

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 *AMICUS CURIAE*
UNITED SPINAL ASSOCIATION
IN SUPPORT OF PETITIONER
DAVID L. HENDERSON**

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INTEREST OF *AMICUS CURIAE*

United Spinal Association is a nonprofit organization formed in 1946 by paralyzed veterans. It has served in the interests of veterans and their families ever since.¹ Fully recognized by the U.S. Department of Veterans Affairs as a national veterans service organization, United Spinal has several thousand veteran members in its ranks.

The organization's mission is to improve the quality of life of Americans with spinal-cord injuries. United Spinal provides services to veterans through its VetsFirst program, in which it provides direct representation and counseling to all veterans, regardless of their membership status or type of disability, as well as to their dependents and survivors. United Spinal also maintains a network of VA-accredited veterans service representatives across the nation to assist veteran claimants for VA benefits in their communities. Further, United Spinal's public policy component advocates on behalf of veterans before Congress and state legislatures.

¹ The Government has consented to the filing of this brief, and Mr. Henderson has filed a letter with the Court consenting to the filing of amicus briefs in support of either party. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission.

United Spinal has a strong interest in this case. Equitable tolling of 38 U.S.C. § 7266 has provided a vital safeguard for veterans with serious physical and mental disabilities, including disabilities resulting from spinal-cord injuries. Many veterans with spinal-cord injuries will be affected adversely under the Federal Circuit's decision in this case. United Spinal therefore supports the petitioner, Mr. Henderson, and urges reversal of the Federal Circuit's judgment.

SUMMARY OF ARGUMENT

In establishing the Court of Appeals for Veterans Claims ("Veterans Court"), Congress was careful to express its intent that judicial review of VA decisions be "[a]ccurate, informal, efficient, and fair." Congress further made clear that achieving those goals was the responsibility of all three branches of government. The Federal Circuit's decision frustrated those goals, however, when it interpreted the "notice of appeal" under section 7266(a) as a rigid filing deadline for unwary veteran claimants. Those veteran claimants are accustomed to the VA's non-adversarial and sympathetic system, which culminates in a decision of the Board of Veterans' Appeals (the "Board"). Now, just at the point in the process when a veteran seeks judicial review of a Board decision denying him benefits, and moves to the truly adversarial forum of the Veterans Court, he can be easily stymied by an inflexible deadline no longer subject to equitable tolling, even

under traditionally deserving circumstances where the veteran missed the deadline due to the VA's negligence.

Adding to the unfairness is that most of these "notices of appeal" are filed by self-represented claimants, and often by veterans who miss the 120-day deadline because of the very disabilities for which they seek benefits, as Mr. Henderson did. Moreover, published statistics of the Veterans Court show that roughly 80% of Board decisions that are challenged in the Veterans Court are reversed or remanded for further proceedings. That means that, in all likelihood, the majority of cases dismissed as untimely under the Federal Circuit's interpretation of section 7266(a) were incorrectly decided.

By foreclosing equitable tolling of section 7266(a), the Federal Circuit has set up an unnecessarily formal and unfair procedural roadblock to many disabled, *pro se* veterans, instead of fulfilling its mandate to ensure informality and fairness in the veterans benefits system. The Federal Circuit's decision should be reversed.

ARGUMENT

I. CONGRESS INTENDED JUDICIAL REVIEW OF VETERANS CLAIMS TO BE “ACCURATE, INFORMAL, EFFICIENT, AND FAIR”

“Accurate, informal, efficient, and fair.” Those were the goals of the veterans benefits system, as envisioned by Congress when it enacted the Veterans’ Judicial Review Act to establish the Veterans Court. H.R. Rep. No. 100-936 at 26 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5808. Members of Congress understood that the Act marked a shift in responsibility within the federal government for ensuring the fair treatment of veterans. “[A]chievement of these goals is no longer solely the function of the executive branch, with an occasional nudge from Congress. By allowing courts to review VA policy, the Congress is entrusting the courts with an important responsibility.” *Id.* Thus, Congress explicitly made clear that the goals of the veterans benefits system were shared by all three branches of government.

Before creation of the Veterans Court, advocates of judicial review had long been concerned that the Board gave “scant attention to appeals.” *Id.* at 5792. The Veterans Court was viewed as a means of ensuring the accuracy and fairness of a system that awarded disability benefits to deserving veterans and their families. *Id.* at 5808. In providing a way for veterans to challenge VA

decisions in court, members of Congress trusted that the judiciary would keep the goals of the veterans benefits system in mind and would not overly formalize the system:

If as a result of the enactment of this legislation, the perception of the VA system is that it has become inefficient, formalized, and unfair, and accuracy in decision-making becomes a fortuitous event rather than a consistent one, veterans will bear the burden of the change. The committee has always been mindful of this possibility, and trusts that courts are no less aware of the vital interests which are at stake.

Id.

The Federal Circuit's decision, however, interprets section 7266(a) based on a flawed reading of a non-veterans case, *Bowles v. Russell*, 551 U.S. 205 (2007), rather than on this Court's veterans caselaw, which consistently has called for liberal construction of veterans statutes in the beneficiary's favor. *See, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"). The result is a decision that is clearly at odds with Congress's stated goals, and for at least the reasons discussed below, invites the very perception of the benefits system that Congress warned against.

II. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 7266 FAILS TO ACHIEVE CONGRESS'S GOALS

First, initiating proceedings before the Veterans Court under section 7266(a) is the first step for claimants outside the VA's non-adversarial disability-benefits-claim process. Until that point, the Secretary has a duty to assist any claimant seeking benefits. 38 U.S.C. § 5103A. Thus, section 7266(a) is most naturally understood to provide a limitations period for challenging an adverse Board decision, as Mr. Henderson argues. *See* Brief for Petitioner at 19. In the context of the veterans benefits system, the transition from an agency-level proceeding to a judicial proceeding is difficult to navigate for *pro se* veterans accustomed to non-adversarial proceedings before the Board. As Professor Michael Allen has observed, “[w]hatever the reality is, there has been, and remains, a tension between the agency-level process and the unquestionably traditional adversarial process at the Veterans Court and beyond. In a sense, veterans transitioning from one system to another have the potential to be caught unaware of new rules and other formalities.” Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 379 (2009) (footnote omitted). Under the Federal Circuit's interpretation of section 7266(a), many veterans and claimants who previously relied on the

agency's assistance throughout the claims process will be caught off guard by the now rigid filing deadline. Already, the Veterans Court has dismissed over 100 cases as untimely under section 7266(a) in the nine months since the Federal Circuit's decision—a rate of over three dismissals per week.² Many of those cases likely would have been procedurally safeguarded by equitable tolling under prior Federal Circuit rulings. *See Jaquay v. Principi*, 304 F.3d 1276, 1289 (Fed. Cir. 2002) (en banc) (holding that veteran who “actively pursues his judicial remedies” is entitled to equitable tolling under section 7266); *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc) (“a veteran’s inducement by an adversary’s conduct is akin to grounds sufficient to toll a limitations period in a private suit.”).

Second, the majority of claimants are self-represented when they initiate proceedings in the Veterans Court. In the past three years, the number of claimants who are self-represented at the time of filing has increased from 53% in 2007, to 64% in 2008, and to 68% in 2009. *See* Veterans Court, Annual Reports (2000-2009), *available at* http://www.uscourts.cavc.gov/annual_report. Appearing *pro se* only increases a veteran claimant’s risk of

² A review of the Veterans Court’s orders reveals 133 orders relying on the Federal Circuit’s decision on December 17, 2009. The Veterans Court’s orders can be searched at <http://search.uscourts.cavc.gov/>.

being caught in the transition from the agency-level proceeding to the adversarial, judicial proceeding of the Veterans Court. Indeed, of the 133 claimants whose cases have been dismissed as untimely filed since the Federal Circuit's decision, 109 were self-represented.³ That is a frustrating result because, as Professor James O'Reilly has observed, “[a] study of veterans’ jurisprudence illustrates a pattern of unfairness that allows systematic VA staff delays, but consistently rejects claims by unrepresented veterans who miss deadlines.” James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 234 (2001).

³ See Vet. App. Nos. 09-3091; 09-3253; 09-3389; 09-3548; 09-3566; 08-3698; 09-3864; 09-3959; 09-4011; 09-4027; 09-4030; 10-4076; 09-4086; 09-4094; 09-4153; 09-4207; 09-4230; 09-4232; 09-4308; 09-4311; 09-4508; 09-4519; 09-4546; 09-4602; 09-4608; 09-4622; 09-4631; 09-4663; 09-4666; 09-4669; 09-4707; 09-4718; 09-4743; 09-4760; 09-4767; 09-4768; 09-4774; 09-4785; 09-4786; 09-4787; 09-1512; 10-0105; 10-0112; 10-0258; 10-0301; 10-0321; 10-0365; 10-0432; 10-0438; 10-0477; 10-0483; 10-0487; 10-0527; 10-0532; 10-0535; 10-0542; 10-0547; 10-0549; 10-0562; 10-0582; 10-0628; 10-0655; 10-0761; 10-0805; 10-0807; 10-0811; 10-0849; 10-0865; 10-0919; 10-0924; 10-0967; 10-1008; 10-1034; 10-1129; 10-1135; 10-1146; 10-1178; 10-1179; 10-1189; 10-1211; 10-1255; 10-1266; 10-1401; 10-1417; 10-1418; 10-1449; 10-1451; 10-1483; 10-1490; 10-1494; 10-1498; 10-1518; 10-1527; 10-1544; 10-1560; 10-1569; 10-1684; 10-1685; 10-1704; 10-1756; 10-1757; 10-1811; 10-1879; 10-1958; 10-2006; 10-2053; 10-2074; 10-2087; 10-2351. Veterans Court dockets are available at <https://efiling.vetapp.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp>.

Third, many veterans are unable to meet the 120-day deadline as a result of the very disabilities for which they seek benefits. The Federal Circuit had previously tolled the limitations period of section 7266(a) when mental or physical illnesses prevented a timely filing. *See, e.g., Arbas v. Nicholson*, 403 F.3d 1379, 1382 (Fed. Cir. 2005); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004). The court applied common sense in construing section 7266(a) in order to reach the conclusion that tolling was warranted. According to the court in *Barrett*, “[i]t would be both ironic and inhumane to rigidly implement section 7266(a) because the condition preventing a veteran from timely filing is often the same illness for which compensation is sought.” 363 F.3d at 1320; *see also Henderson v. Shinseki*, 589 F.3d 1201, 1221 (Fed. Cir. 2009) (en banc) (Mayer, J., dissenting).

Fourth, most of the Board’s decisions challenged in the Veterans Court are flawed in some manner, as indicated by the results of the appealed decisions. From 2000 to 2009, for example, the Veterans Court reversed or remanded an average of 1,762 cases per year, while only affirming an average of 403 cases. *See Veterans Court, Annual Reports (2000-2009)*. Applying those statistics to the three cases per week dismissed as untimely under the Federal Circuit’s interpretation of section 7266(a), means that the Veterans Court is dismissing challenges to many wrongly decided Board decisions. That result is manifestly unfair and unjust to

veterans and their dependents who seek disability benefits under what is supposed to be a system that is “[a]ccurate, informal, efficient, and fair.”

In his opinion concurring with the Federal Circuit majority, Judge Dyk agreed that the majority’s reading of section 7266 “can and does lead to unfairness.” *Henderson*, 589 F.3d at 1221. In particular, he noted that self-represented veterans are particularly at risk and that service-connected illnesses can lead to late filings, as in Mr. Henderson’s case. *Id.* Judge Dyk, however, concluded that the best solution was congressional amendment of section 7266(a) to allow equitable tolling. *Id.* But as previously discussed, Congress entrusted *the judiciary* with safeguarding its stated goals. H.R. Rep. No. 100-936 at 26 (“achievement of these goals is no longer solely the function of the executive branch, with an occasional nudge from the Congress.”). Forcing veterans to seek legislative relief from the Federal Circuit’s decision would merely demonstrate that the judiciary has failed to ensure the accuracy, informality, efficiency, and fairness of the VA’s decision-making process.

CONCLUSION

For these reasons, United Spinal supports the petitioner Mr. Henderson and respectfully requests reversal of the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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