No. 22-259

IN THE
Supreme Court of the United States

LEWIS B. JONES,
Petitioner,

v.

UNITED STATES,
Respondent.

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

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REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition for writ of certiorari remains accurate.

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REPLY BRIEF

As Judge Newman aptly explained in her dissenting opinion, the Federal Circuit's decision in this case "has made a significant change in law and policy." Pet. App. 31. The Government's brief in opposition offers no convincing reason for denying Petitioner Lewis B. Jones' ("Jones") petition for certiorari.

With respect to the first question presented, the Government does not seriously dispute that the question turns purely on the proper interpretation of 10 U.S.C. § 1201, an issue on which the Federal Circuit panel majority and Judge Newman's dissenting opinion disagree. The Government's arguments do not seriously engage with the plain language of 10 U.S.C. § 1201, which unambiguously provides, in relevant part, that a service member may obtain retirement pay only when the Secretary of Veterans Affairs assigns him a disability rating of at least 30 percent. 10 U.S.C. §§ 1201(a), 1201(b)(3)(B). Despite this clear language, the panel majority held that Jones' cause of action for retirement pay accrued in 1988, when Jones obtained a disability rating of only 10 percent. Certiorari should be granted to address this important question of statutory interpretation.

With respect to the second question presented, the Government contends that the Federal Circuit's analysis of the accrual-suspension rule is too "factbound" to warrant this Court's review, but then suggests that the rule is no longer applicable in view

of this Court's conclusion that the Tucker Act is not subject to equitable tolling. As an initial matter, the Federal Circuit's rigid rule is incompatible with the uniquely pro-claimant nature of the veteran compensation system. Moreover, if it is indeed the Government's view that the accrual-suspension rule cannot exist in the absence of equitable tolling, this Court should grant certiorari to clarify the point. Indeed, even after this Court ruled that the Tucker Act is not subject to equitable tolling, the Federal Circuit held that the accrual-suspension rule is still viable.

ARGUMENT

I. The Federal Circuit's Conclusion that a Service Member's Claim for Disability Retirement Pay Accrues Prior to Obtaining the Requisite Disability Rating Cannot Be Squared with the Statute

The Government does not dispute that as relevant here, the plain language of 10 U.S.C. § 1201 permits retirement pay only after the Secretary has issued a disability rating of at least 30 percent. Nevertheless, the Government alleges that the six-year statute of limitations for filing suit for retirement pay began to run in 1988, when Jones indisputably was assigned a disability rating of only 10 percent. Avoiding the unambiguous statutory language, the Government claims that beginning in 1988, Jones could have filed suit seeking a higher disability rating. BIO 10-11. But as Judge Newman correctly recognized in her dissenting opinion, this case "does

not turn on whether Mr. Jones was correctly found to be only 10% disabled at the time of discharge." Pet. App. 28. Indeed, Jones has not disputed that the medical evidence available in 1988 led to the conclusion that Jones was 10 percent disabled based on his diagnosis of migraines. Nevertheless, if he had been permitted to develop a record at the Court of Federal Claims, Jones would have proven that subsequent advances in medical technology that revealed his undiagnosed Traumatic Brain Injury with PTSD show that Jones has been at least 30 percent disabled since 1988—under the rating schedule in place when he was separated from service. As previously explained, the schedule in place at that time provided for a diagnosis of, for example, "chronic brain syndrome associated with brain trauma" (diagnosis code 9304). 38 C.F.R. § 4.124a (1964). Under this diagnosis, anything more than "slight impairment of social and industrial adaptability" would have entitled Jones to at least a 30% disability rating. 38 C.F.R. § 4.124a (1964). The premature adjudication of Jones' claim on a motion to dismiss deprived Jones of the opportunity to prove his case.

The Government suggests that under Jones' interpretation of the statute, service members would be precluded from seeking an increased disability rating. BIO 11. Not so. By statute, the Secretary of Veterans Affairs is to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries." 38 U.S.C. § 1155. If the record at the time of the determination demonstrates that a service member is entitled to a greater rating than that given by the Secretary, then

the service member may seek an increased rating, and, if denied, file suit in the Court of Federal Claims. However, a cause of action *for retirement pay itself* will not lie until the Secretary has assigned at least a 30 percent disability rating. The Government points to no persuasive principle of statutory interpretation that would permit the statute to be read otherwise.

II. This Court Should Grant Certiorari to Resolve the Federal Circuit's Misunderstanding of the Accrual-Suspension Rule

A. The Government's New Argument that the Accrual-Suspension Rule No Longer Applies to Tucker Act Claims Is Unsupported and Contrary to Decades of Case Law

For more than five decades, courts have consistently held that Tucker Act claims are subject to the accrual-suspension rule, under which the accrual of a cause of action against the United States is suspended while the nature of the relevant injury is inherently unknowable. *See, e.g., Japanese War Notes Claimants Ass'n of Philippines, Inc. v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967) ("Plaintiff must either show that 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'") (quoting *Urie v. Thompson*, 337 U.S. 163, 169 (1949)); *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985); *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003); *Young v. United*

States, 529 F.3d 1380, 1384 (Fed. Cir. 2008); *Banks v. United States*, 741 F.3d 1268, 1281-82 (Fed. Cir. 2014); *State v. United States*, 162 Fed. Cl. 476, 483 (2022). This rule is so ubiquitous that even the U.S. Department of Justice's own website advises the public that a Tucker Act claim "accrues when the operative facts exist and are not inherently unknowable." United States Department of Justice, Section on Environment and Natural Resources Division, *Statute Of Limitations*, https://www.justice.gov/enrd/statute-limitations (last visited Dec. 20, 2022).

Here, it is undisputed that Jones' medical injury—Traumatic Brain Injury with PTSD—was undiagnosed and undiagnosable given the state of medical knowledge and technology when Jones was discharged from the Air Force. See Fed. Cir. Rec 9 at 2. This is the epitome of an inherently unknowable injury.

The Federal Circuit nevertheless rejected Jones' application of the accrual-suspension rule by enacting a new and unprecedented exception to the rule, applying only to veterans whose claims become knowable through advances in medical knowledge or technology:

> 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 were first decided by the military service involved.

Pet. App. 21. The panel cited no authority for such an exception to the accrual-suspension rule. The Government now takes this argument a step further, asserting that the accrual-suspension rule should not apply to any Tucker Act claims on a theory that it is, in "practical effect," a tolling "based on equitable considerations." BIO 14-15. The Government asserts that the accrual-suspension rule is barred by this Court's *John R. Sand & Gravel* decision, which requires courts to enforce jurisdictional time bars regardless of potential equitable considerations. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008).

As an initial matter, the Government's new position that the longstanding accrual-suspension rule should no longer apply to Tucker Act claims raises serious issues that impact how courts address such claims, and illustrates why this case is an excellent vehicle for review. Regardless, the Government's argument lacks merit and has been both considered and rejected by the Federal Circuit. In *Martinez v. United States*, the Federal Circuit explained that the accrual-suspension rule "is distinct from the question" of equitable tolling, and is instead "based on a construction of the term 'accrues' in section 2501":

> Mr. Martinez invokes authority from this court holding 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. That legal principle is well settled in our cases. The government agrees with that legal rule, which is based on a construction of the term "accrues" in section 2501. That rule is distinct from the question whether equitable tolling is available under that statute, although the term "tolling" is sometimes used in describing the rule.

Martinez v. United States, 333 F.3d 1295, 1319 (Fed. Cir. 2003).

After the *John R. Sand & Gravel* decision, the Federal Circuit revisited this issue and, while recognizing that "equitable tolling . . . is foreclosed by *John R. Sand & Gravel*," reiterated that accrual suspension "is 'distinct from the question of whether equitable tolling is available under [28 U.S.C. § 2501]. . . .'" *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008).

Because the accrual-suspension rule is based on statutory interpretation of the term "accrues" in Section 2501, and not on equitable tolling of a jurisdictional time bar, it is not impacted by the *John R. Sand & Gravel* decision. *Young*, 529 F.3d at 1384; *Martinez*, 333 F.3d at 1319. It is for this same reason that the Government's argument concerning "Congress's inclusion of express exceptions to the statutory time limit" in Section 2501 is immaterial. The accrual-suspension rule concerns *when* a claim "first accrues" under the statute, and is not an

"exception" to the statutory time limits *after* accrual. And, as explained in Jones' certiorari petition, "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n.9 (1991) and citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980)); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)).

B. The Government Does Not Address Jones' Inability to Petition to Increase His Disability Rating for an Injury that Was Undiagnosable at the Time of His Separation

The Government fails to grapple with the merits of Jones' accrual suspension arguments and, in particular, does not address the fact that Jones could not have petitioned to have his disability rating increased to account for his Traumatic Brain Injury with PTSD without an accompanying diagnosis. As detailed in Jones' certiorari petition, disability ratings are controlled by the VA Schedule (38 C.F.R § 4.124a (1988)), which sets forth ratings based on criteria specific to each diagnosis that a service member has received. Jones' only diagnosis at the time of his separation was migraines, and under the VA Schedule his disability rating could be based only on the *frequency* of his migraines. 38 C.F.R § 4.124a (1988). It could not be increased to account for Jones' other symptoms or his undiagnosed Traumatic Brain Injury

with PTSD, regardless of how debilitating those other symptoms were.

The Government does not dispute that Jones' separate Traumatic Brain Injury was neither known nor diagnosable at the time of his discharge, and the Government does not explain how Jones, without a diagnosis, could have petitioned to have his rating increased to account for his brain injury. Instead, the Government argues that a diagnosis was not "necessary to determine the extent of petitioner's impairment at the time of discharge . . . ." BIO 14. Because the VA Schedule mandated that Jones' disability rating for his sole diagnosis of "migraines" be based on the frequency of his migraines, and not his level of "impairment," the extent of his impairment at the time of separation was irrelevant to his ability to petition for relief. Given the inherently unknowable nature of his injuries, Jones should receive the benefit of accrual suspension.

III. This Case Is an Excellent Vehicle

As discussed above, the Government's new argument that the accrual-suspension rule was abrogated by *John R. Sand & Gravel* only confirms the need for this Court to grant certiorari here. If indeed the Federal Circuit and its predecessors have been misinterpreting the Tucker Act for the better part of a century, this Court should clarify whether the accrual-suspension rule is a viable principle and, if so, provide guidance as to its contours. This case provides a good opportunity for the Court to do so.

Moreover, the Government's argument that Jones delayed in seeking relief (BIO 9) is not supported by the undisputed factual record. The Government asserts that Jones should have petitioned for relief in 2005, when he received a 50% disability rating. *See* BIO 15-16. As an initial matter, the Government has never before suggested that Jones' claim could have accrued in 2005, and for good reason: Jones was not denied disability retirement until 2020. As explained in Jones' certiorari petition and undisputed by the Government, a service member's cause of action for retirement pay cannot accrue until the appropriate board denies the retirement-pay request or refuses to hear it. Pet. 5 (citing *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990)). Accordingly, the mere fact that Jones obtained a higher rating in 2005 does not establish that his cause of action for retirement pay accrued then.

Furthermore, in 2005, Jones hidden Traumatic Brain Injury with PTSD was still undiagnosed. The 50 percent rating that Jones received in 2005 was due to the worsening frequency of Jones' earlier-diagnosed migraines. Pet. App. 56. It was Jones' diagnosis of Traumatic Brain Injury with PTSD more than ten years later, in 2016 (Suppl. Appx. 32)—coupled with a disability rating of over 30 percent—which permitted Jones to seek a higher disability rating. In February 2018, Jones sought such relief from the Air Force Board for Correction of Military Records, which ultimately denied his request in January 2020. Pet. App. 57. Three months later, Jones filed his complaint in the Court of Federal Claims seeking review of that decision. Pet. App. 57. Accordingly, Jones has not

delayed in seeking relief, and this case remains an excellent vehicle to address the application and boundaries of the accrual-suspension rule for cases where a veteran suffers undiagnosed or then-undiagnosable injuries as a result of his or her service.

CONCLUSION

The petition for a writ of certiorari should be granted.

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