenting).

Before turning to the specifics of proceedings in the Board, it is worthwhile briefly to explain the process by which veterans file and pursue claims before reaching the Board. See also Pet. Br. 4-6. The United States provides disability compensation to veterans with injuries or diseases incurred or aggravated during active military service, 38 U.S.C. § 1110, as well as to certain qualifying dependants, *id.* § 1115. To obtain compensation, a veteran must initially file an application at a VA Regional Office. *Id.* § 5101(a). If the RO denies the claim in whole or in part, the veteran may file a “notice of disagreement” within one year. *Id.* § 7105(a) & (b)(1); 38 C.F.R. § 20.201. The RO may reconsider its original decision, but if it does not, it provides a “statement of the case” identifying the evidence, laws, and regulations on which the regional office relied. 38 U.S.C. § 7105(d)(1); 38 C.F.R. § 19.29. Upon receipt of the RO’s statement of the case, the veteran may then make a “substantive appeal” to the Board of Veterans’ Appeals. 38 U.S.C.

§ 7105(a). It is at that point that proceedings in the Board commence.

A. Proceedings In The Board Are Exceptionally Informal.

“When it established the Veterans Court, Congress made clear that proceedings before that court were not to be overly ‘formalized,’ but instead were to be ‘[a]ccurate, informal, efficient and fair.’” Pet. App. 68a (Mayer, J., dissenting) (alteration in original) (quoting H.R. Rep. No. 100-963, at 26 (1988)). Whatever success the *Veterans Court* may have had in achieving these goals, the Board has achieved only informality.

In the Board, proceedings are conducted by a Board member, see 38 U.S.C. § 7107(c), now referred to as a “Veterans Law Judge,” see NVLSP, *Veterans Benefits Manual* § 13.1.2 & n.10 (2009). If the veteran elects, his or her claim proceeds by way of a “hearing,” 38 U.S.C. § 7107(b), either in Washington, D.C. or at the VA Regional Office where the claim was filed.⁴ This is not a “hearing,” however, in any traditional adjudicatory sense. As the VA candidly admits in its instructional pamphlet, “Personal hearings with a Board Member are informal. They are not like the courtroom hearings you see on TV or in trials.” *How Do I Appeal?*, at 9. Confirming that this hearing is unlike “hearings you see on TV” or litigation in any

⁴ 38 U.S.C. § 7107(d); 38 C.F.R. §§ 20.702, 20.703; *see also* Bd. of Veterans’ Appeals, *How Do I Appeal?*, at 8 (Apr. 2002), *available at* <http://www.bva.va.gov/docs/Pamphlets/010202A.pdf>. A hearing at the Regional Office can be a “Travel Board” hearing, in which a Veterans Law Judge travels to the RO to hear appeals, or a videoconference. *See* 38 C.F.R. §§ 20.700(e), 20.703; *Veterans Benefits Manual* § 13.2; *How Do I Appeal?*, at 8.

traditional sense, the VA depicts these “hearings” as follows:



Personal hearing with Board Member

Id. A Veterans Law Judge typically devotes one hour to each hearing, see *Veterans Benefits Manual* §§ 13.3.3.1, 13.6.2.1, and may hold as many as 10 hearings per day, see *How Do I Appeal?*, at 10. It is unlikely that these “judges” could devote any more time to such hearings if they wished: During the last fiscal year, the 60 Veterans Law Judges conducted 11,629 hearings and issued 48,804 decisions.⁵

Simply put, the VA does not follow “the adversary mode of dispute resolution utilized by courts in this country,” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Instead, Board hearings are “informal and nonadversarial.” *Id.* at 324, 325. Hearings are *ex parte*—the Secretary does not

⁵ See Bd. of Veterans’ Appeals, *Report of the Chairman: Fiscal Year 2009*, at 3 (Mar. 2010), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf [hereinafter “FY 2009 Report of the Chairman”].

appear to oppose the claimant. 38 C.F.R. § 20.700(c). Indeed, it is only recently that veterans are permitted to be represented by paid counsel at these hearings, *id.* § 3.103(e), and the reality is that most veterans appear *pro se*. When they are represented, it typically is by a veterans' service organization such as NVLSP, which are prohibited from charging any fee for their services. 38 U.S.C. § 5902(b)(1)(A). In fiscal year 2009, fewer than 8% of veterans had attorneys at the Board, and approximately 10% appeared *pro se*.⁶

At the hearing, the rules of evidence do not apply. 38 C.F.R. § 20.700(c). Although the veteran and any other witnesses are under oath, *id.* § 20.710, cross-examination is not allowed, *id.* § 20.700(c). Indeed, the hearing proceeds unlike "litigation" in the traditional sense, *but cf.* Pet. App. 24a, as the proceedings are meant to be cooperative rather than adversarial. For instance, the Board has a duty to help the veteran develop a claim that was not properly developed at the RO. See *Constantino v. West*, 12 Vet. App. 517, 520 (1999); 38 U.S.C. § 5103A (Board must ensure that the veteran receives assistance in obtaining medical examination and records pertaining to military service or medical treatment).

Finally, unlike traditional modes of adjudication, strict rules of error-preservation and waiver do not apply. Rather, the Board "is required to adjudicate all issues reasonably raised by a liberal reading of the appellant's substantive appeal, including all docu-

⁶ See *FY 2009 Report of the Chairman* at 21; see also James Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Vet. L. Rev. 113, 133 & n.101 (2009), available at http://www.bva.va.gov/docs/VLR_VOL1/vlr1ridgway.pdf (citing statistics from FY 2005 and 2006).

ments and oral testimony of the record prior to the Board's decision." *Brannon v. West*, 12 Vet. App. 32, 34 (1998); see also 38 C.F.R. § 3.103(a). The Board reviews the decision of the regional office de novo, *Boyer v. Derwinski*, 1 Vet. App. 531, 533 (1991), and renders a decision that "shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation," 38 U.S.C. § 7104(a). In so doing, the veteran may elect to have the Board consider new evidence that was not presented to the RO. 38 C.F.R. § 20.1304(c).

B. Board Decisions Are Plagued By Error And Delay.

Although Board proceedings are "informal," they are not "accurate" or "efficient." H.R. Rep. No. 100-963, at 26 (1988). Notwithstanding the non-adversarial nature of the agency process and the Board's duties to assist, the Board does not achieve the results that one associates with, for instance, federal district court litigation. In fiscal year 2009, the veteran prevailed in approximately 80% of the cases in which the Veterans Court reviewed a Board decision on the merits.⁷ Indeed, although the Veterans Court is the first point at which proceedings are adversarial and the Secretary is represented by counsel, remarkably the Secretary felt compelled to consent to vacatur and remand in fully 54% of cases. In an additional 27% of cases (i.e., more than half of the cases in which the Secretary even defended the Board), the

⁷ U.S. Court of Appeals for Veterans Claims, Annual Reports 2000-2009, available at http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf [hereinafter "*Veterans Court Annual Reports*"].

Veterans Court reversed or remanded the Board's decision in whole or in part.⁸ In short, the Board was affirmed in only 17% of the cases that the Veterans Court reviewed on the merits. *Veterans Court Annual Reports*.

Even more striking, the Board's decisions are sufficiently mistaken that the Veterans Court awards attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), most of the time. In fiscal year 2009, the Veterans Court awarded fees in 2385 cases, while denying them in only 21. See *Veterans Court Annual Reports*. Such fees may be awarded only when "the position of the United States" was not "substantially justified," 28 U.S.C. § 2412(d)(1)(A)—i.e., merely "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Yet that meager threshold rarely is met.

The Board's inaccuracy is compounded by delay. Most veterans must wait several years before receiving a final decision from the Board. According to the Board's most recent statistics, it takes an average of 1060 days from the time a veteran files a notice of disagreement with the regional office until the Board issues a decision. These delays are only likely to increase. The Board faced a large backlog of cases at the end of fiscal year 2009, and predicts that an even larger number of cases will be added to its docket in fiscal years 2010 and 2011. *FY2009 Report of the*

⁸ Of the 3270 cases decided by the Veterans Court in fiscal year 2009, 1758 were "Remanded" to the Board, 496 were "Affirmed or dismissed in part, reversed/vacated & remanded in part," and 397 were "Reversed/vacated & remanded." *Veterans Court Annual Reports*. The "Remands" are "cases in which the parties agreed to that remedy through a joint motion granted by the court." Ridgway, *supra*, at 152 & n.226.

Chairman, at 18, 22. This is due at least in part to the increasing number of claims being filed by aging veterans and veterans returning from the wars in Iraq and Afghanistan. Approximately 35% of Iraq and Afghanistan veterans file claims for disability compensation. See *GAO Report* at 11. The VA is also “receiving more claims for complex disabilities related to combat and deployments overseas, including those based on environmental and infectious disease risks and traumatic brain injuries.” *Id.* at 12.

In short, the cohort of cases that make their way to the Veterans Court are not characterized by the sort of finality—or accuracy—that one would anticipate at the outset of an “appeal.” Instead, these decisions are in the main erroneous, often admittedly so, and the proceedings in the Veterans Court more closely resemble litigation in the first instance to correct agency error. Pet. Br. 27-28 & n.4.

II. MODERN COMBAT INCREASINGLY GIVES RISE TO INJURIES THAT INTERFERE WITH PURSUING DISABILITY CLAIMS, PARTICULARLY AT THE VETERANS COURT.

Even if the Board functioned as one might hope and expect, the practical reality is that the inflexible rule adopted by the Federal Circuit will lead directly and inevitably to the denial of meritorious claims. This is because modern combat in particular inflicts injuries that are clinically recognized to cause functional impairments that can interfere with a disabled veteran’s ability to meet rigid deadlines. See Pet. App. 46a (Mayer, J., dissenting) (“It is the veteran who incurs the most devastating service-connected injury who will often be the least able to comply with rigidly enforced filing deadlines.”). This is particularly true of the wars in Iraq and Afghanistan, both because the

nature of the combat in those wars gives rise to such injuries, and because advances in battlefield medicine have increased survival rates for such injuries. Atul Gawande, *Casualties of War: Military Care for the Wounded from Iraq and Afghanistan*, 351 *New Eng. J. of Med.* 2471, 2471 (Dec. 2004). These disabilities are particularly likely to cause problems at the moment when a veteran seeks to transition from proceedings in the Board to review in the Veterans Court. It is at this juncture that the process becomes formal and adversarial for the first time. Particularly in light of the high error rate in Board decisions, there is no question that if the decision below is affirmed, numerous meritorious claims will be rejected on technical procedural grounds.

A. Service Members Suffer Serious Physical And Mental Injuries That Impair Their Ability To Manage Their Own Affairs.

It is widely recognized that many of the most common combat injuries can cause significant, long-term cognitive impairments. The ongoing wars in Afghanistan and Iraq have highlighted the prevalence of two such injuries—traumatic brain injury and post-traumatic stress disorder (PTSD). While neither injury is new, these have been called the “signature wounds” of the current wars because of the frequency with which American soldiers have been targeted by roadside bombs, improvised explosive devices (IEDs), and human suicide bombers. See RAND Ctr. for Military Health Policy Research, *Invisible Wounds of War* 3, 5 (2008); *Remarks by the President, supra* n.3; *Legislative Hearing on H.R. 92, H.R. 315, H.R. 339, H.R. 463, H.R. 538, H.R. 542, H.R. 1426, H.R. 1470, H.R. 1471, H.R. 1527, H.R. 1944, and Discussion Draft of the “Rural Veterans Healthcare Act of 2007” Before the Subcomm. On Health of the H. Comm. on*

Veterans' Affairs, 110th Cong. 21, 74 (2007) (Rep. Altmire). Traumatic brain injuries and post-traumatic stress disorder both can impair a veteran's ability to manage his own affairs, and even to function in society. These are precisely the sort of claimants who should be eligible for equitable tolling in appropriate cases.

1. *Traumatic Brain Injury*. A recent study by the RAND Center for Military Health Policy Research indicates that approximately 19% of soldiers deployed to Iraq or Afghanistan likely suffered a traumatic brain injury during their deployment. RAND, *supra*, at 105. Veterans with moderate or severe traumatic brain injuries frequently experience difficulty with attention, concentration, new learning, memory, and executive control functions. Veterans Health Initiative, *Traumatic Brain Injury* 73-74 (Jan. 2004). Problems with learning and memory, which are the most commonly reported deficits, cause veterans to have "difficulty performing [the] complex activities of daily living." *Id.* at 74. These veterans may suffer from an impaired ability to engage in reasoning and problem solving. *Id.* They may experience difficulty with task persistence, planning and organization, foresight and anticipation. *Id.* In addition, these injuries may make it hard "to schedule and keep appointments." RAND, *supra*, at 318. Even with treatment, these injured veterans often face a lengthy road to recovery, with the majority unable to regain their full cognitive abilities. Veterans Health Initiative, *supra*, at 15.

In addition, veterans with only mild brain injuries also may experience difficulty with concentration, memory, and decision-making, including forgetfulness or confusion regarding recent information and events. *Id.* at 23-29. Approximately 10-30% of individuals with mild traumatic brain injury suffer "sig-

nificant long-term residual neurological symptoms.” *Id.* at 29.

2. *Post-Traumatic Stress Disorder.* Similar impairments characterize PTSD, which is particularly prevalent in veterans returning from Iraq and Afghanistan. RAND recently found that nearly 14% percent of service members who were deployed to Iraq or Afghanistan during the recent wars currently suffer from PTSD. RAND, *supra*, at 97 tbl.4.4 & 103. PTSD is a “signature wound” of the Iraq and Afghanistan wars, but the disorder certainly is not new to America’s veterans. Studies of Vietnam-era veterans show that 20-30% have suffered from war-related PTSD, with 10-15% still suffering from the disorder 15 years or more after service. Kristine Yaffe et al., *Posttraumatic Stress Disorder and Risk of Dementia Among U.S. Veterans*, 67 *Arch. Gen. Psychiatry* 608, 608 & nn.2, 3 (2010). A 1994 study of veterans from World War II and the Korean War similarly found that approximately 12% still experienced symptoms of PTSD decades after the wars. *Id.* at 608 & n.4 (citing Spiro et al., *Combat-related Posttraumatic Stress Disorder Symptoms in Older Men*, 9 *Psychol. Aging* 17 (1994)).

Veterans with PTSD often are significantly impaired in their ability to concentrate and carry out daily tasks.⁹ It long has been recognized that veterans suffering from PTSD (as well as similar cognitive and emotional disorders), may find it difficult to navigate administrative systems with unfamiliar rules and regulations. See RAND, *supra*, at 314 (the De-

⁹ See Nat’l Inst. for Mental Health, *Post-Traumatic Stress Disorder (PTSD) 2*, available at http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/nimh_ptsd_booklet.pdf.

partment of Defense and VA health systems “may be particularly challenging, given that the service-members may be cognitively or emotionally impaired and their families may have a limited understanding of these systems”). This is especially true where the veteran’s injury directly impairs his or her ability to learn and remember new information, plan, organize, conceptualize, and perform other process-related functions. Accordingly, a veteran suffering from any such disorder often has difficulty pursuing a claim for benefits with the VA, especially if, like Mr. Henderson, he or she is proceeding *pro se*.

Moreover, these veterans often face increased difficulty in pursuing a claim for benefits with the VA as they age and their mental functioning decreases. Veterans with PTSD are nearly twice as likely to develop dementia later in life. Yaffe, *supra*, at 610. Of course, dementia is not limited to veterans with PTSD: One study found that 7.3% of all veterans in the VA medical system suffer from some form of dementia. Laura Krishnan et al., *Prevalence of Dementia Among Veterans Affairs Medical Care System Users*, 20 *Dement. Geriatr. Cogn. Disord.* 245, 245 (2005). In addition to the well-recognized issue of memory loss, “[p]eople with dementia lose their ability to solve problems and maintain emotional control, and they may experience personality changes and behavioral problems such as agitation, delusions, and hallucinations.”¹⁰

3. *The Compounding Effect of Multiple Injuries.* The degree of impairment experienced by veterans suffering from traumatic brain injury or PTSD is

¹⁰ Nat’l Inst. of Neurological Disorders & Stroke, Dementia: Hope Through Research (May 21, 2010), http://www.ninds.nih.gov/disorders/dementias/detail_dementia.htm.

compounded when, as often is the case, these conditions are accompanied by other injuries. Mild traumatic brain injury, for instance, is significantly associated with post-traumatic stress disorder, which often leads to a compounding of symptoms. The lack of sleep commonly resulting from PTSD can “significantly affect” symptoms of traumatic brain injury, such as memory problems. RAND, *supra*, at 309.

Veterans often contend with other mental health issues as well. About two-thirds of previously deployed military personnel who suffer from PTSD also have major depression, see *id.* at 103, which in turn tends to exacerbate the symptoms of PTSD, see *id.* at 125. Accordingly, such individuals tend to have “more-severe depression, lower social support, more suicide ideation, and more-frequent primary care and mental health care visits.” *Id.* at 125-26.

These already-debilitating conditions are further complicated by the frequent lack of adequate treatment. Whether due to a missed diagnosis or avoidance based on stigma, “nearly 60 percent of persons who experienced a probable brain injury during deployment [in Iraq and Afghanistan] have not been evaluated for this condition by a physician or other health specialist.” *Id.* at 108. Nearly 70% of those needing mental health care have not received minimally adequate treatment, and almost 50% have not received any care. *Id.* at 103 tbl.4.8. As a result, symptoms from these conditions frequently persist longer and with greater severity. And while these sorts of cognitive and mental wounds are difficult enough to manage on their own, they are often accompanied by other serious physical injuries. The IED or other blast explosions that cause head injury also inflict severe damage to the rest of the soldier’s body, especially to extremities unprotected by body

armor. Severe limb trauma, sometimes resulting in amputation, occurs all too frequently.

It is not surprising, therefore, that high proportions of service members with severe limb trauma also contend with associated cognitive and mental wounds. Studies consistently show that those who have been wounded in combat face significantly higher rates of PTSD. *Id.* at 54. For example, a third of service members with combat-related limb loss have a related traumatic brain injury, and a quarter suffer from PTSD. Paul F. Pasquina, *DOD Paradigm Shift in Care of Service Members with Major Limb Loss*, 47 J. Rehab. Research & Dev. (Apr. 20, 2010), available at 2010 WLNR 15008013, at *2.

In short, veterans continue to bear the emotional and physical brunt of our Nation's wars, and they do so in ways that directly affect their ability to pursue the benefits to which those injuries entitle them. As we discuss next, these cognitive disabilities are likely to cause particular difficulty at the moment when, under the Federal Circuit's holding below, no equitable relief is available—the transition from the Board to the Veterans Court.

B. Most Veterans Appeal To The Veterans Court Without The Assistance Of Counsel.

Upon the Board's denial of a claim for benefits, a veteran immediately faces an array of options. He or she may

- (1) file a motion to reconsider, or a claim for revision of the Board decision based on "clear and unmistakable error";
- (2) return to the Regional Office to file a reopened claim;

- (3) seek review of the Board's decision by the Veterans Court; or
- (4) do nothing and abandon the claim for benefits.

See *Veterans Benefits Manual* §§ 14.2, .4, .6; *How Do I Appeal?*, at 12. This strategic judgment of how to proceed is complicated enough by itself, and even more so if the veteran decides to seek review by the Veterans Court. Such review is the moment of transition from the pro-veteran, informal, non-adversarial VA administrative system to the formal, adversarial judicial system of the Veterans Court. Veterans typically must make this transition without an attorney. As discussed above, *supra* at 9, most veterans appear before the Board *pro se* or with the assistance of a veterans' service organization. But many such organizations do not litigate in the Veterans Court, see *Veterans Benefits Manual*, ch. 14, n.1, so most veterans are forced to initiate the appeal on their own. In fiscal year 2009, 68% of the veterans to file an appeal with the Veterans Court were "self-represented at filing." *Veterans Court Annual Reports*.

Unrepresented by counsel, veterans predictably make procedural missteps. For instance, whereas the initial claim for benefits and the "notice of disagreement" are filed in the VA's Regional Office, see *supra* at 6, the "notice of appeal" to the Veterans Court must be filed in that court. 38 U.S.C. § 7266(a).¹¹ It has been commonplace for veterans (even when assisted by service organizations) to file in the wrong venue—i.e., in the RO with which they have been

¹¹ This fact by itself further highlights that the "notice of appeal" is the commencement of judicial proceedings, and is more akin to filing a complaint than to an appeal in the Article III sense addressed in *Bowles*. See Pet. Br. 19-20, 42.

dealing, instead of in the Veterans Court. Prior to the decision below, equitable tolling was applied to cases like these,¹² which is all the more appropriate given the extent to which the VA itself has exacerbated such errors, see Pet. Br. 27-28. That avenue for relief now is closed. *E.g.*, *Talbot v. Shinseki*, No. 10-1518, 2010 U.S. App. Vet. Claims LEXIS 1554, at *1 (Vet. App. Aug. 20, 2010) (case dismissed where notice of appeal “inadvertently sent ... to the VA regional office”) (unpublished). The results are predictably unjust, as Judge Dyk acknowledged even while concurring in the decision below:

[T]he rigid deadline of the existing statute can and does lead to unfairness. This is particularly so in the many cases where the veteran is not represented by counsel during the processing of the claim at the Veterans Administration and/or is suffering from a mental disability. These circumstances can make it extremely difficult for the veteran to navigate the system and meet the statutory deadline.

Pet. App. 44a.

The potential for mistake and delay is compounded when the veteran has a severe physical or mental

¹² See, e.g., *Santana-Venegas v. Principi*, 314 F.3d 1293, 1295-98 (Fed. Cir. 2002) (veterans service organization mistakenly sent notice of appeal to the regional office); *Bailey v. West*, 160 F.3d 1360, 1361, 1365-68 (Fed. Cir. 1998) (en banc) (equitable tolling applied where VA regional office employee told a *pro se* veteran she would file his appeal with the CAVC but the form was mistakenly placed in the veteran’s file at the regional office); cf. *Jaquay v. Principi*, 304 F.3d 1276, 1279, 1286 (Fed. Cir. 2002) (en banc) (equitable tolling applied where veterans service organization misfiled a motion for reconsideration by the Board that would have tolled the 120-day period for appealing to the CAVC).

disability (and all the more so when he or she remains hospitalized or incapacitated because of wounds suffered in battle). Although the Federal Circuit carefully policed the boundaries of equitable tolling, it properly recognized that there are certain veterans—including those suffering from the types of injuries described above, and like Mr. Henderson—who suffered disabling mental injuries that were incurred in or aggravated by their military service. Under the Federal Circuit’s prior precedents, therefore, the 120-day filing deadline was equitably tolled in cases, like this one, in which the claimant’s disability rendered him “incapable of rational thought or deliberate decision making” or “incapable of handling [his] own affairs or unable to function [in] society.” *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004) (quotations omitted) (alteration in original); see also, e.g., *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005).

To treat the filing deadline as jurisdictional, and thereby to exclude such veterans from the Veterans Court, is directly contrary to Congress’s purpose in authorizing judicial review of Board decisions. Until Congress established the Veterans Court, a veteran whose claim for benefits was wrongly denied by the Board had no recourse. Congress determined, however, that to “continue to inform claimants before the VA that benefits to which they are entitled by law could be wrongly denied and that there is no remedy for such a wrongful denial, is no longer a viable position.” S. Rep. No. 100-418, at 50 (1988). Congress therefore enacted the Veterans’ Judicial Review Act to provide “fundamental justice,” *id.*, and to “ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to

which he or she is entitled under law,” *id.* at 31. There is nothing “compassionate” or “fair” or “efficient” about denying review to veterans whose service-related injuries are so severe that they cannot handle their own affairs. Congress consistently “has expressed special solicitude for the veterans’ cause,” see *Sanders*, 129 S. Ct. at 1707, and has since the earliest days of the Nation “provided for him who has borne the battle, and his widow and his orphan,” *Nat’l Ass’n of Radiation Survivors*, 473 U.S. at 309. It could not and did not intend the inequitable result of the decision below.

CONCLUSION

For the reasons set forth above, and in the Brief for Petitioner, the decision below should be reversed.

Respectfully submitted,

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