

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

MANFREDO M. SALINAS, APPLICANT

v.

UNITED STATES RAILROAD RETIREMENT BOARD

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Samuel A. Alito, Jr.
Associate Justice of the United States Supreme Court
and Circuit Justice for the Fifth Circuit

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for Manfredo M. Salinas respectfully requests a 60-day extension of time, to and including September 14, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The court of appeals entered its judgment on April 17, 2019, App., infra, 1a-4a. Unless extended, the time for filing a petition for a writ of certiorari will expire on July 16, 2019. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important question of statutory interpretation involving the Railroad Retirement Act and the Railroad Unemployment Insurance Act. The courts of appeals are sharply divided over whether Congress provided for judicial review of

Railroad Retirement Board decisions denying requests to reopen a prior claim for benefits. Section 5(f) of the Railroad Unemployment Insurance Act sets out the conditions on judicial review of Board decisions: "Any claimant[] . . . may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review [in the U.S. Court of Appeals for the D.C. Circuit, Seventh Circuit, or the circuit in which the claimant or party resides or has her principal place of business.]" 45 U.S.C. § 355(f); 45 U.S.C. § 231g (Railroad Retirement Act providing for judicial review "in the same manner" as under Section 355(f)). In the decision below, the Fifth Circuit followed its own precedent to conclude that the denial of a request to reopen does not qualify as a final, reviewable decision. App., infra, 3a-4a. That holding further entrenches a seven-to-three circuit split on this critical question of statutory interpretation, and is at odds with the plain text of section 5(f).

2. In February 2006, Salinas applied for a disability annuity under the Railroad Retirement Act, 45 U.S.C. § 231a(a)(1), but the Board denied his application. App., infra, 2a. In December 2013, Salinas reapplied for a disability annuity, which the Board granted. App., infra, 2a. But Salinas challenged "the annuity's beginning date and amount." App., infra, 2a. In February 2015, during the Board's administrative appeal process, Salinas requested that the Board reopen its decisions on all his prior applications, "including the decision denying his February 28, 2006

application.” App., infra, 2a. After conducting a hearing, a Board officer determined that the 2006 application fell outside the four-year period for reopening based on new and material evidence or administrative error under the Board’s regulations. App., infra, 2a (citing 20 C.F.R. § 261.2). The Board officer thus declined to reopen Salinas’s application, and Salinas petitioned the Fifth Circuit for review. App., infra, 2a.

3. In a per curiam opinion, the Fifth Circuit dismissed Salinas’s petition. App., infra, 2a-4a. Applying Roberts v. U.S. Railroad Retirement Board, 346 F.3d 139 (5th Cir. 2003), the panel concluded that circuit precedent squarely foreclosed Salinas’s argument that the “Board’s decision not to reopen his 2006 application qualifies as a final, reviewable decision under section 355(f).” App., infra, 3a-4a. The panel explained that the Fifth Circuit had previously held—in line with several other courts of appeals—that the courts of appeals lack the jurisdiction “to review a Board’s decision not to reopen a prior claim for benefits” under section 355(f). App., infra, 3a (citing cases). Roberts acknowledged a “circuit split” on the issue, explaining that the Second and Eight Circuits had adopted a contrary position. App., infra, 3a (citing cases). Nevertheless, the Fifth Circuit joined the “majority of circuits that had found no jurisdiction.” App., infra, 3a.

Even though Salinas recognized that Roberts foreclosed his argument, he invited the panel to follow the reasoning of a recent D.C. Circuit opinion which rejected the majority view and held

that Congress granted the courts of appeals "jurisdiction to review Board decisions denying requests to reopen initial benefits determinations." App., infra, 3a (citing Stovic v. R.R. Retirement Bd., 826 F.3d 500, 502, 504 (D.C. Cir. 2016) (Kavanaugh, J.)). Citing controlling circuit precedent, the panel declined Salinas's invitation to follow Stovic. App., infra, 3a-4a.

4. Counsel for applicant respectfully requests a 60-day extension of time, to and including September 14, 2019, within which to file a petition for writ of certiorari. The Fifth Circuit's decision in this case presents a substantial question of statutory interpretation involving section 355(f) of the Railroad Unemployment Insurance Act. The undersigned counsel did not represent applicant in the courts below. A 60-day extension would allow recently retained counsel sufficient time to fully research and analyze the statutory issue presented, review the record, and prepare the petition for filing.

In addition, the undersigned counsel will be presenting oral argument in the Seventh Circuit in Kaiser v. Johnson & Johnson, No. 18-2944, on May 21. The undersigned counsel is also currently preparing a reply brief in Romag Fasteners, Inc. v. Fossil, Inc., No. 18-1233, which is due in this Court on June 4; a cert petition to be filed in this Court in June; and other filings, both in this Court and in other courts, with proximate due dates. Further, the undersigned counsel is one of the counsel representing Google in Google v. Oracle, a case in which this Court has called for the

views of the Solicitor General. Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted,

/s/ Lisa S. Blatt
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May 16, 2019

IN THE SUPREME COURT OF THE UNITED STATES

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MANFREDO M. SALINAS, APPLICANT

v.

UNITED STATES RAILROAD RETIREMENT BOARD

CERTIFICATE OF SERVICE

I, Lisa S. Blatt, counsel for applicant and a member of the Bar of this Court, certify that, on May 16, 2019, one copy of the Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari in the above-captioned case was sent, by third-party commercial carrier for delivery overnight, to the following counsel:

Ana M. Kocur, Esq.
General Counsel
U.S. Railroad Retirement Board
Office of General Counsel
844 N. Rush Street
Chicago, IL 60611-2092

cc: Marguerite P. Dadabo, Esq., Assistant General Counsel
Peter J. Orlowicz, Esq., General Attorney

I further certify that all parties required to be served have been served.

/s/ Lisa S. Blatt
Lisa S. Blatt

Appendix A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-60702
Summary Calendar
Filed: April 17, 2019

MANFREDO M. SALINAS,
Petitioner

v.

UNITED STATES RAILROAD RETIREMENT BOARD,
Respondent

Petition for Review from an Order of the
United States Railroad Retirement Board,
Agency No. 16-AP-0038

Attorneys and Law Firms

Manfredo M. Salinas, Pro Se

Peter Joseph Orlowicz, General Attorney, U.S. Railroad
Retirement Board, Office of General Counsel, Chicago, IL, for
Respondent

Opinion

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Petitioner Manfredo Salinas ("Salinas") seeks review of a decision by the United States Railroad Retirement Board ("Board") refusing to reopen the denial of his previous application for a disability annuity under the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.* Under our circuit precedent, we lack jurisdiction to review the Board's decision not to reopen Salinas' prior case.

On February 28, 2006, Salinas applied for a disability annuity under 45 U.S.C. § 231a(a)(1), which was denied by the Board's Disability Benefits Division on August 28, 2006. On November 30, 2006, Salinas untimely sought reconsideration, which the Board's Reconsideration Section denied, concluding Salinas had not shown good cause for the untimely filing. Salinas did not pursue further administrative appeal, and the denial became a final decision of the Board for reopening purposes on February 9, 2007.

On December 26, 2013, Salinas filed a new application for a disability annuity. The Board granted him an annuity, but Salinas appealed the annuity's beginning date and amount. On February 15, 2015, during that appeal, Salinas asked the Board to reopen all its decisions on his prior applications, including the decision denying his February 28, 2006 application. A Board hearing officer conducted an oral hearing and concluded that Salinas' 2006 application was beyond the four-year timeframe for reopening based on new and material evidence or administrative error under the Board's regulations. See 20 C.F.R. § 261.2. Salinas now petitions this court to review the Board's decision not to reopen his 2006 application.¹

* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

¹ Salinas fails to brief whether the Board erred in determining his annuity's beginning date and amount. He has therefore abandoned any appeal of those issues. See *Milligan v. Erath Cty., Tex.*, 95 F.3d 52 (5th Cir. 1996).

Under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), a petitioner may obtain review of certain final Board decisions in federal circuit courts. "Under the plain language of § 355(f), the jurisdiction of the federal courts of appeals is limited to the review of Board decisions on the merits of a claim for benefits after administrative appeals have been exhausted." *Roberts v. R.R. Retirement Bd.*, 346 F.3d 139, 140 (5th Cir. 2003). Salinas argues that the Board's decision not to reopen his 2006 application qualifies as a final, reviewable decision under section 355(f). He acknowledges, however, that this argument is precluded by our 2003 decision in *Roberts v. U.S. Railroad Retirement Board*. In *Roberts*, we "joined several of our sister circuits in determining that we have no jurisdiction [under section 355(f)] to review the Board's decision not to reopen a prior claim for benefits." *Id.* at 140; see also *id.* at 141 (joining *Harris v. R.R. Retirement Bd.*, 198 F.3d 139, 142 (4th Cir. 1999); *Abbruzzese v. R.R. Retirement Bd.*, 63 F.3d 972, 974 (10th Cir. 1995); *Gutierrez v. R.R. Retirement Bd.*, 918 F.2d 567, 570 (6th Cir. 1990); *Steebe v. R.R. Retirement Bd.*, 708 F.2d 250, 254-55 (7th Cir. 1983)). We acknowledged a circuit split on this issue. See *Roberts*, 346 F.3d at 141 (recognizing divergent conclusions in *Sones v. R.R. Retirement Bd.*, 933 F.2d 636, 638 (8th Cir. 1991), and *Szostak v. R.R. Retirement Bd.*, 370 F.2d 253, 254-55 (2nd Cir. 1966)). But we sided with the majority of circuits that had found no jurisdiction to review a Board decision declining to reopen a prior benefits claim. *Roberts*, 346 F.3d at 141 ("find[ing] the reasoning of the Fourth, Sixth, Seventh and Tenth circuits persuasive" in light of *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)).

Despite *Roberts*, Salinas invites us to follow the D.C. Circuit's recent decision in *Stovic v. Railroad Retirement Board*, 826 F.3d 500 (D.C. Cir. 2016). *Stovic* joined the minority of circuits in holding that "the Railroad Retirement Act grants the [circuit] Court jurisdiction to review Board decisions denying requests to reopen initial benefits determinations." *Id.* at 502; see also *id.* at 504 (disagreeing with majority of circuits, including *Roberts*). We are not at liberty to accept Salinas' invitation to ignore

Roberts, which established our circuit's controlling precedent on this issue. The rule of orderliness prevents this panel from reconsidering that decision. *See, e.g., Vaughan v. Anderson Reg'l Med. Ctr.*, 849 F.3d 588, 591 (5th Cir.), cert. denied, --- U.S. ---, 138 S.Ct. 101, 199 L.Ed.2d 29 (2017).

The petition is DISMISSED.