APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2020-2298

[Filed March 31, 2022]

LEWIS B. JONES,	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES,	)
Defendant-Appellee	)
	)

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00520-MMS, Judge Margaret M. Sweeney.

OPINION ISSUED: August 11, 2021
OPINION MODIFIED: March 31, 2022[*]

JONATHAN HERSTOFF, Haug Partners LLP, New York, NY for plaintiff-appellant. Also represented by JASON ARI KANTER.

[*] This opinion has been modified and reissued following a petition for rehearing filed by Appellant.

JAMES WILLIAM POIRIER, I, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., FRANKLIN E. WHITE, JR.

Before NEWMAN, SCHALL, and DYK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SCHALL.

Dissenting opinion filed by *Circuit Judge* NEWMAN.

SCHALL, *Circuit Judge*.

Lewis B. Jones appeals the decision of the United States Court of Federal Claims that dismissed his amended complaint for lack of jurisdiction. *Jones v. United States*, 149 Fed. Cl. 703 (2020) ("*Jones*"). The Court of Federal Claims dismissed the amended complaint on the ground that the claim stated therein was barred by the six-year statute of limitations set forth at 28 U.S.C. § 2501. For the reasons stated below, we affirm.

BACKGROUND

I.

There are two systems that provide disability compensation to former members of the armed services. Both are relevant to this case. First, Section 1201 of Title 10 provides that military personnel who become disabled in service with at least 20 years of service or at least a 30% disability rating are entitled to receive military retirement pay ("disability retirement pay") from the Department of Defense.

Under this system, a service member who is physically disabled while "entitled to basic pay" is eligible to apply for military disability retirement, which is based on the service member's fitness for military duty. 10 U.S.C. § 1201 (1988). Second, under Section 1110 of Title 38 (formerly § 310), veterans are also entitled to receive veterans benefits if they can establish the existence of service-connected disability. Under this system, after discharge, a former service member can seek compensation from the Department of Veterans Affairs ("VA"). This system is based upon a veteran's capacity to function and be compensated in the civilian world. *See* 38 U.S.C. § 355 (1988) ("The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations."); 38 U.S.C. § 1155 (2018); *see also McCord v. United States*, 943 F.3d 1354, 1357–58 (Fed. Cir. 2019) (discussing the interplay between military disability pay and the system of disability benefits administered by the VA).

II.

The pertinent facts are not in dispute. Mr. Jones entered active-duty service in the United States Air Force ("Air Force") on January 29, 1981. *Jones*, 149 Fed. Cl. at 705. Subsequently, in 1982, while serving in Germany, he was struck in the eye by the door of an armored personnel carrier. *Id.* As his service continued, this injury resulted in a number of sequelae, including intense headaches. *Id.* In addition, over time, as a result of the injury, it became increasingly difficult for Mr. Jones to perform his duties. *See id.*

In October of 1988, Mr. Jones was referred to a Medical Evaluation Board ("MEB").[1] A "Narrative Summary (Clinical Resume)" dated October 16, 1988, which was before the MEB, reflects that Mr. Jones had developed "intermittent right cranial nerve 4th palsy associated with chronic right retro-orbital stabbing pain, usually occurring during the late afternoon or night." Suppl. App. 24. According to the summary, a psychiatric consultant felt that Mr. Jones suffered from "psychological factors effecting a physical illness and [the consultant had] recommended psychometric testing." *Id.* at 25. The summary also stated that, in the past, Mr. Jones's "[h]eadaches would occur three to four times a year and last one to three days and were only relieved by alcohol or sleep," and that Mr. Jones had been prescribed a variety of medications without relief. *Id.* at 24. The summary further stated that, in the three months prior to the MEB proceedings, Mr. Jones "noted increasing frequency and duration of headaches (up to two to three times a day[ ]"), and that "[i]n the last two weeks, he noted a nearly constant headache which was relieved only with repetitive doses of intramuscular Demoral." *Id.*

On November 18, 1988, the MEB issued a report referring Mr. Jones's case to a Physical Evaluation Board ("PEB"), to consider whether Mr. Jones's medical condition rendered him physically unfit to serve in the

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[1] An MEB determines the nature of a service member's disability by reviewing the service member's medical records. *Barnick v. United States*, 591 F.3d 1372, 1375 (2010); *see* AFR 35-4 § 1-2.b (1985) ("The MEB is composed of three physicians who review all medical records and make appropriate recommendations.").

Air Force. *See Jones*, 149 Fed. Cl. at 705–06 & n.2.[2] On November 22, 1988, Mr. Jones provided remarks on a "Statement of Record Data," in which he stated that he had been aware of the MEB and the possibility of his discharge for over six years and that his condition had "worsened even more since the M.E.B. evaluation." Suppl. App. 28–29. He indicated that he had "constant temporal and eye pain which varie[d] in severity several times a day that [was] incapacitating." *Id.* at 28. Mr. Jones expressed that "[p]sychologically," he felt "deformed, miserable" and possessed "zero tolerance to stress or anxiety," and that he had to "avoid stressful situations and other things [that] aggravate [his] injury." *Id.* at 28–29. Mr. Jones also indicated that he had "adjusted much of the pain into [his] personality," having become "impatient" and "irritable." *Id.* at 29. He stated: "My injury has certainly hindered my Air Force career. In the event of retirement, my injury will positively hinder civilian employment. This undoubtedly creates a hardship." *Id.* at 28. In a report dated December 6, 1988, the PEB recommended that Mr. Jones be discharged with severance pay based on a 10% disability rating for "Post traumatic pain syndrome manifest[ing] as headaches." *Jones*, 149 Fed. Cl. at 706. Thus, the PEB did not award Mr. Jones a 30% disability rating, which would have qualified him for disability retirement pay.

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[2] A PEB determines a service member's fitness for duty and entitlement to disability retirement pay or severance pay after an MEB finds the service member does not meet the military's standards for retention under its regulations. *Chambers v. United States*, 417 F.3d 1218, 1225 n.2 (Fed. Cir. 2005); *see generally* AFR 35-4 § 3 (1985).

Mr. Jones agreed with the PEB's recommendation, and, on December 29, 1988, he was honorably discharged from the Air Force with severance pay, but with no disability retirement pay. In 1989, his discharge was amended to reflect the fact that his injury was combat-related. *Id.*

In due course, Mr. Jones sought disability benefits from the VA. As a result, over a period of fifteen years, the VA issued various disability ratings or denials of disability claims in response to claims brought by Mr. Jones. *Id.* Eventually, effective December 8, 2017, the VA awarded Mr. Jones a 100% disability rating based on a combination of conditions, including headaches, traumatic brain injury ("TBI"), Post-Traumatic Stress Disorder ("PTSD"), and a number of other physical and mental limitations. *Id.*

Upon receiving this 100% disability rating from the VA, on February 26, 2018, Mr. Jones petitioned the Air Force Board for Correction of Military Records ("AFBCMR") for changes to his record that would entitle him to a disability retirement dating back to 1988, when he was discharged. *Id.* Before the AFBCMR, Mr. Jones also sought disability retirement pay and benefits pursuant to 10 U.S.C. § 1201. In January of 2020, the AFBCMR denied Mr. Jones's petition. *Id.*

III.

On April 23, 2020, Mr. Jones filed a complaint in the Court of Federal Claims seeking review of the AFBCMR decision. Thereafter, on July 1, 2020, he filed an amended complaint. *Jones*, 149 Fed. Cl. at 706.

On August 25, 2020, the Court of Federal Claims granted the government's motion to dismiss pursuant to its Rule 12(b)(1). The court concluded that it lacked jurisdiction because Mr. Jones's claim for disability retirement pay and benefits pursuant to 10 U.S.C. § 1201 was barred by the six-year statute of limitations set forth at 28 U.S.C. § 2501. *Id.* at 707–08.

The Court of Federal Claims determined that Mr. Jones's claim for disability retirement pay and benefits accrued on December 29, 1988, the date of his discharge from the Air Force. *Id.* at 708. As noted above, Mr. Jones's discharge followed the determination of the PEB earlier in December that Mr. Jones should be separated, and not retired, due to his disabling trauma manifesting as headaches. Having determined that Mr. Jones's claim accrued upon his discharge, the court ruled that it was time-barred. The court stated:

> [b]ecause Mr. Jones did not file suit in this court within six years of his separation from the Air Force in 1988, but instead filed suit more than thirty years later, his claim for disability retirement pay and benefits is barred by 28 U.S.C. § 2501.

Id. The court also ruled that Mr. Jones could not rely on the accrual suspension rule, under which "the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed." *Id.* at 709 (quoting *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc)). According to the court, the "amended complaint

establishe[d] a record of Mr. Jones's knowledge of his various health conditions in the months leading up to his discharge," and thus "[t]he facts of this case do not show that Mr. Jones's disabling health problems were inherently unknowable in 1988." *Id.* In reaching its decision, the court cited to *Young v. United States*, 529 F.3d 1380, 1385 (Fed. Cir. 2008), as supporting the proposition that "accrual of a military pay claim should not be suspended where the service member's medical condition was not unknowable before his discharge, notwithstanding the fact that examinations by the VA in later years provided more information about his condition." *Jones*, 149 Fed. Cl. at 710.

Based upon these findings, the court granted the government's motion to dismiss and directed the entry of judgment accordingly. Following entry of judgment, Mr. Jones timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I.

Whether the Court of Federal Claims has jurisdiction over a claim is a question of law that we review de novo. *Biafora v. United States*, 773 F.3d 1326, 1334 (Fed. Cir. 2014). We review the court's findings of fact relating to jurisdictional issues for clear error. *Id.*

II.

Mr. Jones brought suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, which authorizes certain actions for monetary relief against

the United States and waives the government's sovereign immunity for those actions. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). Mr. Jones claims he is entitled to disability retirement pay under 10 U.S.C. § 1201, a money-mandating source of substantive law on which he may base his Tucker Act suit. *See id.* at 1174. Section 1201 provides that, upon the Secretary's determination that a service member is "unfit to perform the duties of [the member's] office, grade, rank, or rating because of physical disability incurred while entitled to basic pay," the Secretary may retire the service member if the Secretary also makes certain determinations. 10 U.S.C. § 1201 (1988). Relevant to the facts here is a service member's eligibility for disability retirement pay upon the Secretary's determination that "the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veteran's Administration at the time of the determination." *Id.*[3]

To fall within the jurisdiction of the Court of Federal Claims, a claim against the United States filed in that court must be "filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1988); *see also John R. Sand & Gravel Co. v United States*, 552 U.S. 130, 132–35 (2008). Generally, "[a] cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when 'all events have

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[3] Section 1201 has since been amended to reflect the change in name of the "Veteran's Administration" to the "Department of Veterans Affairs." *See* 10 U.S.C. § 1201 (2021). We refer to both as "VA."

occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue . . . for [the plaintiff's] money.'" *Martinez*, 333 F.3d at 1303 (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966)). In military disability retirement cases, however, claim accrual is delayed until mandatory administrative proceedings are completed under the so-called "first competent board rule." That rule provides that a service member's claim does not accrue until final action is taken by the first board competent to decide the matter of entitlement, or upon refusal of a service member's request for such a board. *Friedman v. United States*, 310 F.2d 381, 395–96 (1962). As our court explained in *Real v. United States*, 906 F.2d 1557 (Fed. Cir. 1990):

> The generally accepted rule is that claims of entitlement to disability retirement pay do not accrue until the appropriate board either finally denies such a claim or refuses to hear it. The decision by the first statutorily authorized board which hears or refuses to hear the claim is the triggering event. If at the time of discharge an appropriate board was requested by the service member and the request was refused or if the board heard the service member's claim but denied it, the limitations period begins to run upon discharge. A subsequent petition to the corrections board does not toll the running of the limitations period; nor does a new claim accrue upon denial of the petition by the corrections board. However, where the Correction Board is not a reviewing tribunal but is the first board to consider or determine finally the claimant's

> eligibility for disability retirement, the single cause of action accrues upon the Correction Board's final decision.

Real, 906 F.2d at 1560 (citing *Friedman*, 310 F.2d at 390, 396–98) (internal quotation marks omitted); *accord Chambers v. United States*, 417 F.3d 1218, 1221, 1224–25, 1227 (Fed. Cir. 2005); *Martinez*, 333 F.3d at 1311–15.

A PEB is an appropriate board to make a final disability determination, and its decision is adequate to trigger the running of the statute of limitations. *See Chambers*, 417 F.3d at 1224–25 & n.2; *Schmidt v. United States*, 89 Fed. Cl. 111, 120 (2009) ("An 'informal' [Central Physical Evaluation Board] decision is sufficient to start the running of the statute of limitations.").[4]

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[4] The December 6, 1988 PEB report is marked "informal." Suppl. App. 26. A decision by an informal PEB can start the running of the statute of limitations when a plaintiff waives his or her appeal to a formal PEB. *See Schmidt*, 89 Fed. Cl. at 120–21; *Fuller v. United States*, 14 Cl. Ct. 542, 544–45 (1988) (holding that the plaintiff's claim accrued when he waived his right to a hearing before a PEB after a Navy Board of Medical Survey declared him unfit for service); *cf. Gant v. United States*, 417 F.3d 1328, 1332 (Fed. Cir. 2005) (concluding that, by waiving his right to a formal PEB hearing and accepting the findings of the preliminary PEB, "Mr. Gant knowingly and voluntarily accepted the finding of unfitness for duty and the disability rating assigned to him by the preliminary PEB[,] and that he ha[d] not shown any reason that he should be permitted to challenge those determinations in subsequent administrative or judicial proceedings").

The record reflects that Mr. Jones "agreed with the findings and recommended disposition of the [informal PEB]" on December 20, 1988. Suppl. App. 80. Mr. Jones does not argue on appeal, nor

On December 6, 1988, the Air Force PEB recommended severance pay based upon a 10% disability rating for Posttraumatic pain syndrome manifesting as headaches.[5] Thereafter, on December 29, 1988, Mr. Jones was honorably discharged with severance pay, but no disability retirement pay. Under the controlling first board rule, Mr. Jones's claim for disability retirement pay would properly be viewed as accruing in December of 1988. As a result, it would be barred by the six-year statute of limitations because Mr. Jones did not file suit in the Court of Federal Claims until April 23, 2020. Mr. Jones, however, contends that his claim did not accrue in December of 1988 and that his suit in the Court of Federal Claims was, in fact, timely filed. We turn now to the arguments that Mr. Jones makes in that regard.

III.

We understand Mr. Jones to make two main arguments on appeal. First, he argues that his claim

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did he argue before the Court of Federal Claims, that he did not waive his appeal to a formal PEB, so that the informal PEB report could not trigger the running of the statute of limitations. *See id.* at 9.

[5] The schedule of rating disabilities in use by the VA for migraines, available at 38 C.F.R. § 4.124a, reads now as it did in 1988. It provides a 10% rating for migraines "[w]ith characteristic prostrating attacks averaging one in 2 months over last several months," a 30% rating for migraines "[w]ith characteristic prostrating attacks occurring on an average once a month over last several months," and a 50% rating for migraines "[w]ith very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." 38 C.F.R. § 4.124a.

for disability retirement pay could not accrue until both (1) the Air Force determined that he was entitled to a 30% disability rating and (2) a competent board denied his request for disability retirement pay. Before those two conditions were met, he asserts, he could not bring suit and obtain relief, and therefore the statute of limitations did not begin to run in 1988.

Mr. Jones's second argument is that the Court of Federal Claims erred when it held the accrual suspension rule did not apply to his claim. Mr. Jones asserts that the PEB's discharge decision in 1988 was founded solely on his headaches (post-traumatic pain syndrome), and that his later, separate diagnoses of TBI and PTSD were not merely "more information" about his headaches. *See, e.g.*, Appellant's Informal Br. 4, 8–13, 16–17; Reply Br. 4–6; *Jones*, 149 Fed. Cl. at 710. He contends that, due to the state of medical technology in 1988, his TBI and PTSD could not be diagnosed or accounted for in his disability rating at the time of his discharge, and therefore they were "inherently unknowable latent injuries." *See* Appellant's Informal Br. 12–18, Reply Br. 1. Mr. Jones takes issue with the Court of Federal Claims's reliance on *Young v. United States*. Although he admits that he "knew he had serious health issues" in 1988, Appellant's Informal Br. 15, Mr. Jones asserts that he was not aware of his mental impairments prior to discharge, *id.* at 14, and thus he had no reason to question the Air Force medical professionals' diagnosis of headaches and his 10% rating until 2017, when he was diagnosed with TBI and PTSD. *Id.* at 10, 13–15. Accordingly, we understand his second argument to be that accrual of his claim should have been suspended

because in 1988 he could not reasonably have known that he was suffering from, and would later be diagnosed with, ailments that would provide him with a disability rating percentage sufficient to qualify him for disability retirement pay. *Id.* at 15 (Only "[w]hen the plaintiff went through examinations, diagnosis and [received] treatment for TBI and PTSD . . . and proper medications did the cause of action reveal itself.").

The government responds that Mr. Jones's claim for disability retirement pay under § 1201 accrued when he was separated from service in 1988, and that the accrual suspension rule does not apply. This is so, the government argues, because in 1988 "Mr. Jones knew that he had been injured during military service, knew that he had suffered resulting symptoms that impaired his ability to work, and knew both that a [PEB] had considered his eligibility for a medical retirement, and that the Air Force had decided *not* to award him a medical retirement." Appellee's Informal Br. 15, 17–20. The government disagrees that the PEB considered only Mr. Jones's headaches, instead noting that the PEB had before it evidence of both his physical and psychological injuries. *Id.* at 12–16. There is no requirement, the government argues, that Mr. Jones be able to refer to his psychological symptoms as "PTSD" to bring suit in 1988. *Id.* at 20. Instead, he merely needed to show "that he was injured during military service, and that, as a result, he qualified for a rating of 30 percent disability." *Id.* at 20–22.

We address Mr. Jones's arguments in turn.

IV.

First, we agree with the government that Mr. Jones's claim accrued in December of 1988. The PEB, a board competent to decide the issue of his disability, had before it evidence pertaining to Mr. Jones's injuries from being struck in the head, including his headaches and his potential psychological claims, and the Board discharged him with a 10% disability rating. *See Real*, 906 F.2d at 1560 ("The decision by the first statutorily authorized board which hears or refuses to hear the claim is the triggering event."). Accordingly, it was in 1988 that all events necessary to fix the government's alleged liability occurred, entitling Mr. Jones to bring suit and demand payment. Hence, his claim accrued upon his discharge in December of 1988. *See Martinez*, 333 F.3d at 1303.

That he was not yet assigned a 30% disability rating does not mean Mr. Jones's claim did not accrue. The Court of Federal Claims hears cases where a service member challenges a board's rating with respect to disability retirement. *See, e.g.*, *McCord*, 943 F.3d at 1356 (noting that a service member who was discharged with a 20% disability rating brought suit in the Court of Federal Claims after he unsuccessfully applied for a correction); *Casiano v. United States*, 141 Fed. Cl. 528, 536–40 (2019) (considering a challenge to boards' 20% ratings and denial of disability retirement benefits by two plaintiffs); *Rock v. United States*, 112 Fed. Cl. 113, 132–33 (2013) (affirming a PEB's decision granting a service member a disability rating of 20%); *Colon v. United States*, 35 Fed. Cl. 516, 520 (1996) (holding that the plaintiff's cause of action accrued

upon his discharge from the Army after a PEB made a final determination assigning him a 20% disability rating); *Randolph v. United States*, 31 Fed. Cl. 779, 781–84 (1994) (remanding to a PEB for reconsideration of the PEB's assignment of a 10% rating).

We understand Mr. Jones's argument that in 1988 the Secretary had not determined that he was entitled to a 30% rating to be a contention that his claim did not accrue because he could not possibly have received a 30% rating in 1988, given that his headaches were only rated at 10%. We note, however, that the PEB had before it the MEB's report and Mr. Jones's statements, which outlined the severity and frequency of his headaches, as well as his other physical and psychological injuries. Mr. Jones argues that later medical advances were necessary for the Board to make a determination. While the Secretary may certainly consider such advances as he "from time to time readjust[s the] schedule of ratings in accordance with experience," 38 U.S.C. § 1155, statute forecloses Mr. Jones' argument by requiring that eligibility for disability retirement be assessed using "the standard schedule of rating disabilities . . . at the time of the determination." 10 U.S.C. § 1201.

Because, at the time of his discharge, an appropriate board heard his claim but denied it, the limitations period began to run upon Mr. Jones's discharge. *See Real*, 906 F.2d at 1560. The VA's later assignment of a higher disability rating, combined with his proceedings before the Correction Board, did not provide him with a new claim. *Id.*; *see also Friedman*, 310 F.2d at 396 ("Once a final decision is had, adverse

determinations by other boards, including the Correction Board, do not give rise to a new cause of action.").

V.

We turn now to Mr. Jones's argument regarding the accrual suspension rule. As noted above, that rule provides that "the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed." *Martinez*, 333 F.3d at 1319. A plaintiff who shows that his or her injury was "inherently unknowable" at the accrual date can obtain the benefit of such a suspension. *Id.* (citation omitted).[6] The accrual suspension rule is "strictly and narrowly applied." *Id.* (quoting *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985)). The party whose claim is otherwise barred by the statute of limitations has the burden of proving that the facts underlying its claim were inherently unknowable. *Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967). We agree with the Court of Federal Claims that Mr. Jones did not make such a showing.

Mr. Jones's remarks on the November 22, 1988 Statement of Record Data indicate not only that he understood that his injuries were serious, but also that he understood that his injuries were sufficiently severe

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[6] Alternatively, to achieve the benefit of the accrual suspension rule, a plaintiff may show "that the defendant has concealed its acts with the result that plaintiff was unaware of their existence or it." *Martinez*, 333 F.3d at 1319 (citation omitted). This aspect of the rule is not at issue in this case.

that he was being evaluated for discharge and retirement:

> I've been aware of the Medical Evaluation Board for over six years. I first learned about the M.E.B. through threats from doctors. I was warned complaining too much about my injury would lead to M.E.B. discharge action. . . . My condition has worsened and has worsened even more since the M.E.B. evaluation. Medicine and surgery are inapplicable in treating my injury. In the past I've taken some types of medicine for pain. Presently, I'm not taking anything and I suffer during the attacks with no way to relieve the pain. I have constant temporal and eye pain which varies in severity several times a day that are incapacitating. I'm physically deformed at the neck, I have diplopia and my equilibrium is off. Psychologically, I feel deformed, miserable, and I possess zero tolerance to stress. I must avoid stressful situations and other things which aggravate my injury such as certain foods, arguments and other things which may irritate me. . . . My injury has certainly hindered my Air Force career. In the event of retirement, my injury will positively hinder civilian employment. This undoubtedly creates a hardship.

Suppl. App. 28; *see also id.* at 29.

In *Young*, our court affirmed the Court of Federal Claims's decision finding that a service member's claim for military pay was barred by the six-year statute of limitations. 529 F.3d at 1382. We agreed with the

Court of Federal Claims that Mr. Young could not take advantage of the accrual suspension rule because, at the time of his discharge, he "knew he had been treated for abdominal problems repeatedly during his Army service," even if he did not know at that time that his injury would render him disabled four years later. *Id.* at 1385. Similarly, that Mr. Jones could not have known in 1988 that he would later be diagnosed with TBI and PTSD and therefore be eligible for a higher rating under the VA's rating schedule does not detract from either (1) his understanding in 1988 that he was suffering from significant physical and psychological injuries resulting from the armored personnel carrier door incident; or (2) his understanding in 1988 that his injuries were sufficiently serious that he was being considered for military retirement.

We do note that cases from our court and our predecessor court illustrate that service members who never sought review by a board before discharge because they did not know or appreciate the progressive or serious nature of a disability will not be precluded by the statute of limitations from pursuing a late-discovered claim for disability retirement. *See Friedman*, 310 F.2d at 402; *Real*, 906 F.2d at 1562–63 ("The [*Friedman*] court clearly contemplated that there would be some inquiry into the extent of the veteran's understanding of the seriousness of his condition.") (remanding for consideration of whether Mr. Real knew enough about his condition to be held to have the right to challenge the finding that he was not entitled to disability benefits); *Chambers*, 417 F.3d at 1226–27 (holding that the record lacked evidence that Mr. Chambers knew that he was entitled to disability

retirement at discharge and so his cause of action did not accrue until a corrections board denied his claim). Similarly, our predecessor court held that a service member's claim had not "ripened" even though he was offered a retirement board because, at the time of his discharge, his later-diagnosed serious injury, a herniated disc, had been misdiagnosed as a sprain or strain, and because there had been no final adverse action by the government. *Harper v. United States*, 310 F.2d 405, 406–08 (Ct. Cl. 1962). To be clear, a disability that progressively worsens over time is not a basis for suspending the accrual of a claim for disability retirement. The only relevant point in time for a disability retirement determination is "the time of the determination." 10 U.S.C. § 1201(b)(3)(B). The accrual suspension rule is only implicated if the individual was unaware of the nature of the disability at that time. However, those are not the facts of this case.

Not only did Mr. Jones have a board hearing, but the record demonstrates that he knew the serious nature of his disability and that he was being considered for retirement. *See Purvis v. United States*, 77 F. App'x 512, 514 (Fed. Cir. 2003) ("While a serviceman who did not appreciate the progressive or serious nature of his disability will not be precluded by the limitations period from pursuing his late-discovered claim, . . . that scenario is not applicable here because Mr. Purvis was sufficiently concerned about the extent of his injuries to apply for disability in 1974."). Mr. Jones was aware of the "incapacitating" nature of his physical and psychological injuries and believed that they would "positively hinder" his future

employment.[7] Suppl. App. 28. Accordingly, he had an understanding of the seriousness of his condition that was sufficient to justify a conclusion that he could have sought earlier redress, and we cannot say the facts underlying his claim were "inherently unknowable." *See Real*, 906 F.2d at 1561–62; *see also Young*, 529 F.3d at 1385 ("It is a plaintiff's knowledge of the facts of the claim that determines the accrual date.") (first citing *United States v. Kubrick*, 444 U.S. 111, 122 (1979), then citing *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1572 (Fed. Cir. 1993)).

We thus agree with the Court of Federal Claims that Mr. Jones cannot claim that his injury was "inherently unknowable."

VI.

Mr. Jones, who reasonably understood his condition to be disabling in 1988, cannot use his later diagnoses of TBI and PTSD or his subsequent proceedings before the corrections board to obviate the 1988 accrual of his claim and suspend the running of the statute of limitations from that time. To grant Mr. Jones relief in the circumstances of this case would, we believe, impermissibly open the door to the resurrection of previously decided disability retirement claims simply because medical knowledge advanced after the claims first were decided by the military service involved. *See* 10 U.S.C. § 1201 (requiring that the Secretary assess a

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[7] We note that, in 1988, disorders characterized as "psychological factors affecting physical conditions" were ratable as "psychoneurotic disorders" in the VA's disability rating system. *See* 38 C.F.R. § 4.150 (1988).

service member's eligibility for disability retirement using the "standard schedule of rating disabilities in use by the [VA] *at the time of the determination*.") (emphasis added). In addition, we cannot escape the conclusion that such an approach could have the unintended consequence of undermining the careful balance that Congress struck between the disability retirement systems of the several armed services and the veterans benefit system administered by the VA. *See* BACKGROUND, Part I, *supra*.

We have considered Mr. Jones's additional arguments and have found them all to be without merit.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims dismissing Mr. Jones's amended complaint for lack of jurisdiction.

AFFIRMED

COSTS

No costs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2020-2298

LEWIS B. JONES,	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES,	)
Defendant-Appellee	)
	)

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00520-MMS, Judge Margaret M. Sweeney.

NEWMAN, *Circuit Judge*, dissenting.

I respectfully dissent. The court misapplies the principles of limitation statutes, and holds that Mr. Jones' claim became time-barred during the period when, by statute, he could not have brought the claim.[1] A period of limitations does not accrue when the claim could not have been brought. "'Accrue' is '[t]o come into existence as an enforceable claim or right.'" *Shoshone Indian Tribe of Wind River Reserve, Wyo. v. United States*, 51 Fed. Cl. 60, 67 n.8 (2001) (quoting Black's Law Dictionary 21 (7th ed. 1999). "The term accrue in the context of a cause of action means to arrive to commence." *Id.*

[1] *Jones v. United States*, 149 Fed. Cl. 703 (2020) ("Fed. Cl. Op.").

By statute, Mr. Jones could not have established entitlement to disability retirement at discharge in 1988 with 10% disability. From the court's ruling that the statute of limitations accrued from discharge, and that he is time-barred from seeking disability retirement although 100% disabled, I respectfully dissent.

A

Mr. Jones was rated 10% disabled and not eligible for disability retirement at the time of his discharge

Lewis B. Jones was honorably discharged from the United States Air Force in 1988 after eight years of service, because of an eye/head injury and ensuing complications. As recommended by an Air Force Physical Evaluation Board (PEB) and Medical Evaluation Board (MEB), he received severance pay and a 10% disability rating. By statute, he was not eligible for disability retirement with less than 30% disability:

10 U.S.C. § 1201(b).

Required Determinations of Disability

* * *

(3)(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination.

Air Force Instruction 36-3212 *Physical Evaluation for Retention, Retirement and Separation*, implements the statute, and includes:

> **¶ 3.17. Recommended Disposition**. Upon review and evaluation of a disability case, the PEB recommends one of the following dispositions. (See Table 3.1 for recommended disposition decision rules):
>
> * * *
>
> **¶ 3.17.2. Permanent Disability Retirement**. Applies to service members who have been found unfit, the condition is stable and permanent, and the total disability rating is 30 percent or greater or the service member has 20 years or more service computed under 10 U.S.C. § 1208 regardless of the combined compensable disability rating.

Mr. Jones did not appeal the 10% disability rating at discharge. However, as the years passed his disability increased, and in 2005 the VA rated him 50% disabled. In 2017 he was rated 100% disabled. In 2018 Mr. Jones filed a petition with the Air Force Board for Correction of Military Records (AFBCMR or "Board"), seeking disability retirement.

The AFBCMR denied the petition, holding that an increase in disability evaluation after discharge does not warrant changing the compensation awarded at the time of discharge, and thus that disability retirement benefits are not available to Mr. Jones. The Board stated:

> Under the DVA system (Title 38, U.S.C.), the member may be evaluated over the years and their rating may be increased or decreased based on changes in the member's medical condition at the current time. However, a higher rating by the DVA, years following separation from the service, does not warrant a change in the total compensable rating awarded at the time of the member's separation.

AFBCMR Board Decision, Docket No. BC-2019-02820 at 3 (Jan. 2020).

Mr. Jones sought review of this decision in the Court of Federal Claims. That court held that the claim is barred by the Tucker Act's six-year statute of limitations, stating that "the court is powerless to reach the merits of Mr. Jones' claim because that claim is barred by the statute of limitations." Fed. Cl. Op. at 710.

My colleagues agree, holding that any claim for disability retirement benefits accrued at the time of Mr. Jones' 1988 discharge, although he was rated at only 10% disabled at discharge. My colleagues hold that Mr. Jones should have claimed disability retirement at discharge, and that "Mr. Jones, who reasonably understood his condition to be disabling in 1988, cannot use his later diagnosis of TBI and PTSD or his subsequent proceedings before the corrections board to obviate the 1988 accrual of his claim and suspend the running of the statute of limitations from that time." Maj. Op. at 16–17.

I cannot agree that the period of limitations accrues while the claim is barred by statute, for there cannot be a cause of action for a claim that is contrary to law.

B

The period of limitations cannot accrue until the cause of action exists

The government argued that the Tucker Act statute of limitations accrued from Mr. Jones' discharge in 1988. The Court of Federal Claims agreed, holding that "because Mr. Jones did not file suit in this court within six years of his separation from the Air Force in 1988, but instead filed suit more than thirty years later, his claim for disability retirement pay and benefits is barred by 28 U.S.C. § 2501." Fed. Cl. Op. at 708.

My colleagues agree. In this reconsideration decision the court explains at length that Mr. Jones could have argued that he was at least 30% disabled at discharge, despite the holdings of the Air Force's PEB and MEB at the time of discharge. My colleagues appear to rely on their reconstruction of Mr. Jones' disabilities to establish that the statute of limitations has run, although my colleagues provide no citations to contemporaneous findings of increased disability. *See e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("in applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock."). The accruing of a statutory bar requires that the barring events were known or reasonably knowable. In *Martinez v. United States*, 333

F.3d 1295 (Fed. Cir. 2003) (en banc) this court explained:

> A cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.'

Id. at 1303 (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966)). By statute, entitlement to disability retirement requires at least 30% disability or 20 years of service. *See ante*. Since such events had not occurred in 1988, the Tucker Act statute of limitations cannot have accrued in 1988.

The authority cited by the court does not hold otherwise. My colleagues cite *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990) for the statement that a disability retirement claim accrues "[i]f at the time of discharge an appropriate board was requested by the service member and the request was refused or if the board heard the service member's claim but denied it, the limitations period begins to run upon discharge." However, the Physical Evaluation Board and Medical Evaluation Board found only 10% disability, well below the statutory threshold for disability retirement.

This appeal does not turn on whether Mr. Jones was correctly found to be only 10% disabled at the time of discharge. The question is whether the Court of Federal Claims is barred by the statute of limitations from reviewing Mr. Jones' claim for disability

retirement, including whether he became entitled to such benefit when he was rated at 100% disabled in 2017. The age-related progression of service-connected disability is not unusual, and the record before us shows no determinations of fact and law for Mr. Jones' concerns.

With no development of evidence, my colleagues accept the government's argument that Mr. Jones was required to litigate disability retirement in 1988, and that his failure to do so exposed all later actions to the bar of accrued limitations. The government states that "[i]n 1988, Mr. Jones could have filed suit to challenge the disability rating by the Air Force as insufficient, and so could have sought a medical retirement." Gov't Br. 20. My colleagues agree, and hold that since Mr. Jones did not challenge his 10% disability rating in 1988, he became forever barred although his rating reached 100%. That cannot be an appropriate application of limitations principles to the facts hereof.

The PEB and the MEB in recommending Mr. Jones' discharge agreed that he was 10% disabled; they did not "consider or determine finally the claimant's eligibility for disability retirement," as in *Real*, 906 F.2d at 1560 (quoting *Friedman v. United States*, 310 F.2d 381, 396 (Ct. Cl. 1962). Although my colleagues state that "an appropriate board heard his claim" at discharge, Maj. Op. at 12, neither Mr. Jones nor the government states that he received a hearing on a claim for disability retirement at discharge. Precedent is more rigorous; in *Real* the court explained that "under *Friedman* if the service member had neither requested nor been offered consideration by a retiring

board prior to discharge, the later denial of his petition by the corrections board was the triggering event, not his discharge." 906 F.2d at 1560. That is the situation here, for Mr. Jones went to the corrections board in 2018, and no Tucker Act period of limitations has run.

Of concern is the court's holding that because Mr. Jones did not take legal action to challenge the 10% disability rating, there accrued a statutory bar to his claim after he became 100% disabled. This view of the law contravenes the principles of limitations, for changing circumstances may change the claim. However, the majority states its concern about "open[ing] the door to the resurrection of previously decided disability retirement claims simply because medical knowledge advanced after the claims first were decided by the military service involved." Maj. Op. at 17. I observe, first, that Mr. Jones' claim based on 100% disability was not "previously decided;" and second, if medical knowledge indeed has advanced in a way relevant to a veteran's claim, surely the door should be opened wider—not slammed shut.[2]

The AFBCMR decision was not based on a theory of limitations; it was a decision on the merits, and Mr. Jones presented the Court of Federal Claims with challenges to the merits of the decision. Mr. Jones has the right of judicial review of the rulings of these governmental/military agencies. The Court of Federal

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[2] Veterans law accommodates changing circumstances and the passage of time, not by barring all claims six years after discharge from service or some initial ruling, but by limiting the compensation for meritorious claims to the date the veteran applied for the benefit.

Claims, and now this court, err in holding that such review is barred on limitations principles accruing when there was no right of action. The court has made a significant change in law and policy. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2020-2298

[Filed March 31, 2022]

LEWIS B. JONES,	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES,	)
Defendant-Appellee	)
	)

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00520-MMS, Judge Margaret M. Sweeney.

ON PETITION FOR PANEL REHEARING

Before NEWMAN, SCHALL, and DYK, *Circuit Judges*.

PER CURIAM.

O R D E R

Appellant Lewis B. Jones filed a combined petition for panel rehearing and rehearing en banc. A response

thereto was invited by the court and was filed by the United States.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is granted to the extent that the previous precedential opinion and judgment issued August 11, 2021, are withdrawn and replaced with the modified precedential opinion and judgment accompanying this order.

FOR THE COURT

March 31, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2020-2298

[Filed March 31, 2022]

LEWIS B. JONES,	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES,	)
Defendant-Appellee	)
	)

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00520-MMS, Judge Margaret M. Sweeney.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, SCHALL[1], DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, and CUNNINGHAM, *Circuit Judges*.[*]

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[1] Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

[*] Circuit Judge O'Malley retired on March 11, 2022 and did not participate. Circuit Judge Stark did not participate.

PER CURIAM.

O R D E R

Appellant Lewis B. Jones filed a combined petition for panel rehearing and rehearing en banc. A response thereto was invited by the court and was filed by the United States. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is granted. See accompanying order.

(2) The petition for rehearing en banc is denied.

FOR THE COURT

March 31, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-2298

[Filed August 11, 2021]

LEWIS B. JONES,	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES,	)
Defendant-Appellee	)
	)

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00520-MMS, Judge Margaret M. Sweeney.

Decided: August 11, 2021

LEWIS JONES, Kansas City, MO, pro se.

JAMES WILLIAM POIRIER, I, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR., FRANKLIN E. WHITE.

Before NEWMAN, SCHALL, and DYK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SCHALL.

Dissenting opinion filed by *Circuit Judge* NEWMAN.

SCHALL, *Circuit Judge*.

Lewis B. Jones appeals the decision of the United States Court of Federal Claims that dismissed his amended complaint for lack of jurisdiction. *Jones v. United States*, 149 Fed. Cl. 703 (2020) ("*Jones*"). The Court of Federal Claims dismissed the amended complaint on the grounds that the claims stated therein were barred by the six-year statute of limitations set forth at 28 U.S.C. § 2501. For the reasons stated below, we affirm.

BACKGROUND

I.

The pertinent facts are not in dispute. Mr. Jones entered active-duty service in the United States Air Force ("Air Force") on January 29, 1981. *Jones*, 149 Fed. Cl. at 705. Subsequently, in 1982, while serving in Germany, he was struck in the eye by the door of an armored personnel carrier. *Id.* As his service continued, this injury resulted in a number of sequelae, including intense headaches. *Id.* In addition, over time, as a result of the injury, it became increasingly difficult for Mr. Jones to perform his duties. *See id.*

In October of 1988, Mr. Jones was referred to a Medical Evaluation Board ("MEB"). A "Narrative

Summary (Clinical Resume)" dated October 16, 1988, that was before the MEB reflects that Mr. Jones had developed "intermittent right cranial nerve 4th palsy associated with chronic right retro-orbital stabbing pain, usually occurring during the late afternoon or night." Suppl. App. 24. According to the summary, a psychiatric consultant felt that Mr. Jones suffered from psychological factors effecting a physical illness and had recommended psychometric testing. *Id.* at 25. The summary also states that Mr. Jones had previously experienced headaches "three to four times a year" lasting "one to three days." *Id.* at 24. The summary further states that, in the three months prior to the MEB proceedings, Mr. Jones "noted increasing frequency and duration of headaches (up to two to three times a day[ ]"), and that "[i]n the last two weeks, he noted a nearly constant headache which was relieved only with repetitive doses of intramuscular Demoral." *Id.* On November 18, 1988, the MEB issued a report referring Mr. Jones's case to a Physical Evaluation Board ("PEB"), to consider whether Mr. Jones's medical condition rendered him physically unfit to serve in the Air Force. *See Jones*, 149 Fed. Cl. at 705–06 & n.2. Mr. Jones provided remarks on the "Statement of Record Data," in which he stated that his condition had "worsened even more since the M.E.B. evaluation." Suppl. App. 28–29. He indicated that he had "constant temporal and eye pain which varie[d] in severity several times a day that [was] incapacitating." Suppl. App. 28. He expressed that "[p]sychologically," he felt "deformed, miserable" and possessed "zero tolerance to stress." *Id.* He remarked that, "[i]n the event of retirement," his injury would "positively hinder civilian employment." *Id.* In a report dated

December 6, 1988, the PEB recommended that Mr. Jones be discharged with severance pay based on a 10% disability rating for "Post traumatic pain syndrome manifest[ing] as headaches." *Jones*, 149 Fed. Cl. at 706.

On December 29, 1988, Mr. Jones was honorably discharged from the Air Force with severance pay. In 1989, his discharge was amended to reflect the fact that his injury was combat-related. *Id.*

In due course, Mr. Jones sought disability benefits from the Department of Veterans Affairs ("VA"). As a result, over a period of fifteen years, the VA issued various disability ratings or denials of disability claims in response to claims brought by Mr. Jones. *Id.* Eventually, effective December 8, 2017, the VA awarded Mr. Jones a 100% disability rating. *Id.*

Upon receiving this 100% disability rating from the VA, on February 26, 2018, Mr. Jones petitioned the Air Force Board for Correction of Military Records ("AFBCMR") for changes to his record that would entitle him to a disability retirement dating back to 1988, when he was discharged. *Id.* Before the AFBCMR, Mr. Jones also sought disability retirement pay and benefits pursuant to 10 U.S.C. § 1201. In January of 2020, the AFBCMR denied Mr. Jones's petition. *Id.*

II.

On April 23, 2020, Mr. Jones filed a complaint in the Court of Federal Claims seeking review of the AFBCMR decision. Thereafter, on July 1, 2020, he filed an amended complaint. *Jones*, 149 Fed. Cl. at 706.

On August 25, 2020, the Court of Federal Claims granted the government's motion to dismiss pursuant to its Rule 12(b)(1). Although the court determined that Mr. Jones's claim for disability retirement pay and benefits pursuant to 10 U.S.C. § 1201 was a claim under a money-mandating statute, as required by the Tucker Act, 28 U.S.C. § 1491(a)(1), and thus within the scope of its jurisdiction, it concluded that it lacked jurisdiction because the claim was barred by the statute of limitations. *Id.* at 707– 08.

To fall within the jurisdiction of the Court of Federal Claims, a claim against the United States filed in that court must be "filed within six years after such claim first accrues." 28 U.S.C. § 2501; *see also John R. Sand & Gravel Co. v United States*, 552 U.S. 130, 132–35 (2008). "A cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue . . . for his money.'" *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc) (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966)).

The Court of Federal Claims determined that Mr. Jones's claim for disability retirement pay and benefits accrued on December 29, 1988, the date of his discharge from the Air Force. *Jones*, 149 Fed. Cl. at 708. As noted above, Mr. Jones's discharge followed the determination of the PEB earlier in December that Mr. Jones should be separated, and not retired, due to his disabling trauma manifesting as headaches. Having

determined that Mr. Jones's claim accrued upon his discharge, the court ruled that it was time-barred. The court stated:

> [b]ecause Mr. Jones did not file suit in this court within six years of his separation from the Air Force in 1988, but instead filed suit more than thirty years later, his claim for disability retirement pay and benefits is barred by 28 U.S.C. § 2501.

Id. In reaching this conclusion, the court ruled that Mr. Jones could not rely on the accrual suspension rule, under which "the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed." *Id.* at 709 (quoting *Martinez*, 333 F.3d at 1319). According to the court, the "amended complaint establishe[d] a record of Mr. Jones's knowledge of his various health conditions in the months leading up to his discharge," and thus "[t]he facts of this case do not show that Mr. Jones's disabling health problems were inherently unknowable in 1988." *Id.* at 709.

Based upon these findings, the court granted the government's motion to dismiss and directed the entry of judgment accordingly. Following the entry of judgment, Mr. Jones timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I.

Whether the Court of Federal Claims has jurisdiction over a claim is a question of law that we review de novo. *Biafora v. United States*, 773 F.3d 1326, 1334 (Fed. Cir. 2014). We review the court's findings of fact relating to jurisdictional issues for clear error. *Id.*

II.

The Court of Federal Claims did not err in ruling that Mr. Jones's claim accrued upon the date of his discharge and therefore was barred by the six-year statute of limitations set forth at 28 U.S.C. § 2501.

> The generally accepted rule is that claims of entitlement to disability retirement pay do not accrue until the appropriate board either finally denies such a claim or refuses to hear it. The decision by the first statutorily authorized board which hears or refuses to hear the claim is the triggering event. If at the time of discharge an appropriate board was requested by the service member and the request was refused or if the board heard the service member's claim but denied it, the limitations period begins to run upon discharge. A subsequent petition to the corrections board does not toll the running of the limitations period; nor does a new claim accrue upon denial of the petition by the corrections board.

Real v. United States, 906 F.2d 1557, 1560 (Fed. Cir. 1990) (citing *Friedman v. United States*, 310 F.2d 381, 390, 396– 98 (Ct. Cl. 1962)); *accord Chambers v. United States*, 417 F.3d 1218, 1221, 1224–25, 1227 (Fed. Cir. 2005); *Martinez*, 333 F.3d at 1311–15.

Moreover, as the Court of Federal Claims noted, statutorily authorized military boards whose decisions are sufficient to trigger the running of the six-year limitations period include PEBs. *Chambers*, 417 F.3d at 1225 & n.2; *Schmidt v. United States*, 89 Fed. Cl. 111, 120 (2009) ("An 'informal' [Central Physical Evaluation Board] decision is sufficient to start the running of the statute of limitations.").

III.

On appeal, Mr. Jones devotes the bulk of his brief to the argument that the Court of Federal Claims erred when it held the accrual suspension rule does not apply to his claim. According to Mr. Jones, the PEB's discharge decision in 1988 was founded solely on his headaches (posttraumatic pain syndrome), whereas he was later diagnosed with traumatic brain injury ("TBI") and Post-Traumatic Stress Disorder ("PTSD"). *See, e.g.*, Appellant's Informal Br. 12, 13, 16, 17. He contends that because the MEB and PEB could not have articulated his health problems to be TBI and PTSD, they were "unknowable" at the time of his discharge. Thus, Mr. Jones argues, his claim for retirement benefits did not accrue until he was diagnosed with TBI and PTSD in 2017. *Id.* at 10–12.

To take advantage of the accrual suspension rule, a plaintiff must either show that the "defendant has

concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." *Martinez*, 333 F.3d at 1319 (quoting *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985)). The accrual suspension rule is "strictly and narrowly applied." *Id.* (quoting *Welcker*, 752 F.2d at 1580). As the government points out, the record makes it clear that, in 1988, Mr. Jones knew that he had been injured, knew that he suffered physical and psychological symptoms as a result of his injury, knew that these symptoms had an impact upon his ability to work, and knew that the PEB had considered his symptoms and his ability to work, and had rated him only 10% disabled. Appellee's Br. 19–20; Suppl. App. 24–29. Moreover, the Court of Federal Claims explained why Mr. Jones's claim was not inherently unknowable for these reasons. *See Jones*, 149 Fed. Cl. at 709–10 ("In this case, the record shows that Mr. Jones recognized the disabling nature of his health problems in 1988; thus, his claim accrued in 1988 when he was discharged with severance pay rather than with disability retirement pay and benefits."). The court explained that Mr. Jones may not have had a full understanding of all of his health problems in 1988, but his disability retirement claim was not inherently unknowable in 1988. *Id.* at 709. Thus, even though Mr. Jones had not been diagnosed as having TBI or PTSD, he was aware of the "incapacitating" nature of his injury and believed that it would "positively hinder" his future employment. Suppl. App. 28. Accordingly, he had an understanding of the seriousness of his condition that was sufficient to justify a conclusion that he could have sought earlier redress. *See Real*, 906 F.2d

at 1561–62; *see also Young v. United States*, 529 F.3d 1380, 1385 (Fed. Cir. 2008) ("It is a plaintiff's knowledge of the facts of the claim that determines the accrual date.") (first citing *United States v. Kubrick*, 444 U.S. 111, 122 (1979), then citing *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1572 (Fed. Cir. 1993)). The accrual suspension rule therefore does not apply.

IV.

We have considered Mr. Jones's additional arguments and have found them all to be without merit.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims dismissing Mr. Jones's amended complaint for lack of jurisdiction.

AFFIRMED

COSTS

No costs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2020-2298

LEWIS B. JONES,	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES,	)
Defendant-Appellee	)
	)

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00520-MMS, Judge Margaret M. Sweeney.

NEWMAN, *Circuit Judge*, dissenting.

When Lewis B. Jones was honorably discharged from the United States Air Force in 1988 because of an eye injury, he received severance pay and a 10% disability rating. He was not granted disability retirement, which requires a disability rating of at least 30%. Thus, even if the six-year Tucker Act statute of limitations were to apply to review of actions of correction boards, a limitations bar cannot accrue before the action could have been brought.

From the court's dismissal of this appeal on limitations grounds, I respectfully dissent.

The Court of Federal Claims, and now the Federal Circuit, hold that this action is subject to a six-year period of limitations accruing from the date of Mr. Jones' 1988 discharge with 10% disability, but since disability retirement requires at least 30% disability (or 20 years of service, not here applicable), Mr. Jones was not entitled to disability retirement in 1988. As provided in 10 U.S.C. § 1201(b)(3)(B), to be eligible for disability retirement "the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination."

Air Force Instruction 36-3212 Physical Evaluation for Retention, Retirement and Separation (15 July 2019) provides:

> **¶ 3.13. Determining Compensable Disabilities**. Eligibility for referral to the DES for fitness determinations does not automatically confer retirement or separation benefits to the service member. A service member determined unfit to perform the duties of his or her office, grade, rank, or rating because of disability may be eligible for disability compensation. The PEB determines compensability in accordance with DoDI 1332.18, Appendix 3 to Enclosure 3.
>
> * * *
>
> **¶ 3.17. Recommended Disposition**. Upon review and evaluation of a disability case, the

> PEB recommends one of the following dispositions. (See Table 3.1 for a recommended disposition decision rules):
>
> * * *
>
> > 3.17.2. Permanent Disability Retirement. Applies to service members who have been found unfit, the condition is stable and permanent, and the total disability rating is 30 percent or greater or the service member has 20 years or more service computed under 10 U.S.C. § 1208 regardless of the combined compensable disability rating.

The question on this appeal is not whether Mr. Jones is entitled to the award of retroactive disability retirement pay, for the Court of Federal Claims did not decide the merits of Mr. Jones' action. The question before us is whether this suit is barred by the Tucker Act six-year statute of limitations.

The Court of Federal Claims accepted the government's position that Mr. Jones' claim became barred six years after his 1988 discharge, although his 10% disability rating was not entitled to disability retirement. That is not correct application of limitations law. *See Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc) ("A cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment

and sue here for his money.'") (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966)). "'Accrue' is '[t]o come into existence as an enforceable claim or right.'" *Shoshone Indian Tribe of Wind River Reserve, Wyo. v. United States*, 51 Fed. Cl. 60, 67, n.8 (2001) (quoting Black's Law Dictionary 21 (7th ed. 1999)).

The Court of Federal Claims reports that Mr. Jones was rated 50% disabled in 2005 and 100% disabled in 2017. *Jones v. United States*, 149 Fed. Cl. 703, 706 (2020). After Mr. Jones was rated 100% disabled, he requested the Air Force Board for Correction of Military Records ("AFBCMR") to correct his 1988 discharge to establish entitlement to disability retirement from the date of discharge. The Court of Federal Claims, stating that "Mr. Jones now seeks review of the AFBCMR's decision," held that the requested action was barred by the Tucker Act statute of limitations. *Id.* at 706, 710.

This holding violates limitations principles, for a Tucker Act suit cannot be brought until "all events have occurred that are necessary to enable the plaintiff to bring suit." *Martinez*, 333 F.3d at 1303. Although Mr. Jones had no claim for disability retirement with a 10% disability rating, my colleagues hold that he could have and should have taken some sort of action in 1988:

> [E]ven though Mr. Jones had not been diagnosed as having TBI or PTSD [at discharge in 1988], he was aware of the "incapacitating" nature of his injury and believed that it would "positively hinder" his future employment. Accordingly, he

> had an understanding of the seriousness of his condition that was sufficient to justify a conclusion that he could have sought earlier redress.

Maj. Op. at 8 (internal citation omitted). According to the majority, Mr. Jones' symptoms at the time of his discharge were such that he "could have sought earlier redress," *id.*, whereby the majority concludes that the statute of limitations bars suit for redress six years after discharge. However, with only 10% disability, he was not entitled to "earlier redress."

The court errs in holding that the period of limitations accrued from the date of discharge in 1988. The record before us does not explain how Mr. Jones' undiagnosed disabilities qualified him for disability retirement in 1988, and the Court of Federal Claims did not discuss the merits. My concern is with the ruling that although Mr. Jones did not have a legally cognizable claim in 1988, this claim became barred after six years.

The government urges that the statute of limitations was properly applied, stating that "[i]n 1988, Mr. Jones could have filed suit to challenge the disability rating by the Air Force as insufficient, and so could have sought a medical retirement." Gov't Br. 20. The government responds to Mr. Jones' argument that he was not aware of all his ailments in 1988 "and so it was impossible for him to make a claim in 1988," with the response that "it was not necessary for Mr. Jones to know the term 'PTSD' in order to bring suit. There was no requirement that Mr. Jones give this name (or any

name) to his symptoms. Instead, Mr. Jones merely needed to show that he was injured during his military service, and that, as a result, he qualified for a rating of 30 percent disability." *Id.* The government states that Mr. Jones "understood that the symptoms experienced in 1988 would have an impact upon his ability to work," and therefore "accrual of his claim should not be suspended." Gov't Br. 22.

The government also rejects Mr. Jones' alternative arguments of equitable tolling, his reference to Department of Defense guidance documents, and any theory of "legal disability." Govt Br. 24–27.

It is not disputed that Mr. Jones' present 100% disability is a "disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. § 1110. There is no issue before us concerning this rating; the only issue is the holding that a limitations bar arose six years after his 1988 discharge from service.

No law or policy requires a veteran to apply for or sue for a benefit within a statutory period after he might have become eligible for the benefit. The veterans' laws recognize the possible progression of service-connected disability, and simply hold that any compensation to which the veteran is or becomes entitled is paid only from the date of application, although the evidence of service-connection may span decades. A veteran's claim is not barred if the claim could have been brought more than six years earlier.

Heretofore, a claim for service-connected benefits could be filed at the veteran's choice, although benefits are payable only from the date of filing the claim. Today's holding is a significant change for veterans' claims. I respectfully dissent.

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 20-520C

[Filed: August 25, 2020]

LEWIS B. JONES,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Military Disability Retirement Pay Claim, 10 U.S.C. § 1201 (2018); Statute of Limitations, 28 U.S.C. § 2501 (2018); RCFC 12(b)(1); Informal Physical Evaluation Board; Claim Accrued at Time of Discharge from the Military

Lewis B. Jones, Kansas City, MO, pro se.

James W. Poirier, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

SWEENEY, Chief Judge

Plaintiff Lewis B. Jones, proceeding pro se, was separated from the United States Air Force ("Air Force") with disability severance pay in 1988 after honorably serving his country for approximately eight years. He contends that the Air Force should have retired him for disability reasons instead and seeks disability retirement pay and benefits dating back to his discharge date. Defendant moves to dismiss Mr. Jones's complaint as barred by this court's statute of limitations. For the reasons set forth below, the court grants defendant's motion and dismisses the amended complaint for lack of jurisdiction.

I. BACKGROUND

Mr. Jones entered active duty service in the Air Force on January 29, 1981.[1] While serving in Germany in 1982, he was struck in the eye by the door of an armored personnel carrier. As his service continued, the eye injury caused a number of sequelae, including intense headaches. Mr. Jones struggled to find relief from the pain through a variety of prescribed medications and also through alcohol use. In 1986, he had a consultation for alcohol abuse. He eventually changed jobs from security policeman to recreation supervisor and was serving in the Philippines when his

[1] The court derives all background information from plaintiff's amended complaint that includes a number of supporting documents. Page references are provided by the court's electronic filing system.

health problems led to an evaluation of his fitness for continued duty.

The primary contemporaneous documents supplied by Mr. Jones that address his medical evaluation in late 1988 include: (1) a "Narrative Summary (Clinical Resume)" of consultations with specialists in neurology, psychiatry, psychology, and ophthalmology at a medical center at Travis Air Force Base in California, dated October 31, 1988; (2) a Medical Evaluation Board ("MEB") report dated November 18, 1988; (3) two statements from Mr. Jones responding to the MEB report, dated November 22, 1988; and (4) a report from an Informal Physical Evaluation Board ("IPEB"), dated December 6, 1988, which was convened upon the recommendation of the MEB.[2] Am. Compl. 24-29. The IPEB recommended discharge with severance pay based on a 10% disability rating for "Post traumatic pain syndrome manifest[ing] as headaches." Id. at 26.

After Mr. Jones agreed with the IPEB's recommendation he was honorably discharged on December 29, 1988, and received an $18,000 severance payment, less taxes. His discharge was amended in 1989 to reflect the fact that his injury was combat-related.

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[2] Generally speaking, an MEB evaluates whether a service member meets retention standards and, if not, refers the service member to an IPEB or formal Physical Evaluation Board ("PEB"). Chambers v. United States, 417 F.3d 1218, 1225 & n.2 (Fed. Cir. 2005). The IPEB or PEB then reviews the service member's fitness for duty and any entitlement to a disability retirement. Id.

Mr. Jones alleges that a number of his health conditions can be traced to his eye injury and that these related problems should have been discerned at the time of his separation. Specifically, he contends: "[Traumatic Brain Injury ("TBI")] occurred June 8, 1982 and after six years of TBI deteriorations and its mental disorders effects, the Plaintiff was discharged December 29, 1988 after experiencing subsequent psychiatric illnesses such as post-traumatic stress disorder [("PTSD")] manifested as fear of doors phobia, anxiety, depression, alcohol and narcotics disorder, cognitive deficits and sleeping problems." Id. at 9. Although no precise chronology of Mr. Jones's health problems is before the court, the Department of Veterans Affairs ("VA") record included with the complaint shows that Mr. Jones was repeatedly evaluated by the VA over the last fifteen years, with various disability ratings or denials of disability claims provided in 2006, 2009, 2013, 2015, 2017, and 2018. Effective December 8, 2017, the VA increased Mr. Jones's rating to 100% disabled. This disability rating by the VA is based on previous VA disability ratings that slowly grew from a 10% disability rating at the time of discharge, attributed to migraine headaches, to a 50% disability rating as of 2005, also attributed to headaches, and higher ratings starting in 2012 based on a combination of conditions such as headaches, PTSD, TBI, and a number of other limitations either physical or mental in nature.

Once Mr. Jones received the 100% disability rating from the VA, he petitioned the Air Force Board for Correction of Military Records ("AFBCMR") for changes to his record that would entitle him to a disability

retirement dating back to 1988. His petition is dated February 26, 2018. As part of the AFBCMR proceedings, he received memoranda indicating the Air Force's disagreement with his petition; he later amended his claim on October 16, 2019. Mr. Jones's request for correction of his military records to show that he should be paid disability retirement benefits was denied by the AFBCMR on or after January 7, 2020.

Mr. Jones now seeks review of the AFBCMR's decision. His original complaint was filed on April 23, 2020, followed by an amended complaint filed on July 1, 2020. Defendant filed a motion to dismiss pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"), alleging that the court lacks jurisdiction to entertain Mr. Jones's claim because it is barred by this court's six-year statute of limitations, 28 U.S.C. § 2501 (2018). Plaintiff responded to the motion with a document titled "Motion to Strike Defense's Motion," which was docketed as plaintiff's response brief. Once defendant filed its reply brief, the motion to dismiss was ripe and the court deemed oral argument unnecessary.

II. DISCUSSION

A. Standard of Review

When considering whether to dismiss a complaint for lack of jurisdiction pursuant to RCFC 12(b)(1), the court assumes that the allegations in the complaint are true and construes those allegations in the plaintiff's favor. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011). However, plaintiffs

proceeding pro se are not excused from meeting basic jurisdictional requirements, Henke v. United States, 60 F.3d 795, 799 (Fed. Cir. 1995), even though the court holds their complaints to "less stringent standards than formal pleadings drafted by lawyers," Haines v. Kerner, 404 U.S. 519, 520-21 (1972). In other words, a plaintiff proceeding pro se must prove, by a preponderance of the evidence, that the court possesses jurisdiction. See McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Trusted Integration, 659 F.3d at 1163. If the court finds that it lacks subject matter jurisdiction over a claim, RCFC 12(h)(3) requires the court to dismiss that claim.

B. Jurisdiction

Whether the court has subject matter jurisdiction to decide the merits of a case is a threshold matter. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868). The parties or the court sua sponte may challenge the existence of subject matter jurisdiction at any time. Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006).

The ability of the United States Court of Federal Claims ("Court of Federal Claims") to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity "cannot

be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969).

The Tucker Act, the principal statute governing the jurisdiction of this court, waives sovereign immunity for claims against the United States that are founded upon the United States Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1). However, the Tucker Act is merely a jurisdictional statute and "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976). Instead, the substantive right must appear in another source of law, such as a "money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc). Further, to fall within the jurisdiction of the Court of Federal Claims, any claim against the United States filed in the court must be "filed within six years after such claim first accrues." 28 U.S.C. § 2501; see also John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-35 (2008) (providing that the limitations period set forth in 28 U.S.C. § 2501 is an "absolute" limit on the ability of the Court of Federal Claims to reach the merits of a claim).

In his complaint, Mr. Jones claims entitlement to disability retirement pay and benefits pursuant to 10 U.S.C. § 1201 (2018). There is no dispute that 10 U.S.C. § 1201 is a money-mandating statute. See Fisher v. United States, 402 F.3d 1167, 1174-75 (Fed. Cir. 2005) (panel portion). Although Mr. Jones also references a

variety of other authorities, his citation to 10 U.S.C. § 1201 is sufficient to establish this court's jurisdiction over his claim for disability retirement pay and benefits if that claim is not time-barred.

C. Plaintiff's Claim for Disability Retirement Pay and Benefits Is Barred by the Statute of Limitations

"A cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, i.e., when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.'" Martinez v. United States, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc) (quoting Nager Elec. Co. v. United States, 368 F.2d 847, 851 (Ct. Cl. 1966)). To determine whether Mr. Jones's claim was filed "within six years after such claim first accrue[d]," 28 U.S.C. § 2501, this court is guided by well-established precedent on the topic of the accrual of claims for military disability retirement pay and benefits.

The United States Court of Appeals for the Federal Circuit has succinctly summarized the rule for determining when a claim for disability retirement pay and benefits accrues:

> The generally accepted rule is that claims of entitlement to disability retirement pay do not accrue until the appropriate board either finally denies such a claim or refuses to hear it. The decision by the first statutorily authorized board which hears or refuses to hear the claim is the

> triggering event. If at the time of discharge an appropriate board was requested by the service member and the request was refused or if the board heard the service member's claim but denied it, the limitations period begins to run upon discharge. A subsequent petition to the corrections board does not toll the running of the limitations period; nor does a new claim accrue upon denial of the petition by the corrections board.

Real v. United States, 906 F.2d 1557, 1560 (Fed. Cir. 1990) (citing Friedman v. United States, 310 F.2d 381, 390, 396-98 (Ct. Cl. 1962)); accord Chambers, 417 F.3d at 1221, 1224-25, 1227; Martinez, 333 F.3d at 1311-15. Statutorily authorized military boards whose decisions are sufficient to trigger the running of the six-year limitations period include IPEBs and PEBs. Chambers, 417 F.3d at 1225 & n.2; Schmidt v. United States, 89 Fed. Cl. 111, 120 (2009) ("An 'informal' [Central Physical Evaluation Board] decision is sufficient to start the running of the statute of limitations.").

In this case, an IPEB was convened to consider Mr. Jones's fitness for duty, and it ultimately determined—in December 1988—that Mr. Jones should be separated, and not retired, due to his disabling trauma manifesting as headaches. Thus, Mr. Jones's claim for disability retirement pay and benefits accrued on the date of his discharge—December 29, 1988. See, e.g., Garcia-Gines v. United States, 131 Fed. Cl. 689, 701 (2017) (holding that the decision of an IPEB triggered the accrual of a disability retirement claim at the time the service member was discharged, because

the service member accepted the IPEB's decision and was discharged with severance pay instead of receiving a disability retirement). This accrual date, moreover, is not affected by Mr. Jones's subsequent application to the AFBCMR in 2018 for disability retirement pay and benefits or by the AFBCMR's denial or rejection of that application because that action does not toll the statute of limitations. E.g., Real, 906 F.2d at 1560. In short, because Mr. Jones did not file suit in this court within six years of his separation from the Air Force in 1988, but instead filed suit more than thirty years later, his claim for disability retirement pay and benefits is barred by 28 U.S.C. § 2501.

D. There Are No Facts or Arguments that Overcome the Statute of Limitations Bar

Because Mr. Jones is proceeding pro se and is battling a number of serious health conditions, the court examined his amended complaint and response brief thoroughly in an attempt to identify any relevant facts or legal theories that might overcome the statute of limitations that bars his suit. Only two areas of inquiry were suggested by this review, and the parties have focused their arguments in these two areas.[3]

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[3] The court also considered whether statutory tolling, pursuant to 28 U.S.C. § 2501 and its "legal disability" provision, could assist Mr. Jones. No reasonable construction of the amended complaint and Mr. Jones's response brief could support statutory tolling under this provision. His claims for VA benefits, for example, which were presented to the VA as early as 2006 and consistently through 2018, show that his capacity for "transacting business" was not impaired to the extent and for the number of years that could establish statutory tolling due to legal disability. Goewey v. United States, 612 F.2d 539, 544 (Ct. Cl. 1979).

First, the court considers whether Mr. Jones's disabling conditions were essentially unknowable at the time of his discharge so that the accrual date of his claim was suspended until he learned more about his conditions. Second, the court discusses the policy documents issued by the Air Force or some other authority within the United States Department of Defense ("Defense Department") that, according to Mr. Jones, should govern the question of whether his claim is timely. Unfortunately for Mr. Jones, neither of these areas of inquiry permits the court to consider his time-barred claim.

E. The Accrual Suspension Rule Does Not Apply in This Case

Claims against the United States are subject to the doctrine of accrual suspension, which directs "that the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed." Martinez, 333 F.3d at 1319. The accrual suspension rule, however, is "strictly and narrowly applied," Welcker v. United States, 752 F.2d 1577, 1580 (Fed. Cir. 1985), and "it is not necessary that the plaintiff obtain a complete understanding of all the facts before the tolling ceases and the statute begins to run," Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (citing Japanese War Notes Claimants Ass'n of the Phil., Inc. v. United States, 373 F.2d 356, 359 (Ct. Cl. 1967)). To take advantage of the accrual suspension rule for his disability retirement claim, Mr. Jones must show that his "injury was 'inherently unknowable' at the accrual

date."[4] Japanese War Notes Claimants Ass'n, 373 F.2d at 359 (quoting Urie v. Thompson, 337 U.S. 163, 169 (1949)). The facts of this case do not show that Mr. Jones's disabling health problems were inherently unknowable in 1988.

The amended complaint establishes a record of Mr. Jones's knowledge of his various health conditions in the months leading up to his discharge. The contemporaneous documents provided by Mr. Jones show that he received neurologic, psychiatric, and psychological consultations in 1988; that his headaches were increasing in frequency and were incapacitating; that he felt psychologically deformed; that he was impatient, irritable, and had no tolerance for stress or anxiety; that he had been prescribed a number of pain-killers but these were largely ineffective; and that he sometimes used alcohol for pain relief. These documents also indicate that the Air Force medical staff believed there was a psychological component to his health problems but did not feel he suffered from a psychiatric disorder that should be treated with narcotics. In addition, Mr. Jones told the Air Force in 1988 that he believed his injury, which required that

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[4] The other type of accrual suspension scenario is where the facts of the claim were concealed by the defendant. Japanese War Notes Claimants Ass'n, 373 F.2d at 359. That scenario is not present here. The MEB and IPEB proceedings, rather than concealing relevant facts, confronted Mr. Jones with the topic of disabling health conditions. See, e.g., Joppy v. United States, 123 Fed. Cl. 701, 706 (2015) (finding that claim accrual should not be suspended where the service member knew of the facts that would support his claim at the time of discharge), aff'd, 646 F. App'x 998 (Fed. Cir. 2016).

he avoid stressful situations, would hinder civilian employment after he left the Air Force.

In short, the record before the court reflects that while Mr. Jones may not have had a full understanding of all of his health problems in 1988, he was aware of the evaluation of those health issues by the MEB and the IPEB. He was also aware that his serious health problems were deemed to be only 10% disabling in 1988, which determination was insufficient for the Air Force to provide him with disability retirement pay and benefits. These facts establish that Mr. Jones's disability retirement claim was not inherently unknowable in 1988 and that the accrual suspension rule does not apply in this case. See, e.g., Malcolm v. United States, No. 16-545C, 2017 WL 105946, at *5 (Fed. Cl. Jan. 11, 2017) (finding that the accrual suspension rule could not apply where the service member "knew of his impaired mental condition and its effects on his behavior at the time of his discharge"), aff'd, 690 F. App'x 687 (Fed. Cir. 2017); Dubsky v. United States, 98 Fed. Cl. 703, 709 (2011) (citing Young v. United States, 529 F.3d 1380, 1385 (Fed. Cir. 2008); Catawba Indian Tribe v. United States, 982 F.2d 1564, 1572 (Fed. Cir. 1993)) (declining to apply the accrual suspension rule because, at the time of his discharge, the plaintiff "possessed the factual information required to bring his claim in this Court, even if he lacked the awareness of his legal right to do so").

In his response brief, Mr. Jones argues that the health conditions that underly his 100% disability rating from the VA are "newly discovered with corrected diagnosis," and appears to suggest that the

IPEB's discharge decision in 1988 was founded on either a failure to uncover the symptoms of his TBI, PTSD, and other mental health problems, or a misdiagnosis of those health problems. Pl.'s Resp. 2. For the accrual suspension rule to be applied by this court, however, it is not enough to show an error on the part of an IPEB. The service member must show, instead, that his disabling health problems were unknowable at the time of discharge. See, e.g., Young, 529 F.3d at 1384-85 (agreeing with the trial court that accrual of a military pay claim should not be suspended where the service member's medical condition was not unknowable before his discharge, notwithstanding the fact that examinations by the VA in later years provided more information about his condition). In this case, the record shows that Mr. Jones recognized the disabling nature of his health problems in 1988; thus, his claim accrued in 1988 when he was discharged with severance pay rather than with disability retirement pay and benefits.

F. Defense Department Policies Do Not Waive This Court's Statute of Limitations

In addition to invoking accrual suspension principles to avoid a statute-of-limitations dismissal, Mr. Jones argues that Defense Department policies render his claim timely. Mr. Jones references three documents disseminated by the Defense Department in his amended complaint. The first is Inspector General Complaints Resolution, Air Force Instruction 90-301 (Dec. 28, 2018). Am. Compl. 41. The second is Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval

Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, Office of the Under Secretary of Defense (Aug. 25, 2017), which addresses PTSD and TBI as conditions warranting liberal consideration of the veteran's evidence in such proceedings. Am. Compl. 36-40. The third is Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI), Principal Deputy Under Secretary of Defense (Feb. 24, 2016), which instructs boards for correction of military records to waive statutes of limitation in appropriate cases. Am. Compl. at 8.

None of these statements of Defense Department policies and instructions waives or otherwise affects this court's statute of limitations. See, e.g., John R. Sand & Gravel Co., 552 U.S. at 133-35 (holding that the government may not waive the six-year limitations period); Martinez, 333 F.3d at 1312-13 (explaining that even if a service branch provides an ancillary method for a service member to obtain relief through a corrections board, the service member's monetary claim before this court, as a general rule, retains the claim's original accrual date and is subject to this court's six-year statute of limitations (citing Hurick v. Lehman, 782 F.2d 984, 984 (Fed. Cir. 1986))). The court is bound by these precedential decisions issued by the United States Supreme Court and the United States Court of Appeals for the Federal Circuit, just as it is bound by

28 U.S.C. § 2501. Because Mr. Jones's disability retirement claim is time-barred, it must be dismissed.

III. CONCLUSION

Mr. Jones asks this court to review what he believes were errors in his discharge in 1988 and errors in the AFBCMR's decision rendered in 2020. Although it has great respect for Mr. Jones's service to the United States and sympathy for Mr. Jones's health situation, the court is powerless to reach the merits of Mr. Jones's claim because that claim is barred by the statute of limitations.

Consequently, the court **GRANTS** defendant's motion and **DISMISSES** plaintiff's amended complaint for lack of jurisdiction. No costs. The clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/_____
MARGARET M. SWEENEY
Chief Judge

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 20-520 C

[Filed: August 25, 2020]

LEWIS B. JONES	)
	)
	)
v.	)
	)
UNITED STATES	)
	)
	)

JUDGMENT

Pursuant to the court's Opinion and Order, filed August 25, 2020, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's amended complaint is dismissed for lack of jurisdiction. No costs.

Lisa L. Reyes
Clerk of Court

By: *Debra L. Samler*

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX F

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2020-2298

[Filed June 17, 2022]

LEWIS B. JONES, *Plaintiff-Appellant*	)
v.	)
UNITED STATES, *Defendant-Appellee*	)

Appeal from the United States Court of Federal Claims in No. 1:20-cv-00520-MMS, Judge Margaret M. Sweeney.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, SCHALL[1], DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

O R D E R

Lewis B. Jones filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue June 24, 2022.

FOR THE COURT

June 17, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

[1] Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

APPENDIX G

10 U.S. Code § 1201 - Regulars and members on active duty for more than 30 days: retirement

(a) Retirement.—

Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).

(b) Required Determinations of Disability.— Determinations referred to in subsection (a) are determinations by the Secretary that—

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either—

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination; and either—

(i) the disability was not noted at the time of the member's entrance on active duty (unless clear and unmistakable evidence demonstrates that the disability existed before the member's entrance on active duty and was not aggravated by active military service);

(ii) the disability is the proximate result of performing active duty;

(iii) the disability was incurred in line of duty in time of war or national emergency; or

(iv) the disability was incurred in line of duty after September 14, 1978.

(c) Eligible Members.—This section and sections 1202 and 1203 of this title apply to the following members:

(1) A member of a regular component of the armed forces entitled to basic pay.

(2) Any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 10148(a) of this title) for a period of more than 30 days.

(3) Any other member of the armed forces who is on active duty but is not entitled to basic pay by reason of section 502(b) of title 37 due to authorized

absence (A) to participate in an educational program, or (B) for an emergency purpose, as determined by the Secretary concerned.

28 U.S. Code § 2501 - Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.