

No. 09-1036

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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 *AMICUS CURIAE* OF THE AMERICAN  
LEGION IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Chartered and incorporated by Congress in 1919, The American Legion is a nonpartisan, not-for-profit organization that works on behalf of United States veterans regardless of war era or nature of service. Representing approximately 2.5 million wartime veterans and their families, it stands as the nation's largest veterans service organization.

One of the four pillars upon which The American Legion was founded is Veterans Affairs and Rehabilitation. Consistent with its core mission, The American Legion advocates for adequate funding of health care, timely access to health care facilities, fair rulings on benefit claims, and economic opportunities for veterans who have returned home shaped and sometimes changed by their military experiences.

Like the Petitioner, many veterans are affected by medical conditions directly linked to their military service. Veterans of recent military operations, such as Operation Iraqi Freedom and Operation Enduring Freedom, are all too often crippled by posttraumatic stress disorder ("PTSD"). The effects of this condition can be debilitating, and The American Legion works hard to ensure that affected men and

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<sup>1</sup> The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

women have access to adequate care and compassionate treatment.

In holding that the time to file an appeal to the United States Court of Appeals for Veterans Claims (“Veterans Court”) is jurisdictional and no longer subject to equitable tolling, the Federal Circuit has issued an opinion that significantly undermines this care and treatment. The Federal Circuit’s decision will predictably and inexorably result in the denial of benefits to our veterans who are most in need, particularly those suffering from mental illnesses like PTSD that interfere with their ability to comply with time limits and deadlines. Accordingly, The American Legion has a strong interest in seeing that the decision of the Court of Appeals is rectified and reversed.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

The American Legion respectfully submits this brief to ensure that the Court has a clear, informed, and thorough understanding of how PTSD handicaps the ability of veterans to file appeals with the Veterans Court within the 120-day time limit established by statute. 38 U.S.C. § 7266(a). Adopting the rule set forth by the Federal Circuit would shutter the courthouse doors to veterans like David Henderson who may deserve federal assistance but failed to file a timely appeal because of emotional

and psychological disabilities directly attributable to military service.<sup>2</sup>

Petitioner Henderson began serving in the military in 1950. He was discharged in 1952 after being diagnosed with paranoid schizophrenia, which he established as related to his military service; he received a 100% disability rating. In 2001, without the assistance of counsel, Henderson applied for special compensation for in-home care to treat his service-related mental disability. The Department of Veterans Affairs (“VA”) regional office denied his request, and this decision was affirmed by the Board of Veterans’ Appeals.

According to his treating psychiatrist, Henderson is “incapable of rational thought or deliberate decision-making” and “incapable of understanding and meeting deadlines.” Badawi Decl., ¶ 4 & Ex. A at 2 (Mar. 13, 2007) (Fed. Cir. JA at A1028, A1031). While PTSD was not clinically recognized as a diagnosis when Henderson was first diagnosed in 1950, Henderson’s symptoms are consistent with

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<sup>2</sup> Indeed, such a rule runs counter to recent policy changes concerning benefits for veterans with PTSD. *See* Julie Pace, *Obama Pledges Help for Veterans to Address Post-Traumatic Stress*, Wash. Post, July 11, 2010, at A08 (“President Obama said Saturday that the government is taking ‘a long overdue step’ to aid veterans with post-traumatic stress disorder, making it easier for them receive federal benefits.”).

those of veterans who today are diagnosed with PTSD.<sup>3</sup>

PTSD, which is now better understood and widely documented, literally affects hundreds of thousands of servicemen and women, and its effects on their lives can be debilitating. The daily functioning of veterans suffering from PTSD can be significantly impaired, and even with treatment they commonly miss deadlines as a direct consequence of their condition.

Our country has made a pledge, through its laws and in our communities, to care for its servicemen and women upon their return home. The American Legion urges the Court to follow settled law and honor this promise by protecting Petitioner and other veterans' access to judicial redress.

## ARGUMENT

### **I. PTSD Is a Debilitating Illness That Strikes Military Veterans at Alarming High Rates.**

The psychological and emotional toll of military service can endure long after tours of duty end and physical injuries heal.<sup>4</sup> The United States created

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<sup>3</sup> See generally Jaydip Sarkar *et al.*, *Comorbidity of Post Traumatic Stress Disorder and Paranoid Schizophrenia*, 16 J. Forensic Psychiatry & Psychol. 660 (2005).

<sup>4</sup> One in six troops returning from duty in Iraq suffered from anxiety, major depression, or PTSD according to a study published in the *New England Journal of Medicine*. Charles Hoge *et al.*, *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 *New Eng. J. Med.* 13 (2004).

“the first military hospital for the insane in 1863” to treat Civil War soldiers. Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190/191 Mil. L. Rev. 67, 70 (2007). The federal government, however, only undertook its first intensive research study of posttraumatic illnesses once known as “shell shock” or “war neurosis” after the Vietnam War. This study eventually led in 1980 to the official diagnostic classification of PTSD and codification by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (DSM-III).<sup>5</sup>

PTSD is a severe anxiety disorder that can develop after an extreme traumatic event that causes psychological trauma. The traumatic stressor may involve either “direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity,” or indirectly “witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.” American Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 463 (4th ed. text revision, 2000) (“DSM-IV-TR”).

PTSD may be issued as the formal diagnosis only if the symptoms cause “clinically significant distress or impairment” of major domains of daily life, such as occupational activities, social relations, or other

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<sup>5</sup> Henderson’s diagnosis therefore predated the clinical recognition of PTSD.

“important areas of functioning,” and only if these effects last for over one month. *Id.*

To be clinically diagnosed with PTSD, a patient must have experienced “intense fear, helplessness, or horror” in response to a trauma and exhibit the following symptoms: “numbing of general responsiveness”; “persistent reexperiencing of the traumatic event”; “persistent avoidance of stimuli associated with the trauma”; and “persistent symptoms of increased arousal.” *Id.* Patients often experience depression, sleep disorders, and nervousness. Some veterans suffering from PTSD experience “flashbacks” that force the individual to relive the combat trauma. U.S. Dep’t of Veteran Affairs, *Understanding PTSD*, available at [http://www.ptsd.va.gov/public/understanding\\_ptsd/booklet.pdf](http://www.ptsd.va.gov/public/understanding_ptsd/booklet.pdf).

Veterans suffer from PTSD at an alarmingly high rate.<sup>6</sup> A study commissioned by Congress concluded that a significant number of Vietnam veterans have experienced psychological and emotional problems, which produced life-adjustment difficulties both at work and in their personal lives. Jennifer L. Price, National Center for PTSD, *Findings from the*

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<sup>6</sup> As this Court noted in *Porter v. McCollum*, “PTSD is not uncommon among veterans returning from combat.” 130 S. Ct. 447, 451 n.4 (2009) (per curiam) (citing *Fiscal Year 2010 Budget for Veterans’ Programs: Hearing Before the S. Comm. on Veterans’ Affairs*, 111th Cong. 63 (2009) (uncorrected copy) (testimony of Eric K. Shinseki, Secretary of Veterans Affairs (VA), reporting that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD)).

*National Vietnam Veterans' Readjustment Study*, available at <http://www.ptsd.va.gov/professional/pages/vietnam-vets-study.asp> (last visited Sept. 16, 2010). With respect to more recent military operations, since 2001, over 227,000 veterans have received medical treatment through the VA for mental health issues; of that number, the VA is caring for over 130,000 servicemen and women suffering from PTSD.<sup>7</sup> It is estimated that about 770,000 veterans have been diagnosed with PTSD since 2001.<sup>8</sup>

## **II. PTSD May Prevent Affected Veterans from Filing Within the 120-day Window for Appeals of Decisions to the Veterans Court.**

Veterans diagnosed with PTSD suffer significant impairment in their functional ability to perform at their jobs and in social settings. As the VA has explained, PTSD can substantially “disrupt” the lives of veterans, “making it hard to continue with . . . daily activities.” National Center for PTSD, available at <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp> (last visited Sept, 15, 2010). Hence, it comes as no surprise that some veterans fail to file appeals of final agency decisions by the Board of Veterans' Appeals in a timely fashion given their “diminished responsiveness to the external world.” DSM-IV-TR at 464. In clinical terms, this is described as “psychic numbing” or “emotional

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<sup>7</sup> Brief of the *Amici Curiae* National Organization of Veterans' Advocates, Inc. *et al.*, at 4a (U.S. filed Mar. 26, 2010).

<sup>8</sup> *Id.* at 6a.

anesthesia.” *Id.* Indeed, veterans seeking benefits for service-related disabilities may be especially averse to pursuing an appeal if denied assistance because those with PTSD “try to avoid situations . . . that trigger memories of the traumatic event” and “avoid talking or thinking about the event.” National Center for PTSD, *Understanding PTSD*, at 4, available at [http://www.ptsd.va.gov/public/understanding\\_ptsd/booklet.pdf](http://www.ptsd.va.gov/public/understanding_ptsd/booklet.pdf).

The Federal Circuit’s decision, if left in place, would bar all appeals in all cases brought outside of the 120-day window, no matter the circumstances. Pet. App. 33a-34a. Such a rule would turn a blind eye to the fact that the same disability for which a veteran seeks federal assistance might also prevent him or her from filing within 120 days of the benefit’s denial.

In this case, Petitioner Henderson, even while suffering from paranoid schizophrenia, only missed the statutory deadline by two weeks, filing 135 days after notice was mailed. To uphold the Federal Circuit’s decision would preclude any court from considering the circumstances of his delayed appeal and reviewing whether he is entitled to in-home care.

The Federal Circuit has previously recognized that mental and physical illness can in some cases justify equitable tolling. *See Arbas v. Nicholson*, 403 F.3d 1379, 1382 (Fed. Cir. 2005); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004).<sup>9</sup> In the absence

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<sup>9</sup> In the criminal context, the mental disability of veterans has been presented by their defense counsel as a valid consideration in judging a defendant’s mental state: “I think they should

of equitable tolling, veterans and their dependents will have no recourse when the failure to file was caused by the very disability for which the veteran sought federal assistance. As the dissenting judges from the Federal Circuit noted, the majority's ruling "creates 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 (Mayer, J., dissenting). Upholding the Federal Circuit would run directly afoul of this Nation's "long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . ." *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) (per curiam).

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always receive some kind of consideration for the fact that their mind has been broken by war." Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Is Taking the Stand*, N.Y. Times, Jan. 27, 2008, at 1 (quoting Western regional defense counsel for the Marines).

**CONCLUSION**

The somber and sobering reality is that hundreds of thousands of veterans return from service bearing the emotional and psychological scars of their combat experiences. Unless the Court overturns the Federal Circuit's unbending ruling, those veterans with the most debilitating service-related disabilities will be at greatest risk of losing judicial review of a denial of their federal benefits.

Respectfully submitted,

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