No. 21-___

IN THE

Supreme Court of the United States

ADOLFO R. ARELLANO,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JAMES R. BARNEY
Counsel of Record
KELLY S. HORN
ALEXANDER E. HARDING
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000
James.Barney@finnegan.com

Counsel for Petitioner

September 17, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

Under 38 U.S.C. § 5110(b)(1), "[t]he effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release *if application therefor is received within one year from such date of discharge or release*." (emphasis added.) Veterans who miss this one-year statutory deadline—even if because of a service-connected physical or mental impairment—are barred from recovering retroactive disability benefits reaching back to their date of discharge. In *Irwin*, this Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Despite this, an "equally divided" Federal Circuit held 6-6 that military veterans are categorically precluded from pursuing equitable tolling of § 5110(b)(1)'s one-year deadline, regardless of the facts and circumstances of their individual cases.

The questions presented are:

- (1) Does *Irwin*'s rebuttable presumption of equitable tolling apply to the one-year statutory deadline in 38 U.S.C. § 5110(b)(1) for seeking retroactive disability benefits, and, if so, has the Government rebutted that presumption?
- (2) If 38 U.S.C. § 5110(b)(1) is amenable to equitable tolling, should this case be remanded so the agency can consider the particular facts and circumstances in the first instance?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Adolfo R. Arellano was Claimant-Appellant in No. 20-1073.

Respondent Denis McDonough, Secretary of Veterans Affairs, was Respondent-Appellee in No. 20-1073.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Arellano v. McDonough*, United States Court of Appeals for the Federal Circuit, No. 20-1073
- *Arellano v. Wilkie*, United States Court of Appeals for Veterans Claims, No. 18-3908

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

U.S. Navy veteran Adolfo R. Arellano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at *Arellano v. McDonough*, 1 F.4th 1059 (Fed. Cir. 2021) (en banc).

The opinion of the United States Court of Appeals for Veterans Claims is reported at *Arellano v. Wilkie*, No. 18-3908, 2019 WL 3294899 (Vet. App. July 23, 2019).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition is timely filed per the Court's March 19, 2020, order extending the time to file any petition to 150 days after the lower court judgment.

STATUTORY PROVISIONS INVOLVED

Section 5110 of title 38 is titled "Effective dates of awards." Section 5110(a)(1) states:

> Unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

38 U.S.C. § 5110(a)(1).

Section 5110(b)(1) states:

> The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.

38 U.S.C. § 5110(b)(1).

INTRODUCTION

When service-disabled veterans are discharged from military service, they have one year to file an application for disability benefits retroactive to their date of discharge. 38 U.S.C. § 5110(b)(1). If they fail to do so within one year, the effective date of any subsequent award "shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a)(1). Thus, service-disabled veterans who fail to file a claim within one year of discharge lose the retroactive disability compensation to which they would otherwise be entitled. This case presents a simple but important question: can the one-year filing deadline of § 5110(b)(1) be equitably tolled for good cause?

Sitting en banc, the Federal Circuit split evenly on this question. App. 16a ("The court is equally divided as to the reasons for its decision and as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1) . . . ."). Six judges concluded that the Federal Circuit's earlier decision in *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), which held that equitable tolling is categorically unavailable for the one-year period in § 5110(b)(1), was correctly decided and should remain in effect. App. 69a. The other six judges concluded that, under this Court's *Irwin* decision, a rebuttable presumption of equitable

tolling applies to § 5110(b)(1) and the Government failed to rebut this presumption. App. 97a.

Because the Federal Circuit has exclusive jurisdiction to review veterans' benefits statutes, *see* 38 U.S.C. § 7292(c), this 6-6 split at the Federal Circuit is unlikely to be addressed or resolved by any other circuit courts. Accordingly, this appeal is ripe for Supreme Court review.

The issue presented here is important to tens of thousands of current and future military veterans. It is an unfortunate reality that many members of the armed forces face a difficult path once discharged from service. Some suffer from severe physical and mental impairments such as brain injuries, post-traumatic stress disorder ("PTSD"), and depression,[1] which can impair their ability to timely file a disability claim within one year of discharge. Indeed, the sad irony is that the very illnesses the veterans' benefits system is designed to address, such as PTSD, are often the ones that cause veterans to miss the one-year deadline of § 5110(b)(1), forfeiting retroactive benefits to which they would otherwise be entitled.

STATEMENT OF THE CASE

A. Background

Mr. Arellano served honorably in the U.S. Navy from November 1977 to October 1981. App. 23a. Mr. Arellano's psychiatric problems include prolonged schizoaffective disorder and bipolar disorder with

[1] Research shows the rate of suicide among veterans is greatest within three years of leaving service. U.S. DEP'T OF VETERANS AFFAIRS, SUICIDE RISK AND RISK OF DEATH AMONG RECENT VETERANS, www.publichealth.va.gov/epidemiology/studies/suicide-risk-death-risk-recent-veterans.asp (last visited Sept. 8, 2021).

PTSD. *Id.* The Department of Veterans Affairs ("VA") found that symptoms of these disorders were causally linked to trauma he suffered while in service when he was working on an aircraft carrier during a collision that killed and injured several of his shipmates and nearly swept him overboard. App. 23a-24a, 155a-156a.

B. Proceedings Before the VA and the Veterans Court

Mr. Arellano first applied for disability benefits in 2011 and was awarded a 100% disability rating for his psychiatric disorders with an effective date of June 3, 2011, the date of his application. App. 153a, 156a. Mr. Arellano, through his brother as his representative, appealed the decision to the Board of Veterans' Appeals ("Board"), arguing that the one-year filing deadline in § 5110(b)(1) should be equitably tolled to allow Mr. Arellano to claim retroactive benefits back to the date of his discharge from service. App. 123a-139a.

The Board acknowledged that "the assertion has been raised that the Veteran's mental illness prevented him from filing a claim earlier than June 3, 2011." App. 116a. Nevertheless, the Board declined to consider a claim for equitable tolling because it construed Federal Circuit precedent as categorically barring equitable tolling of the one-year filing period of § 5110(b)(1) under any circumstances. App. 116a-117a.

Mr. Arellano timely appealed to the Court of Appeals for Veterans Claims ("Veterans Court") and again argued that the facts of his case warrant equitably tolling the one-year filing deadline of § 5110(b)(1). App. 2a-3a. The Veterans Court dismissed that argument and held that the Federal Circuit's decision in

Andrews categorically precludes equitable tolling of any of the deadlines in 38 U.S.C. § 5110. App. 4a-5a ("Appellant's argument is squarely foreclosed by binding precedent. In *Andrews* . . . [,] the Federal Circuit addressed whether section 5110 was subject to equitable tolling. It rejected that argument." (citations omitted)). Yet despite finding that *Andrews* "binds the Court today," the Veterans Court stated that, "[i]f we were writing on a blank slate, appellant's arguments would be worth exploring." App. 6a.

Thus, the Veterans Court did not reach the merits of Mr. Arellano's equitable tolling argument because it held that equitable tolling is inapplicable to § 5110 under any circumstances. *Id*. Mr. Arellano timely appealed the Veterans Court's decision to the Federal Circuit.

C. The Federal Circuit's En Banc Decision

Following oral argument before the assigned three-judge panel, the Federal Circuit sua sponte ordered the case to be reheard en banc. App. 9a. The court requested supplemental briefing on several questions, including:

> A. Does the rebuttable presumption of the availability of equitable tolling articulated in *Irwin* . . . apply to 38 U.S.C. § 5110(b)(1), and if so, is it necessary for the court to overrule *Andrews* . . . ?
>
> B. Assuming *Irwin*'s rebuttable presumption applies to § 5110(b)(1), has that presumption been rebutted?

App. 9a-10a.

On June 17, 2021, the Federal Circuit issued a per curiam decision affirming the Veterans Court's decision based on two evenly divided and contradictory grounds. App. 14a-97a. In a concurring opinion by Circuit Judge Chen, six judges concluded that, consistent with the Federal Circuit's earlier ruling in *Andrews*, "§ 5110(b)(1) is not a statute of limitations subject to *Irwin*'s presumption of equitable tolling." App. 69a. They further concluded that, "even if *Irwin*'s presumption were to apply, it would be rebutted by the statutory text of § 5110, which evinces clear intent from Congress to foreclose equitable tolling of § 5110(b)(1)'s one-year period." *Id*.

The other six judges, in a concurring opinion by Circuit Judge Dyk, reached the opposite conclusion regarding the *Irwin* presumption and the availability of equitable tolling. They concluded that "§ 5110(b)(1) is a statute of limitations that is subject to the rebuttable presumption of equitable tolling under *Irwin*," and that "the presumption has not been rebutted." App. 97a. On the other hand, they found that Mr. Arellano's "specific circumstances" did not justify equitable tolling in this case, and they therefore concurred in the judgment affirming the Veterans Court's decision with respect to Mr. Arellano. *Id*.

The judges joining Judge Chen's concurrence disagreed with those who joined Judge Dyk's concurrence as to whether, if equitable tolling is available, this appeal can be decided without a remand based on the facts of Mr. Arellano's particular case. As they explained, if equitable tolling were deemed to apply to § 5110(b)(1), "we would remand this case for further factual development—which is all the more justified because Mr. Arellano has expressly requested this outcome under such circumstances and no party has

argued that we may affirm the Veterans Court's decision on factual grounds." App. 68a-69a.

Thus, although the judgment below is a per curiam affirmance, there is no single majority opinion supporting this outcome. As the Federal Circuit itself observed:

> The court is equally divided as to the reasons for its decision and as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1) in other circumstances. The effect of our decision is to leave in place our prior decision, *Andrews* . . . , which held that principles of equitable tolling are not applicable to the time period in 38 U.S.C. § 5110(b)(1).

App. 16a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT IS DEADLOCKED 6-6 ON AN ISSUE FOR WHICH IT HAS EXCLUSIVE APPELLATE JURISDICTION

This case is ripe for Supreme Court review because it involves a clear intra-circuit conflict regarding a federal statute for which the Federal Circuit has exclusive appellate jurisdiction. Specifically, 38 U.S.C. § 7292(c) gives the Federal Circuit "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" raised in an appeal from the Veterans Court. The Veterans Court, in turn, has exclusive jurisdiction to review decisions of the Board, which is part of the VA. *See* 38 U.S.C. § 7252(a). Because the VA is the sole agency charged with administering

veterans' benefits statutes, *see* 38 U.S.C. § 301(b), this means the Federal Circuit has exclusive jurisdiction for reviewing any challenge to the interpretation of such statutes, including 38 U.S.C. § 5110(b)(1).

Given the Federal Circuit's unique subject matter jurisdiction, no other circuit is likely to address or critique the Federal Circuit's 6-6 decision in this case regarding the availability of equitable tolling for § 5110(b)(1). In other words, this is not a situation where a majority view will eventually emerge among the circuits given enough time. The only circuit with jurisdiction to address this issue has spoken, and it is deadlocked.

Moreover, this is not a situation where the intra-circuit conflict exists only in the form of contradictory panel decisions. In such cases, this Court may prefer to allow the circuit to try to resolve the conflict on its own. Here, however, the Federal Circuit has already attempted to resolve its internal conflict by sua sponte ordering this case to be reheard en banc. App. 9a. Even then, the conflict persisted, resulting in the Federal Circuit being "equally divided as to the reasons for its decision and as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1) in other circumstances." App. 16a.

Because there is no majority opinion in the decision below, the effect is to leave in place the Federal Circuit's earlier panel decision in *Andrews*, which held that § 5110(b)(1) is not amenable to equitable tolling under any circumstances. *Id.* Yet fully half of the en banc court believes *Andrews* was wrongly decided in light of *Irwin* and should be overturned. App. 19a ("Judge Dyk and five of our colleagues, however, would overturn *Andrews* and conclude that § 5110(b)(1) is a statute of limitations entitled to *Irwin*'s presumption.").

In similar situations where a circuit court has been evenly divided on an issue after thoroughly considering it en banc, this Court has granted certiorari to resolve the conflict. *See, e.g., Lucia v. SEC*, 138 S. Ct. 2044, 2050-51 (2018); *Connick v. Thompson*, 563 U.S. 51, 54 (2011); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 89 (2007); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348 (1988); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969). The Court should likewise do so here.

II. WHETHER 38 U.S.C. § 5110(b)(1) IS AMENABLE TO EQUITABLE TOLLING IS AN ISSUE OF GREAT IMPORTANCE TO MILITARY VETERANS AND THEIR FAMILIES

Congress created the veterans' benefits system to compensate veterans for the sacrifices they make in service to our country. The system "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)); *see also United States v. Oregon*, 366 U.S. 643, 647 (1961) ("The solicitude of Congress for veterans is of long standing.").

A unique aspect of the veterans' benefits system is that "the veteran is often unrepresented during the claims proceedings." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) (citation omitted). This is especially true at the beginning of the process when the veteran first separates from the military and transitions to civilian life. It is during this tumultuous transition[2]

[2] "The transition from military to civilian life is widely recognized as a sometimes challenging and stressful process for

that the one-year clock of 38 U.S.C. § 5110(b)(1) begins winding down.

Mr. Arellano, suffering from severe service-connected cognitive impairments and unrepresented by counsel, missed his one-year deadline for filing a claim for retroactive disability benefits. But he is hardly alone in doing so. Other veterans have likewise argued that they lacked the mental or physical capacity during this one-year period to file a disability claim, yet the Veterans Court has consistently dismissed such arguments as being "foreclosed" by binding Federal Circuit precedent. *See, e.g.*, *Kappen v. Wilkie*, No. 18-3484, 2019 WL 3949462, at *3 (Vet. App. Aug. 22, 2019); *Savage v. Wilkie*, No. 18-6687, 2020 WL 1846012, at *2 (Vet. App. Apr. 13, 2020); *Ford v. McDonald*, No. 15-3306, 2016 WL 4137532, at *3-4 (Vet. App. Aug. 3, 2016).

At times, the Veterans Court has acknowledged the harshness of *Andrews*, which categorically precludes *all* veterans from seeking equitable tolling of § 5110(b)(1) no matter how compelling their individual circumstances. For instance, the veteran in *Savage* began experiencing severe psychological symptoms while on active duty in the Navy and was later diagnosed with service-connected "bipolar disorder and panic disorder with agoraphobia." 2020 WL 1846012, at *1. However, because he missed the deadline to apply for retroactive benefits under § 5110(b)(1), he lost eight years of payments to which he otherwise would have been entitled. While sympathizing with

---

Service members, Veterans, their families, caregivers, and survivors." U.S. DEP'T OF VETERANS AFFAIRS, THE MILITARY TO CIVILIAN TRANSITION 2018, at 1, *available at* https://www.benefits.va.gov/TRANSITION/ docs/mct-report-2018.pdf.

Mr. Savage's predicament, the Veterans Court explained that its hands were tied by *Andrews* and its progeny.

> We have profound sympathy for appellant and his family and their collective struggles with mental illness. We do not question that appellant suffered from a severe mental illness during the period after his separation from service and when he filed a claim for VA benefits. However, we cannot provide the relief sought in this appeal under the law that binds us.

Id. at *2 (citation omitted). In Mr. Arellano's case, the Veterans Court expressed a similar sentiment. App. 6a ("If we were writing on a blank slate, appellant's arguments would be worth exploring. But our slate is far from blank." (citation omitted)).

Aside from psychological impairments such as those at issue here and in *Savage*, there are other extenuating reasons why service-disabled veterans sometimes miss the one-year deadline of § 5110(b)(1). Some veterans are simply unaware of their eligibility for disability compensation.[3] Others are misled or confused by contradictory—and sometimes incorrect—information provided by VA personnel.

For instance, in *Butler*, the veteran alleged that VA personnel actively "discouraged" him from filing a timely claim within one year of his discharge from service, resulting in him losing retroactive benefits.

---

[3] *See* NATIONAL SURVEY OF VETERANS, at xiii (Oct. 18, 2010), *available at* https://www.va.gov/SURVIVORS/docs/NVSSurvey FinalWeightedReport.pdf (reporting 17.1% of veterans who failed to apply for disability benefits were not aware of the VA's disability benefits program).

Butler v. Peake, No. 07-1985, 2008 WL 5101007, at *3 (Vet. App. Nov. 26, 2008), *aff'd*, 603 F.3d 922 (Fed. Cir. 2010). Relying on *Andrews*, the Veterans Court held that, "[e]ven if it is assumed that VA personnel discouraged [Mr. Butler] from filing a claim *and that such an action was unlawful*," § 5110 is not subject to equitable tolling under those circumstances. *Id.* (emphasis added) (citing *Andrews*, 351 F.3d at 1137-38). Thus, under *Andrews*, even unlawful efforts by the VA to discourage a veteran from filing a timely disability claim are not enough to warrant equitable tolling.

Another reason some service-disabled veterans fail to meet the one-year deadline of § 5110(b)(1) is that they are under secrecy orders not to disclose the very facts and circumstances that gave rise to their injuries. For instance, in *Taylor*, the veteran voluntarily participated in military experiments involving chemical warfare agents and was required to sign a secrecy oath preventing him from divulging "any information" about these experiments. *Taylor v. McDonough*, 3 F.4th 1351, 1356 (Fed. Cir.) (citation omitted), *reh'g en banc granted and op. vacated*, 4 F.4th 1381 (Fed. Cir. 2021). During these experiments, "Mr. Taylor was exposed to EA-3580 (a nerve agent akin to VX and sarin), EA-3547 (also called CR, a tear gas agent), and other chemical agents." *Id.* at 1357 (citations omitted).

In 2006, the Department of Defense declassified the names of the military members who had volunteered for these experiments. *Id.* at 1358 (citation omitted). The following year, in 2007, Mr. Taylor filed a claim for a service-connected disability relating to his involvement in the previously classified program. *Id.* The VA granted his 2007 claim for prospective

benefits but denied his request for retroactive benefits dating back to his discharge from service, notwithstanding that he potentially faced disciplinary action had he disclosed the existence of the military's secret chemical/biological human testing program earlier than he did. *Id.* at 1359. The Veterans Court affirmed the VA's ruling, citing *Andrews* for the proposition that § 5110 is not subject to equitable tolling under any circumstances, no matter how compelling the facts. *Id.* at 1360 (citing *Taylor v. Wilkie*, 31 Vet. App. 147, 154 (2019)). The *Taylor* case is currently pending en banc review at the Federal Circuit.[4]

Still another reason some service-disabled veterans fail to file a claim for disability benefits within the one-year deadline of § 5110(b)(1) is the nature of PTSD itself. A common symptom of PTSD is avoidance. *See* U.S. Dep't of Veterans Affairs, What Is PTSD, Avoidance, https://www.ptsd.va.gov/understand/what/avoidance.asp (last visited Sept. 6, 2021). Avoidance occurs "when a person avoids thoughts or feelings about a traumatic event." *Id.* Avoidance causes the veteran to shun reminders of the trauma. *Id.*

This avoidance phenomenon is particularly prevalent among veterans suffering from PTSD caused by

---

[4] On June 30, 2021, a panel of the Federal Circuit held that, although *Andrews* precludes equitably tolling the one-year deadline of § 5110(b)(1), principles of equitable *estoppel* precluded the VA from asserting § 5110(a)(1)'s default rule against Mr. Taylor to deprive him of retroactive benefits dating back to his discharge from service. *Taylor*, 3 F.4th at 1372 n.13, 1374. On July 22, 2021, the Federal Circuit sua sponte vacated the panel decision and ordered the case to be reheard en banc, but only as to the issue of equitable estoppel, not equitable tolling. *Taylor*, 4 F.4th at 1381-82.

military sexual trauma ("MST"), an unfortunately growing problem. Evidence shows MST victims are reluctant to file for VA disability compensation due to avoidance, stigma, or concerns the VA will erroneously deny their claims. *See* Dep't of Veterans Affairs Office of Inspector General, Rep. No. 17-05248-241, Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma, at i-ii, 1-4, 8-9 (Aug. 21, 2018), *available at* https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf. As the VA's own Office of Inspector General report found, "the trauma of restating or reliving stressful events could cause psychological harm to MST victims and prevent them from pursuing their claims." *Id*. at 9.

III. THIS CASE IS A GOOD VEHICLE TO RESOLVE THE FEDERAL CIRCUIT'S SPLIT

This case is an ideal vehicle for resolving the 6-6 split at the Federal Circuit as to whether the *Irwin* presumption applies to 38 U.S.C. § 5110(b)(1) and whether the Government can rebut it. First and foremost, the 6-6 split occurred *in this case*, making it the most logical vehicle for resolving the dispute.

In addition, the issue of equitable tolling of § 5110(b)(1) was specifically and carefully preserved at every level of the adjudicatory process in this case, from the agency level through Mr. Arellano's appeal to the Federal Circuit. Thus, there are no concerns about waiver, nor are there any concerns that the lower tribunals did not have a clear opportunity to consider and address this issue. In fact, equitable tolling of § 5110(b)(1) was the *only* issue raised before the Veterans Court and the Federal Circuit, making this a highly focused appeal with just one determinative legal issue. *See* App. 3a ("Appellant's sole

argument on appeal is that the Board erred when it did not 'toll' the operation of 38 U.S.C. § 5110 concerning the 'effective dates of awards.'").

This Court has jurisdiction over this appeal, the petitioner has standing, and the issue of equitable tolling of § 5110(b)(1) is clearly ripe for review. Thus, there are no procedural hurdles or jurisdictional pitfalls associated with this case.

Finally, there are no disputed factual issues precluding this Court from reaching and resolving the legal question presented—whether § 5110(b)(1) is amenable to equitable tolling. Although the Dyk concurrence concluded that equitable tolling is not available in Mr. Arellano's "specific circumstances," App. 97a, the Chen concurrence disagreed that this case can be resolved without a remand if § 5110(b)(1) is deemed amenable to equitable tolling. App. 68a-69a. Thus, even on this issue, the Federal Circuit is equally divided.

In any event, the question of whether a remand is necessary if this Court concludes that § 5110(b)(1) is amenable to equitable tolling is not a question that turns on disputed facts. Rather, it turns on a disputed principle of *jurisprudence*, namely whether it is appropriate for an appellate court reviewing an agency's decision to apply the law to the facts of a particular case when the agency itself specifically declined to address those facts and made no factual findings. On this point, the Dyk concurrence represents not only a split from the six judges of the Chen concurrence, but also from all other circuits and this Court's longstanding guidance. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the

propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *accord INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."). This Court can resolve this intra- and inter-circuit jurisprudential split without having to wade into any disputed facts.

IV. THE FEDERAL CIRCUIT'S DECISION BELOW SHOULD BE OVERTURNED BECAUSE IT IS INCONSISTENT WITH *IRWIN* AND ITS PROGENY

A. The Irwin Presumption Applies to the One-Year Filing Deadline of 38 U.S.C. § 5110(b)(1)

In *Irwin*, this Court announced a new, "more general rule" to determine when equitable tolling is available in suits against the Government. 498 U.S. at 95-96. The Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* The Court used broad language to describe the timing provisions to which this new rule would apply, including "statutory time limit[s]," "statutory filing deadline[s]," "time limits in suits against the Government," and "[t]ime requirements." *Id.* at 94-95. The Court gave no indication that the presumption could not apply to administrative deadlines or to deadlines set forth in federal disability benefits programs. *Cf. Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 162 (2013) (Sotomayor, J., concurring) ("[W]e have never suggested that the

presumption in favor of equitable tolling is generally inapplicable to administrative deadlines."); *Scarborough v. Principi*, 541 U.S. 401, 422 (2004) (noting that *Irwin*'s presumption could extend to "the administration of benefit programs").

In his concurring opinion below, Judge Chen concludes that *Irwin*'s presumption of equitable tolling is categorically inapplicable to the one-year deadline in 38 U.S.C. § 5110(b)(1) because this provision does not meet the traditional definition of a statute of limitations. App. 27a-29a, 54a-55a. In contrast, Judge Dyk concludes just the opposite—that "§ 5110(b)(1) is a statute of limitations that is subject to the rebuttable presumption of equitable tolling under *Irwin*." App. 97a. This Court should resolve this 6-6 split in favor of Judge Dyk's view because it more clearly aligns with *Irwin* and other decisions of this Court.

To begin with, contrary to the assumption at the heart of Judge Chen's concurrence, nowhere does *Irwin* state that its new, "more general rule" regarding equitable tolling was intended to apply only to traditional or rigidly defined statutes of limitations. For instance, *Irwin* itself cites *Zipes* as informative on the issue of equitable tolling. *See* 498 U.S. at 95 & n.2 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). *Zipes* involved an administrative filing deadline that was "like" a statute of limitations, albeit not necessarily one in the definitional sense. 455 U.S. at 393.

Zipes involved a 180-day administrative requirement for lodging a charge of workplace discrimination under Title VII of the Civil Rights Act. *Id.* at 388-89 (citing 42 U.S.C. § 2000e-5(e)). In deciding whether failure to satisfy this provision constituted a nonwaivable impediment to maintaining a federal lawsuit,

this Court applied the traditional distinction between jurisdictional and nonjurisdictional timing requirements. *Id.* at 392 (formulating the question as "whether the timely filing of an EEOC [Equal Employment Opportunity Commission] charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel"). The Court concluded that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, *like* a statute of limitations, is subject to waiver, estoppel, *and equitable tolling*." *Id.* at 393 (emphases added). The word "like" indicates that this Court considered the EEOC deadline to be similar to a statute of limitations, in the sense that it is nonjurisdictional and waivable, but nevertheless distinct. Other courts have described the EEOC filing deadline as an "exhaustion of remedies" requirement rather than a statute of limitations. *See, e.g.*, *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489-90 (2d Cir. 2018) (holding that "the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement" (citation omitted)).

Consistent with *Zipes*, this Court has held that timing provisions that *function* as statutes of limitations, or that operate as "limited" statutes of limitations, are subject to the *Irwin* presumption. *See, e.g.*, *Scarborough*, 541 U.S. at 420-23 (applying the *Irwin* presumption to a thirty-day deadline for applying for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B)); *Young v. United States*, 535 U.S. 43, 47-48 (2002) (applying the presumption to a three-year lookback provision in the bankruptcy statute). In determining whether a timing provision

functions as a statute of limitations, this Court considers the provision's "functional characteristics," i.e., whether it serves the policies of a statute of limitations. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 14-15 & n.6 (2014). Statutes of limitations encourage "plaintiffs to pursue 'diligent prosecution of known claims,'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (citation omitted), and thereby "protect defendants against stale or unduly delayed claims," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). Thus, in determining whether a timing provision functions as a statute of limitations, courts focus on whether the provision serves "the main goal of a statute of limitations: encouraging plaintiffs to prosecute their actions promptly or risk losing rights." *In re Neff*, 824 F.3d 1181, 1185 (9th Cir. 2016).

In *Young*, this Court considered whether equitable tolling was available for the three-year "lookback" period in 11 U.S.C. § 507(a)(8)(A)(i), which provides that a claim by the Internal Revenue Service ("IRS") for tax liabilities owed by a bankrupt taxpayer is nondischargeable if the tax return was due within three years before the bankruptcy petition was filed. 535 U.S. at 46-47. This Court agreed with the IRS that "[t]he three-year lookback period is a limitations period subject to traditional principles of equitable tolling." *Id.* at 47. The Court acknowledged that, "unlike most statutes of limitations, the lookback period bars only *some*, and not *all*, legal remedies for enforcing the claim (viz., priority and nondischargeability in bankruptcy)." *Id.* at 47-48 (footnote omitted). But it nevertheless serves the same "basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* (alteration in

original) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). The Court reasoned that this "makes it a more limited statute of limitations, but a statute of limitations nonetheless." *Id.*

Section 5110(b)(1) of title 38 functions as a statute of limitations every bit as much as the three-year lookback period in *Young*, if not more. Like the lookback period in *Young*, § 5110(b)(1) "prescribes a period within which certain rights"—namely a disabled veteran's right to claim retroactive disability benefits—"may be enforced." *Id.* at 47. Like the lookback period in *Young*, § 5110(b)(1) encourages disabled veterans to protect their rights by filing any ripe disability claims within one year of discharge. And, as in *Young*, if disabled veterans "sleep[] on [their] rights," they lose entitlement to any retroactive benefits they otherwise could have been awarded. *Id.* This, in turn, serves the "basic policies of . . . repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555.

In his concurring opinion, Judge Chen reasons that § 5110(b)(1) is not a statute of limitations because it "does not operate to bar a veteran's claim for benefits for a particular service-connected disability after one year has passed." App. 30a. But as Judge Dyk correctly recognizes in his concurrence, § 5110(b)(1) controls whether service-disabled veterans are entitled to *retroactive* disability benefits dating back to their discharge from service. App. 77a. As Judge Dyk explains, "[t]he claim for benefits here has two components: (1) a retrospective claim for benefits for past disability, and (2) a prospective claim for future benefits." *Id.* "[Section] 5110(b)(1) does impose what is clearly a one-year statute of limitations for retrospective

claims—making retrospective benefits unavailable unless the claim is filed within one year after discharge." *Id*.

Judge Chen also opines that § 5110(b)(1) "determines one of many elements of a benefits claim that affects the amount of a veteran's award but, unlike a statute of limitations, does not eliminate a veteran's ability to collect benefits for that very disability." App. 30a. But this Court has deemed similar timing provisions to be statutes of limitations amenable to equitable tolling, despite being primarily related to the amount a claimant can recover. For instance, the Court has described the copyright damages statute as "a three-year look-back limitations period." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014). As the Court explained in *Petrella*, the copyright damages statute, "coupled to the separate-accrual rule," means that a copyright owner can sue *anytime* during an ongoing infringement. *Id.* at 682-83. "She will miss out on damages for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered." *Id.* The six-year lookback period in the patent damages statute operates similarly, and this Court has likewise described it as a statute of limitations. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 961-62 (2017).

The three-year copyright statute of limitations has long been understood to be amenable to equitable tolling for circumstances such as the legal disability of an injured party. *See, e.g.*, *Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 F. App'x 259, 264 (5th Cir. 2014); *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 339-40 (5th Cir. 1971). In response, Judge Chen attempts

to distinguish copyright causes of action based on a "series of discrete infringing acts" from a veteran's claim for disability benefits, which he describes as a "*single* benefits claim for an ongoing disability." App. 37a-38a (quoting *Petrella*, 572 U.S. at 671-72). But as Judge Dyk correctly notes in his concurrence, a veteran's claim for disability benefits is, in reality, "not a single benefits claim, but a claim for a series of payments allegedly due." App. 80a (citations omitted); *see also* 38 U.S.C. § 1114 (providing monthly rates for disability compensation).

Judge Chen further contends that § 5110(b)(1) is not a statute of limitations because it "is not triggered by harm from the breach of a legal duty owed by the opposing party, and it does not start the clock on seeking a remedy for that breach from a separate remedial entity." App. 30a-31a (citing 1 Calvin W. Corman, *Limitation of Actions*, § 6.1, at 370 (1991)). But as Judge Dyk correctly notes in his concurrence, many statutory time periods and deadlines that do not fall within these rigid definitional constraints have been found amenable to equitable tolling. App. 73a-76a (citing the thirty-six-month filing deadline of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-16(a)(2), as a "primary example of a no-fault statute of limitations" found amenable to equitable tolling).

B. The Irwin Presumption Has Not Been Rebutted for 38 U.S.C. § 5110(b)(1)

Judge Chen opines in his concurrence that, "even if *Irwin*'s presumption were to apply, equitable tolling would nonetheless be unavailable because it is 'inconsistent with the text of the relevant statute.'" App. 55a (quoting *Young*, 535 U.S. at 49). This is incorrect.

Judge Chen's concurrence first attempts to rebut *Irwin* by arguing that § 5110(a)(1) is part of a "highly detailed statutory scheme dictating specific legislative choices for when a veteran's claim may enjoy an effective date earlier than the date it was received by the VA." *Id*. Judge Chen points to § 5110(a)(1)'s text, which instructs that a day-of-receipt effective date applies "[u]nless specifically provided otherwise in this chapter." App. 57a (quoting 38 U.S.C. § 5110(a)(1)). Judge Chen opines that this "unless" clause proves that Congress "implicitly intended to preclude the general availability of equitable tolling by explicitly including a more limited, specific selection of equitable circumstances under which a veteran is entitled to an earlier effective date . . . ." App. 57a-58a.

Although Judge Chen concedes that § 5110(b)(1) is not jurisdictional, App. 56a, his "unless" reasoning is fundamentally a jurisdictional argument—i.e., that Congress intended to expressly *forbid* equitable tolling. *See John R. Sand*, 552 U.S. at 134 (referring to "jurisdictional" as a "convenient shorthand" for absolute time limits that forbid equitable tolling (citation omitted)); *see also United States v. Kwai Fun Wong*, 575 U.S. 402, 408 n.2 (2015) (resolving the argument that 28 U.S.C. § 2401(b) "prohibits" equitable tolling under the same analysis used to determine whether § 2401(b) is jurisdictional). The VA must therefore show that the language of § 5110(b)(1) meets the "high bar" of showing that Congress made a "clear statement" towards such a prohibition. *Kwai Fun Wong*, 575 U.S. at 409-10 (citation omitted). It cannot do so.

As Judge Dyk explains in his concurrence, many limitations periods are framed in language far more

emphatic and mandatory than § 5110(a)(1), yet they have nevertheless been found to be nonjurisdictional and subject to the general rule in favor of equitable tolling. *See* App. 83a-84a; *see also Henderson*, 562 U.S. at 439 ("[W]e have rejected the notion that 'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'" (citation omitted)).

This Court has also rejected the idea that an "unless" clause to an otherwise general prohibition such as § 5110(a)(1) creates a jurisdictional bar to equitable tolling. *Kwai Fun Wong*, 575 U.S. at 410-11. The Federal Tort Claims Act, 28 U.S.C. § 2401(b) ("FTCA") is one such example. Like § 5110(a)(1), it employs an "unless" clause to forbid a tort claim against the United States "unless" certain criteria are met: "A tort claim against the United States *shall be forever barred unless* it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b) (emphasis added). Despite the FTCA's emphatic "forever barred" language, this Court found it to be "of no consequence" to the *Irwin* presumption. *Kwai Fun Wong*, 575 U.S. at 410-11.

In his concurring opinion, Judge Chen also attempts to rebut *Irwin* by branding § 5110(a)(1) as the general rule that controls the effective dates for various VA benefits and characterizing § 5110(b)-(n) as "exceptions" to that rule. App. 59a-60a. Judge Chen relies on *TRW* to argue that, because Congress enumerated exceptions to § 5110(a)(1), it must have intended to bar implied exceptions *anywhere* in § 5110 that touches on effective dates, including § 5110(b)(1). *Id.* (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)). But this ignores the nexus element of *TRW*, i.e., that the enumerated exceptions must relate to the specific limitations period at issue.

This Court held in *TRW* that an implied general discovery rule in the Fair Credit Reporting Act ("FCRA") was not applicable in calculating the FCRA's limitations period because the statute's text and structure established a two-year limitations period and *in the same sentence* provided a limited exception for cases of willful misrepresentation. *See TRW*, 534 U.S. at 28-31. The Court reasoned that a judicially recognized general discovery rule under the FCRA would render the narrower statutory misrepresentation exception "insignificant, if not wholly superfluous." *Id*. at 31 (citation omitted); *see also id.* at 28 ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (citation omitted)).

Here, in contrast, no explicit exception exists for § 5110(b)(1)'s one-year deadline. Section 5110 generally lists additional limitations periods to receive retroactive coverage for *other types* of VA benefits such as disability pension or death compensation. *See* 38 U.S.C. § 5110(b)-(n). But these have no nexus with § 5110(b)(1) and can never stop or slow its one-year clock. The provision for death compensation, for example, would hardly be rendered "insignificant" or "wholly superfluous" if equitable tolling were available for retroactive disability compensation under § 5110(b)(1). *TRW*, 534 U.S. at 31 (citation omitted); *compare* 38 U.S.C. § 5110(d), *with* 38 U.S.C. § 5110(b)(1) (defining separate benefits).

C. If 38 U.S.C. § 5110(b)(1) Is Amenable to Equitable Tolling, Mr. Arellano's Case Must Be Remanded for Further Factual Development

The only issue raised before the Federal Circuit in this case was whether 38 U.S.C. § 5110(b)(1) is amenable to equitable tolling as a matter of law. App. 18a. The Chen concurrence correctly explains that "[b]ecause both the Board and the Veterans Court concluded that equitable tolling was categorically unavailable for § 5110(b)(1) as a matter of law, neither had reason to consider whether the specific facts of Mr. Arellano's case justified equitable tolling." App. 67a. Nevertheless, Judge Dyk would find in the first instance that Mr. Arellano's specific facts do not warrant equitable tolling in this case. App. 96a-97a.

While Judge Dyk's concurrence purports to be merely applying the legal standard to undisputed facts, it errs by relying on an undeveloped evidentiary record in attempting to do so, going so far as to construe the *absence* of certain facts in the undeveloped record as dispositive factual findings. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

Judge Dyk's analysis relies primarily on the absence of an "allegation that Mr. Lamar [Mr. Arellano's brother] was somehow prevented from filing, or faced obstacles in his attempt to file, Mr. Arellano's request for benefits sooner." App. 96a. But Mr. Arellano had no reason to present such an allegation, if it exists, because he was instructed at every stage of his claim that equitable tolling was categorically unavailable to him as a matter of law. Moreover, it is far from clear that Judge Dyk's proposed caregiver rule applies so rigidly. *See* App. 68a ("[I]t is unsurprising that Mr. Arellano has not alleged 'any special circumstances' in relation to his caregiver, as Judge Dyk observes, since no one until today had suggested that having a caregiver creates a default presumption against equitable tolling in this context or in any other setting where equitable tolling can arise.").

As Judge Dyk acknowledges, "the mere fact that a guardian has been appointed for a claimant is a factor in the equitable tolling inquiry, *but only one factor*." App. 93a (emphasis added) (citing *K. G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1381 (Fed. Cir. 2020)). Judge Dyk attempts to dispense with all the other potential factors by alleging that "there is no claim that Mr. Arellano was estranged from Mr. Lamar or refused to interact with him," a factual scenario present in the *K. G.* case. App. 96a-97a (citing *K. G.*, 951 F.3d at 1377). Again, the Federal Circuit has no way of knowing whether those (or other compelling) facts might exist in this case because Mr. Arellano was never given an opportunity to develop the evidentiary record in support of equitable tolling.

It is undisputed that neither the Board nor the Veterans Court made any factual findings relevant to whether Mr. Arellano would be entitled to equitable

tolling if it was available for § 5110(b)(1). *See* App. 68a ("The government, for its part, has never argued in this court that we can—or should—affirm the denial of equitable tolling on the facts of Mr. Arellano's case; it has only argued that equitable tolling is unavailable as a matter of law."). As the Chen concurrence correctly observes, the Veterans Court and the Board:

> (1) did not address any of [Mr. Arellano's] facts in denying equitable tolling; (2) made no factual findings on this issue; (3) did not consider whether further factual development may be warranted to adequately answer that question; and (4) did not consider Judge Dyk's rigid 'caregiver rule' that bars equitable tolling for totally and permanently disabled veterans who have a caregiver.

Id. Indeed, far from indicating that Mr. Arellano's facts could never support a claim for equitable tolling, the Veterans Court stated that his allegations would be "worth exploring" in the absence of *Andrews*. App. 6a ("If we were writing on a blank slate, appellant's argument would be worth exploring.").

If *Andrews* is overturned, the six judges of the Chen concurrence would "remand this case for further factual development—which is all the more justified because Mr. Arellano has expressly requested this outcome under such circumstances and no party has argued that we may affirm the Veteran Court's decision on factual grounds." App. 68a-69a. This is the correct result. Because Mr. Arellano has yet to be afforded the opportunity to develop and argue his facts, and because the agency specifically refrained from making any factual findings relating to equitable tolling, a remand is necessary if this Court holds that 38 U.S.C. § 5110(b)(1) is amenable to equitable tolling.

Chenery, 332 U.S. at 196; *Florida Power*, 470 U.S. at 744; *see also Goonsuwan v. Ashcroft*, 252 F.3d 383, 390 n. 15 (5th Cir. 2001) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside the administrative record."); *Rhoa-Zamora v. INS*, 971 F.2d 26, 34 (7th Cir. 1992), *as modified on denial of reh'g* (Nov. 4, 1992) ("We will not weigh evidence that the Board has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance."); *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980) ("[T]his Court does not sit as an administrative agency for the purpose of fact-finding in the first instance. . ."); *Uanreroro v. Gonzales*, 443 F.3d 1197, 1208 (10th Cir. 2006) ("[W]e will not, as a reviewing court, step into the agency's role and engage in our own fact-finding.").

CONCLUSION

For the reasons explained above, the Court should grant the petition.

Respectfully submitted,

JAMES R. BARNEY
Counsel of Record
KELLY S. HORN
ALEXANDER E. HARDING
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
(202) 408-4000
James.Barney@finnegan.com

Counsel for Petitioner

September 17, 2021

APPENDIX

APPENDIX A

Not Published

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No: 18-3908

ADOLFO R. ARELLANO,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered and effective this date.

Dated: August 14, 2019

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Abie M. Ngala
Deputy Clerk

Copies to:

James R. Bareny, Esq.
VA General Counsel (027)

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 18-3908

ADOLFO R. ARELLANO,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

ALLEN, *Judge*: Appellant Adolfo Arellano served the Nation honorably in the United States Navy. In this appeal, which is timely and over which the Court has jurisdiction,[1] he contests a July 28, 2017, decision of the Board of Veterans' Appeals that denied him an effective date before June 3, 2011, for service connection for schizoaffective disorder type with PTSD

[1] *See* 38 U.S.C. §§ 7252(a), 7266(a).

(what we will refer to as the "mental disorder").[2] Appellant's sole argument on appeal is that the Board erred when it did not "toll" the operation of 38 U.S.C. § 5110 concerning the "effective dates of awards." Because that argument is foreclosed by binding precedent from both this Court and the Federal Circuit, we will affirm the Board's decision.

I. ANALYSIS

Congress has provided in section 5110 that the effective date of an award based on an initial claim generally is assigned based on the facts found, but shall not be earlier than the date of receipt of an application for compensation.[3] This foundational principle is also set forth in VA regulations.[4] The Court reviews the Board's assignment of an appropriate effective date for clear error.[5] We will reverse a factual finding of the Board when, after reviewing the evidence of

---

[2] Record (R.) at 2-13. The Board's decision to award an effective date of August 29, 2011, for appellant's service-connected tardive dyskinesia is a favorable finding the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Appellant does not contest this finding to the extent it is not favorable, expressly limiting his argument to the mental disorder. *See* Appellant's Brief (Br.) at 1. Therefore, the Court considers any arguments about the effective date for tardive dyskinesia abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc). But even if that were not the case (appellant's briefing is somewhat confusing on that score) the sole argument for an earlier effective date for this condition would be the same as the one advanced for the mental disorder. It is as legally defective here as it is there.

[3] 38 U.S.C. § 5110(a).

[4] 38 C.F.R. § 3.400(b).

[5] *Canady v. Nicholson,* 20 Vet.App. 393, 398 (2006); *see also* 38 U.S.C. § 7261(a)(4); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

record, the Court is left with "'a definite and firm conviction that a mistake has been committed.'"[6] However, and importantly for this appeal, the Court reviews legal questions de novo.[7] Finally, for all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.[8] If the Board failed to do so, remand is appropriate.[9]

As noted above, appellant presents only a single issue on appeal. He does not contest the Board's finding that he filed his claim for service connection for his mental disorder no earlier than June 3, 2011.[10] The Board used that date for the assignment of the effective date for service connection for his mental disorder.[11] He claims that he is entitled to an earlier effective date because his mental disorder was so disabling from the moment he left service in 1981 that section 5110 should be tolled such that it would be possible for him to obtain an effective date as early as the date of his separation from service.

Appellant's argument is squarely foreclosed by binding precedent. In *Andrews v. Principi* the Federal Circuit addressed whether section 5110 was subject to

---

[6] *Gilbert*, 1 Vet.App. at 53 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[7] *Butts v. Brown,* 5 Vet.App. 532, 538 (1993) (en banc).

[8] 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

[9] *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

[10] *See* Appellant's Br. at 2.

[11] R. at 10-11.

equitable tolling.[12] It rejected that argument.[13] Its core reasoning is worth quoting at length:

> [P]rinciples of equitable tolling . . . are not applicable to the time period in § 5110(b)(1). Equitable tolling may be applied to toll a statute of limitations "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." This is not such a case, as § 5110 does not contain a statute of limitations, but merely indicates when benefits may begin and provides for an earlier date under certain limited circumstances. "Generally, the effective date of an award of disability benefits can be no earlier than the date of application for such benefits." Section 5110 addresses the question of when benefits begin to accrue, not whether a veteran is entitled to benefits at all. Passage of the one-year period in § 5110(b)(1) for filing a claim of disability compensation therefore does not foreclose payment for the veteran and thus cannot be construed as establishing a statute of limitations.[14]

Appellant attempts to avoid the clear holding in *Andrews* by arguing that it did not establish a broad

---

[12] 351 F.3d 1134, 1137-38 (Fed. Cir. 2003).

[13] *Id*.

[14] *Id.* (citations omitted) (quoting, respectively, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *McCay v. Brown*, 106 F.3d 1577, 1579 (Fed. Cir. 1997)).

rule that equitable tolling can never apply to section 5110, but was limited only to the factual situation before the court in that case.[15] And he makes similar arguments[16] concerning this Court's decision in *Noah v. McDonald*, in which we interpreted *Andrews* to foreclose the application of equitable toiling to section 5110.[17] But these cases simply cannot be read in the manner appellant argues. And even if we could somehow avoid *Andrews* and *Noah* as appellant suggests, the Court's recent decision in *Taylor v. Wilkie* would alone foreclose his argument.[18] There, we stated unequivocally that "[t]his Court and the Federal Circuit have considered whether section 5110 is subject to equitable tolling and have found that it is not."[19]

If we were writing on a blank slate, appellant's arguments would be worth exploring.[20] But our slate is far from blank. Instead, it is filled with caselaw that binds the Court today and dooms appellant's sole argument that the Board's decision is erroneous. As the law stands today, it is not because section 5110 is not subject to equitable tolling.

---

[15] *See, e.g.,* Appellant's Br. at 7-9.

[16] *See id*. at 9-10.

[17] 28 Vet.App. 120, 128 (2016)).

[18] 31 Vet.App. 147 (2019).

[19] *Id*. at 154.

[20] *See, e.g., Butler v. Shinseki*, 603 F.3d 922, 926-28 (Fed. Cir. 2010) (Newman, J., concurring in the result) (developing an argument for equitable tolling to apply to section 5110 in certain circumstances).

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and a review of the record, the Court AFFIRMS the Board's July 28, 2017, decision.

DATED: July 23, 2019

Copies to:

James R. Barney, Esq.

VA General Counsel (027)

APPENDIX C

United States Court of Appeals
for the Federal Circuit

[Filed August 5, 2020]

2020-1073

Appeal from the United States Court
of Appeals for Veterans Claims in
No. 18-3908.

ADOLFO R. ARELLANO,

Claimant-Appellant

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

SUA SPONTE HEARING EN BANC

JAMES R. BARNEY, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, for claimant-appellant. Also represented by ALEXANDER EDISON HARDING, KELLY HORN.

ANDREW JAMES HUNTER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by ETHAN P. DAVIS, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; CHRISTINA LYNN GREGG, Y. KEN LEE, Office of General

Counsel, United States Department of Veterans Affairs, Washington, DC.

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

This case was argued before a panel of three judges on July 6, 2020. A sua sponte request for a poll on whether to consider this case en banc in the first instance was made. A poll was conducted and a majority of the judges who are in regular active service voted for sua sponte en banc consideration.

Accordingly,

IT IS ORDERED THAT:

(1) This case will be heard en banc under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 35(a). The court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified.

(2) The parties are requested to file new briefs addressing the following four issues:

A. Does the rebuttable presumption of the availability of equitable tolling articulated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), apply to 38 U.S.C. § 5110(b)(1), and if so, is it necessary for the court to overrule *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003)?

B. Assuming *Irwin*'s rebuttable presumption applies to § 5110(b)(1), has that presumption been rebutted?

C. Assuming this court holds that *Irwin*'s rebuttable presumption applies to § 5110(b)(1), would such a holding extend to any additional provisions of § 5110, including but not limited to § 5110(a)(1)?

D. To what extent have courts ruled on the availability of equitable tolling under statutes in other benefits programs that include timing provisions similar to § 5110?

(3) The opening brief of Appellant Adolfo R. Arellano must be filed within 45 days from the date of this order. The brief of Appellee Secretary of Veterans Affairs is due within 45 days after service of Mr. Arellano's opening brief. Mr. Arellano's reply brief must be filed within 30 days after service of the Secretary's brief. The parties' briefs must comply with Fed. Cir. R. 32(b)(1).

(4) The court invites the views of amici curiae. Any amicus brief may be filed without consent and leave of court. Any amicus brief supporting Mr. Arellano's position or supporting neither position must be filed within 20 days after service of Mr. Arellano's opening brief. Any amicus brief supporting the Secretary's position must be filed within 20 days after service of the Secretary's brief. Amicus briefs must comply with Fed. Cir. R. 29(b).

(5) The court requires 26 paper copies of all briefs and appendices provided by the filer within 5 business days from the date of electronic filing

of the document. Administrative Order No. 20-01 does not exempt the filing of these paper copies.

(6) This case will be heard en banc on the basis of the briefing ordered herein and oral argument.

(7) Oral argument will be scheduled at a later date.

FOR THE COURT

August 5, 2020
Date

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

APPENDIX D

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

[Filed September 24, 2020]

2020-1073

Appeal from the United States
Court of Appeals for Veterans Claims in
No. 18-3908.

ADOLFO R. ARELLANO,

Claimant-Appellant

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

PER CURIAM.

ORDER

On September 22, 2020, Paul Wright, proceeding pro se, submitted an "informal amicus brief." Mr. Wright also requests an exemption from the court's August 5, 2020 order, which directed the filing of 26 paper copies of all briefs.

Upon consideration thereof,

IT IS ORDERED THAT:

Mr. Wright's brief is accepted. The court will not require paper copies of this brief.

FOR THE COURT

September 24, 2020
Date

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

APPENDIX E

United States Court of Appeals
for the Federal Circuit

2020-1073

Appeal from the United States
Court of Appeals for Veterans Claims in
No. 18-3908, Judge Michael P. Allen.

ADOLFO R. ARELLANO,

Claimant-Appellant

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

Decided: June 17, 2021

JAMES R. BARNEY, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, argued for claimant-appellant. Also represented by ALEXANDER EDISON HARDING, KELLY HORN.

BARBARA E. THOMAS, Commercial Litigation Branch, Civil Division, United States Department of Justice, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, CLAUDIA BURKE, MARTIN F. HOCKEY, JR., ANDREW JAMES HUNTER; CHRISTINA LYNN GREGG, Y. KEN LEE, Office of General Counsel,

United States Department of Veterans Affairs, Washington, DC.

MELANIE L. BOSTWICK, Orrick, Herrington & Sutcliffe LLP, Washington, DC, for amicus curiae Military-Veterans Advocacy Inc. Also represented by ANNE SAVIN; JOHN B. WELLS, Law Office of John B. Wells, Slidell, LA.

JILLIAN BERNER, UIC John Marshall Law School Veterans Legal Clinic, Chicago, IL, for amicus curiae National Law School Veterans Clinic Consortium.

LIAM JAMES MONTGOMERY, Williams & Connolly LLP, Washington, DC, for amici curiae National Organization of Veterans' Advocates, Inc., National Veterans Legal Services Program. Also represented by DEBMALLO SHAYON GHOSH, ANNA JOHNS HROM; BRIAN WOLFMAN, Georgetown Law Appellate Courts Immersion Clinic, Washington, DC.

HANNAH LAUREN BEDARD, Kirkland & Ellis LLP, Washington, DC, for amicus curiae Charles J. Raybine. Also represented by WILLIAM H. BURGESS.

PAUL WRIGHT, Marietta, SC, as amicus curiae, pro se.

Before MOORE, *Chief Judge*[*], NEWMAN, LOURIE, DYK, PROST[**], O'MALLEY, REYNA, WALLACH[***], TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

---

[*] Chief Judge Kimberly A. Moore assumed the position of Chief Judge on May 22, 2021.

[**] Circuit Judge Sharon Prost vacated the position of Chief Judge on May 21, 2021.

[***] Circuit Judge Evan J. Wallach assumed senior status on May 31, 2021.

Opinion for the court filed PER CURIAM.

Concurring opinion filed by CHEN, *Circuit Judge*, in which MOORE, *Chief Judge*, and LOURIE, PROST, TARANTO, and HUGHES, *Circuit Judges*, join.

Concurring opinion filed by DYK, *Circuit Judge*, in which NEWMAN, O'MALLEY, REYNA, WALLACH, and STOLL, *Circuit Judges*, join.

PER CURIAM.

Upon consideration en banc, a unanimous court holds that equitable tolling is not available to afford Mr. Arellano an effective date earlier than the date his application for benefits was received.

The court is equally divided as to the reasons for its decision and as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1) in other circumstances. The effect of our decision is to leave in place our prior decision, *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), which held that principles of equitable tolling are not applicable to the time period in 38 U.S.C. § 5110(b)(1).

Accordingly, the judgment of the United States Court of Appeals for Veterans Claims is affirmed.

AFFIRMED

COSTS

No costs.

United States Court of Appeals
for the Federal Circuit

2020-1073

Appeal from the United States
Court of Appeals for Veterans Claims in
No. 18-3908, Judge Michael P. Allen.

ADOLFO R. ARELLANO,

Claimant-Appellant

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

Decided: June 17, 2021

CHEN, *Circuit Judge*, with whom MOORE, *Chief Judge*, and LOURIE, PROST, TARANTO, and HUGHES, *Circuit Judges*, join, concurring in the judgment.

By statute, the "effective date of an award" of disability compensation to a veteran "shall not be earlier than the date" the veteran's "application" for such compensation is received by the Department of Veterans Affairs (VA). 38 U.S.C. § 5110(a)(1). Section 5110(b)(1), however, provides an exception that permits an earlier effective date if the VA receives the application within one year of the veteran's discharge from military service: under such circumstances, the effective date of the award shall date back to "the day

following the date of the veteran's discharge or release." *Id*. § 5110(b)(1). This case poses the question of whether, under an equitable-tolling theory, an award on an application received more than one year after the veteran's discharge date may still be accorded an effective date of the day after discharge. Specifically, we consider whether the rebuttable presumption of equitable tolling for statutes of limitations established in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), applies to the one-year period in § 5110(b)(1).

This question arises from Adolfo R. Arellano's appeal from a decision of the Court of Appeals for Veterans Claims (Veterans Court) denying him an effective date earlier than the date his disability benefits application was received by the VA. Though Mr. Arellano filed his application more than 30 years after he was discharged from the Navy, he argues that § 5110(b)(1)'s one-year period should be equitably tolled in his case to afford his award an earlier effective date (and his compensation an earlier starting date) reaching back to the day after his discharge from service.

Mr. Arellano also urges us to overrule our prior decision in *Andrews v. Principi*, which held that § 5110(b)(1) is not a statute of limitations amenable to equitable tolling but merely establishes an effective date for the payment of benefits, thereby categorically foreclosing equitable tolling under this provision. 351 F.3d 1134, 1137–38 (Fed. Cir. 2003). Because this court sitting en banc is equally divided on this issue, our decision today does not alter our precedent that § 5110(b)(1) is not a statute of limitations to which *Irwin*'s presumption of equitable tolling applies. Accordingly, the Veterans Court's decision, which

relies on *Andrews* to deny Mr. Arellano an earlier effective date under § 5110(b)(1), is affirmed.

Judge Dyk and five of our colleagues, however, would overturn *Andrews* and conclude that § 5110(b)(1) is a statute of limitations entitled to *Irwin*'s presumption. But their basis for affirming the Veterans Court's decision rests on deciding, in the first instance, that the facts of Mr. Arellano's case do not warrant equitable tolling. We disagree with this approach both in substance and process. Even if *Irwin*'s presumption were to somehow apply here, it would be rebutted by the statutory text of § 5110, which evinces clear intent from Congress to foreclose equitable tolling of § 5110(b)(1)'s one-year period. Moreover, it is not our role as an appellate court to decide whether Mr. Arellano's factual circumstances warrant equitable tolling where no prior tribunal has considered the issue and no party has argued for such an outcome.

BACKGROUND

A

Congress has provided by statute for the payment of monetary benefits to veterans with disabilities arising from service. 38 U.S.C. § 1110. To obtain disability compensation, veterans must first file a claim with the VA. 38 U.S.C. § 5101(a)(1). With certain limited exceptions not relevant here, no compensation may be paid before such a claim is filed. *Id*. (with exceptions not applicable here, a "claim . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary"). The size of a veteran's disability compensation award is determined, in part, by the effective date assigned to his award—i.e., the date on

which benefits begin to accrue. An earlier effective date means a greater accrual of benefits.

Section 5110 of Title 38 governs the effective date of VA benefits awards. Two of its provisions are at issue in this appeal. First, § 5110(a)(1) sets forth the default rule that the effective date of an award cannot be earlier than the date the VA receives the veteran's application submitting a claim for that award:

> Unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

§ 5110(a)(1).[1] Accordingly, the natural consequence of § 5110(a)(1)'s default rule is that no disability compensation is payable for periods predating the VA's receipt of the application for benefits, "[u]nless specifically provided otherwise" by statute.

Section 5110 sets forth several exceptions to § 5110(a)(1)'s default rule, each providing for a retroactive effective date—that is, an effective date earlier than the date VA received the application—which, in turn, leads to a greater benefits award than under the

---

[1] No party has identified a material difference, for present purposes, between "claim" and "application," and the VA's regulations appear to use these terms interchangeably. *See*, *e.g.*, 38 C.F.R. § 3.1(p) (defining "claim" as "a written or electronic communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the [VA] submitted on an application form prescribed by the Secretary").

default rule. *See* § 5110(b)–(n). Many of § 5110's exceptions pertain to specific circumstances that may delay the filing of an application for benefits. These include: discharge from the military, § 5110(b)(1); increase in the severity of a disability, § 5110(b)(3); the "permanent[] and total[] disab[ility]" of a veteran, § 5110(b)(4); death of a spouse, § 5110(d); and correction of military records, § 5110(i). Each of § 5110's enumerated exceptions, however, expressly limits the retroactivity of the effective date to one year. *See*, *e.g.*, § 5110(g) ("In no event shall [an] award or increase [under this paragraph] be retroactive for more than one year from the date of application therefor . . . .").

As relevant here, one of those enumerated exceptions § 5110(b)(1)—provides that a disability compensation award's effective date may date back to the day after a veteran's discharge if the application for such benefits is received within one year after discharge:

> The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.

§ 5110(b)(1).

On the face of the statute, then, the effective date for awards based on applications received more than one year after discharge (that do not otherwise fall within any of § 5110's other enumerated exceptions) "shall not be earlier than the date of receipt of application therefor." § 5110(a)(1). This appeal considers whether equitable tolling may apply to § 5110(b)(1)'s one-year period to permit an effective date reaching

back to the day after the veteran's discharge from service, even though the application for that award was received more than one year after discharge.

The equitable-tolling doctrine, as traditionally understood, "permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'" *See Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014)) . Such "extraordinary circumstances" include "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," but exclude "a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at .96 (footnote omitted). But before deciding whether the factual circumstances are extraordinary enough to justify equitable tolling, a court must first determine whether the statutory time limit at issue is one amenable to equitable tolling.

This court has previously addressed whether § 5110(b)(1)'s one-year period is subject to equitable tolling in *Andrews*. There, the claimant-appellant, Ms. Andrews, submitted a claim for disability compensation approximately fourteen months after her discharge from service. 351 F.3d at 1135. As a result, she was awarded compensation effective as of the date the VA received her claim. Ms. Andrews appealed that decision, arguing that § 5110(b)(1)'s one-year period should be equitably tolled for at least two months (on a failure-to-notify theory) to qualify her for an earlier effective date dating back to the day

after discharge. We disagreed, holding that the "principles of equitable tolling . . . are not applicable to the time period in § 5110(b)(1)." *Id*. at 1137. This follows, we explained, because § 5110(b)(1) "does not contain a statute of limitations, but merely indicates when benefits may begin and provides for an earlier date under certain limited circumstances." *Id*. at 1138. Unlike how a statute of limitations operates, this statutory provision "addresses the question of when benefits begin to accrue, not whether a veteran is entitled to benefits at all," and "[p]assage of the one-year period in § 5110(b)(1) . . . does not foreclose payment for the veteran." *Id*. On that basis, we affirmed the denial of an earlier effective date for Ms. Andrews's claim.

B

We now turn to the facts of Mr. Arellano's appeal. Mr. Arellano served honorably in the Navy from November 1977 to October 1981. Nearly 30 years later, on June 3, 2011, the VA regional office (RO) received Mr. Arellano's claim for service-connected disability benefits for his psychiatric disorders. The RO granted service connection with a 100 percent disability rating for "schizoaffective disorder bipolar type with PTSD [post-traumatic stress disorder]." J.A. 506. The granted effective date of Mr. Arellano's award was the date his claim was received—i.e., June 3, 2011.

Mr. Arellano appealed his effective-date determination to the Board of Veterans' Appeals (Board), arguing that his mental illness had prevented him from filing his claim earlier. Mr. Arellano submitted, as support, a medical opinion by his psychiatrist indicating that he had been "100% disabled since 1980," when he was "almost crushed and swept overboard while working on the flight deck of [an] aircraft

carrier." J.A. 529. Given his disability, Mr. Arellano argued that § 5110(b)(1)'s one-year period should be equitably tolled to qualify him for an effective date retroactive to the day after his discharge from the Navy. The Board rejected his equitable-tolling argument, and the Veterans Court affirmed that decision, concluding that Mr. Arellano's claim was "squarely foreclosed by binding precedent" in *Andrews*. *See Arellano v. Wilkie*, No. 18-3908, 2019 WL 3294899, at *2 (Vet. App. July 23, 2019).

Mr. Arellano then timely appealed to this court, and the case was heard before a panel on July 6, 2020. On August 5, 2020, we took the case *en banc* and entered a *sua sponte* order directing the parties to brief the following issues:

> A. Does the rebuttable presumption of the availability of equitable tolling articulated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), apply to 38 U.S.C. § 5110(b)(1), and if so, is it necessary for the court to overrule *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003)?
>
> B. Assuming *Irwin*'s rebuttable presumption applies to § 5110(b)(1), has that presumption been rebutted?
>
> C. Assuming this court holds that *Irwin*'s rebuttable presumption applies to § 5110(b)(1), would such a holding extend to any additional provisions of § 5110, including but not limited to § 5110(a)(1)?
>
> D. To what extent have courts ruled on the availability of equitable tolling under statutes in other benefits programs that include timing provisions similar to § 5110?

Order Granting En Banc Review, No. 20-1073 (Aug. 5, 2020), ECF No. 45, at 2–3.

DISCUSSION

A

Our jurisdiction to review decisions of the Veterans Court is limited by statute. *See* 38 U.S.C. § 7292. "The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." § 7292(d)(1). Because our review of this decision involves a question of statutory interpretation—namely, the availability of equitable tolling for a particular statutory provision—we have jurisdiction over this matter. We review questions of law, such as this one, de novo. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991).

Irwin sets forth the analytical framework that guides our decision. At issue there was whether a statute of limitations in a suit against the government was subject to equitable tolling. Specifically, the *Irwin* petitioner sought equitable tolling of 42 U.S.C. § 2000e-16(c)'s 30-day deadline for filing a Title VII civil action against the federal government in district court after receiving a right-to-sue notice from the Equal Employment Opportunity Commission (EEOC). While statutes of limitations in suits between private litigants are "customarily" subject to equitable tolling, an analogous presumption had not yet been established for suits against the government. *See Irwin*, 498 U.S. at 95. *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95–96. This case thus established a rule of general applicability for

equitable tolling of statutes of limitations in suits against the government, with the caveat that "Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 96.

From this, we have understood the *Irwin* framework to consist of two steps. First, we must determine whether the rebuttable presumption of equitable tolling applies to the statutory provision at issue. And, if so, we must then determine whether that presumption has been rebutted—or in other words, whether there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply" to the statute. *See United States v. Brockamp*, 519 U.S. 347, 349–50 (1997). We address each step of the analysis in turn.

B

Before determining whether *Irwin*'s presumption of equitable tolling applies to § 5110(b)(1), we first elucidate our understanding of the presumption's origins and limits.

"Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). One such background principle is that "federal statutes of limitations are generally subject to equitable principles of tolling," *see Rotella v. Wood*, 528 U.S. 549, 560–61 (2000), which is "a long-established feature of American jurisprudence derived from 'the old chancery rule,'" *Lozano*, 572 U.S. at 10–11 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). Justification for this principle comes from recognizing that tolling can be consistent with the purpose of a statute of limitations under certain circumstances. In other words, because a statute of

limitations is designed "to encourage the plaintiff to pursue his rights diligently" after a cause of action has accrued, when an "extraordinary circumstance prevents him from bringing a timely action" despite his diligence, "the restriction imposed by the statute of limitations [no longer] further[s] the statute's purpose" and can be equitably tolled. *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014) (cleaned up).

Given that "Congress must be presumed to draft limitations periods in light of this background principle," *Young v. United States*, 535 U.S. 43, 49–50 (2002), courts have customarily "presume[d] that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute," *Lozano*, 572 U.S. at 11. And while this practice began in lawsuits between private litigants, *Irwin* subsequently extended the presumption to suits against the government. 498 U.S. at 95– 96 ("[T]he *same* rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." (emphasis added)); *see also id*. at 96 ("[I]t is evident that no more favorable tolling doctrine may be employed against the [g]overnment than is employed in suits between private litigants.").

Because the presumption serves as a proxy for the background legal principles that Congress is understood to legislate against, it follows that *Irwin*'s presumption is limited to only those statutory provisions that are established in common law as subject to equitable tolling—namely, statutes of limitations. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008) ("[*Irwin*'s] presumption seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in

the mine run of instances where it enacted a [g]overnment-related statute of limitations."). To that end, the Supreme Court has so far applied the presumption of equitable tolling *only* to statutory provisions that Congress clearly would have viewed as statutes of limitations. *See*, *e.g., Lozano*, 572 U.S. at 13–14 ("[W]e have only applied [the] presumption [in favor of equitable tolling] to statutes of limitations."); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–95 (1982) (holding that a limited filing period for EEOC charges is like a statute of limitations that is subject to waiver, estoppel, and equitable tolling). This comports with the understanding that equitable tolling "applies when there is a statute of limitations; it is, in effect, *a rule of interpretation tied to that limit*." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 681 (2014) (emphasis added); *see also Equitable Tolling*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "equitable tolling" as "[t]he doctrine that the *statute of limitations* will not bar a claim if . . ." (emphasis added)); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("[E]quitable [tolling] is read into every federal statute of limitation."). Conversely, the Supreme Court has declined to presume that equitable tolling applies where the time limit at issue functions "*[u]nlike* a statute of limitations," *see Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) (emphasis added), or lacks "a background principle of equitable tolling," *see Lozano*, 572 U.S. at 12. *See also Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158–59 (2013) (declining to presume that "an agency's internal appeal deadline" is subject to equitable tolling because the Supreme Court had "never applied the *Irwin* presumption to [such a provision]"). As these cases reflect, determining that Congress would have viewed a provision as a statute of limitations is a necessary

first step in inferring congressional intent to permit equitable tolling of that provision. Accordingly, absent some other established background principle of law permitting equitable tolling for the statutory provision at issue, *Irwin*'s presumption applies only to those statutory provisions that Congress clearly would have viewed as statutes of limitations.

Our conclusion is supported not only by *Irwin*'s logic and the subsequent cases applying it, but also, by the limitations of the Appropriations Clause of the Constitution, art. I, § 9, cl. 7, on the payment of money from the public fisc contrary to the express terms of a statute. *See Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." As the Supreme Court explained in *Richmond*: "For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." 496 U.S. at 424.[2] Thus, where a plaintiff seeks to enlarge the monetary benefits awarded by the express terms of a statute through equitable tolling (as Mr. Arellano does here), we must decide whether Congress intended to authorize payment of those additional benefits via

---

[2] That is not to say, however, that the Appropriations Clause bars all equitable tolling against the government for monetary claims. Instead, if "application of the doctrine [of equitable tolling] is consistent with Congress' intent in enacting a particular statutory scheme, [then] there is no justification for limiting the doctrine to cases that do not involve monetary relief." *See Bowen v. City of New York*, 476 U.S. 467, 479 (1986).

equitable tolling. This, in turn, necessarily implicates the question of whether Congress would have viewed the benefits provision at issue as a statute of limitations carrying the usual feature of equitable tolling.

Our analysis therefore begins by asking whether § 5110(b)(1)'s effective date provision is such a provision. As discussed below, and consistent with our reasoning in *Andrews*, § 5110(b)(1) is not a statute of limitations.

C

To determine whether § 5110(b)(1) is a statute of limitations, we consider whether this provision satisfies the "functional characteristics" of such statutes. *Lozano*, 572 U.S. at 15 n.6 ("[T]he determination [of] whether [a statutory provision] is a statute of limitations depends on its functional characteristics . . . ."). As explained below, § 5110(b)(1) does not have the functional characteristics of a statute of limitations. We see two reasons why Congress would not have thought that the provision belongs to that category of laws.

First, § 5110(b)(1) does not operate to bar a veteran's claim for benefits for a particular service-connected disability after one year has passed. Instead, like the general rule of § 5110(a)(1), it determines one of many elements of a benefits claim that affects the amount of a veteran's award but, unlike a statute of limitations, does not eliminate a veteran's ability to collect benefits for that very disability. Second, and relatedly, § 5110(b)(1) lacks features standard to the laws recognized as statutes of limitations with presumptive equitable tolling: its one-year period is not triggered by harm from the breach of a legal duty owed by the opposing party, and

it does not start the clock on seeking a remedy for that breach from a separate remedial entity. *See* 1 Calvin W. Corman, LIMITATION OF ACTIONS, § 6.1, at 370 (1991). The statutory scheme governing veterans' benefits makes clear that the VA is not obligated to pay any benefits before a claim applying for such benefits is filed, so there is no duty, or breach of duty, at the onset of § 5110(b)(1)'s one-year period (i.e., the day after discharge). Moreover, no remedial authority separate from the VA is involved in an initial application for veterans' benefits.[3] The effective-date

---

[3] Judge Dyk contends that the need for a separate remedial authority is inconsistent with three cases purportedly establishing that "a statute governing the timeliness of a claim to an agency for payment from that agency is a statute of limitations." Dyk Op. 7 (citing *United States v. Williams*, 514 U.S. 527, 534 & n.7 (1995); *Colvin v. Sullivan*, 939 F.2d 153, 156 (4th Cir. 1991); and *Warren v. Off. of Pers. Mgmt.*, 407 F.3d 1309, 1316 (Fed. Cir. 2005)). None of these cases, however, addresses equitable tolling of such statutes, let alone holds that they are entitled to *Irwin*'s presumption. Instead, these cases merely use the phrase "statute of limitations" briefly in dicta as a colloquial expression for a statutory time limit. But as *Williams* readily demonstrates, the fleeting and casual use of this phrase in no way establishes that *Irwin*'s presumption applies to those time limits or that they can be equitably tolled.

Williams concerns the same statutory provision (26 U.S.C. § 6511) revisited two years later in *Brockamp*. While equitable tolling was not at issue in *Williams*, *Brockamp* raised the question of whether § 6511 may be equitably tolled under *Irwin*. Rather than concluding that *Irwin*'s presumption applies, the Supreme Court carefully "assume[d] . . . only for argument's sake" that § 6511's time limit was an *Irwin*-covered statute of limitations. *See Brockamp*, 519 U.S. at 349–50; *see also Auburn*, 568 U.S. at 159. And even under that assumption, the Court nonetheless concluded that Congress did not intend for equitable tolling to apply to § 6511's time limit. *Brockamp*, 519 U.S. at 350–54.

provision in this case, then, is of a sufficiently different character from that of statutes of limitations entitled to *Irwin*'s presumption. These marked differences undermine any inference that Congress would have viewed § 5110(b)(1) as falling within that category of laws, so as to justify judicial override of Congress' express statutory limits on benefits payments. Below, we address these differences in function and characteristics in detail.

1

A statute of limitations, simply put, is a "law that bars claims after a specified period." *Statute of Limitations*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Statutes of limitations are designed to encourage plaintiffs to pursue diligent prosecution of known claims," *Cal. Pub. Emps. Ret. Sys.*, 137 S. Ct. at 2049 (internal quotation marks omitted), by "prescrib[ing] a period within which certain rights . . . may be enforced," *Young*, 535 U.S. at 47. By barring stale claims, statutes of limitations "assure fairness to defendants" and "promote justice by preventing surprises through the revival of claims that have been allowed to slumber." *See Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (internal quotation marks omitted).

These cases, moreover, do not involve statutory provision functionally similar to § 5110(b)(1), or otherwise establish a background principle of law that would authorize a tribunal to override § 5110(b)(1)'s express statutory limits on monetary governmental benefits. And unlike an initial application for veterans' benefits, these cases implicate a preexisting duty to pay owed by the government. *Williams*, *Colvin*, and *Warren* therefore fail to establish that a tribunal may override, through equitable tolling, an indisputably applicable statutory limit on governmental monetary benefits.

To determine whether the functional characteristics of a statute of limitations are met, the Supreme Court has focused the inquiry on whether the statute at issue encourages plaintiffs to promptly pursue their claims or risk losing remedies for those claims. In *Young*, for instance, the Court held that a statutory "three-year lookback period" for the IRS to collect overdue, unpaid taxes from a taxpayer in bankruptcy proceedings was a statute of limitations because it "encourages the IRS to protect its rights" by "collecting the debt or perfecting a tax lien—before three years have elapsed." 535 U.S. at 47 (citations omitted). There, the relevant statute afforded the IRS certain "legal remedies" for collecting a tax debt accrued within three years before a debtor's bankruptcy petition filing: the tax debt is nondischargeable and the IRS's claim enjoys eighth priority[4] in bankruptcy. *Id.* at 47–48. But if the IRS "sleeps on its rights" by failing to act within the three-year lookback period, then the IRS loses those "legal remedies" for collecting that debt. Specifically, "its claim loses priority and the debt becomes dischargeable" in bankruptcy, so that a bankruptcy decree will release the debtor from any obligation to pay and leave the IRS unable to collect on that debt. *Id*. The Court concluded that such a provision which bars the IRS from recovering any tax debt accrued more than three years before bankruptcy proceedings begin—is a statute of limitations because it serves the "same basic policies [furthered by] all limitations provisions: repose, elimination of stale

[4] The bankruptcy priority scheme determines the order in which claims are paid. Claims with higher priority are entitled to payment in full before anything can be distributed to claims of lower rank. *See* 1 Richard I. Aaron, *Bankruptcy Law Fundamentals* § 8:10 (2020 ed.).

claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* The Supreme Court also employed similar reasoning in *Zipes*, determining that the period for filing a charge of employment discrimination with the EEOC (a precondition to a federal-court action) operates as a statute of limitations given "its purpose [of] preventing the pressing of stale claims" and "giv[ing] prompt notice to the [defendant] employer"—the very "end[s] served by a statute of limitations." 455 U.S. at 394, 398 (internal quotation marks omitted).

By contrast, *Lozano* considered a time limitation that did not function as a statute of limitations and was therefore not subject to equitable-tolling principles. There, the Supreme Court declined to apply the presumption of equitable tolling to a treaty provision that did not did not "establish[] any certainty about the respective rights of the parties" and, instead, addressed policy concerns irrelevant to the functioning of a statute of limitations. 572 U.S. at 14–15. At issue was a Hague Convention provision requiring the return of a child abducted by a parent in a foreign country, so long as the left-behind parent requests return "within one year." 572 U.S. at 4. After one year, the child must still be returned to the left-behind parent "*unless* it is demonstrated that the child is now settled." *Id*. at 15 (emphasis added). Expiration of the one-year period thus "does not eliminate the remedy [for] the left-behind parent namely, the return of the child" and, instead, merely "opens the door" to consider "the child's interest" as well as the parent's interest. *Id*. at 14–15. Such a provision "is not a statute of limitations," the Court explained, because the "continued availability of the return remedy after one year preserves the possibility of relief for the left-behind parent and prevents repose for the abducting

parent." *Id.* Moreover, the additional consideration of the child's interest is "not the sort of interest addressed by a statute of limitations." *Id.*; *see also In re Neff*, 824 F.3d 1181, 1186–87 (9th Cir. 2016) (holding that a statutory provision is not a statute of limitations because it does not serve the purposes of "repose, elimination of stale claims, and certainty" and, instead, addressed unrelated policy concerns).[5] The Court thus concluded that equitable tolling was unavailable for the treaty provision at issue.

Similarly, in *Hallstrom v. Tillamook County*, the Court determined that a provision requiring plaintiffs to give notice of alleged environmental violations to the relevant agency 60 days prior to commencing a civil action was not a statute of limitations subject to equitable modification. 493 U.S. at 27. The Court explained: "*Unlike* a statute of limitations, [the] 60-day notice provision is not triggered by the violation giving rise to the action." *Id.* (emphasis added). Instead, plaintiffs "have full control over the timing of their suit," as "they need only give notice to the appropriate [agency] and refrain from commencing their action for at least 60 days. *Id*. The 60-day notice period, therefore, did not encourage plaintiffs to

---

[5] In *Neff*, the statutory provision at issue foreclosed discharge in bankruptcy for debtors who improperly transferred property "within one year" of filing a bankruptcy petition. 824 F.3d at 1183. The Ninth Circuit concluded that such a provision is not a statute of limitations because it "is not designed to encourage a specific creditor to prosecute its claim promptly to avoid losing rights" and, in fact, "does not encourage (or require) a creditor to take any action at all." *Id.* at 1186. Moreover, the purpose of the statute—to deter and penalize dishonest debtors from "seeking to abuse the bankruptcy system"—concerned policy matters unrelated to "the sort of interest addressed by a statute of limitations." *Id.* at 1187 (citing *Lozano*, 572 U.S. at 15).

diligently file claims or risk losing remedies for a violation.

Here, as in *Lozano* and *Hallstrom*, § 5110(b)(1)'s effective-date provision does not have the key "functional characteristics" that define a statute of limitations. Because a veteran seeking disability compensation "faces no time limit for filing a claim," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011), "[t]here is no statute of limitations" for filing such a claim, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). The timing of *when* the claim is filed affects only an element of the claim itself—the effective date—and not whether the veteran is entitled to benefits at all. *See Collaro v. West*, 136 F.3d 1304, 1308 (Fed. Cir. 1998) (explaining that "the effective date of the disability" is one of five elements to a veteran's application for benefits). A veteran is entitled to press the same claim for a specific service-connected disability regardless of whether the claim is filed within a year after discharge or 30 years after discharge, as was the case for Mr. Arellano. Section 5110(b)(1), like the treaty provision in *Lozano*, thus does not set forth any period after which a veteran is foreclosed from pressing that claim and receiving benefits if the claim is established.

The timing provision of § 5110(b)(1), in fact, does not function to bar stale claims or encourage the diligent prosecution of known claims. To the contrary, § 5110(b)(1) was adopted to "remove[] injustices where there is delay in filing [a] claim due to no fault of the veteran and payment could otherwise be made only from [the filing] date of [the] claim." *See* 89 Cong. Rec. A4026 (1943) (statement of Rep. Rankin). Section 5110(b)(1)'s one-year grace period thus forgives a veteran's temporary *delay* in filing a claim in the

immediate aftermath of a veteran's transition back to civilian life upon discharge from military service. This provision is itself an equitable exception provided by Congress to address injustices that may arise from § 5110(a)(1)'s default rule and, in that respect, speaks to policy concerns that are "not the sort of interest addressed by a statute of limitations." *See Lozano*, 572 U.S. at 15. Given (1) the well-established understanding of what constitutes a statute of limitations, and (2) the nature of § 5110(b)(1)'s effective-date provision, § 5110(b)(1) does not satisfy the "functional characteristics" of a statute of limitations.

Mr. Arellano, in response, asserts that even if § 5110 preserves the possibility of prospective benefits for an ongoing disability regardless of when the claim is filed, a veteran will nonetheless lose out on retroactive benefits dating back to the day after discharge if his claim is not filed within one year of discharge. Section 5110(b)(1)'s one-year period therefore encourages veterans to diligently file their disability claims after discharge to protect their rights to retroactive benefits. He argues that § 5110(b)(1) is "similar" to the statutory-lookback periods for copyright and patent damages in *Petrella* and *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), respectively, insofar as these statutes all "limit [the amount of] claimants' damages but not their ability to seek redress for an ongoing . . . injury." Appellant's Supp. Reply Br. 10. We disagree.

This argument overlooks the distinction that § 5110(b)(1) establishes the effective date of a *single* benefits claim for an ongoing disability, whereas an ongoing course of infringement in *Petrella* and *SCA Hygiene* comprises a "series of discrete infringing acts," *each* of which is a distinct harm giving rise to

an independent claim for relief that starts a new limitations period. *See Petrella*, 572 U.S. at 671–72. The copyright damages statute states: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). As *Petrella* explains, this statute is subject to the "separate accrual rule"—that is, "when a defendant commits successive violations, the statute of limitations runs separately from each violation," such that each violation "gives rise to a *discrete 'claim'* that 'accrue[s]' at the time the wrong occurs." 572 U.S. at 671 (alteration in original) (emphasis added). "In short, *each* infringing act starts a new limitations period." *Id*. (emphasis added). Subsequently, in *SCA Hygiene*, the Supreme Court confirmed that the "same reasoning" from *Petrella* applies to the six-year lookback period in the patent damages statute, 35 U.S.C. § 286. As with copyright infringement, each individual act of patent infringement gives rise to a discrete claim that starts its own six-year limitations period for seeking a remedy for that act. *See* 1 Robert A. Matthews, Jr., Annotated Patent Digest § 9:2 (2021 ed.) (explaining that in a series of discrete infringing acts, "each act . . . can constitute its own separate act of [patent] infringement"). The lookback periods for copyright and patent damages, therefore, function just as a traditional statute of limitations would to foreclose pressing of stale claims, while permitting timely claims to proceed.

By contrast, § 5110(b)(1)'s one-year grace period never bars a veteran's benefits claim regardless of when it was filed and, instead, establishes an element of the claim itself (i.e., the effective date of the award). *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (distinguishing an "essential element of a claim for relief" from a jurisdictional statutory limitation). Mr.

Arellano, moreover, has not demonstrated that a single claim seeking benefits for a specific disability can comprise two discrete claims for retrospective and prospective benefits, each arising from a distinct injury that starts its own limitations period. Nor is there a basis for construing his claim in this manner, given that retrospective and prospective benefits arise from the same "five common elements" of a single benefits claim: "[1] status as a veteran, [2] existence of disability, [3] a connection between the veteran's service and the disability, [4] the degree of disability, and [5] the effective date of the disability." *See Collaro*, 136 F.3d at 1308. Thus, neither § 507(b)'s copyright limitations period nor § 286's patent limitations period support finding that § 5110(b)(1) functions as a statute of limitations amenable to equitable tolling.

Mr. Arellano next analogizes to *Young*'s three-year lookback period, arguing that § 5110(b)(1)—which bars only *retroactive* benefits predating the date the VA received his claim, but not *prospective* benefits beginning from the date the VA received his claim—is no less a statute of limitations than the lookback period in *Young*. We disagree. *Young*'s lookback period is a "limited statute of limitations" in the sense that it arises only in the situation when a tax debtor files a bankruptcy petition and bars certain "legal remedies" (i.e., priority and nondischargeability in bankruptcy) outside of the lookback period. *See* 535 U.S. at 47– 48. But the Supreme Court concluded it was "a statute of limitations nonetheless" because any tax debt accrued more than three years before the date of the bankruptcy petition becomes fully dischargeable, leading to the "elimination of stale claims." *Id.* Expiration of the three-year lookback period therefore barred the entirety of the IRS's claim, just as a traditional statute of limitations would. *See id.* at 47 (explaining

that the lookback period functions as a statute of limitations by barring "[o]ld tax claims" falling outside the statutory period). Here, under § 5110(b)(1), disability compensation claims received within one year of discharge are afforded an earlier effective date that results in, at most, one year of retroactive benefits. But unlike *Young*'s lookback period, passage of this one-year period does not bar a veteran from attaining any effective date at all and, instead, bars only an effective date earlier than the date of receipt. The practical effect of § 5110(b)(1), then, is not to foreclose a veteran from all benefits but only from those retroactive from the day his claim is received.

Mr. Arellano, however, offers the following variation on *Young*: instead of having only one tax year at issue, suppose that the Youngs owed tax debt from multiple years. The IRS would then be barred from recovering tax debt from the years outside the three-year lookback period but could still recover any of the debt from within that period. *See* Oral Arg. at 30:32–32:52. Under this hypothetical, Mr. Arellano contends, the lookback period merely affects the *amount* of relief the IRS would be entitled to recover but does not entirely bar the IRS from such relief, meaning that it is a "more limited statute of limitations, but a statute of limitations nonetheless." *See Young*, 535 U.S. at 48. So too here, Mr. Arellano asserts, where filing a benefits claim after § 5110(b)(1)'s one-year grace period merely affects the amount of benefits awarded without barring the claim itself.

But this hypothetical is no different from the lookback periods in *Petrella* and *SCA Hygiene* and is distinguishable for the same reason: § 5110(b)(1) establishes the effective date of a *single* application for disability benefits, whereas each year of tax debt

in Mr. Arellano's hypothetical corresponds to a *separate* IRS claim involving different facts and liabilities. *See*, *e.g.*, *Young*, 535 U.S. at 46 (three-year look-back period applies to "claims" for unpaid taxes "for a *taxable year*" (emphasis added)). In other words, "[i]f the IRS has a claim for taxes for which the return was due within three years before the bankruptcy petition was filed," then the IRS's claim is protected and "nondischargeable in bankruptcy." *Id.* But if the claim is for unpaid taxes from a return due more than three years before the bankruptcy petition was filed, then that individual claim is lost and dischargeable in bankruptcy. Because the tax debt arising from each tax year constitutes its own distinct claim against a taxpayer, *Young*'s lookback period operates as any other statute of limitations would to bar stale claims arising from older tax years while providing remedies for timely claims. *See id.* at 49 (the lookback period "define[s] *a subset of claims* eligible for certain remedies" when a tax debtor is in bankruptcy (emphasis added)). Accordingly, for the reasons discussed above, *Young*'s lookback period fails to demonstrate that § 5110(b)(1) functions as a statute of limitations.

2

Section 5110(b)(1) also differs from statutes of limitations in additional ways—namely, with respect to the onset of its one-year period and the remedial authority involved. These differences further undermine any inference that Congress must have viewed § 5110(b)(1) as a statute of limitations that would presumptively allow judicial override of express statutory limits on benefits payments under *Irwin*.

The "standard rule" is that a statute of limitations begins to run when the cause of action "accrues," i.e., when "the plaintiff has a 'complete and present cause

of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)); *see also Wallace v. Kato*, 549 U.S. 384, 388 (2007). Unless Congress indicates otherwise, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201. The earliest opportunity for a plaintiff to sue under such circumstances is when the opposing party has violated some duty owed to that plaintiff, such as contractual obligations or a duty of care. *See* 1 Calvin W. Corman, LIMITATION OF ACTIONS, § 6.1, at 370 (1991) ("The earliest opportunity for a complete and present cause of action is that moment when the plaintiff has suffered a *legally recognizable harm* at the hands of the defendant, such as the time of contract breach or the commission of a tortious wrong." (emphasis added)). In *Bay Area Laundry*, for instance, the Supreme Court held that a cause of action against an employer that withdraws from a multiemployer pension plan is not complete, and therefore the statute of limitations does not run, until a demand for payment is made by the plan's trustees and rejected by that employer. 522 U.S. at 202. This follows, the Court explained, because "the statute makes clear that the withdrawing employer owes nothing *until* its plan demands payment," and absent such a demand, the employer has no duty of payment that could be violated to give rise to a cause of action. *See id.* (emphasis added).

As applied to the veterans' benefits context, the earliest point at which a veteran could have a "complete and present cause of action" is when the VA has failed to satisfy a legal duty owed to the veteran, such as when his claim for benefits has been wrongfully

adjudicated or denied. In this vein, we have recognized that the 120-day time limit for a veteran to appeal an unsatisfactory Board decision to the Veterans Court is a statute of limitations to which *Irwin*'s presumption applies. *See Jaquay v. Principi*, 304 F.3d 1276, 1283 (Fed. Cir. 2002) (en banc) (citing *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc)). But the one-year period in § 5110(b)(1), beginning on the day after discharge from service, does not measure the time from harm caused by a breach of duty, or even from a breach of duty, to the filing of the claim. This, together with the fact that the claim is not made to a separate entity with authority to address an asserted breach, makes it unlikely that Congress conceived of this timing rule as a statute of limitations for *Irwin* purposes.

Indeed, in an initial application for disability compensation where § 5110 governs the effective-date determination, the VA has not yet violated any legal duty owed to the claimant that would trigger a statute of limitations to run. The statutory scheme governing veterans' benefits makes clear that the VA is not obligated to pay any benefits before a claim applying for such benefits is filed. In particular, § 5101(a)(1)(A) states that "a specific claim in the form prescribed by the Secretary . . . *must* be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." § 5101(a)(1)(A) (emphasis added). This provision explains that the filing of a benefits claim must first occur for any benefits to accrue or be paid by the VA. The VA thus has no preexisting duty to award benefits, and a veteran has no corresponding right to receive such benefits, until after a claim applying for benefits is filed by the veteran with the VA. *See Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998) ("Section

5101(a) is a clause of general applicability and mandates that a claim must be filed in order for any type of benefit to accrue or be paid."), *cert. denied*, 525 U.S. 834 (1998); *McCay v. Brown*, 106 F.3d 1577, 1580 (Fed. Cir. 1997) (stating § 5101(a) requires that "a claim must be on file before benefits may be obtained"). Without a preexisting right, there can be no violation of that right for which a veteran would seek redress, which could then be barred if not pursued within a specified limitations period. *See* Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS 136–37 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *id.* at 137 (stating that it is wrong to "allow a primary right to be confused with a remedial right of action, which is a very different legal animal" and criticizing "confusion between a primary claim to a performance and a remedial capacity to invoke a sanction for nonperformance"). Section 5110(b)(1)'s effective-date provision, then, is of a different character than a statute of limitations because the filing of a benefits claim is not an action seeking a remedy for previously due, but wrongfully unpaid, benefits. *See Hallstrom*, 493 U.S. at 27 (holding that a statutory time limit is "[u]nlike a statute of limitations" because it is not "triggered by the violation giving rise to the action" and is therefore not subject to equitable modification and cure).

Logic also supports our conclusion that there is no cause of action, and therefore no statute of limitations that could be equitably tolled, until after a claimant files an initial claim for benefits and receives an unsatisfactory VA decision on that claim. A claimant seeking an increased benefits award, as Mr. Arellano does here, has no basis to maintain a suit against the VA until at least two events have transpired. He must first file an initial claim seeking benefits from the VA. And second, he must receive the VA's initial decision

determining the amount of his award. Only then could that claimant have a cause of action against the VA if he disagrees with the amount of benefits awarded. *Cf. Bay Area Laundry*, 522 U.S. at 202 ("Absent a demand, even a willing employer cannot satisfy its payment obligation, for the withdrawing employer cannot determine, or pay, the amount of its debt until the plan has calculated that amount."). Yet if § 5110(b)(1) were a statute of limitations as Mr. Arellano and Judge Dyk contend, a claimant would have a cause of action on the day after his discharge from service—before any claim for benefits has been filed and before the VA has made an initial determination on the claim with which the claimant could disagree. "Such a result is inconsistent with basic limitations principles," *id.* at 200, and we do not see how a statute of limitations could begin to run on the day after discharge.

Judge Dyk responds that this reasoning is inconsistent with "cases holding that a provision barring benefits for failure to file [a claim] within a prescribed period constitutes a statute of limitations, regardless of any alleged breach of duty by the government." Dyk Op. at 5. He cites our decision in *Cloer v. Sec'y of Health & Hum. Servs.*, where we held that the Vaccine Act's 36-month deadline for filing a petition for compensation for a "vaccine-related injury" is a statute of limitations that begins to run on the date the first symptom or manifestation of onset of the injury claimed occurs. 654 F.3d 1322, 1340–44 (Fed. Cir. 2011) (en banc). The Vaccine Act's 36-month filing deadline, however, is easily distinguishable from § 5110(b)(1)'s effective date provision.

Unlike § 5110(b)(1), the Vaccine Act's filing deadline is phrased and functions as a traditional statute of

limitations that *bars* a plaintiff from seeking relief from a tribunal once the specified time limit has passed. Specifically, 42 U.S.C. § 300aa-16(a)(2) recites: "if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." Nothing in this provision purports to affect the amount of compensation awarded on a successful petition. In contrast to § 5110(b)(1)'s effective date provision, which does not bar a claimant from filing an application for benefits more than one year after discharge, § 300aa16(a)(2) bars the filing of a petition for compensation after 36 months have passed since the "first symptom or manifestation of onset or of the significant aggravation" of claimant's vaccine-related injury. Section 300aa-16(a)(2) thus exhibits the functional characteristics germane to all statutes of limitations by encouraging claimants to promptly file a petition or risk losing remedies available under the Vaccine Act.

Moreover, in contrast to an initial application seeking veterans' benefits from the VA, the Vaccine Act's filing deadline arises in a context in which a plaintiff seeks redress in federal court for a *preexisting* duty owed by the defendant. Prior to the Act, a plaintiff injured by a vaccine could directly sue the vaccine's manufacturer in civil court, alleging harm caused by that manufacturer's breach of duty. But due to concerns that civil actions against vaccine manufacturers were unsustainably raising vaccine prices and driving manufacturers out of the market, Congress enacted the Vaccine Act to create a streamlined process to "stabilize the vaccine market and

expedite compensation to injured parties." *Sebelius v. Cloer*, 569 U.S. 369, 372 (2013) (citing H.R. Rep. No. 99-908, at 4 (1986)). Payments awarded under the Act are funded by the vaccine manufacturers themselves through an excise tax levied on each dose of vaccine. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 239–40 (2011); H.R. Rep. No. 99-908, at 34 (excise tax on vaccine manufacturers are intended to "generate sufficient annual income for the Fund to cover all costs of compensation"). However, the government (specifically, the Secretary of Health and Human Services) administers the program and, in doing so, assumes the preexisting legal duty owed to a claimant who has suffered a vaccine-related injury. *See* 42 U.S.C. § 300aa-12(b)(1) ("In all proceedings brought by the filing of a petition under [§] 300aa-11(b) of this title, the Secretary shall be named as the respondent, shall participate, and shall be represented.").

While the Vaccine Act eases certain evidentiary burdens by not requiring claimants to prove "wrongdoing by the manufacturer" or causation for on-Table injuries, *see* H.R. Rep. 99-908, at 12 (1986), initiating a Vaccine Act proceeding bears substantial similarities to initiating a civil action governed by a statute of limitations. Both require an injured party to seek—within a statutory time period a remedy before a federal court predicated on a legal duty owed by another. Just as a plaintiff initiates a civil action by serving the defendant and timely filing a complaint in court, "[a] proceeding for compensation under [the Vaccine Act] shall be initiated by service upon the Secretary and the filing of a petition . . . with the United States Court of Federal Claims" within 36 months of the first symptom or manifestation of vaccine-related injury. *See* 42 U.S.C. § 300aa–11(a)(1). Nothing in this initiation process speaks to the

administrative context in which § 5110(b)(1) operates, wherein a claimant files an initial application with the VA seeking an award of monetary benefits from that agency, such that the application's date of receipt determines (in part) the total amount of benefits awarded.

Our understanding of the functional distinction between § 5110(b)(1)'s effective-date provision and a statute of limitations is further confirmed by observing that "the *creation of a right* is distinct from the provision of *remedies for violations* of that right." *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (emphasis added). A statute of limitations pertains to the latter, but not the former, by establishing a period for a veteran to seek a remedy for the violation of a right to benefits. Section 5110(b)(1)'s effective-date provision, on the other hand, is an element of the veteran's claim seeking benefits that pertains to the creation of a right to benefits but not to the remedies for violations of that right. *Cf. Cloer*, 654 F.3d at 1335 (explaining that § 300aa-11(c)(1)(D)(i)'s requirement a claimant suffer the effects of a vaccine-related injury for "more than 6 months after the administration of the vaccine" is "a condition precedent to filing a petition for compensation" that "is intended to restrict eligibility to the compensation program, not to act as a statutory tolling mechanism for the [36-month] statute of limitations"). Accordingly, § 5110(b)(1), which establishes the effective date of a claim whose filing is necessary "for benefits to be paid or furnished" by the VA, is not a statute of limitations because it pertains only to the creation of the right to be paid benefits, and not to the provision of remedies for violations of that right. For this reason, too, Congress would not have viewed § 5110(b)(1) as a statute of limitations.

D

Having determined that Congress would not have viewed § 5110(b)(1) as a statute of limitations, we are left to consider whether some other background principle of law supports applying *Irwin*'s presumption of equitable tolling to § 5110(b)(1)'s effective-date provision. We see nothing in the cases identified by Mr. Arellano and Judge Dyk that would establish any such principle of law.

1

We are unaware of any case that applies *Irwin*'s presumption to a statutory provision functionally similar to § 5110(b)(1)—namely, one that does not encourage the diligent prosecution of a claim by barring a claimant from seeking relief after the statutory period elapses and, instead, establishes an element of the claim itself. Instead, cases applying *Irwin*'s presumption have all involved a time limit that functions as a statute of limitations by foreclosing a plaintiff from seeking relief once that time has passed. *See*, *e.g.*, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015) (two-year time limit for bringing a tort claim against the government); *Holland v. Florida*, 560 U.S. 631 (2010) (one-year period for filing a petition for federal habeas relief); *Scarborough v. Principi*, 541 U.S. 401 (2004) (30-day deadline for filing an application for attorney's fees under the Equal Access to Justice Act); *Bailey*, 160 F.3d at 1363–64 (120-day time limit to file notice of appeal with the Veterans Court); *Cloer*, 654 F.3d at 1341–42 (36-month deadline to file a petition under the Vaccine Act).

Mr. Arellano and Judge Dyk point to a statute governing Social Security disability insurance benefits, 42 U.S.C. § 423(b), which states: "An individual

who would have been entitled to a disability insurance benefit for any month had he filed application therefor before the end of such month shall be entitled to such benefit if such application is filed before the end of the 12th month immediately succeeding such month." In other words, this provision provides that qualifying claimants may receive retroactive benefits up to a year prior to the date of application. But as Mr. Arellano and amici concede, courts have so far *declined* to find equitable exceptions available for this statutory period. *See* Appellant's Suppl. Br. 45–49; Military-Veterans Advocates Amicus Br. 8; *see also Shepherd ex rel. Shepherd v. Chater*, 932 F. Supp. 1314, 1318 (D. Utah 1996) ("Courts have uniformly refused to find equitable exceptions to the statutory limit on retroactive benefits."). Moreover, several cases explain that "filing [an application within § 423(b)'s one year period] is a substantive condition of eligibility" for retroactive Social Security benefits, rather than a statute of limitations that may be equitable tolled. *See Yeiter v. Sec'y of Health & Hum. Servs.*, 818 F.2d 8, 10 (6th Cir. 1987) (explaining that appellant was not entitled to retroactive benefits from an earlier date because she had not filed an application within 12 months of that date, and "filing is a substantive condition of eligibility"); *Sweeney v. Sec'y of Health, Ed. & Welfare*, 379 F. Supp. 1098, 1100 (E.D.N.Y. 1974) (declining to apply equitable exceptions based on physical disability to award retroactive benefits because "the filing of an application [is] a condition precedent to payment of benefits"). While courts have yet to analyze the availability of equitable tolling for this statute under the *Irwin* framework, neither Mr. Arellano nor amici argue that *Irwin* compels a different result. *See* Military-Veterans Advocates Amicus Br. 10 ("Nonetheless, the reasoning of these courts

points toward the conclusion that *Irwin*'s presumption of equitable tolling would be rebutted in the context of retroactive Social Security benefits under §§ 402(j) and 423.").

Judge Dyk nonetheless contends that § 423(b) is not only a "statute of limitations," but that its approach to claims involving retroactive benefits is "not unusual" in government benefit programs, which purportedly "often" permit claimants to recover future benefits while establishing a statute of limitations for past benefits. *See* Dyk Op. at 8. He cites a single district court case for this proposition, *see Begley v. Weinberger*, 400 F. Supp. 901, 911 (S.D. Ohio 1975), which merely opines in passing that § 423(b) is a "statute of limitations" for "retroactive disability insurance benefits." *Begley*, however, does not discuss equitable tolling, and its holding does not rely on its characterization of § 423(b) as a statute of limitations. In the 46 years since *Begley* was decided, no opinion has cited it for the proposition that § 423(b) is a statute of limitations, until Judge Dyk's opinion in this appeal. Nor are we aware of any other case characterizing § 423(b) as a "statute of limitations." Section 423(b) thus fails to establish a background principle of equitable tolling applicable to § 5110(b)(1).[6]

---

[6] If § 423(b) were deemed a statute of limitations, as Judge Dyk contends, such a determination would be a trailblazing event, making equitable tolling potentially available (absent congressional intent otherwise) in large swaths of Social Security cases involving retroactive benefits, contrary to what courts had uniformly held pre-*Irwin*. Even more troubling is Judge Dyk's assertion that government benefits programs "often" include "statutes of limitations" for retroactive benefits. If this too is accurate, then the ramification of his reasoning is that equitable tolling could potentially apply to many, if not all, of those statutes (assuming *Irwin*'s presumption has not been rebutted), thereby

Mr. Arellano responds that a background principle of law applying equitable tolling to functionally similar statutes is not necessary for *Irwin*'s presumption to apply to § 5110(b)(1). Appellant's Reply Br. 13–14. He contends that *Scarborough* expressly rejected any such requirement by explaining that "it is hardly clear *Irwin* demands a precise private analogue," especially in "matters such as the administration of benefits programs." 541 U.S. at 422; *see also id.* ("Because many statutes that create claims for relief against the United States or its agencies apply *only* to Government defendants, *Irwin's* reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent." (emphasis added)). But seeking a background principle of law that demonstrates equitable tolling is not exclusive to statutes of limitations is a far cry from requiring a "precise private analogue." *Scarborough* itself is instructive on this point. There, the Supreme Court considered whether a timely application for attorneys' fees under the Equal Access to Justice Act (EAJA) may be amended after the 30-day filing deadline expired to cure a defect in the application. The Court held that a curative amendment should be allowed based on the "relation back" doctrine, which permits a later amendment to relate back to the day of the original filing under certain circumstances. In doing so, the Court rejected an argument that the relation back doctrine is limited to its codification in the Federal Rules of Civil Procedure, which governs only amended district court "pleadings" and not EAJA fee applications. *See id.* at 417– 18. While not requiring "a precise private [litigation] analogue," the

---

opening the door for retroactive benefits in numerous different statutory schemes.

Court observed that (1) it had previously applied the relation back doctrine in "analogous settings" to fee applications; and (2) the doctrine itself predated the Federal Rules and had "its roots in [the] former federal equity practice" of the courts. *Id.* at 417–18. Rather than rejecting the requirement for a background principle of law, the Court's application of the relation back doctrine in the context of an EAJA fee application was premised on just such a principle—namely, the historical practice of the relation back doctrine outside the limited context of district court pleadings. Here, however, courts have applied the presumption of equitable tolling only to statutes of limitations that run once a cause of action accrues, and Mr. Arellano has not identified a case or background principle of law demonstrating otherwise.

2

The language and administrative context of § 5110(b)(1), moreover, are unlike that of any statute of limitations we have seen. Neither *Irwin*, nor any of the cases in this line, considered a statute of limitations having "effective date" language. At the same time, § 5110(b)(1) does not use the typical statute-of-limitations language establishing when a plaintiff must file an action against a defendant in a tribunal or else lose the claim—the setting addressed by all statutory provisions treated as statutes of limitation in the *Irwin* line.

Section 5110(b)(1) instead addresses a structurally distinct setting—i.e., filing an initial claim with a federal agency to obtain monetary benefits from that agency, wherein the claim's receipt date determines the amount of awardable benefits but not whether the claim is barred. Unlike the traditional context in which a statute of limitations operates, the relevant

"defendant" and "tribunal" for § 5110(b)(1) are one and the same (the VA), and the "defendant" has yet to violate any legal duty owed to the claimant that would give rise to a cause of action. While Judge Dyk asserts that the Supreme Court and several circuits have found equitable tolling applicable to "time requirements in administrative agency proceedings," *see* Dyk Op. at 3, none of the cases he cites address the type of agency proceedings relevant here. These cases instead involve filing deadlines for administrative complaints, which address the same structural setting as any statute of limitations, wherein a complainant seeking redress for a respondent's breach of duty before an independent tribunal. *Cloer*, as previously explained, involved a deadline for filing a petition before a federal court and not an agency. *See* 42 U.S.C. § 300aa–11(a)(1). This deadline is effectively no different than a traditional statute of limitations that establishes a period in which a plaintiff may sue a government defendant in federal court. Similarly, *Zipes*, *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996), and *Farris v. Shinseki*, 660 F.3d 557, 563 (1st Cir. 2011), which all relate to the deadline for filing a charge of discrimination with the EEOC, address a setting in which an injured complainant seeks redress before a separate entity (the EEOC) with the authority to address the asserted breach of duty by the employer, whether through adjudication, enforcement, or lesser measures. Thus, none of these cases speak to filing an initial claim with a federal agency to obtain monetary benefits from that agency, and we are unaware of any case holding that a provision with language or operational context similar to § 5110(b)(1) is a statute of limitations.

Section 5110(b)(1), for these additional reasons, would not have looked like a statute of limitations to

Congress, meaning we cannot presume that Congress intended for this provision to carry the default feature of equitable tolling. The effective-date provision is therefore not a statute of limitations but merely determines the starting date for the right to payment on a veteran's benefits claim. Because no background principle of law establishes that we may equitably toll such a statutory provision, *Irwin*'s presumption is inapplicable to § 5110(b)(1)'s effective date provision. Our reasoning here is consistent with *Andrews*' longstanding holding that principles of equitable tolling are inapplicable to the one-year period in § 5110(b)(1), *see* 351 F.3d at 1137–38, our equally divided court today leaves that holding undisturbed.

E

Although § 5110(b)(1) is not a statute of limitations amenable to equitable tolling, even if *Irwin*'s presumption were to apply, equitable tolling would nonetheless be unavailable because it is "inconsistent with the text of the relevant statute." *Young*, 535 U.S. at 49 (quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998)). "[T]he word 'rebuttable' means that the presumption is not conclusive," and "[s]pecific statutory language, for example, could rebut the presumption by demonstrating Congress' intent to the contrary." *John R. Sand & Gravel Co.*, 552 U.S. at 137–38. Here, *Irwin*'s presumption—were it to apply—would be rebutted by Congress' highly detailed statutory scheme dictating specific legislative choices for when a veteran's claim may enjoy an effective date earlier than the date it was received by the VA.

There are several ways to rebut the presumption of equitable tolling, all of which seek to answer *Irwin*'s "negatively phrased question: "Is there good reason to believe that Congress did *not* want the equitable

tolling doctrine to apply?" *See Brockamp*, 519 U.S. at 350. One way "is to show that Congress made the time bar at issue jurisdictional." *Kwai Fun Wong*, 135 S. Ct. at 1631. Another way is to demonstrate that the statutory text precludes equitable tolling. *See Brockamp*, 519 U.S. at 352; *Beggerly*, 524 U.S. at 48. Additionally, the statutory history and administrative context can demonstrate that Congress did not intend for equitable tolling to apply. *See Auburn*, 568 U.S. at 159–60. We address each in turn.

Neither party here argues that § 5110(b)(1)'s effective-date provision is jurisdictional. *See* Appellant's Supp. Br. 24–28; Appellee's Supp. Br. 57–60. And for good reason. Nothing in § 5110 purports to define a tribunal's jurisdiction, and the filing of a benefits claim more than one year after discharge does not deprive any tribunal of jurisdiction to adjudicate that claim. *Cf. Henderson*, 562 U.S. at 438 (finding no clear indication that Congress intended for § 7266(a)'s 120-day filing deadline for Veterans Court appeals to be jurisdictional where the statute "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the Veterans Court" (cleaned up)). Filing a claim more than a year after discharge merely means that a provision of § 5110 other than § 5110(b)(1) governs the claim's effective date.

But concluding that § 5110(b)(1)'s effective date provision is nonjurisdictional does not end our inquiry because "Congress may preclude equitable tolling of even a nonjurisdictional statute of limitations." *See Kwai Fun Wong*, 135 S. Ct. at 1631 n.2; *see also Auburn*, 568 U.S. at 149 (holding that "the presumption in favor of equitable tolling does not apply" to a nonjurisdictional agency appeal deadline given the statutory history and administrative context); *Nutraceu-*

tical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019) (the mere fact that a statutory provision "lacks jurisdictional force . . . does not render it malleable in every respect," for such provisions may nonetheless be "mandatory" and "not susceptible [to] equitable [tolling]"). "Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the *text* of the rule leaves room for such flexibility." *Id.* (emphasis added). We therefore look to the statutory text to discern whether Congress intended to displace the general availability of equitable tolling with its own preferred regime of concrete deadlines.

Section 5110 begins with the default rule: "*Unless specifically provided otherwise in this chapter*, the effective date of an award . . . shall not be earlier than the date of receipt of application therefor." § 5110(a)(1) (emphasis added). Section 5110(a)(1), together with § 5101(a)'s requirement that a claim "must be filed in order for benefits to be paid or furnished," establishes the baseline rule that no benefits may accrue or be awarded before a claim asserting the right to such benefits is filed, "unless specifically provided" for by statute. Section 5110 then proceeds to list more than a dozen detailed exceptions to the default rule that permit an earlier effective date and, as a result, additional benefits accruing up to one year before the VA receives the claim. Section 5110(b)(1)'s day-after-discharge provision is one such enumerated exception. By mandating that any exception to the default rule must be provided for "specifically" and "in this chapter," the most natural reading of § 5110 is that Congress implicitly intended to preclude the general availability of equitable tolling by explicitly including a more limited, specific selection of equitable circumstances under which a veteran is entitled to an earlier effective date and specifying

the temporal extent of the exceptions for those circumstances. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). In other words, the text of § 5110 makes clear that Congress did not intend for the VA or the courts to create additional exceptions other than those choices it "specifically provided" in the statute. Because none of § 5110's specifically enumerated exceptions, nor any other provision "of this chapter," provide for equitable tolling of § 5110(b)(1)'s one-year period, such tolling is unavailable as it is not "specifically provided" for "in this chapter."

Mr. Arellano and Judge Dyk respond that courts have construed statutory language far more imperative than that of § 5110(a)(1) to permit equitable tolling. Specifically, they rely on *Kwai Fun Wong*'s analysis of the Federal Tort Claims Act, which states that "[a] tort claim against the United States *shall be forever barred* unless it is presented [to the agency] within two years . . . or unless action is begun within six months." 28 U.S.C. § 2401(b) (emphasis added). There, the Supreme Court held that the phrase "shall be forever barred," though "mandatory" and "emphatic," did not render the filing deadline at issue jurisdictional and foreclosed from equitable tolling. *Kwai Fun Wong*, 135 S. Ct. at 1632–33. But this argument misses the mark. *Kwai Fun Wong* stands for the unremarkable proposition that *Irwin*'s presumption is not rebutted merely because the statutory text "reads like an ordinary, run-of-the-mill statute of limitations" to bar relief unless a claim is brought within a specified amount of time. *Id*. at 1633 (quoting *Holland*, 560 U.S. at 647). Holding otherwise would have effectively eviscerated *Irwin*'s presumption because, as the Court explained, most statutes of limitations are framed in that manner. *Id.* at 1632. The Court clarified that "Congress must do something

special, beyond setting an exception-free deadline," to prohibit a court from equitably tolling the deadline. *Id.* Congress did just that here: not only is § 5110(b)(1)'s one-year period itself an exception to the default effective-date rule, § 5110 further provides numerous other detailed, technical exceptions to the default effective-date rule, thereby creating a catalog of congressional choices that foreclose courts from recognizing any additional, unwritten exceptions.

Indeed, § 5110's enumeration of a wide range of specific exceptions to the default rule hews closer to the "highly detailed" and "technical" exceptions that foreclosed equitable tolling in *Brockamp* than to *Kwai Fun Wong*'s "fairly simple language [that] can often [be] plausibly read as containing an implied 'equitable tolling' exception." *Brockamp*, 519 U.S. at 350. At issue in *Brockamp* was a statute reciting time limits for taxpayers to file tax refund claims. Just as with § 5110, the *Brockamp* statute provided a default rule with "basic time limits" for filing such claims, followed by "very specific exceptions" establishing "special time limit rules" for certain claims relating to precise circumstances ("operating losses, credit carrybacks, foreign taxes, self-employment taxes, worthless securities, and bad debts"). *Id.* at 351–52. The Court concluded that the statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate . . . that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote," thereby rebutting the presumption of equitable tolling. *Id*. at 352. The same reasoning applies here, where Congress has explicitly provided more than a dozen detailed exceptions to § 5110(a)(1)'s default rule prohibiting an effective date earlier than

the date of receipt. And "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *TRW*, 534 U.S. at 28 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980))[7]; *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) ("[i]t is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts" because doing so "is not a construction of a statute, but, in effect, an enlargement of it by the court" (internal quotation marks omitted)).

The implication that § 5110's explicitly enumerated exceptions preclude the judicial recognition of additional equitable exceptions can, of course, be overcome by "contrary legislative intent." *See TRW*, 534 U.S. at 28 (quoting *Andrus*, 446 U.S. at 616–17). But we see nothing in the statutory text, structure, or history that persuades us that such an intent exists for § 5110. To the contrary, § 5110's enumerated exceptions confirm that Congress has already considered which equitable considerations may provide a retroactive effective date and declined to provide the relief Mr. Arellano seeks. These exceptions cover specific circumstances beyond the veteran's control that may delay the filing of

---

[7] Mr. Arellano also argues that the principle of statutory construction quoted from *TRW* applies only where it would render one of those exceptions insignificant or superfluous. *E.g.*, Appellant's Supp. Reply Br. 21–22. But while that principle may be strongest in such a case, it is clearly instructive even where no exception would be effectively read out of the statute. *See Andrus*, 446 U.S. at 616–17 (declining to recognize an additional exception where statute recites explicitly enumerated exceptions to a general prohibition, even where no other exception would be rendered superfluous by the addition); *United States v. Smith*, 499 U.S. 160, 166 (1991) (same).

a claim, such as: discharge from the military, § 5110(b)(1); increase in the severity of a disability, § 5110(b)(3); the "permanent[] and total[] disab[ility]" of a veteran, § 5110(b)(4); death of a spouse, § 5110(d); and correction of military records, § 5110(i).[8]

More importantly, § 5110(b)(4) addresses the precise circumstances that prevented Mr. Arellano—a "veteran who is permanently and totally disabled"—from filing his claim earlier, but in the context of disability *pension*, *see* 38 U.S.C. ch. 15, and not the disability compensation at issue here, *id.*, ch. 11. Section 5110(b)(4) provides a one-year grace period for disability pension filings by a permanently and totally disabled veteran who was "prevented by a disability from applying for disability pension for a period of at least 30 days beginning on the date on which the veteran became permanently and totally disabled."

---

[8] Though several of § 5110's enumerated exceptions address equitable circumstances in which the filing of a claim may be delayed, Judge Dyk nonetheless contends that no provision of § 5110 other than § 5110(b)(4) "speak[s] to equitable tolling," and § 5110(b)(4) alone "can hardly be read as evincing a desire by Congress to eliminate equitable tolling" generally as to disability compensation. Dyk Op. at 16. He does not explain why, if retroactive effective date provisions are statutes of limitations (as he insists), provisions analogous to § 5110(b)(4) that permit an earlier effective date when a claimant delays filing a claim due to the death of a spouse or parent, an increase in disability severity, or even discharge from military service do not likewise "speak to equitable tolling." Judge Dyk appears to argue that *Irwin*'s presumption may not be rebutted unless a statute explicitly references more than one circumstance for which courts have traditionally permitted equitable tolling (e.g., defective pleadings, deception through defendant's misconduct, severe disability) but cites no support for such a proposition. Nor would the enumerated exceptions in *Brockamp* satisfy his heightened standard for rebutting *Irwin*'s presumption.

This provision demonstrates that Congress considered the very circumstances that delayed Mr. Arellano from filing a claim and nonetheless declined to afford equitable relief beyond what was already provided in § 5110(b)(1). It is not our role as a court to second-guess Congress' judgment as to when such equitable exceptions are warranted. To decide otherwise would amount to "[a]textual judicial supplementation," which "is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision" that would equitably toll § 5110(b)(1) for permanently and totally disabled veterans. *See Rotkiske*, 140 S. Ct. at 361; *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). We therefore decline, as the Supreme Court did in *Brockamp*, to read additional, unwritten equitable exceptions into the statute.

Though we need not look beyond the unambiguous statutory text, the statutory history of § 5110 reinforces our conclusion that Congress did not intend for equitable tolling to apply to § 5110(b)(1)'s effective date provision. In the seventeen years since our court decided *Andrews* in 2003, we have repeatedly followed its holding, each time reiterating that equitable tolling is inapplicable to § 5110's effective date rules. *See Titone v. McDonald*, 637 F. App'x 592, 593 (Fed. Cir. 2016) (per curiam); *Butler v. Shinseki*, 603 F.3d 922, 926 (Fed. Cir. 2010) (per curiam); *AF v. Nicholson*, 168 F. App'x 406, 408–09 (Fed. Cir. 2006); *Ashbaugh v. Nicholson*, 129 F. App'x 607, 609 (Fed. Cir. 2005) (per curiam). Congress has amended § 5110 four times since *Andrews*, and at no point has it

expressed disapproval of *Andrews* and its progeny or otherwise indicated that equitable tolling is available under this statute. *See Auburn*, 568 U.S. at 159 (no legislative intent of equitable tolling where Congress had amended the relevant statute "six times since 1974, each time leaving [the provision at issue] untouched" and had never "express[ed] disapproval" of the agency's longstanding regulation setting deadlines). To the contrary, Congress' amendments adding provisions § 5110(a)(2)–(3) under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Pub. L. No. 115–55, § 2(*l*), 131 Stat. 1105, 1110, underscore an intent to continue limiting retroactivity to one year. *See* § 5110(a)(2) (a claim receiving an adverse decision retains "the date of the filing of the initial application for a benefit" as the effective date on appeal if the claim is "continuously pursued" within "one year after the date" of the adverse decision); § 5110(a)(3) (the effective date of "supplemental claims received *more than one year*" after the RO or Board decision "shall not be earlier than the date of receipt of the supplemental claim" (emphasis added)).

The statutory history of § 5110(b)(4) also confirms that Congress did not intend to provide more equitable relief than what was specifically enumerated in the statute. When § 5110(b)(4) was proposed in 1973, Congress explained that "[t]he *1-year period* prescribed by the proposal . . . is considered *reasonable*" to address the filing "delays" of "permanently and totally disabled" veterans whose "very condition upon which entitlement may depend may also prevent prompt application for benefit." *See* H.R. Rep. No. 93-398), at 14 (1973) (emphases added). Congress, moreover, remarked that the proposed one-year grace period would bring the effective-date rules governing disability pension into conformity with those already

governing disability compensation in § 5110(b)(1) and death benefits in § 5110(d). *See id.* Because § 5110(b)(4)'s one-year grace period was considered a "reasonable" equitable remedy for filing delays by permanently and totally disabled veterans, this statutory history supports our conclusion that Congress did not intend for equitable tolling of § 5110(b)(1)'s analogous one-year grace period.

While acknowledging that § 5110(b)(4) speaks to equitable tolling and indicates "Congressional willingness to delay veterans' filing obligations where a disability makes meeting them difficult or impossible," *see* Dyk Op. at 26, Judge Dyk nonetheless argues that this provision merely signals "a beneficent Congressional act, [and] not a rebuttal of the *Irwin* presumption," *id.* at 16 (citing *Cloer*, 654 F.3d at 1343).[9] But this ignores *Cloer*'s precise reasoning. *Cloer* explains that enumerated statutory exceptions do not necessarily rebut *Irwin*'s presumption where those exceptions address a "special need" that is *unrelated* to equitable tolling concerns. *See id*. Unlike § 5110(b)(4) and other exceptions addressing specific equitable circumstances warranting a delayed claim filing, *Cloer* concluded that the two exceptions to the Vaccine Act's 36-month filing deadline are driven by "specific concern[s] unrelated to equitable tolling considerations," such as minimizing "confusion" and addressing "scientific advances in medicine," and thus

[9] Despite maintaining that § 5110(b)(4) does not signal congressional intent to preclude equitable tolling beyond the statutory limits, Judge Dyk nonetheless claims this provision demonstrates congressional intent to deny Mr. Arellano and other disabled claimants with a caregiver or other representative equitable relief beyond what is expressly provided by statute. *See* Dyk Op. at 22–24.

do not "show a desire by Congress to bar equitable tolling." *Id.* at 1343–44; *see also, id.* at 1343 ("Individual factual circumstances, the first of equitable tolling claims, played no role in enactment of this provision.").

Mr. Arellano and Judge Dyk also argue that § 5110's listed exceptions are irrelevant because they are exceptions to § 5110(a)(1)'s default effective-date rule, and not § 5110(b)(1)'s one-year grace period. In their view, the question is whether § 5110(b)(1)'s one-year period can be tolled, and because that period does not itself have any enumerated exceptions, precedent such as *TRW* and *Brockamp* are not controlling. But this argument ignores that tolling § 5110(b)(1)'s one-year grace period would operate as an exception to not only § 5110(b)(1)'s one-year grace period but also to § 5110(a)(1)'s default rule. This follows because, as mentioned, § 5110(b)(1) is itself an equitable exception to § 5110(a)(1)'s default rule. *Cf. Beggerly*, 524 U.S. at 48 (declining to further toll a statute "providing that the statute of limitations will not begin to run until plaintiff 'knew or should have known of [the government's] claim,' [because it] has already effectively allowed for equitable tolling"). It would be odd to conclude that, because Congress chose to soften the default effective-date rule by providing specific enumerated equitable exceptions, it has somehow opened the door for courts to create their own exceptions-to-theexception through equitable tolling.

Mr. Arellano further argues that the relevant administrative context and subject matter of § 5110(b)(1)—veterans' benefits—support equitable tolling. We acknowledge that Congress is more likely to have intended equitable tolling for statutes "designed to be 'unusually protective' of claimants" where "laymen, unassisted by trained lawyers, initiate the process."

See Auburn, 568 U.S. at 160 (citing *Bowen v. City of New York*, 476 U.S. 467, 480 (1986) and *Zipes*, 455 U.S. at 397). And it is undoubtedly true that the statutory scheme for veterans' benefits is "uniquely pro-claimant [in] nature," *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000), and imbued with "[t]he solicitude of Congress for veterans," *United States v. Oregon*, 366 U.S. 643, 647 (1961).

But these general background principles cannot override the unambiguous meaning of the statutory text. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–16 (2019) (ambiguity often resolved by full consideration of "text, structure, history, and purpose"); *cf. Andrus*, 446 U.S. at 618–19 ("[A]lthough the rule by which legal ambiguities are resolved to the benefit to the Indians is to be given the broadest possible scope, a canon of construction is not a license to disregard clear expressions of . . . congressional intent." (cleaned up)); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("canons of construction are no more than rules of thumb," and the text is the "one, cardinal canon" a court must turn to "before all others"). Here, for the reasons we have set forth, the comprehensiveness of the congressionally enumerated exceptions to the § 5110(a)(1) default rule leave no room for additional judicially recognized exceptions. Similarly, the language, context, and characteristics of the § 5110(b)(1) time provision leave no room for reasonably concluding that Congress viewed it as a statute of limitations. Those conclusions leave no ambiguity. Where, as here, "the words of a statute are unambiguous, this first step of the interpretive inquiry is our last." *Rotkiske*, 140 S. Ct. at 360.

We recognize there are circumstances under which it may seem unjust to preclude equitable tolling. But

where the statutory text demonstrates "a clear intent to preclude tolling, courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving." *Nutraceutical*, 139 S. Ct. at 714; *see also California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."). "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963); *see also United States v. First Nat'l Bank of Detroit*, 234 U.S. 245, 260 (1914) ("The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws.").

For these reasons, equitable tolling is inconsistent with Congress' intent in enacting § 5110(b)(1), and *Irwin*'s presumption—were it to apply in this instance—would have been rebutted.

F

Lastly, we briefly address Judge Dyk's conclusion that equitable tolling is unavailable on the undisputed facts of Mr. Arellano's appeal. *See* Dyk Op. at 26 n.20. Because both the Board and the Veterans Court concluded that equitable tolling was categorically unavailable for § 5110(b)(1) as a matter of law, neither had reason to consider whether the specific facts of Mr. Arellano's case justified equitable tolling. Nor did they consider whether further factual development would be warranted if equitable tolling were not categorically unavailable. In the event of a reversal, Mr. Arellano has requested that we remand this case for further proceedings so he can present why his factual

circumstances warrant equitable tolling. *See* Appellant's Suppl. Br. 49; Appellant's Br. 32. The government, for its part, has never argued in this court that we can—or should—affirm the denial of equitable tolling on the facts of Mr. Arellano's case; it has only argued that equitable tolling is unavailable as a matter of law.

However, Judge Dyk contends that we may determine the application of equitable tolling in the first instance "[w]here the facts are undisputed, [and] all that remains is a legal question, even if that legal question requires the application of the appropriate standard to the facts of a particular case." Dyk Op. at 26 n.20 (quoting *Former Employees of Sonoco Prod. Co. v. Chao*, 372 F.3d 1291, 1294–95 (Fed. Cir. 2004)). But neither *Former Employees*, nor any case cited within, holds that we may apply a legal standard to the facts where the Veterans Court (and the Board): (1) did not address any of those facts in denying equitable tolling; (2) made no factual findings on this issue; (3) did not consider whether further factual development may be warranted to adequately answer that question; and (4) did not consider Judge Dyk's rigid "caregiver rule" that bars equitable tolling for totally and permanently disabled veterans who have a caregiver. For that reason, it is unsurprising that Mr. Arellano has not alleged "any special circumstances" in relation to his caregiver, as Judge Dyk observes, since no one until today had suggested that having a caregiver creates a default presumption against equitable tolling in this context or in any other setting where equitable tolling can arise. Thus, even if *Irwin*'s presumption of equitable tolling were to apply to § 5110(b)(1), which it does not, we would remand this case for further factual development—which is all the more justified because Mr. Arellano

has expressly requested this outcome under such circumstances and no party has argued that we may affirm the Veterans Court's decision on factual grounds.

CONCLUSION

For the aforementioned reasons, and consistent with our longstanding holding in *Andrews*, § 5110(b)(1) is not a statute of limitations subject to *Irwin*'s presumption of equitable tolling. But even if *Irwin*'s presumption were to apply, it would be rebutted by the statutory text of § 5110, which evinces clear intent from Congress to foreclose equitable tolling of § 5110(b)(1)'s one-year period.

United States Court of Appeals
for the Federal Circuit

2020-1073

Appeal from the United States
Court of Appeals for Veterans Claims in
No. 18-3908, Judge Michael P. Allen.

ADOLFO R. ARELLANO,

Claimant-Appellant

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

Decided: June 17, 2021

DYK, *Circuit Judge*, with whom NEWMAN, O'MALLEY, REYNA, WALLACH, and STOLL, *Circuit Judges*, join, concurring in the judgment.

The court here agrees that Mr. Arellano's claim for benefits was untimely, but the court is equally divided on the question whether 38 U.S.C. § 5110(b)(1) is subject to equitable tolling. Judge Chen (joined by Chief Judge Moore and Judges Lourie, Prost, Taranto, and Hughes) would hold that the section is not a statute of limitations, and, even if it were, the presumption of equitable tolling under *Irwin* has been rebutted. An equal number of judges (Judges Newman, O'Malley, Reyna, Wallach, Stoll, and myself) join this

opinion and would hold that § 5110(b)(1) is a statute of limitations subject to equitable tolling, that the *Irwin* presumption of equitable tolling applies, but that § 5110(b)(1) cannot be equitably tolled for mental disability in the circumstances of this case.

I

The effective date of an award of service-connected benefits is governed by 38 U.S.C. § 5110. "Unless specifically provided otherwise in this chapter, the effective date of an award . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a)(1). An exception to § 5110(a)(1) is available under § 5110(b)(1), which provides:

> The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.

38 U.S.C. § 5110(b)(1); *see also* 38 C.F.R. § 3.400(b)(2)(i) (2020) ("Day following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later.").

Here, the claim for benefits was filed on June 3, 2011, thirty years after the veteran's discharge, and benefits were allowed as of the date the claim was filed, June 3, 2011. The question is whether § 5110(b)(1) may be equitably tolled based on mental disability so that the veteran can receive retroactive benefits to the date his entitlement arose, which was within a year of his discharge, thirty years earlier.

II

"Time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95 (1990) (quoting *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27 (1989)). *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95–96.

The Supreme Court and several circuits have found equitable tolling to be applicable to time requirements in administrative agency proceedings. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[F]iling a timely charge of discrimination with the [Equal Employment Opportunity Commission] is . . . a requirement that, like a statute of limitations, is subject to . . . equitable tolling."); *Farris v. Shinseki*, 660 F.3d 557, 563 (1st Cir. 2011) (citation omitted) ("[F]ailure to comply with an agency's applicable time limit may expose the plaintiff's federal law suit to dismissal . . . subject to narrowly applied equitable doctrines such as tolling . . . ."); *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996) ("Because the deadlines for filing administrative complaints operate as statutes of limitations, the doctrines of equitable tolling and estoppel apply."). The Supreme Court has "never suggested that the presumption in favor of equitable tolling is generally inapplicable to administrative deadlines," *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 162 (2013) (Sotomayor, J., concurring), and has suggested that *Irwin* can apply to "matters such as the administration of benefit programs," *Scarborough v. Principi*, 541 U.S. 401, 422 (2004).

III

The framework governing the *Irwin* presumption of equitable tolling has two steps.

The first step is determining whether the statute is a statute of limitations, in which case the *Irwin* presumption will apply. Courts "have only applied [the] presumption [of equitable tolling] to statutes of limitations," *Lozano v. Montoya Alvarez*, 572 U.S. 1, 13–14 (2014), or a "filing period" that "operate[s] as a statute of limitations," *Zipes*, 455 U.S. at 394. The second step is determining if the presumption has been rebutted.

A

Judge Chen at the first step would hold that 38 U.S.C. § 5110(b)(1) is not a statute of limitations or otherwise subject to tolling, and he would reaffirm our *Andrews* panel decision in this respect. I think this view is quite clearly incorrect.

Judge Chen urges that the limitations period on past benefits for disability compensation in § 5110(b)(1) is not a statute of limitations because the one-year period "[1] is not triggered by harm from the breach of a legal duty owed by the opposing party, and [2] it does not start the clock on seeking a remedy for that breach from a separate remedial entity." Chen Op. 13 (citing 1 Calvin W. Corman, LIMITATION OF ACTIONS, § 6.1, at 370 (1991)). In Judge Chen's view, § 5110(b)(1) is not a statute of limitations because "there is no duty, or breach of duty, at the onset of § 5110(b)(1)'s one-year period (i.e., the day after discharge)" and "no remedial authority separate from the [Department of Veterans Affairs ("VA")] is involved in an initial application for veterans' benefits." *Id.* at 13–14.

Judge Chen's opinion is bereft of support for these supposed rules. The cited treatise contains only general language describing general principles of statutes of limitations. *See* Corman, *supra*, § 6.1, at 370 ("The earliest opportunity for a complete and present cause of action is that moment when the plaintiff has suffered a legally recognizable harm at the hands of the defendant, such as the time of contract breach or the commission of a tortious wrong."). Judge Chen cites no case, and I am aware of none, holding that statutes of limitations are limited as Judge Chen suggests.[1]

The cases establish that there are no such rules. The notion that statutes of limitations are triggered only by a breach of legal duty is quite inconsistent with cases holding that a provision barring benefits for failure to file within a prescribed period constitutes a statute of limitations, regardless of any alleged breach of duty by the government. This has been made clear by *Scarborough*, where (as noted above) the Supreme Court explained that *Irwin*'s reasoning may extend to "the administration of benefit programs." 541 U.S. at 422.

A primary example of a no-fault statute of limitations is the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"), which requires that, for vaccines

---

[1] Judge Chen relies on *Hallstrom*, which concerned the citizen suit provision of the Resource Conservation and Recovery Act of 1976 that required 60 days' notice before filing suit. *See* 493 U.S. at 22 (citing 42 U.S.C. § 6972(b)(1) (1982)). *Hallstrom* noted in passing that, "[u]nlike a statute of limitations," the "60-day notice provision is not triggered by the violation giving rise to the action." *Id.* at 27. The Supreme Court's characterization of the notice provision at issue in *Hallstrom* hardly suggests that a violation is essential to the existence of statute of limitations.

administered after October 1, 1988, a "petition" for "compensation" for a vaccine-related injury be filed within 36 months "after the date of the occurrence of the first symptom or manifestation of onset . . . of such injury." 42 U.S.C. § 300aa-16(a)(2).

Vaccine Act claims are not tied to fault by the government. The system established by the Vaccine Act "was 'intended to be expeditious and fair' and 'to compensate persons with recognized vaccine injuries . . . without a demonstration that a manufacturer was negligent or that a vaccine was defective.'" *Zatuchni v. Sec'y of Health & Hum. Servs.*, 516 F.3d 1312, 1316 (Fed. Cir. 2008) (quoting H.R. Rep. 99-908, at 12, *reprinted in* 1986 U.S.C.C.A.N. 6344, 6353).

> Under this compensation system, vaccine-injured persons may obtain a full and fair award for their injuries even if the manufacturer has made as safe a vaccine as possible. Petitioners are compensated because they suffered harm from the vaccine—even a 'safe' one—not because they demonstrated wrongdoing on the part of the manufacturer.

H.R. Rep. 99-908, at 26, *reprinted in* 1986 U.S.C.C.A.N. at 6367.

We have nonetheless held en banc that 42 U.S.C. § 300aa-16(a)(2) establishes a statute of limitations subject to equitable tolling under *Irwin*. *See Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1340–44 (Fed. Cir. 2011) (en banc); *see also id.* at 1341 n.9. We held that "[t]he statute of limitations begins to run on a specific statutory date: the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury recognized as such by the medical profession at large." *Id.* at 1340. We reached

this conclusion because "the plain words of the statute trigger the statute of limitations on the date of the first symptom or manifestation of onset of the injury claimed," and Congress did not intend for a discovery rule to apply. *See id.* at 1336, 1340. The prescribed period is a statute of limitations even though the underlying claim is not based on a breach of duty, either by the government or the manufacturer. *See Zatuchni*, 516 F.3d at 1316; H.R. Rep. 99-908, at 12, *reprinted in* 1986 U.S.C.C.A.N. at 6353.

The second of Judge Chen's factors—the involvement of a "separate remedial entity," Chen Op. 13—is also inconsistent with cases in the administrative context, in which the Supreme Court and other courts have made clear that a statute governing the timeliness of a claim to an agency for payment from that agency is a statute of limitations. *See United States v. Williams*, 514 U.S. 527, 534 & n.7 (1995) (26 U.S.C. § 6511(a) is a "statute of limitations" that "bar[s] . . . tardy" tax refund claims filed with the Internal Revenue Service); *Colvin v. Sullivan*, 939 F.2d 153, 156 (4th Cir. 1991) (referring to 42 U.S.C. § 1320b-2(a), which provides for a two-year period during which states are permitted to file claims with the federal government for expenditures made in carrying out a state plan under specific subchapters of the codification of the Social Security Act, as a "statute of limitations"); *cf. Warren v. Off. of Pers. Mgmt.*, 407 F.3d 1309, 1316 (Fed. Cir. 2005) (referring to the two-year period "after the date on which the marriage of [a] former spouse . . . is dissolved" to make an election with the Office of Personal Management to provide a survivor annuity for the former spouse, *see* 5 U.S.C. § 8339(j)(3), as a "statute of limitations").

B

Judge Chen offers an alternative theory—that § 5110(b)(1) is not a statute of limitations because it "does not eliminate a veteran's ability to collect benefits for [a service-connected] disability," Chen Op. 13, but instead "forgives a veteran's temporary delay in filing a claim in the immediate aftermath of a veteran's transition back to civilian life upon discharge from military service," *id.* at 19 (emphasis omitted). In my view, this analysis blinks reality.

The claim for benefits here has two components: (1) a retrospective claim for benefits for past disability, and (2) a prospective claim for future benefits. The statute imposes no statute of limitations for prospective benefits, and a veteran may be entitled to forward-looking benefits after the one-year period prescribed by § 5110(b)(1) runs. *See Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) ("A veteran faces no time limit for filing a claim . . . ."). But § 5110(b)(1) does impose what is clearly a one-year statute of limitations for retrospective claims—making retrospective benefits unavailable unless the claim is filed within one year after discharge. Section 5110(b)(1) is a "more limited statute of limitations," *see Young v. United States*, 535 U.S. 43, 48 (2002), applicable only to retrospective benefit claims, but it is a statute of limitations nonetheless. Section 5110(b)(1) "is a limitations period because it prescribes a period within which certain rights . . . may be enforced." *See id.* at 47. It bars retroactive benefits if the claim is filed more than a year after discharge.

This approach to periods of limitations for claims for benefits is not unusual. Government benefits programs often provide that an individual qualifying for benefits may recover future benefits once an

application is filed but is limited in the recovery of past benefits to a set period before the filing of the application. One example is the statute providing for Social Security disability benefits, which provides no limit on the recovery of future benefits once an application has been filed but imposes a twelve-month limitations periods on the recovery of past benefits—in other words, a statute of limitations. *Begley v. Weinberger*, 400 F. Supp. 901, 911 (S.D. Ohio 1975) (noting a "one-year statute of limitations upon the availability of retroactive disability insurance benefits" established by 42 U.S.C. § 423(b)).[2]

Section 5110(b)(1) is nearly the same as the statutes of limitation in copyright actions and patent infringement, where the statutes bar recovery for past events if the claim is not filed within a specified period, but permit recovery for future acts. The copyright limitations period is governed by 17 U.S.C. § 507,[3] which the Supreme Court has described as a "limitations period [that] allows plaintiffs during [the copyright] term to gain retrospective relief running

---

[2] The cases Judge Chen cites, both decided before *Irwin*, are not to the contrary. *See* Chen Op. 31 (citing *Yeiter v. Sec'y of Health & Hum. Servs.*, 818 F.2d 8, 10 (6th Cir. 1987); and then citing *Sweeney v. Sec'y of Health, Ed. & Welfare*, 379 F. Supp. 1098, 1100 (E.D.N.Y. 1974)).

Yeiter rejected the argument that "Congress did not intend the one-year limit on retroactive benefits [in 42 U.S.C. § 423(b)] to apply where the failure to file for benefits arises from the disability itself." 818 F.2d at 9. *Sweeney* held that "equitable considerations [were] irrelevant" to the application of § 423 "to this case." 379 F. Supp. at 1100–01. Neither held that § 423(b) is not a statute of limitations.

[3] "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b).

only three years back from the date the complaint was filed." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 672 (2014); *see also id.* at 670 (describing copyright limitations period as a "a three-year look-back limitations period").[4] Thus, "the infringer is insulated from liability for earlier infringements of the same work." *Id.* at 671.

Likewise, § 5110(b)(1) is similar to the limitations period in patent infringement actions, 35 U.S.C. § 286,[5] which "represents a judgment by Congress that a patentee may recover damages for any infringement committed within six years of the filing of the claim." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, LLC, 137 S. Ct. 954, 961 (2017). In so holding, the Supreme Court rejected the argument that § 286 was not a "true statute of limitations" because it "runs backward from the time of suit." *Id.* at 961–62 (citing *Petrella*, 572 U.S. at 672).[6]

Judge Chen attempts to distinguish these cases on the ground that "§ 5110(b)(1) establishes the effective

---

[4] The copyright statute of limitations has been held to be subject to equitable tolling. *See Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 340 (5th Cir. 1971) ("[T]he intent of the drafters [of the predecessor of § 507(b)] was that the limitations period would affect the remedy only, not the substantive right, and that equitable considerations would therefore apply to suspend the running of the statute.").

[5] "Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." 35 U.S.C. § 286.

[6] The holdings of *Petrella* and *SCA Hygiene* addressed whether the provisions were statutes of limitations because that affected application of the doctrine of laches. *See Petrella*, 572 U.S. at 686; *SCA Hygiene*, 137 S. Ct. at 967.

date of a single benefits claim for an ongoing disability, whereas an ongoing course of infringement in *Petrella* and *SCA Hygiene* comprises a 'series of discrete infringing acts,' each of which is a distinct harm giving rise to an independent claim for relief that starts a new limitations period." Chen Op. 20 (quoting *Petrella*, 572 U.S. at 671–72). The same is true here. The claim is not a single benefits claim, but a claim for a series of payments allegedly due. *See* 38 U.S.C. § 1110 (establishing basic entitlement for disability compensation); *id.* § 1114 (providing monthly rates for disability compensation); *id.* § 1115 (providing additional compensation for dependents); *see also* Veterans' Compensation Cost-of-Living Adjustment Act of 2020, Pub. L. 116 178, 134 Stat. 853 (providing cost-of-living adjustment).

The Supreme Court's decision in *Young*, 535 U.S. 43, also supports the view that § 5110(b)(1) is a statute of limitations. In *Young*, the Supreme Court considered whether a three-year lookback period provided by § 507 of the Bankruptcy Code was a statute of limitations. *See* 11 U.S.C. § 507(a)(8)(A)(i). Under this lookback period, "[i]f the IRS has a claim for taxes for which the return was due within three years before the bankruptcy petition was filed, the claim enjoys eighth priority . . . and is nondischargeable in bankruptcy." *Young*, 535 U.S. at 46. "The period thus encourages the IRS to protect its rights—by, say, collecting the debt, or perfecting a tax lien—before three years have elapsed." *Id.* at 47 (citations omitted). "If the IRS sleeps on its rights, its claim loses priority and the debt becomes dischargeable." *Id.* The Supreme Court acknowledged that, "unlike most statutes of limitations, the lookback period bars only *some*, and not *all*, legal remedies for enforcing the claim," *id.* (footnote omitted), and noted that "[e]quitable

remedies may still be available," *id.* at 47 n.1. That qualification "ma[de] it a more limited statute of limitations, but a statute of limitations nonetheless" subject to equitable tolling. *Id.* at 48.

In determining that the lookback period was a statute of limitations, the Supreme Court found it significant that "the lookback period serve[d] the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Young*, 535 U.S. at 47 (second alteration in original) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

Section 5110(b)(1), like the provision at issue in *Young*, serves the same basic policies of limitations periods. It encourages veterans to file for disability compensation benefits within a year of their discharge, or else lose retroactive benefits that they would otherwise be entitled to. It limits veterans' "opportunity for recovery" and the government's "potential liabilities," *see Rotella*, 528 U.S. at 555, to only forward-looking benefits if the filing deadline is missed.

Judge Chen attempts to find support in the Supreme Court's *Lozano* decision. *Lozano* involved Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, which was held not to be a statute of limitations. "When a parent abducts a child and flees to another country," the Hague Convention "generally requires that country to return the child immediately if the other parent requests return within one year." *Lozano*, 572 U.S. at 4. After the one-year period has expired, under Article 12, the court "shall also order the return of the child, unless it is demonstrated that the child is now settled." *Id.* at

15 (citation and quotation marks omitted). *Lozano* did not involve a statute, but rather a treaty provision, which "was not adopted against a shared background of equitable tolling." *Id.* at 11. Also, this treaty provision in *Lozano* did not provide a cut-off for monetary recovery, unlike § 5110(b)(1), which provides "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" by providing a cut-off date for retroactive disability benefits. *See Rotella*, 528 U.S. at 555. *Lozano* has no relevance here.

Nor is this case similar to *Hallstrom*, on which Judge Chen also relies. As noted above, *Hallstrom* concerned a 60-day notice provision of the Resource Conservation and Recovery Act of 1976. 493 U.S. at 22 (citing 42 U.S.C. § 6972(b)(1) (1982)). The Supreme Court held that this "60-day notice provision" was "[u]nlike a statute of limitations" because "petitioners [had] full control over the timing of their suit: they need only give notice to the appropriate parties and refrain from commencing their action for at least 60 days." *Id.* at 27. Section § 5110(b)(1) is not a notice provision.

In sum, § 5110(b)(1) is a statute of limitations, and the *Irwin* rebuttable presumption of equitable tolling applies. As Judge Newman has noted, "[t]he time period of § 5110(b)(1) is not a jurisdictional restriction, and its blanket immunization from equitable extension, whatever the circumstances, appears to be directly contrary to the legislative purpose." *Butler v. Shinseki*, 603 F.3d 922, 928 (Fed. Cir. 2010) (Newman, J., concurring in the result).

IV

"To be sure, *Irwin*'s presumption is rebuttable." *United States v. Kwai Fun Wong*, 575 U.S. 402, 419

(2015). Judge Chen concludes that even if the presumption of equitable tolling applies to § 5110(b)(1), the presumption has been rebutted. I disagree. Congress has not clearly indicated a general prohibition against equitable tolling as to § 5110(b)(1).

The Supreme Court has identified several factors that determine whether the equitable tolling presumption has been rebutted, and here, almost all of the factors signal that there is no general prohibition against equitable tolling.[7]

The first factor is the language of the statute. The language of a statute of limitations may indicate that it is jurisdictional, in which case a court must enforce the limitation "even if equitable considerations would support extending the prescribed time period." *Kwai Fun Wong*, 575 U.S. at 408–09. In determining whether a statute is jurisdictional, courts have often held that it does not matter if a statute's language is "mandatory" or "emphatic" if "text speaks only to a claim's timeliness, not to a court's power." *Id.* at 410–11.

Section 5110(b)(1) is not jurisdictional, as Judge Chen concedes. Chen Op. 36–37. Nevertheless, Judge Chen relies on the use of the phrase "[u]nless specifically provided otherwise in this chapter" in § 5110(a)(1), concluding that by using that term, Congress "implicitly intended to preclude the general availability of equitable tolling by explicitly including a more limited, specific selection of equitable circumstances under which a veteran is entitled to an earlier

---

[7] Our decision in *Cloer* identified many of the same factors. *See* 654 F.3d at 1342. The Supreme Court has identified further factors since we decided *Cloer* that I discuss here. *See generally Auburn*, 568 U.S. 145; *Kwai Fun Wong*, 575 U.S. 402.

effective date and specifying the temporal extent of the exceptions for those circumstances." *Id.* at 37–38.

In *Kwai Fun Wong*, the Supreme Court held that the use of the phrase "shall be forever barred" in the Federal Tort Claims Act limitations period, 28 U.S.C. § 2401(b), though "mandatory" and "emphatic," "[spoke] only to a claim's timeliness, not to a court's power," and did not designate § 2401(b) as a jurisdictional time bar not subject to equitable tolling. 575 U.S. at 410–11. Here, too, the phrase "[u]nless specifically provided otherwise in this chapter" in § 5110(a)(1), though mandatory and emphatic, does not clearly foreclose equitable tolling of § 5110(b)(1).

Second, the detailed nature of a statute may suggest that Congress did not intend for a statute of limitations to be equitably tolled. "Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception." *United States v. Brockamp*, 519 U.S. 347, 350 (1997). A statute that "uses language that is not simple" and "sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions" could indicate Congress's intent to preclude equitable tolling. *Id.*

Judge Chen determines that the language and structure of § 5110's subsections are "highly detailed" and "technical." Chen Op. 39 (quoting *Brockamp*, 519 U.S. at 350). While it is true that § 5110 is a detailed statute, it "use[s] fairly simple language." *See Brockamp*, 519 U.S. at 350. For example, § 5110(b)(1) simply states that "[t]he effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year

from such date of discharge or release." 38 U.S.C. § 5110(b)(1). Section § 5110, even considered as a whole, is not as detailed as the tax statute at issue in *Brockamp*, 26 U.S.C. § 6511, where equitable tolling was disallowed. This factor does not weigh against equitable tolling of § 5110(b)(1).

Third, we consider if a statute of limitations has "explicit exceptions to its basic time limits," which may preclude equitable tolling. *Brockamp*, 519 U.S. at 351. Judge Chen concludes that "§ 5110's enumerated exceptions confirm that Congress has already considered which equitable considerations may provide a retroactive effective date and declined to provide the relief Mr. Arellano seeks." Chen Op. 41.

We noted in *Cloer* that "exceptions to statutes of limitations do not necessarily rebut the bedrock *Irwin* presumption in favor of equitable tolling," and that "an exception may signal a beneficent Congressional act, not a rebuttal of the *Irwin* presumption." 654 F.3d at 1343. Although § 5110(b)(1) is itself an exception to the general effective date rule of § 5110(a)(1), there are no explicit exceptions to the one-year period in § 5110(b)(1).[8]

Nor do the other provisions of § 5110 speak to equitable tolling, with the exception of § 5110(b)(4), which provides a retroactive period of disability pension benefits for a veteran who is "prevented by a

[8] Under the VA's regulation, "[t]ime limits within which claimants or beneficiaries are required to act to perfect a claim or challenge an adverse VA decision may be extended for good cause shown." 38 C.F.R. § 3.109(b) (2020). The government argues that this regulation does not apply to § 5110(b)(1), and Mr. Arellano does not contend otherwise.

disability from applying for disability pension." 38 U.S.C. § 5110(b)(4)(B).

Apart from § 5110(b)(4), this is not a situation in which the statute "has already effectively allowed for equitable tolling." *See United States v. Beggerly*, 524 U.S. 38, 48 (1998). The other § 5110 provisions discuss situations—for example, when a child turns 18, 38 U.S.C. § 5110(e)(2); when there has been a report or finding of death of a service member, *id.* § 5110(j); or when there has been an annulment of marriage, *id.* § 5110(k)—which do not on their face relate to equitable tolling or indicate Congress's intent to preclude equitable tolling of § 5110(b)(1).

With respect to § 5110(b)(4), it is true that § 5110(b)(4) speaks to one limited aspect of equitable tolling (tolling for disability), but only in the unique context of disability pension and not disability compensation. While this may indicate a desire to limit equitable tolling for mental disability in specific circumstances (as discussed below), this can hardly be read as evincing a desire by Congress to eliminate equitable tolling generally as to disability compensation. It is simply an example of "a beneficent Congressional act, not a rebuttal of the *Irwin* presumption." *See Cloer*, 654 F.3d at 1343.

Fourth, Congress is more likely to have intended a statute of limitations that governs a statutory scheme "in which laymen, unassisted by trained lawyers, initiate the process" to be subject to equitable tolling, *Zipes*, 455 U.S. at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)), in contrast to statutory schemes that govern sophisticated parties "assisted by legal counsel," *Auburn*, 568 U.S. at 160.

The fact that "the veteran is often unrepresented during the claims proceedings," *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009), especially, as here, "in the early stages of the application process," when "the veteran is almost always unassisted by legal counsel," *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000), suggests that Congress intended for equitable tolling to be available.[9] This is in contrast to situations such as in *Auburn*, where the statutory scheme at issue governed reimbursements to healthcare providers. The statute "[was] not designed to be unusually protective of claimants," was not one "in which laymen, unassisted by trained lawyers, initiate the process," and "applie[d] to sophisticated institutional providers assisted by legal counsel." 568 U.S. at 160–61 (citations and internal quotation marks omitted) (holding that equitable tolling did not apply to the 180-day statutory deadline for health care providers to file appeals with the Provider Reimbursement Review Board under 42 U.S.C. § 1395oo(a)(3)).

Fifth, we consider the subject matter of the statute. If the statute of limitations "is contained in a statute that Congress designed to be 'unusually protective' of claimants," that will suggest Congress intended for equitable tolling to apply. *Bowen v. City of New York*,

---

[9] *See also* Department of Veterans Affairs Board of Veterans' Appeals, Annual Report Fiscal Year 2020, 36, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf (24.4% of legacy appeals before the Board of Veterans' Appeals ("Board") in fiscal year 2020 had attorney representation); Connie Vogelmann, Admin. Conf. of the United States, *Self-Represented Parties in Administrative Hearings* 29 (Oct. 28, 2016), https://www.acus.gov/sites/default/files/documents/Self-Represented-Parties-Administrative-Hearings-Final-Re-port-10-28-16.pdf (10.5% of claimants before the Board between fiscal years 2011–2015 had attorney representation).

476 U.S. 467, 480 (1986) (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)).

"[T]he uniquely pro-claimant nature of the veterans compensation system" suggests that Congress intended at least some form of equitable tolling to be available. *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000). The veterans' claims process is "designed to be 'unusually protective' of claimants," *see Bowen*, 476 U.S. at 480, and "is designed to function throughout with a high degree of informality and solicitude for the claimant," *Henderson*, 562 U.S. at 431 (quoting *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985)).[10]

"Congress has expressed special solicitude for the veterans' cause." *Shinseki*, 556 U.S. at 412. "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Id.* "[T]he veterans benefit system is designed to award 'entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.'" *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring)).[11]

---

[10] Although *Walters* noted in passing that "[t]here is no statute of limitations" in the veterans' claims process generally, 473 U.S. at 311, the court appears to have been referring to the fact that "[a] veteran faces no time limit for filing a claim," *Henderson*, 562 U.S. at 431.

[11] In *Bailey*, we held that the 120-day period for a claimant to appeal an adverse decision of the Board to the Court of Appeals for Veterans Claims ("Veterans Court"), 38 U.S.C. § 7266, is subject to equitable tolling. 160 F.3d at 1368 (en banc). *Bailey* and its progeny, including *Jaquay v. Principi*, 304 F.3d 1276 (Fed.

The veterans benefits system is unlike the tax collection system, which the Supreme Court held was not subject to equitable tolling because "Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system." *Brockamp*, 519 U.S. at 352–53.

"[O]nce a claim is filed, the VA's process for adjudicating it at the regional office and the Board is *ex parte* and nonadversarial." *Henderson*, 562 U.S. at 431; *see* 38 C.F.R. §§ 3.103(a), § 20.700(c) (2020). "In the context of the non-adversarial, paternalistic, uniquely pro-claimant veterans' compensation system, and consistent with our decision in *Bailey*, the availability of equitable tolling pursuant to *Irwin* should be interpreted liberally with respect to filings during the non-adversarial stage of the veterans' benefits process." *Jaquay*, 304 F.3d at 1286.

These factors, as well as "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991), lead to the conclusion that there is no clear indication that Congress intended to broadly foreclose equitable tolling in § 5110(b)(1), and that equitable tolling should be available in appropriate cases.

Cir. 2002) (en banc), were overruled by our en banc decision in *Henderson v. Shinseki*, 589 F.3d 1201, 1203 (Fed. Cir. 2009) (en banc), reversed in *Henderson v. Shinseki*, 562 U.S. 428, 441–42 & n.4 (2011). The effect of the Supreme Court's decision was to reinstate our decision in *Bailey*, and we have since reaffirmed that "[t]he filing deadline of § 7266 is not jurisdictional and may be tolled where appropriate." *James v. Wilkie*, 917 F.3d 1368, 1372 (Fed. Cir. 2019).

Nor does the fact that Congress amended § 5110 four times since *Andrews* indicate approval of *Andrews*. The presumption that reenactment of a statute ratifies the settled interpretation of that statute is strongest when there is evidence that "Congress was indeed well aware of [the prior interpretation]." *Lindahl v. OPM*, 470 U.S. 768, 782 (1985); *see also Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). However, "[r]e-enactment—particularly without the slightest affirmative indication that Congress ever had the [prior judicial interpretation] decision before it—is an unreliable indicium at best." *C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *see also Brown v. Gardner*, 513 U.S. 115, 121 (1994) (declining to find that reenactment of a statute ratified the VA's interpretation of that statute in part because "the record of congressional discussion preceding reenactment ma[de] no reference to the VA regulation [interpreting the statute at issue], and there is no other evidence to suggest that Congress was even aware of the VA's interpretive position."); *Micron Technology, Inc. v. U.S.*, 243 F.3d 1301, 1310 (Fed. Cir. 2001). There is not the slightest indication that Congress when it amended § 5110 was aware of our decision in *Andrews*, and there is no basis for concluding that Congress intended to approve that decision.[12] Nor is this a well-settled administrative interpretation as in *Auburn*, 568 U.S. 145. *Auburn* concerned Congress's delegation of rulemaking authority

[12] This is especially true because, as Judge Newman pointed out in her concurrence in *Butler*, it is unclear whether the broad language in *Andrews* was even relevant to its resolution of the precise issue for which it is now cited to us. 603 F.3d at 927 ("The Veterans Court enlarged *Andrews* beyond its premises, in holding that tolling of the one-year term of retroactivity under § 5110(b)(1) is never available.").

relating to a specific statutory provision to the Secretary of Health and Human Services, and the Secretary's implementation of that authority. 568 U.S. at 159. Here, by contrast, we are dealing with the decision of a single circuit court, which has not been reviewed by the Supreme Court.

Judge Chen's approach is particularly difficult to defend because it would bar equitable tolling in all cases, including cases where equitable tolling could be argued to be particularly important and appropriate. This approach forecloses the possibility of equitable tolling entirely, even in circumstances in which there is no indication that Congress intended strict enforcement of the one-year period of § 5110(b)(1).

V

The fact that the statute does not foreclose equitable tolling in the case of § 5110(b)(1) does not suggest that equitable tolling is available in every circumstance. While the statute does not indicate a general prohibition against equitable tolling, "[f]ederal courts have typically extended equitable relief only sparingly." *Irwin*, 498 U.S. at 96. To determine when equitable tolling is justified, we apply well-established equitable tolling principles to the circumstances presented. Such analysis is done on a case-by-case basis, though general principles will often guide the analysis in a broad swath of cases.

Equitable tolling analysis begins with the governing statutory scheme. Even where the *Irwin* presumption has not been rebutted, the statute and statutory scheme are instructive as to the particular circumstances that will justify equitable tolling. *See Mapu v. Nicholson*, 397 F.3d 1375, 1381 (Fed. Cir. 2005) (concluding that "Congress's explicit decision not to

broaden the postmark rule by extending it to delivery services other than the Postal Service must trump any extension of equitable tolling to this case"); *Cloer*, 654 F.3d at 1345 (no relief under equitable tolling because of "a policy calculation made by Congress not to afford a discovery rule to all Vaccine Act petitioners and Dr. Cloer's failure to point to circumstances that could justify the application of equitable tolling to forgive her untimely claim"). The statutory scheme here helps inform the scope of equitable tolling on the ground of mental disability.

First, an individual who lacks mental capacity may have a caregiver sign a form for benefits on his or her behalf. Under 38 U.S.C. § 5101, as amended in 2012,[13] if an "individual lacks the mental capacity . . . to provide substantially accurate information needed to complete a form; or . . . to certify that the statements made on a form are true and complete," 38 U.S.C. § 5101(e)(1),[14] then "a form filed . . . for the individual may be signed by a court-appointed representative, a person who is responsible for the care of the individual, including a spouse or other relative, or . . . agent authorized to act on behalf of the individual under a durable power of attorney," *id.* § 5101(a)(2).

In addition, 38 C.F.R. § 3.155 provides that "some person acting as next friend of claimant who is not of full age or capacity may indicate a claimant's desire to file a claim for benefits by submitting an intent to file

---

[13] *See* Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. 112-154, Title V, § 502(a), 126 Stat. 1165, 1190.

[14] 38 U.S.C. § 5101(d) (2020) was renumbered as § 5101(e) in 2021. *See* Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. 116-315, § 2006(a), 134 Stat. 4932 (enacted Jan. 5, 2021).

a claim to [the] VA." 38 C.F.R. § 3.155(b) (2020). "Upon receipt of the intent to file a claim, [the] VA will furnish the claimant with the appropriate application form prescribed by the Secretary." *Id.* Thus, § 3.155 "provide[s] a way for claimants who cannot engage in a legal contract due to age or disability to be represented by someone (or next friend) who can do so on their behalf." Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57,667 (Sept. 25, 2014) (Final Rule).[15]

In the context of the Vaccine Act, the provision that allows a "legal representative," 42 U.S.C. § 300aa-11(b)(1)(A), to file a petition on the behalf of a person who is disabled, "does not foreclose the availability of equitable tolling for claimants with mental illness," under all circumstances. *K. G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1381 (Fed. Cir. 2020). *K.G.* makes clear that the mere fact that a guardian has been appointed for a claimant is a factor in the equitable tolling inquiry, but only one factor. While that fact is true for veterans as well, it is a more important factor in the veteran's context than in Vaccine Act cases. That is because Congress has gone further in the veteran's context, by allowing any person on the claimant's behalf to indicate an intent to file a claim, and making a mere indication of a desire

---

[15] A similar provision existed under the informal claim system, which ended in 2015. *See Shea v. Wilkie*, 926 F.3d 1362, 1366 n.3 (Fed. Cir. 2019). Under the informal claim system, "[a]ny communication or action, indicating an intent to apply for one or more benefits under the laws administered by [the VA], from a claimant . . . or some person acting as next friend of a claimant who is not sui juris" could be "considered an informal claim," which was a longstanding practice of the VA. 26 Fed. Reg. 1561, 1570, (codified at 38 C.F.R. § 3.155(a)) (Feb. 24, 1961). *Compare id. with* 38 C.F.R. § 3.155(a) (2014).

to file a claim sufficient to start the claims process. *See* 38 C.F.R. § 3.155(b) (2020).

Thus, absent special circumstances demonstrating an inability of the caregiver to at least indicate an intent to file a claim (which can trigger the claim filing process),[16] I believe it would be only the rare case where a mentally disabled veteran with a caregiver would be entitled to equitably toll § 5110(b)(1).

Second, 38 U.S.C. § 5110(b)(4) provides a one-year period for a retroactive effective date for disability pension (a form of compensation distinct from service-connected benefits).[17] That subsection provides:

> (A) The effective date of an award of disability pension to a veteran described in subparagraph (B) of this paragraph shall be the date of application or the date on which the veteran became permanently and totally disabled, if the veteran applies for a retroactive award within one year from such date, whichever is to the advantage of the veteran.
>
> (B) A veteran referred to in subparagraph (A) of this paragraph is a veteran who is permanently and totally disabled and who is

---

[16] For claims of equitable tolling prior to 2015, as is the case here, the relevant inquiry would be whether there are special circumstances demonstrating an inability of the caregiver to submit an informal claim. *See* 38 C.F.R. § 3.155(a) (2014).

[17] Disability pension is available for veterans who are "permanently and totally disabled from non-service-connected disability," 38 U.S.C. § 1521(a), and pension is need-based, so veterans who exceed a maximum annual income or net worth set by regulation will not qualify. *See id.* § 1522; 38 C.F.R. §§ 3.274, 3.275 (2020); *see also* H.R. Rep. No. 79-2425 (June 28, 1946); Act of July 9, 1946, Pub. L. No. 79-494, 60 Stat. 524.

> prevented by a disability from applying for disability pension for a period of at least 30 days beginning on the date on which the veteran became permanently and totally disabled.

38 U.S.C. § 5110(b)(4) (emphasis added).

The predecessor to subsection (A) of § 5110(b)(4) was adopted[18] based on a proposal from the VA to address "problems resulting from the veteran's disability [that] delays [the veteran's] application for the benefit," whereby "the very condition upon which entitlement may depend may also prevent prompt application for the benefit." H.R. Rep. 93-398, 1973 U.S.C.C.A.N. 2759, 2772 (July 25, 1973) (letter dated May 10, 1973, from Donald E. Johnson, Administrator of Veterans Affairs). The VA's proposal "would alleviate this situation by affording the disabled veteran a year from onset of disability to apply for pension and, if he is otherwise eligible, authorize payment retroactively to the date on which he became permanently and totally disabled." *Id.* "The 1-year period prescribed by the proposal within which to apply for disability pension [was] considered reasonable . . . ." *Id.*

This provision was further amended in 1984 in part to add subsection (B), which specified that veterans who qualify for the one-year lookback period for disability pension are veterans "who [are] permanently and totally disabled and who [are] prevented by a disability from applying for disability pension for a period of at least 30 days beginning on the date on which the veteran became permanently and totally

---

[18] The predecessor to § 5110(b)(4)(A) was enacted in 1973 as 38 U.S.C. § 3010(b)(2). *See* Act of Dec. 6, 1973, Pub. L. 93-177, sec. 6, 87 Stat. 694, 696.

disabled." Deficit Reduction Act of 1984, Pub. L. 98–369, sec. 2501, 98 Stat. 494, 1116–17.[19]

While pension benefits are different from disability benefits, this provision is instructive because it indicates Congressional willingness to delay veterans' filing obligations where a disability makes meeting them difficult or impossible, but not to do so indefinitely, or even for a substantial period of time.

Against this backdrop, I now turn to the particular circumstances presented here.[20] Mr. Arellano's brother, Pedro Arellano Lamar, has been Mr. Arellano's "caregiver since [Mr. Arellano] returned home mentally disabled in November 1981." J.A. 554; *see also id.* at 565. Yet, the VA did not receive Mr. Arellano's application until June 3, 2011. According to Mr. Arellano's counsel, Mr. Arellano's brother, "acting as guardian ad litem," filed the application on Mr. Arellano's behalf. Oral Arg. 41:25–42:06, 43:27–44:10, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-1073_02042021.mp3. There is no allegation that Mr. Lamar was somehow prevented from filing, or faced obstacles in his attempt to file, Mr. Arellano's request for benefits sooner. Unlike in *K. G.*, there is no claim that Mr. Arellano was estranged from Mr. Lamar or refused to

---

[19] The predecessor to § 5110(b)(4)(B) was enacted in 1984 as 38 U.S.C § 3010(b)(3)(B). Deficit Reduction Act of 1984, Pub. L. 98–369, sec. 2501(a)(1), 98 Stat. at 1116.

[20] We have recognized that in determining the application of equitable tolling, "[w]here the facts are undisputed, all that remains is a legal question, even if that legal question requires the application of the appropriate standard to the facts of a particular case." *Former Employees of Sonoco Prod. Co. v. Chao*, 372 F.3d 1291, 1294–95 (Fed. Cir. 2004) (collecting cases). Because we assume the facts are as Mr. Arellano describes them, we address the availability of tolling in the first instance.

interact with him. *See* 951 F.3d at 1377. Indeed, Mr. Arellano signed the application himself at Mr. Lamar's direction. There is nothing in the record that justifies the inordinate thirty-year delay in filing the application at issue.

Because Mr. Arellano had a caregiver who could have filed (and indeed did later file) an application on Mr. Arellano's behalf, and no special circumstances are alleged, equitable tolling on the ground of Mr. Arellano's mental disability is not warranted, especially for such an untimely filing. Equitable tolling for mental disability is not available in this case.

CONCLUSION

I would hold that § 5110(b)(1) is a statute of limitations that is subject to the rebuttal presumption of equitable tolling under *Irwin*. I would also hold that the presumption has not been rebutted as to equitable tolling, but that equitable tolling is not available to Mr. Arellano's specific circumstances. Thus, I concur in the judgment.

APPENDIX F

United States Court of Appeals
for the Federal Circuit

2020-1073

Appeal from the United States
Court of Appeals for Veterans Claims in
No. 18-3908, Judge Michael P. Allen.

ADOLFO R. ARELLANO,

Claimant-Appellant

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

June 17, 2021

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

APPENDIX G

United States Court of Appeals
for the Federal Circuit

2020-1073

Appeal from the United States
Court of Appeals for Veterans Claims in
No. 18-3908, Judge Michael P. Allen.

ADOLFO R. ARELLANO,

Claimant-Appellant

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

MANDATE

In accordance with the judgment of this Court, entered June 17, 2021, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

August 9, 2021

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

APPENDIX H

U.S. Court of Appeals for Veterans Claim
Docket Sheet

Notice of Appeal (July 25, 2018)

Excerpts from Appellee's Brief (May 30, 2019)

Excerpts from Decision (July 28, 2017)

Letter from R. Douyand, M.D. to Dept. of
Veterans Affairs (Jan. 31, 2012)

Appeal to BVA (January 2, 2017)

Notification Letter (December 23, 2015)

Notice of Disagreement (December 24, 2014)

Notification Letter (December 23, 2014)

Authorization to Disclose Personal Information
to a Third Party (Aug. 25, 2011)

GENERAL DOCKET

United States Court of Appeals
for Veterans Claims

No. 18-3908

ADOLFO R. ARELLANO,

v.

ROBERT L. WILKIE

Docketed: July 25, 2018

Adolfo R. Arellano,
Appellant

James R. Barney, Esq., Attorney
Direct: 202-408-4412
[COR LD NTC]
Firm: 202-408-4412
Finnegan
901 New York Avenue, N.W.
Washington, DC 20001

Kelly S. Horn, Esq., Attorney
Direct: 202-408-4313
[COR NTC]
Firm: 202-408-4313
Finnegan, Henderson, Farabow,
Garrett & Dunner LLP
901 New York Avenue, N.W.
Washington, DC 20001

David T. Landers, Esq., Attorney
Direct: 202-408-4196
[CUR NTC]
Firm: 202-408-4196

Finnegan, Henderson, & LLP
901 New York Ave., NW
Washington, DC 20001-4413

Ronald L. Smith, Esq., Attorney
Direct: 202-408-4195
[CUR NTC]
Firm: 202-408-4195
Finnegan
901 New York Ave., NW
Washington, DC 20001-4413

Thomas E. Sullivan, Esq., Attorney
Direct: 202-408-4113
[COR NTC]
Finn: 202-408-4113
Finnegan, Henderson, Farabow,
Garrett & Dunner LLP
901 New York Avenue, N.W.
Washington, DC 20001

v.

Robert L Wilkie, Secretary of Veterans Affairs,
Appellee

Robert Schneider, Esq., Attorney
[COR LD NTC]
Finn: 202-632-6988
Department of Veterans Affairs, OGC (027)
810 Vermont Ave., NW
Washington, DC 20420

OGC-ICM8, Non-Attorney
[COR NTC]
Department of Veterans Affairs, OGC (027)
810 Vermont Avenue, N.W.
Washington, DC 20420

———

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
07/25/2018		Notice of Appeal (JC)
07/25/2018		Appearance of Thomas E. Sullivan, Esq., as lead counsel (JC)
07/25/2018		Fee Agreement (JC)
07/25/2018		Declaration of Financial Hardship (JC)
07/26/2018		Notice of Docketing for BVA's decision w/in 30 days; RBA w/in 60 days (JC)
07/27/2018		Appearance of Attorney(s) David T Landers for party(s) Appellant Adolfo R. Arellano, in case 18-3908 as co-counsel (DTL)
08/06/2018		Appearance of Attorney(s) Ronald L Smith for party(s) Appellant Adolfo R. Arellano, in case 18-3908 as co-counsel (RLS)
08/16/2018		BVA Decision transmittal (0)
08/16/2018		Copy of BVA Decision (0)
09/06/2018		Appearance of Attorney(s) Robert Schneider for party(s) Appellee Robert L. Wilkie, in case 18-3908 as lead counsel (RS)
09/20/2018		Record Before the Agency notice (0)
10/10/2018		Notice to file Appellant's Brief w/in 60 days (AMN)

DATE	PROCEEDINGS
10/30/2018	ORDERED that the Court will initiate a telephonic briefing conference on November 27, 2018, at 1:30 PM (ET). It will be conducted by Jennifer k Dowd, Esq., of the Court's Central Legal Staff (CLS), and this conference may be rescheduled by the Court only upon a showing of good cause. It is further ORDERED that not later than 14 days prior to the scheduled conference, the appellant's counsel or representative shall submit to the Secretary and the Central Legal Staff (by e-mail or fax), a summary of the issues that the appellant intends to raise in the appeal before the Court. to include citations to the relevant authorities and the pertinent documents in the record. (CLS). (AMN)
11/08/2018	Appearance of Attorney(s) Kelly S Horn for party(s) Appellant Adolfo R. Arellano, in case 18-3908 as co-counsel (KSH)
11/16/2018	Mot of Appellant to reschedule R33 Conference to 12/18/2018 (KSH)

DATE		PROCEEDINGS
11/20/2018		ORDERED that the motion is granted. The Court's order of October 30, 2018, is hereby amended as follows: Change briefing conference date "November 27, 2018, at 1:30 PM (ET)" to read "December 18, 2018, at 10:30 AM (ET)." (AMN)
12/04/2018		Rule 33 Certificate of Service (KSH)
12/06/2018		Appearance of Attorney(s) James R Barney for party(s) Appellant Adolfo R. Arellano, in case 18-3908 as lead counsel (SL)
12/18/2018		Conference held (JAD)
12/18/2018		Mot of Appellant to extend time to file appellant brief Requested date 03/04/2018.--[Edited 12/19/2018 by AMN] (KSH)
12/19/2018		Clerk's stamp ord granting appellant's motion to extend time to file appellant's brief until 03/04/2019 (AMN)
03/04/2019		Appellant's Brief (KSH)
05/02/2019		Mot of Appellee to extend time to file appellee brief Requested date 06/17/2019. (RS)
05/02/2019		Clerk's stamp ord granting appellee's motion to extend time to file appellee's brief until 06/17/2019 (AMN)
05/30/2019		Appellee's Brief (RS)

DATE		PROCEEDINGS
06/13/2019		Appellant's reply brief (KSH)
06/24/2019		Record of Proceedings (RS)
07/10/2019		Assigned case to Judge Allen (MVL)
07/23/2019		Memorandum Decision that the BVA decision is affirmed (ALLEN) (AMN)
08/14/2019		Judgment (AMN)
10/07/2019		Appellant's Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit (KSH)
10/21/2019		Appellant's Notice of Appeal transmitted to U.S. Court of Appeals for the Federal Circuit (AMN)

[SEAL: UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS]

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

VA File No. 264437740

ADOLFO R. ARELLANO,

Appellant,

v.

PETER O'ROURKE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

NOTICE OF APPEAL

Notice is hereby given that Appellant appeals to the United States Court of Appeals for Veterans Claims from the July 28, 2017, decision of the Board of Veterans' Appeals in docket number 17-02 159.[1]

Appellant's address is [redacted]. Appellant's telephone number is [redacted]

Respectfully submitted,

/s/ Thomas E. Sullivan
THOMAS E. SULLIVAN[*]
Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
901 New York Avenue, NW
Washington, DC 20001-4413
202.408.4113
thomas.e.sullivan@finnegan.com

[1] A timely-filed Motion for Reconsideration was denied by the Board of Veteran's Appeals on April 10, 2018.

[*] Admitted in California only; practicing under the supervision of the partners of the Washington, DC office of Finnegan.

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 18-3908

ADOLFO R. ARELLANO,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

JAMES M. BYRNE
General Counsel

MARY ANN FLYNN
Chief Counsel

SELKET N. COTTLE
Deputy Chief Counsel

ROBERT SCHNEIDER
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027i)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6988

Attorneys for the Appellee

* * *

arguments must fail. As the Federal Circuit explained in *Andrews,* 38 U.S.C. § 5110 does not contain a statute of limitations; rather it illustrates when benefits may begin to accrue and provides for an earlier effective date under specific limited circumstances. Because 38 U.S.C. § 5110 does not include a statue of limitations, equitable tolling is not applicable.

IV. ARGUMENTS

A. Standard of Review

The clearly erroneous standard of review applies to situations in which the Court is applying facts to established law to determine whether a claimant is entitled to an earlier effective date. 38 U.S.C. § 7261(a)(4); *see Ross v. Peake,* 21 Vet.App. 528, 531 (2008). Under this deferential standard, the Court will evaluate the Board's findings of fact to determine whether those findings are plausibly based in the record. *See Gilbert v. Derwinski,* 1 Vet.App. 49, 52-53 (1990) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard (quoting *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985)). When doing so, if there is evidence both for and against a claim, but a review of the entire record provides a plausible basis for the Board's decision that the preponderance of evidence is against the appellant, and if the Board supports its rationale with an adequate statement of reasons or bases, the Court may not substitute its judgment of the facts for that of the primary fact-finder. *Overton v. Nicholson,* 20 Vet.App. 427, 432 (2006) (citing *Gilbert,* 1 Vet.App. at 52; *Prejean v. West,* 13 Vet.App. 444, 448-89 (2000)).

* * *

DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20038

[SEAL]

July 28. 2017

In Reply Refer To: (0141 A1)
[redacted]

ADOLFO R ARELLANO
[redacted]

Dear Appellant:

The Board of Veterans' Appeals has made a decision in this case, and a copy is enclosed. The records are being returned to the Department of Veterans Affairs office having jurisdiction over this matter.

The Board of Veterans Appeals has partnered with J.D. Power and Associates to determine how our customers perceive the service we provide as an organization. You may be contacted by telephone from someone at J.D. Power and Associates in the next 30-60 days and asked to provide feedback on your experience with the Board of Veterans Appeals by taking a brief survey. We appreciate your willingness to help us improve our processes and the service we provide for Veterans by participating in this survey. Any comments provided to J.D. Power are 100% anonymous and will not impact the delivery or timing of any future benefits provided by VA.

Thank you in advance for your willingness to participate and share your feedback.

Sincerely yours,

/s/ Donnie R. Hachey
Donnie R. Hachey
Chief Counsel for Operations

Enclosures (1)

cc: PEDRO ARELLANO
[redacted]

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

DOCKET NO. 17-02 159

IN THE APPEAL OF
ADOLFO R. ARELLANO

DATE July 28, 2017

On appeal from the

Department of Veterans Affairs Regional Office in St. Petersburg, Florida

THE ISSUES

1. Entitlement to an effective date earlier than June 3, 2011, for the grant of service connection for schizoaffective disorder bipolar type with posttraumatic stress disorder (PTSD).

2. Entitlement to an effective date earlier than January 31, 2012, for the grant of service connection for tardive dyskinesia.

REPRESENTATION

Appellant represented by: Pedro Arellano Lamar

ATTORNEY FOR THE BOARD

D. Van Wambeke, Counsel

In the January 2017 VA Form 9, the Veteran's brother asserts that it was error for the RO to deny the Veteran the service connection to which he was entitled as of October 30, 1981, the day after he was

discharged from active service, based on the psychosis, delusions, schizoaffective disorders, paranoia and anxiety (including PTSD) that was documented by his psychiatrists from November 1981 to the present and submitted as part of his claim. The Veteran's brother cited to 38 C.F.R. § 3.309 and resubmitted several opinions that were received in conjunction with the original claim for service connection, which he asserts supports a finding that the Veteran had been suffering from a psychiatric disorder and tardive dyskinesia on a continuing basis since 1981 and that his psychiatric disorder left him completely disabled as of 1981. The Veteran's brother again asserts that error was committed when these medical opinions were ignored.

The effective date for an award of service connection for claims received within one year after separation from service shall be the day following separation from service, or date entitlement arose; otherwise, the effective date shall be the date of receipt of claim, or date entitlement arose, whichever is later. 38 U.S.C.A. § 5110; 38 C.F.R. § 3.400(b)(2).

Prior to March 24, 2015, the VA administrative claims process recognized formal and informal claims. A formal claim is one that has been filed in the form prescribed by VA. *See* 38 U.S.C.A. § 5101(a) (West 2014); 38 C.F.R. § 3.151(a) (2014). An informal claim was considered to be any communication or action indicating an intent to apply for one or more benefits under VA law. *See Thomas v. Principi*, 16 Vet. App. 197 (2002); *see also* 38 C.F.R. §§ 3.1(p), 3.155(a) (2014). An informal claim needed to be written, *see Rodriguez v. West*, 189 F. 3d. 1351 (Fed. Cir. 1999), and it had to identify the benefit being sought. *Brannon v. West*, 12 Vet. App. 32, 34-5 (1998).

Upon review of the record, the Board finds the RO assigned the earliest possible effective date for its grant of service connection for schizoaffective disorder bipolar type with PTSD. Specifically, although the supplemental claim for PTSD was not received until June 13, 2011, and the supplemental claim for schizoaffective disorder was not received until October 9, 2012, the RO clearly indicated that it had considered the original claim for head injury received on June 3, 2011, as part of the claim for a psychiatric or mental disorder. There is no indication from review of the claims file, and neither the Veteran nor his representative has alleged, that a claim was filed prior to receipt of the June 3, 2011 VA Form 21-526. In fact, the Veteran's representative, who is his brother, has candidly acknowledged that it was not until after their father, who was the Veteran's principal source of support, died in December 2010 that the Veteran, having no income, was able to be convinced by his brother and his psychiatrists to file the June 3, 2011 application. *See* February 2015 letter to the VA Under Secretary for Benefits.

The Veteran in essence contends that the effective date for the grant of service connection for schizoaffective disorder bipolar type with PTSD should be based on the date his psychiatric disability was incurred, in other words, immediately after his discharge from service, or, at the latest, as of January 1, 1982. However, the law governing effective dates is clear: the effective date is the date of claim or date entitlement arose, *whichever is later*. 38 C.F.R. § 3.400(b)(2) (emphasis added).

Although it has been determined that the Veteran's schizoaffective disorder bipolar type with PTSD is related to service, it does not follow that just because

service connection is warranted, the effective date of a grant of service connection should be during the time frame in which the incident that formed the basis of the grant occurred or the day following service, since doing so would render meaningless many of the provisions of 38 U.S.C.A. § 5110 and 38 C.F.R. § 3.400.

Here, the Veteran's original claim for benefits was received approximately 30 years after his discharge from service. Thus, under the law, there is no basis to assign an effective date for service connection for schizoaffective disorder bipolar type with PTSD earlier than the date his original application was received.

In regards to the claim for an effective date earlier than January 31, 2012 for the grant of service connection for tardive dyskinesia, the Board notes the claim specifically seeking that benefit was received on October 9, 2012. However, in a statement received on August 29, 2011 requesting expedited processing of the Veteran's compensation claim, the Veteran's representative mentioned parkinsonism. The Veteran claimed his tardive dyskinesia as hand shaking. The Board notes that the February 13, 2012 VA examination noted the Veteran had tardive and neuroleptic induce parkinsonism. Resolving all doubt in the Veteran's favor, the Board finds that the August 29, 2011 statement constitutes an informal claim for the tardive dyskinesia, and that the proper effective date for that disability is August 29, 2011.

However, the Veteran in essence contends that the effective date for the grant of service connection for tardive dyskinesia should be based on the date his disability was incurred, or, at the latest, as of January 1, 1982. In this case, the date of claim of August 29, 2011 is later than the date entitlement for service con-

nection for tardive dyskinesia arose. Thus, an effective date earlier than August 29, 2011 is not warranted.

Moreover, although the tardive dyskinesia was granted as being secondary to the service-connected psychiatric disorder, the effective date assigned for a secondary condition does not automatically revert to the effective date of service connection for the primary condition. Rather, the effective date is based on the date of claim or date entitlement to the secondary disability arose. *Ellington v. Nicholson*, 22 Vet. App. 141 (2007); *see also Ross v. Peake*, 21 Vet. App. 528, 531 (2008); 38 C.F.R. § 3.400. In this case, the earliest claim for tardive dyskinesia is August 29, 2011.

At this juncture, the Board will address several assertions raised in support of the claims for earlier effective dates. First, the assertion has been raised that the Veteran's mental illness prevented him from filing a claim earlier than June 3, 2011. 38 U.S.C.A. § 5110 (4)(A) and 38 C.F.R. § 3.400 (b)(ii)(B) authorize VA to assign an effective date earlier than the date of claim when a disability is so incapacitating that it prevents the claimant from filing the claim earlier. However, both provisions apply only to claims for disability pension, rather than service-connected compensation. As disability pension and service-connected compensation are distinct benefits, those regulations do not apply in the instant case. Additionally, to the extent the representative's argument is one for equitable tolling, case law has established that with respect to the question of equitable tolling for purposes of establishing an award of retroactive benefits, there is an "unequivocal command in 38 U.S.C. § 5110(a) that the effective date of benefits cannot be earlier than the filing of an application therefore." *Rodriguez v. West*, 189 F.3d 1351 (Fed.Cir.1999), *reh'g denied (en banc),*

cert. denied, 529 U.S. 1004, 120 (2000); *see also Andrews v. Principi*, 16 Vet. App. 309, 312 (2002).

Second, the assertion has been raised that the RO committed error in the December 2014 rating decision that is the subject of this appeal because it did not consider medical documentation from the Veteran's psychiatrists that the Veteran was 100 percent disabled on or before January 1, 1982, and did not consider 38 C.F.R. § 3.309, which provides that service connection for psychosis may be granted on a presumptive basis if the disease is manifested to a compensable degree within one year following service discharge. The assertion that 38 C.F.R. § 3.309 was not considered was accompanied by the contention that the Veteran was entitled to service connection as of October 30, 1981, the day after he was discharged from active service, based on the psychosis, delusions, schizoaffective disorders, paranoia and anxiety (including PTSD) that was documented by his psychiatrists from November 1981 to the present and submitted as part of his claim.

However, as noted above, it the date of claim that controls, not the date the medical evidence shows the first indication of the disability. *See Brannon v. West*, 12 Vet. App. 32, 35 (1998) ("The mere presence of . . . medical evidence does not establish an intent on the part of the veteran to seek . . . service connection for [a] condition."). The RO did consider the medical evidence attesting to the fact that the Veteran has been disabled since 1981. However, meeting the elements for service connection, whether it be under 38 C.F.R. § 3.303 or § 3.309, does not establish the effective date for compensation purposes. As noted above, the law governing effective dates is clear: the effective date is the date of claim or date

entitlement arose, *whichever is later*. 38 C.F.R. § 3.400(b)(2) (emphasis added).

Here, the Veteran has submitted evidence indicating his disability was present in 1981, contemporaneous with his service discharge. However, the Veteran does not dispute that the original claim for service connection was filed in June 2011 as to his psychiatric disability. There has been no argument that a claim for compensation was filed prior to June 2011. As a claim for compensation benefits was not filed within one year following the Veteran's discharge from service, the effective date of the award of service connection can be no earlier than the date of receipt of the claim; in this case, June 3, 2011 for the psychiatric claim, and August 29, 2011 for tardive dyskinesia.

For the foregoing reasons, the claim for entitlement to an effective date earlier than June 3, 2011 for the grant of service connection for schizoaffective disorder bipolar type with PTSD is denied. Additionally, an effective date of August 29, 2011 for the grant of service connection for tardive dyskinesia is granted, but an effective date prior to that date is denied.

ORDER

An effective date earlier than June 3, 2011 for the grant of service connection for schizoaffective disorder bipolar type with PTSD is denied.

An effective date of August 29, 2011, but no earlier, for the grant of service connection for tardive dyskinesia is granted, subject to the rules and regulations governing the payment of VA monetary benefits.

/s/ K. A. Banfield

K. A. BANFIELD

Veterans Law Judge, Board of Veterans' Appeals

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
1201 Northwest 16th Street
Miami FL 35125-1693

January 31, 2012

In Reply Refer To:

Department of Veterans Affairs
St. Petersburg Regional Office
PO Box 7000
Bay Pines, FL 33744

Re: Adolfo R. Arellano-[redacted]

Service Connected Disability Application Supplement to May 15, 2011 100% Disability Letter.

To Whom It May Concern:

I have known and treated the Navy Veteran Adolfo R. Arellano ([redacted]) since on or before 2001, both at the Inpatient facility of the Miami VA Healthcare system, and at the Miami VA Outpatient Behavioral Health Clinic.

In my medical opinion as Mr. Arellano's psychiatrist the cause of all of the psychiatric Medical Symptoms which are part of his attached medical record, including Prolonged Post Traumatic Stress Disorder (309.81), Schizoaffective Disorder (295.70), Neuroleptic Induced/Tardive Dyskinesia (333.82), disorders of refraction and accommodations (ICD-0-CM 367.9), Bipolar (296.7), and Anxiety State (300) symptoms, is the trauma which he suffered on July 29, 1980, when he was almost crushed and swept overboard while working on the flight deck of the USS Midway aircraft carrier, when the Cactus freighter collided with it in the Persian Gulf during the Iranian Hostage Crisis,

killing and injuring a number of his shipmates who were working near him.

It is also my medical opinion that the psychiatric symptoms resulting from this well documented trauma rendered him 100% disabled since 1980, as outlined in the attached May 17, 2011 disability letter.

Should you need additional information, please call me at [redacted], extension [redacted], Fax [redacted], email [redacted].

Sincerely,

/s/ Richard Douyon, MD

Richard Douyon, MD
Director of Hospital Programs, Mental Health Services, Miami VA Healthcare System
Associate Professor of Clinical Psychiatry & Behavioral Sciences,
University of Miami, Miller School of Medicine.

Faxed to - [redacted] 16 Pages

Form Approved: OMB No. 2900-0085
Expiration Date: July 31, 2018
Respondent Burden: 1 Hour

Department of Veterans Affairs

APPEAL TO BOARD OF VETERANS' APPEALS

IMPORTANT: *Read the attached instructions before you fill out this form. VA also encourages you to get assistance from your representative in filling out this form.*

1. NAME OF VETERAN *(Last Name, First Name, Middle Initial)*	2. CLAIM FILE NO. *(Include prefix)*	3. INSURANCE FILE NO., OR LOAN NO.
ARELLANO, Adolfo R.	[redacted]	

4. I AM THE:
☐ VETERAN ☐ VETERAN'S WIDOW/ER ☐ VETERAN'S CHILD ☐ VETERAN'S PARENT
☒ OTHER *(Specify)* poa & caregiver since 1981

5. TELEPHONE NUMBERS		6. MY ADDRESS IS: *(Number & Street or Post Office Box, City, State & ZIP Code)*
A. HOME *(Include Area Code)*	B. WORK *(Include Area Code)*	c.o. Adolfo R. Arellano [redacted]
[redacted]		

7. IF I AM NOT THE VETERAN, MY NAME IS: *(Last Name, First Name, Middle Initial)*
ARELLANO LAMAR, Pedro

8. THESE ARE THE ISSUES I WANT TO APPEAL TO THE BOARD: *(Be sure to read the information about this block in paragraph 6 of the attached instructions.)*

A. ☒ I HAVE READ THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENT OF THE CASE I RECEIVED. I AM ONLY APPEALING THESE ISSUES: *(List below.)*

Entitlement to an earlier effective date of January 1, 1982 for service connection of:

1. Schizoaffective disorder, bipolar type, with ptsd is denied.
2. Tardive Diskenesia is denied.

B. ☐ I WANT TO APPEAL **ALL** OF THE ISSUES LISTED ON THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENT OF THE CASE THAT MY LOCAL VA OFFICE SENT TO ME.

9. HERE IS WHY I THINK THAT VA DECIDED MY CASE INCORRECTLY: *(Be sure to read the information about this block in paragraph 6 of the attached instructions.)*

3.309, states that when a psychoses becomes manifest within one year of service, such disease shall be presumed to have been incurred during the period of service. Therefore, it was CUE for the St. Petersburg DRO in 2014 and in 2016 to deny Veteran the service connection to which he is entitled as of October 30, 1981, the day after he was discharged from active service, based on the psicosis, delusions, schizoaffective disorders, paranoia and anxiety (including ptsd) that was documented by his psychiatrists from Nov. 1981 to the present, submitted as part of his claim, and attached herein in Exhibit A. The prejudice to Veteran included increased anxiety which caused him 3 atrial fibrillations during the past year and a TIA (near stroke), as documented in the accompanying motion for advancing the docket on this appeal.

(Continue on the back, or attach sheets of paper, if you need more space.)

10. OPTIONAL BOARD HEARING

IMPORTANT: *Read the information about this block in paragraph 6 of the attached instructions. This block is used to request an optional Board of Veterans' Appeals (Board) hearing. DO NOT USE THIS FORM TO REQUEST A HEARING BEFORE VA REGIONAL OFFICE PERSONNEL. Check one (and only one) of the following boxes:*

A. ☒ I DO NOT WANT AN OPTIONAL BOARD HEARING. *(Choosing this option often results in the Board issuing its decision most quickly. If you choose, you may write down what you would say at a hearing and submit it directly to the Board.)*

I WANT AN OPTIONAL BOARD HEARING:

B. ☐ BY LIVE VIDEOCONFERENCE AT A LOCAL VA OFFICE. *(Choosing this option will add delay to issuance of a Board decision.)*
C. ☐ IN WASHINGTON, DC. *(Choosing this option will add delay to issuance of a Board decision.)*
D. ☐ AT A LOCAL VA OFFICE.* *(Choosing this option will add **significant** delay to issuance of a Board decision.)*
*This option is not available at the Washington, DC, or Baltimore, MD, Regional Offices.

11. SIGNATURE OF PERSON MAKING THIS APPEAL	12. DATE *(MM/DD/YYYY)*	13. SIGNATURE OF APPOINTED REPRESENTATIVE, IF ANY *(Not required if signed by appellant. See paragraph 6 of the instructions.)*	14. DATE *(MM/DD/YYYY)*
	1.2.2017	[signature]	1.2.2017

VA FORM JUL 2015 **9**

PLEASE NOTE: ATTACHED IS MOTION FOR ADVANCEMENT OF APPEAL AS EXHIBIT B DOCKET - PURSUANT TO 38 USC 7107

[This page intentionally left blank.]

Exhibit A- to Appeal- Form 9- dated 1.3.2017-
Arellano, Adolfo R.-[redacted] - US Navy Veteran

REPRESENTATION-

Veteran Appellant is represented by Pedro Arellano Lamar, veteran's poa, brother, health care surrogate and caregiver since Veteran returned home mentally disabled in November 1981.

INTRODUCTION

The Veteran served on Active Duty from November 1, 1977 to October 29,19S1. Service Medical Records reflect no complaints or diagnoses of a psychiatric disorder upon the veteran's entrance into the military.

On July 29, 1980, while servicing fighters on the deck of the USS Midway, Veteran was almost killed and swept overboard when a freighter rammed the USS Midway and killed and injured a number of his shipmates. Photos and Descriptions of the Accident, attached as Exhibit 1 have been presented with Veteran's claim.

Veteran's claim was originally submitted on June 3, 2011, and classified as a hardship claim, entitled to expedited processing. As of this writing. Veteran's claim is now 5 1/2 years old.

This appeal comes before the Board of Veterans Appeals (Board) from a. December 24, 2014 Decision of the St. Petersburg RO (RO) which granted Veteran Service Connection with an effective date of:

- June 3. 2011 for Schizoaffective Disorder bipolar type, with post traumatic stress disorder, with 100 % disability, and of
- January 31, 2012 for tardive diskenesia, with zero disability.

THE ISSUE BEING APPEALED

Is Veteran's entitlement as a matter of law and of fact to an *earlier effective date of January 1,1982* for Veteran's *Direct Service Connection* - for 100 % disability benefits for following *Chronic Conditions and Disabilities* affecting Veteran:

1. Schizoaffective Disorder, Bipolar type, with Ptsd (involving Anxiety, Psychoses and Delusions)- caused, according to Veteran's psychiatrists from 1981 to the present, by mental trauma suffered by Veteran while serving aboard the USS Midway aircraft carrier (the USS Midway).

2. Tardive Diskenesia (the shakes) caused, according to Veteran's psychiatrists from 1981 to the present, by the medications used to treat the symptoms of Veteran's Schizoaffective Disorder, Bipolar type, with Ptsd (involving Anxiety, Psychoses and Delusions)- caused by his service aboard the USS Midway.

VETERAN'S. SEPARATE MOTION FOR ADVANCEMENT OF APPEALS DOCKET ON THIS CLAIM DUE TO EXTRAORDINARY FINANCIAL HARDSHIP AND ILLNESS.

Is attached as Exhibit B.

THE LAW -AND THE FACTS- ENTITLING VETERAN TO A JANUARY 1, 1982 EFFECTIVE DATE FOR SERVICE CONNECTION.

Service Connection may be granted for disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. 1131 (West 2002); 38 C.F.R. 3.303, 3.304.

Attached herein as Exhibit 2 are copies of the psychiatric opinion of Dr. Angel Diaz, previously

submitted as apart of Veteran's claim, that Veterans 1981-1990 delusions, paranoia, anxiety (including ptsd) and tardive diskenesia left him completely disabled and were the result of his service aboard the USS Midway.

Attached herein as Exhibit 3 are copies of the psychiatric opinion of Dr. Richard Douyon of the Miami, VA, previously submitted as apart of Veteran's claim, that Veterans 1981-2012 delusions, paranoia, thought disorder, anxiety, ptsd, and tardive diskenesia left him completely disabled and were the result of his service aboard the USS Midway.

Attached herein as Exhibit 4 are copies of the psychiatric opinion of Dr. Nita Kumar of the Miami, VA, previously submitted as apart of Veteran's claim, that Veterans 100 % 1981-present delusions, paranoia, thought disorder, anxiety, ptsd, and tardive diskenesia left him completely disabled and were the result of his service aboard the USS Midway.

Veteran's brother and caregiver has also attested that from the time Veteran returned home in 1981, Veteran was completely disabled with delusions, paranoia, and anxiety.

3.309- Where a veteran served 90 days or more . . . during peacetime service after December 31, 1946, and a psychosis becomes manifests within one year from the date of termination of service, such disease shall be presumed to have been incurred in service,, even though there is no evidence of such disease during the period of service.

3.384 —"The term "psychosis" means any of the following disorders listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5):

(b) Delusional Disorder.

(e) Schizoaffective Disorder.

3.307- (1) Service- the veteran must have served 90 days or more . . . after December 31, 1946 . . .

3.303 (d) The fact that the diagnosis occurred after discharge from service does not preclude service connection.

The Psychiatric Opinion of Dr. Angel Diaz (Exhibit 2- previously submitted as part of the Veteran's claim) establishes that Veteran was disabled with psychosis, including delusional disorder, paranoia and schizoaffective disorder, from the time Veteran arrived home in November 1981 after his discharge from the Navy on October 29, 1981- until 1990, when Veteran stopped treatment with Dr. Diaz.

Veteran brother's and caregiver has also attested that since returning home from the Navy (in November 1981) Veteran was exhibiting disabling symptoms of delusions, paranoia and anxiety, which continue to the present date.

According to the Psychiatric Opinions of Dr. Diaz, Dr. Douyon, and Dr. Kumar, attached as Exhibits 2, 3, and 4, and according to Veteran's brother's lay opinions (all of which were previously submitted as part of Veteran's claims) Veteran has been chronically ill with psychoaffective disorder, bipolar type, with ptsd, and related anxiety, delusions and psycosis's, since Veteran came home from the Navy in November 1981 to the present.

3.4 (b) Disability benefits 2) Disability compensation- i) Direct service connection. Day following separation from active service.

According to 3.4.b.i, due to his psychoses and mental disabilities which were manifested and diagnosed by Dr. Angel Diaz within several weeks from his October 29, 1981 discharge from active service, pursuant to 3.309, Veteran is entitled to direct service connection with an effective date of October 30, 1982, the day after separation from active military service.

Accordingly Veteran qualifies for direct service connection with an effective date of on or before January 1, 1982, as requested by Veteran in this appeal.

Given that Veteran's disabling chronic psychoses manifested and was diagnosed and treated by Dr. Diaz within a month of Veteran's discharge, and given that Veteran is entitled to direct service connection pursuant to 3.309, is Veteran required to have filed a disability claim within a year of discharge, in order to be entitled to direct service connection from October 30, 1981, the day after discharge?

NO. Even assuming arguendo that Veteran was required as a matter of claims regulations to file a disability claim within a year of discharge, such requirements would be equitably tolled as a result of Veteran's extraordinary circumstances, including Veteran's psychoses, repression of the July 29, 1980 accident aboard the Midway, and Veteran's inability to understand that he was mentally disabled and entitled to apply for and procure 100 % disability benefits.

Is there documentation in the Veteran's claim's record establishing extraordinary circumstances that prevented Veteran from filing a disability claim prior to June 3, 2011 ?

YES.

1. The medical opinion of Veteran's Psychiatrist from 1981 to 1990-Dr. Diaz- in Ex. 2.

"As of 1990 when Veteran stopped coming for treatment, Veteran was still suffering from the same anxiety, delusions, paranoia that I had been treating him for since 1981. He was so sick that he believed that nothing was wrong with him and therefore he did not need to continue taking antipsychotics or anxiolitics; or to seek medical help from the Veteran's Administration; or to apply for service connected disability benefits.

2. The medical opinion of Veteran's Psychiatrist from 1991 to 2012- Dr. Douyon- in Ex. 3,

"From 1991 to 2012, the physicians who treated Veteran at the Miami VA Mental Health Facility on both an inpatient and outpatient basis, including myself, were not aware until late 2011 that Veteran had almost been killed and swept of the deck of the USS Midway on July 29, 1989 [typo 1980]. Once Veteran disclosed this repressed memory, he was immediately diagnosed with ptsd.

"In my medical opinion, since 1980 the mental trauma experienced while serving aboard the USS Midway, Veteran's resulting anxiety, paranoia, delusions and thought disorder has prevented Veteran from understanding that he is suffering from a grave mental illness that has rendered him 100 % disabled; and also prevented him from understanding his right and need to apply and procure the service connected disability benefits that he earned as a result of his military service."

3. The medical opinion of Veteran's Psychiatrist from 2012 to the present, Dr. Kumar-in Ex. 4.

"As you can see from my September 13, 2012 Progress Notes on Veteran (Tab 9), patient is still voicing delusions about the accident that killed and injured a number of his shipmantes, and did cause him irreparable harm" . . . In my independent medical opinion . . . Veteran suffered a psychotic break that rendered him disabled with anxiety, delusions and paranoia as the result of:

a). the constant psychological pressure of being "hunted and/or observed" by the Russian submarines, airplanes and other vessels that were tracking, the USS Midway during the Iranian Crisis; and,

b) the psychological trauma of the July 29, 1980 accident that almost killed veteran and swept him overboard, and did kill and injure a number of his shipmates.

4. The lay opinion of Pedro Arellano Lamar. Veteran's brother and caregiver from 1981 to the Present-

From his return from the Navy on or about November 1981, to the present, Veteran could not understand that he was mentally disabled, and did not and could not tell us (because he had repressed this memory until 2011), that he had suffered a mental trauma in the service that entitled him to he a claim for direct service connection and 100 % disability benefits.

According to the VA's analysis of Presumptions of Service Connection: When the party invoking a presumption (in this case, the Veteran) establishes the basic fact(s) giving rise to the presumption (in this case, the effective date of Veteran's disabling

psychoses) the burden of proof shifts to the other party to prove non existence of the presumed fact. 38 U.S.C.A., 1101, 1112, 113 (West 2002 & Supp. 2005); 38 C.F.R. 3.307, 3.309 (2005).

The St. Petersburg RO did not (and could not) raise any arguments to prove the non existence of Veteran's psychoses (including delusions, paranoia, anxiety and ptsd from the time that Dr. Diaz diagnosed these disabling symptoms in 1981, attached as Exhibit 1).

Furthermore, Veteran has been suffering these disabling psychoses and tardive diskenesia on a continuing basis since 1981, as established by the Psychiatric Opinions of Dr. Diaz, Dr. Douyon, and Dr. Kumar, attached as Exhibits 2, 3 and 4, previously submitted to the VA; and as established by the opinions of Veteran's brother and caregiver which are part of Veteran's claim's file.

Because the VA has not met its legal burden to prove the non existence of the presumption that Veteran was completely disabled with the psychoses and delusions well within a year of being discharged from the service on October 29, 1981, Veteran is entitled to an earlier effective date of October 30, 1981 for these disability benefits (Or January 1, 1982- as requested by Veteran)- *38 U.S.C.A., 1101, 1112, 113 (Best 2002 & Supp. 2005); 38 C.F.R. 3.307, 3.309 (2005).*

3.102- Reasonable doubt doctrine . . . Requires doubts be resolved in favor of the claimant, even in the absence of official records. See also 38 USC Section 5107-benefit of the doubt-"The benevolent intent behind the veteran's system" supported the conclusion that "a showing of clear and convincing evidence to the contrary is [required] to rebut the presumption of service connection afforded a veteran under U.S.0 105.

Instead, in its November 15, 2016 Decision and SOC the DRO ignored the opinions of the 3 psychiatrists and the Veteran's caregiver submitted as part of the claims and summarized herein, and without presenting any evidence, much less the required clear and convincing evidence to rebut the presumption of evidence of service connection, it rendered the following decisions based on the RO's erroneous opinion :

1. Your claims folder does not support a claim [for service connection of schizoaffective disorder bipolar type, with post traumatic stress disorder prior to this date [June 3, 2011]. The mere fact that you were being treated for a mental disorder within your VA treatment report does not support a claim.

2. Your claims folder does not support a claim [for service connection of tardive diskenesia prior to this date [January 31,2012]. The mere fact that you were being treated for this condition within your VA treatment reports does not support a claim.

This constitutes Clear and Unmistakeable Error (CUE) by the RO, which has prejudiced the Veteran,, and requires advancement of his appeal docket, as requested in Exhibit B, attached herein.

SUMMARY OF PSYCHIATRIC OPINIONS
DOCUMENTED TO THE VA
By Dr. Angel Diaz, Board Certified Psychiatrist
(See attached Exhibit 2).

From 1981 to 1990 Dr. Angel Diaz treated Veteran with antipsychotics and anxiolitics, to help alleviate Veteran's symptoms of :

(a) anxiety disorder, a general diagnosis that includes anxiety produced by post traumatic stress.

(b) Delusions, including of being hunted by Russians and being swept of the deck of the aircraft carrier.

(c) Tardive diskenisia, resulting from the antipsychotics.

Documentation presented to the VA includes attached Dr. Diaz letters of 10.21.2013, 11.25.2013., in which Dr. Diaz states that in his medical opinion-

> "Veteran's PTSD, Schizoaffective disorder, and the Tardive diskenesia resulting from the medications required to treat Veteran's symptoms, were caused by the mental trauma he suffered when he was almost swept off the deck us the USS Midway aircraft carrier and almost killed on July 29 1980".

and his 12.52015 medical opinion in which Dr. Diaz states-

> "In 1990, when Veteran stopped coming for treatment, Veteran was still suffering from the same anxiety, delusions, paranoia that I had been treating him for since 1981. He was so sick that he believed that nothing was wrong with him, and therefore he did not need to continue antipsychotics of anxiolitics; or to seek medical help from the Veteran's Administration; or to apply for service connected disability benefits."

By Dr. Richard Douyon, Director of
Hospital Programs see attached Ex. 3.
Mental Health Services,
Miami VA Healthcare System,
Associate Professor of Clinical Psychiatry-
University of Miami.

From on or before 2001 to 2012, Dr. Douyon treated Veteran with antipsychotics and anxiolitics, to help alleviate Veteran's symptoms of :

a) anxiety disorder, a general diagnosis that includes anxiety produced by post traumatic stress.

b) Delusions, including of being hunted by Russians and being swept of the deck of the aircraft carrier.

c) Tardive diskenisia, resulting from the antipsychotics.

Documentation presented to the VA includes attached Dr. Douyon 100% disability determination letter of 5.17.11, and his 1.31.2012 opinion stating -

> "In my medical opinion as Mr. Arellano's psychiatrist the cause of all the psychiatric symptoms that are part of his attached medical record, including Prolonged Post Traumatic Stress Disorder (309.81), Schizoaffective Disorder (295.70), Neuroleptic Induced/ Tardive Diskinesia (333.82), disorders of refraction and accommodations (ICD-O-CM 367.9), Bipolar (296.7) and Anxiety State (300) Symptoms, is the trauma which he suffered on July 29, 1980, when he was almost crushed and swept overboard while working on the flight deck of the USS Midway aircraft carrier, when the Cactus freighter collided with it in the Persian Gulf during the Iranian Hostage Crisis, killing and injuring a number of his shipmates that were working near him.

> It is also my medical opinion that the psychiatric symptoms resulting from this well documented trauma rendered him 100 % disabled since 1980, as outlined in the attached May 17, 2011 disability letter".

Other documention presented to the VA is Dr. Douyon's Nexus statements of 4.4.2012 and of 11.22.2013, in which Dr. Douyon reaffirms that-

> "Veteran's anxiety, delusions, psychoses, and tardive diskenesia were caused by his accident on July 29. 1980 while serving aboard the USS Midway."

Additional documentation presented to the VA is Dr. Douyon's 12.23.2014 letter to the Board of Veteran Appeals in which in addition to confirming once again that Veteran is suffering from anxiety, ptsd, and tardive diskenesia, Dr. Douyon states:

> "My medical diagnosis and opinion carries the considerable probative value of over 15 years of hearing veteran's delusions of being swept of the deck of the aircraft carrier, and of his anxiety and paranoia of being persecuted by the Russians . . . .
>
> In my medical opinion, Veteran suffered a psychotic break that rendered him disabled with anxiety, delusions and paranoia as the result of (a) the constant psychological pressure of being "hunted and/or observed" by the Russian submarines, airplanes, and other vessels that were tracking the USS Midway during the Iranian crises, combined with (b) the psychological trauma of the July 29, 1980 accident that almost killed veteran and swept him overboard . . ."

By Dr. Nita Kumar, Attending Psychiatrist

Mental Health Services, Miami VA Healthcare System.

Dr. Kumar's Medical Opinion of 11.22.2013 states:

> "I have been treating Veteran as his attending physician . . . since early 2012 . . . As you can see from my September 13, 2013 Progress Notes on Veteran (Tab 9), patient is still voicing delusions about the accident that killed and injured a number of his shipmates, and did cause him irreparable mental trauma.
>
> I concur with all of the opinions submitted by Dr. Douyon in the attached Nexus statement, including his opinion that Veteran's PTSD, Schizoaffective disorder and the tardive diskenesia . . . were caused by the mental trauma suffered by Veteran when he was almost killed and swept of the deck of the USS Midway aircraft carrier on July 29, 1980."

Dr. Kumar's Medical Opinion of December 3, 2014 to the Board of Veteran's Appeals, includes the following statement:

> "Veteran suffered a psychotic break that rendered him disabled with anxiety, delusions and Paranoia as the result of
>
> a) the constant psychological pressure of being "hunted and/or observed" by the Russian submarines, airplanes and other vessels that were tracking the USS Midway during the Iranian Crisis; and

b) the psychological trauma of the July 29, 1980 accident that almost killed veteran and swept him overboard, and did kill and injure a number of his shipmates."

TESTIMONY OF VETERAN'S CAREGIVER SINCE 1981

Pedro R. Arellano Jr. aka Pedro Arellano Lamar

On. April 28, 2012, Veteran's caregiver and poa provided the VA with the following testimony:

> "Veteran has been having terrifying memories and dreams of "falling of the flight deck of the USS Midway aircraft carrier, surviving, and being captured by the Russians" since on or about late 1980. As a result of the stress caused by these terrifying memories and dreams Veteran has been treated with antipsychotic medications by VA doctors since the early 1980's, on both an outpatient and inpatient basis. The antipsychotic medications gave veteran "the shakes", and the shakes made it difficult for Veteran to procure and maintain work."

On January 8, 2014, Veteran's caregiver and poa provided the VA a list of facts and medical opinions and documentation entitling Veteran to service connection from 1981, including following answer to whether Veteran exhibited symptoms of psychosis well within 1 year of being released from active service on the USS Midway. (i.e. from 1.1.1981).

> YES. Pedro Arellano Lamar attests that since arriving at his parents home a couple of weeks after being released from active duty aboard the USS Midway, on October 29, 1981, Veteran stayed in his room, would not converse with his parents or his brother, was anxious, could not sleep, was hypervigilant, paranoid and would seldom go out of the house, much less date, play sports or relax. To the point that his father got him an appointment with a psychiatrist, Dr. Angel Diaz.

Pedro Arellano Lamar testimony in Veteran's claim files includes the following:

> Since on or before January 1, 1982, well within 1 year of separation from the service, Veteran exhibited disabling delusions, anxiety and paranoia which required him to be treated with antipsychotics, which gave him violent shakes (tardive diskenesia). Veteran returned home from the service disabled as a result of his psychotic symptoms, and could not understand then, or now, that he was suffering from a serious and disabling mental illness that entitled him to 100 % disability benefits from the VA.
>
> From 1990 to on or about 1994 when Veteran was admitted to the VA for treatment, Veteran continued to be treated with antipsychotics on an outpatient basis by Dr. Gaston Magrinat, a psychiatrist at the UM who was also a psychiatrist at the Miami VA. Dr. Magrinat was unable to testify. He passed away soon thereafter. His records were destroyed.

From 1994 to on or about 2000, a number of psychiatrists at the Miami VA have treated Veteran with antipsychotics and anxiolitics, including Dr. Ambrose. When Dr. Ambrose retired from the VA, Dr. Douyon became his attending physician. Dr. Ambrose is unable to testify. He passed away.

From January 1, 1982 to the present Veteran suffered delusions, anxiety, and paranoia, had great difficulty procuring and keeping work, interacting with his family and others, and required repeated involuntarily admissions to the VA for treatment with antipsychotics and anxiolitics.

Having known Veteran all of his life, Pedro Arellano Lamar believes Veteran suffered irreparable mental trauma while serving aboard the USS Midway that rendered him 100% disabled by the time he came back home on or about November 1981 and his father and I took Veteran to Dr. Angel Diaz, to diagnose and treat the disabling symptoms he was manifesting. It is my opinion that from 1981 to the present, Veteran has been so disabled with all of the psychoses and mental disabilities attested to by his psychiatrists, that he could not understand then or now that he was seriously disabled and entitled to file a claim for service connected disability benefits.

I pray the VBA advances the docket on Veteran's appeal, as requested in attached Exhibit B, and approves without further delays the direct service connected disability

benefits to which Veteran has been entitled since October 30, 1981.

Respectfully Submitted on
January 3, 2011 by

/s/Pedro Arellano Lamar
Pedro Arellano Lamar
POA and Caregiver for Veteran-
Adolfo R. Arellano- since 1981.

Department of
Veterans Affairs
PO BOX 1437
ST PETERSBURG FL 33731

December 23, 2015

Veteran's Name:
Arellano, Adolfo, R

ADOLFO R ARELLANO
[redacted]

This letter is a summary of benefits you currently receive from the Department of Veterans Affairs (VA). We are providing this letter to disabled Veterans to use in applying for benefits such as housing entitlements, free or reduced state park annual memberships, state or local property or vehicle tax relief, civil service preference, or any other program or entitlement in which verification of VA benefits is required. Please safeguard this important document. This letter replaces VA Form 20-5455, and is considered an official record of your VA entitlement.

—America is Grateful to You for Your Service—

Our records contain the following information:

Personal Claim Information:
Your VA claim number is: [redacted]
You are the Veteran

Military Information:

Your character(s) of discharge and service date(s) include:

Navy, Honorable, 01-Nov-1977 - 29-Oct-1981

(You may have additional periods of service not listed above)

VA Benefits Information:

Service-connected disability: Yes

Your combined service-connected evaluation is: 100 PERCENT

The effective date of the last change to your current award was: 01-DEC-2014

Your current monthly award amount is: $2,906.83

Are you considered to be totally and permanently disabled due to your service-connected disabilities: Yes

You should contact your state or local office of Veterans' affairs for information on any tax, license, or fee-related benefits for which you may be eligible. State offices of Veterans' affairs are available at http://www.va.gov/statedva.htm.

Need Additional Information or Verification?

If you have any questions about this letter or need additional verification of VA benefits, please call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the federal relay number is 711. Send electronic inquiries through the Internet at https://iris.va.gov.

Sincerely yours,

Regional Office Director

[This page intentionally left blank.]

VIA FAX - [redacted]
TO EVIDENCE INTAKE CENTER

OMB Approved No. 2900-0791
Respondent Burden: 30 minutes

Department of Veterans Affairs — NOTICE OF DISAGREEMENT

A CLAIMANT OR HIS OR HER DULY APPOINTED REPRESENTATIVE MAY FILE NOTICE EXPRESSING THEIR DISSATISFACTION OR DISAGREEMENT WITH AN ADJUDICATIVE DETERMINATION BY THE AGENCY OF ORIGINAL JURISDICTION. A DESIRE TO CONTEST THE RESULT WILL CONSTITUTE A NOTICE OF DISAGREEMENT (NOD.) WHILE SPECIAL WORDING IS NOT REQUIRED, THE NOD MUST BE IN TERMS WHICH CAN BE REASONABLY CONSTRUED AS DISAGREEMENT WITH THAT DETERMINATION AND A DESIRE FOR APPELLATE REVIEW. (AUTHORITY: 38 U.S.C. 7105)

TO FILE A VALID NOD, THERE IS A TIME LIMIT OF ONE YEAR FROM THE DATE VA MAILED THE NOTIFICATION OF THE DECISION TO THE CLAIMANT. FOR CONTESTED CLAIMS INCLUDING CLAIMS OF APPORTIONMENT, THIS TIME LIMIT IS 60 DAYS FROM THE DATE VA MAILED THE NOTIFICATION OF THE DECISION TO THE CLAIMANT.

(DO NOT WRITE IN THIS SPACE)
(VA DATE STAMP)

PART I - PERSONAL INFORMATION

1A. VETERAN'S FIRST NAME	1B. MIDDLE NAME	1C. LAST NAME
ADOLFO	R.	ARELLANO

2. VA FILE NUMBER	3. VETERAN'S SOCIAL SECURITY NUMBER
C/CSS - [redacted]	[redacted]

CLAIMANT'S PERSONAL INFORMATION

4A. CLAIMANT'S FIRST NAME	4B. MIDDLE NAME	4C. LAST NAME
ADOLFO	R.	ARELLANO

5. STREET ADDRESS	6. APT. NO.	7. CITY	8. STATE	9. ZIP CODE
[redacted]		[redacted]	[redacted]	[redacted]

10. DAYTIME TELEPHONE NUMBER	11. EVENING TELEPHONE NUMBER	12. EMAIL ADDRESS
[redacted]	[redacted]	[redacted]

PART II - TELEPHONE CONTACT

13. WOULD YOU LIKE TO RECEIVE A TELEPHONE CALL OR EMAIL FROM A REPRESENTATIVE AT YOUR LOCAL REGIONAL OFFICE REGARDING YOUR NOD?

☐ YES ☐ NO *(If you answered "Yes," VA will make up to two attempts to call you between 8:00 a.m. and 4:30 p.m. local time at the telephone number and time period you select below. Please select up to two time periods you are available to receive a phone call.)*

☐ 8:00 a.m. - 10:00 a.m. ☑ 10:00 a.m. - 12:30 p.m. ☑ 12:30 p.m. - 2:00 p.m. ☐ 2:00 p.m. - 4:30 p.m.

Phone number I can be reached at the above checked time: [redacted]

PART III - SPECIFIC ISSUES OF DISAGREEMENT

14. NOTIFICATION/DECISION LETTER DATE: 12.24.2014

15. PLEASE LIST EACH SPECIFIC ISSUE OF DISAGREEMENT AND NOTE THE AREA OF DISAGREEMENT. IF YOU DISAGREE ON THE EVALUATION OF A DISABILITY, SPECIFY PERCENTAGE EVALUATION SOUGHT, IF KNOWN. PLEASE LIST ONLY ONE DISABILITY IN EACH BOX. YOU MAY ATTACH ADDITIONAL SHEETS IF NECESSARY.

A. Specific Issue of Disagreement	B. Area of Disagreement	C. Percentage (%) Evaluation Sought *(If known)*
THE DOCUMENTATION FROM COMPETENT MEDICAL EXAMINERS ESTABLISHES THAT VETERAN	☐ Service Connection ☑ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	
HAS BEEN 100% DISABLED WITH ~~PTSD~~ SCHIZOAFFECTIVE DISORDER (PARANOIA) AND	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	
RESULTING TARDIVE DISKINESIA SINCE [redacted] OR ON BEFORE 10.2011 DISCHARGE FROM NAVY CONTINUED.	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	

VA FORM FEB 2013 21-0958

(Continued on next page)

Pg 1/3

PART III - SPECIFIC ISSUES OF DISAGREEMENT *(Continued)*		
A. Specific Issue of Disagreement	**B. Area of Disagreement**	**C. Percentage (%) Evaluation Sought *(if known)***
ILLEGAL OF AWARDING SERVICE CONNECTION FROM 1984, THE RATER AWARDED IT FROM THE JULY 1, 2011	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	
DATE OF VETERAN'S CLAIM APPLICATION.	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	

16A. IN THE SPACE BELOW, OR ON A SEPARATE PAGE, PLEASE EXPLAIN WHY YOU FEEL WE INCORRECTLY DECIDED YOUR CLAIM, AND LIST ANY DISAGREEMENT(S) NOT COVERED ABOVE:

PLEASE SEE ATTACHED EXPLANATION OF WHY VA SHOULD AWARD SERVICE CONNECTED 100% DISABILITY BENEFITS TO VETERAN FROM JAN 1, 1982 TO PRESENT.

16B. DID YOU ATTACH ADDITIONAL PAGES TO THIS NOD?

☑ YES ☐ NO *(If so, how many?)* |

PART IV - CERTIFICATION AND SIGNATURE

I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

17A. SIGNATURE	17B. DATE SIGNED
Ted Adolfo Poa for Adolfo R. Avila	2.24.2015

PENALTY: THE LAW PROVIDES SEVERE PENALTIES WHICH INCLUDE A FINE, IMPRISONMENT, OR BOTH, FOR THE WILLFUL SUBMISSION OF ANY STATEMENT OR EVIDENCE OF A MATERIAL FACT, KNOWING IT TO BE FALSE.

VA FORM 21-0958, FEB 2013

Pg 2/3

Form Approved: OMB No. 2900-0085
Respondent Burden: 1 Hour

Department of Veterans Affairs — APPEAL TO BOARD OF VETERANS' APPEALS

IMPORTANT: *Read the attached instructions before you fill out this form. VA also encourages you to get assistance from your representative in filling out this form.*

1. NAME OF VETERAN *(Last Name, First Name, Middle Initial)*	2. CLAIM FILE NO. *(Include prefix)*	3. INSURANCE FILE NO., OR LOAN NO.
~~ADOLFO~~ ARELLANO, ADOLFO R.	[redacted]	

4. I AM THE:
☐ VETERAN ☐ VETERAN'S WIDOW/ER ☐ VETERAN'S CHILD ☐ VETERAN'S PARENT
☑ OTHER *(Specify)* POA, BROTHER, HEALTH CARE SURROGATE

5. TELEPHONE NUMBERS		6. MY ADDRESS IS: *(Number & Street or Post Office Box, City, State & ZIP Code)*
A. HOME *(Include Area Code)*	B. WORK *(Include Area Code)*	c/o ADOLFO R. ARELLANO [redacted]
[redacted]		

7. IF I AM NOT THE VETERAN, MY NAME IS: *(Last Name, First Name, Middle Initial)* AKA PEDRO R. ARELLANO JR. PEDRO ARELLANO LAMAR

8. OPTIONAL BVA HEARING

IMPORTANT: *Read the information about this block in paragraph 6 of the attached instructions. This block is used to request a Board of Veterans' Appeals hearing. DO NOT USE THIS FORM TO REQUEST A HEARING BEFORE VA REGIONAL OFFICE PERSONNEL.*
Check one (and only one) of the following boxes:

A. ☐ I DO NOT WANT A BVA HEARING.
B. ☑ I WANT A BVA HEARING BY LIVE VIDEOCONFERENCE. AT MIAMI VA OFFICE
C. ☐ I WANT A BVA HEARING IN WASHINGTON, DC.
D. ☐ I WANT A BVA HEARING AT A LOCAL VA OFFICE.*
**Due to travel requirements for BVA personnel, selecting Option D may result in a lengthier waiting period for the hearing than the other options. (This option is also not available at the Washington, DC, or Baltimore, MD, Regional Offices.)*

9. THESE ARE THE ISSUES I WANT TO APPEAL TO THE BVA: *(Be sure to read the information about this block in paragraph 9 of the attached instructions.)*

A. ☐ I WANT TO APPEAL ALL OF THE ISSUES LISTED ON THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENTS OF THE CASE THAT MY LOCAL VA OFFICE SENT TO ME.
B. ☑ I HAVE READ THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENT OF THE CASE I RECEIVED. I AM ONLY APPEALING THESE ISSUES: *(List below.)*

JUNE 3, 2011 EFFECTIVE DATE
SHOULD BE DATE VETERAN BECAME 100% DISABLED.
C OCTOBER 1981 discharge ~~and~~ TO
JAN 1, 1982 - Date at VET WAS DETERMINED

10. HERE IS WHY I THINK THAT VA DECIDED MY CASE INCORRECTLY: *(Be sure to read the information about this block in paragraph 10 of the attached instructions.)*
TO BE 100% DISABLED.

SEE ATTACHED LETTER OF FEBRUARY 24, 2015

(Continue on the back, or attach sheets of paper, if you need more space.)

11. SIGNATURE OF PERSON MAKING THIS APPEAL	12. DATE *(MM/DD/YYYY)*	13. SIGNATURE OF APPOINTED REPRESENTATIVE, IF ANY *(Not required if signed by appellant. See paragraph 6 of the instructions.)*	14. DATE *(MM/DD/YYYY)*
[signature]	02/24/2015	[signature]	02/24/2015

VA FORM NOV 2009 9

[This page intentionally left blank]

February 24, 2015

Department of Veterans Affairs
Evidence Intake Center
PO Box 44445
Newman, GA 30217-0020

Re: 317/VSC/APPLS/MRH- CSS [REDACTED] ARELLANO, Adolfo R.- NOTICE OF DISAGREEMENT-on that part of December 24, 2014 Decision Limiting Effective Date of benefits to June 3, 2011 date of application, instead of 1981 date of disability.

Dear Board of Veteran Appeals (BVA),

In deciding on a June 3, 2011 effective date, the rating department appears to have overlooked, or ignored that part of the medical opinions of Dr. Diaz and Dr. Douyon, and Dr. Kumar (the "psychiatric opinions") which state that Veteran was 100% disabled as a result of his service connected schizoaffective and post traumatic disorders. The rating department also appears to have overlooked that part of the psychiatric opinions which stare that Veteran was so ill, that he could not realize that he was all, or disabled, or that he was entitled to and needed to make an application for service connected disability benefits.

It appears to me to be erroneous for the VA to deny this Veteran the benefits to which he is entitled from the date he became 100% disabled as a result of his service. Accordingly, could you please supplement your December 24, 2014 decision to change the effective date of June 3, 2011 to January 1, 1982 (the date by which Veteran's psychiatrist and his family member established that Veteran was 100% disabled)?

If for any reason you can not voluntarily correct your error, I am submitting Veteran's Form 9 requesting a Hearing asap with the Board of Veteran Appeals by live videoconference with Veteran and his witnesses at the Miami Office of the VA to appeal the above referenced effective date for benefits, and respectfully request the service connection be awarded retroactively From the date Veteran was observed by his psychiatrist and family members as being 100 %disabled, January 1, 1982) to the present June 3, 2011 effective date.

Respectfully,

/s/ Pedro Arellano

Pedro Arellano
Personal Representative of Veteran

[redacted]

Department of
Veterans Affairs
PO BOX 1437
ST PETERSBURG FL 33731

December 23, 2014

Veteran's Name:
Arellano, Adolfo, R

ADOLFO R ARELLANO
[redacted]

This letter is a summary of benefits you currently receive from the Department of Veterans Affairs (VA). We are providing this letter to disabled Veterans to use in applying for benefits such as housing entitlements, free or reduced state park annual memberships, state or local property or vehicle tax relief, civil service preference, or any other program or entitlement in which verification of VA benefits is required. Please safeguard this important document. This letter replaces VA Form 20-5455, and is considered an official record of your VA entitlement.

—America is Grateful to You for Your Service—

Our records contain the following information:

Personal Claim Information:
Your VA claim number is: [redacted]
You are the Veteran

Military Information:

Your character(s) of discharge and service date(s) include:

Navy, Honorable, 01-Nov-1977 - 29-Oct-1981

(You may have additional periods of service not listed above)

VA Benefits Information:

Service-connected disability: Yes

Your combined service-connected evaluation is: 30 PERCENT

The effective date of the last change to your current award was: 01-DEC-2014

Your current monthly award amount is: $407.75

You should contact your state or local office of Veterans' affairs for information on any tax, license, or fee-related benefits for which you may be eligible. State offices of Veterans' affairs are available at http://www.va.gov/statedva.htm.

Need Additional Information or Verification?

If you have any questions about this letter or need additional verification of VA benefits, please call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the federal relay number is 711. Send electronic inquiries through the Internet at https://iris.va.gov.

Sincerely yours,

S. L. SMITH

VETERANS SERVICE CENTER MANAGER

VA Benefit Details

SERVICE-CONNECTED DISABILITY: A condition incurred during or aggravated by military service, for which the Veteran is receiving VA benefits.

COMBINED SERVICE-CONNECTED EVALUATION: The Veteran's disability rating for all conditions determined to be service-connected.

CURRENT MONTHLY AWARD AMOUNT: The monthly monetary benefit paid to the Veteran or survivor receiving benefits under a VA program.

NON-SERVICE-CONNECTED PENSION: Benefit for a non-service connected Veteran who meets specific criteria, which include disability or age, wartime service, minimum length of service, and income restrictions. If a Veteran is eligible for service-connected benefits and pension benefits, VA will pay the higher benefit.

INDIVIDUAL UNEMPLOYABILITY (IU): The Veteran is receiving payment at the 100 percent rate, even though the combined service-connected evaluation is not 100 percent. The Veteran's service-connected conditions cause him/her to be unable to obtain or maintain substantially gainful employment because of the Veteran's service-connected conditions. The Veteran must periodically certify continued unemployability, but if there is no scheduled future reduction or medical examination required, he/she may be considered by some states to be permanently and totally disabled.

PERMANENT AND TOTAL (P&T) DISABILITY: The Veteran is considered by VA to be permanently and totally disabled because of his/her service-connected conditions.

SPECIAL MONTHLY COMPENSATION: The Veteran is receiving additional compensation for one or more of the following: a service-connected loss of or loss of use of one or more specific organs or extremities; a combination of severe disabilities; is 100 percent disabled and housebound, bedridden, or in the need of the aid and attendance of another person.

SPECIALLY ADAPTED HOUSING and/or SPECIAL HOME ADAPTATION GRANT: Grants provided by VA to service-connected veterans and service members to help build a new specially adapted house, to adapt a home they already own, or buy a house and modify it to meet their disability-related requirements.

Wartime Service Periods

Mexican Border Period: May 9, 1916, through April 5, 1917, for veterans who served in Mexico, on its borders or in adjacent waters.

World War I: April 6, 1917, through Nov. 11, 1918; for veterans who served in Russia, April 6, 1917, through April 1, 1920; extended through July 1, 1921, for veterans who had at least one day of service between April 6, 1917, and Nov. 11, 1918.

World War II: Dec. 7, 1941, through Dec. 31, 1946. Korean War: June 27, 1950, through Jan. 31, 1955.

Vietnam War: Aug. 5, 1964 (Feb. 28, 1961, for veterans who served "in country" before Aug. 5, 1964), through May 7, 1975.

Gulf War: Aug. 2, 1990, through a date to be set by law or Presidential Proclamation.

[SEAL]

DEPARTMENT OF VETERANS AFFAIRS
St Petersburg VA Regional Office
St Petersburg Florida

ADOLFO R. ARELLANO
VA File Number [redacted]

Represented by:

AGENT OR PVT ATTY-EXCLUSIVE
CONTACT NOT REQUESTED

Rating Decision
December 23, 2014

INTRODUCTION

The records reflect that you are a veteran of the Peacetime. You served in the Navy from November 1, 1977 to October 29, 1981. We received your Substantive Appeal on December 17, 2014. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. Service connection for schizoaffective disorder bipolar type, with post traumatic stress disorder is granted with an evaluation of 100 percent effective June 3, 2011.

2. Service connection for tardive dyskinesia (also claimed as the shakes") is granted with an evaluation of 0 percent effective January 31, 2012.

3. Basic eligibility to Dependents' Educational Assistance is established from June 3, 2011.

EVIDENCE

- VA treatment reports from May 30, 1994 to December 17, 2014, Orlando
- All evidence cited, and considered in statement of the case October 15, 2014, with included hearing testimony
- Copy of SOC submitted by veteran with additional comments, and remarks
- Facts, and statement with attached documentation received 12/17/2014
- Medical assessment from Dr. Douyton dated 05/17/2011
- Medical assessment dated 12/03/2014 from Dr. Kumar
- Medical assessment from Dr. Douyon date signed 12/03/2014
- Veterans supplemental claim received 06/13/2011 for PTSD
- Military service treatment reports, and personnel file from Navy from November 1, 1977 to October 29, 1981

REASONS FOR DECISION

1. Service connection for schizoaffective disorder bipolar type, with post traumatic stress disorder.

Service connection for schizo-affective disorder bipolar type, with post traumatic stress disorder has been established as directly related to military service. We have reviewed your entire claims folder, but only the pertinent evidence has been noted, and discussed.

We have reviewed the evidence of record, and have considered the evidence submitted with your Form 9. Upon review of your entire claims folder, with the new evidence reviewed, service connection has been establish3ed for schizo-affective disorder with post traumatic stress disorder has been granted. We have reviewed your statement in regards to the stressful event during service. Your personnel file does support that you were assigned to the USS Midway when the reported crash occurred. Your DD214, and personnel file does support your military occupation. You have had numerous statements, and clinical assessments submitted. The medical assessment from Dr. Douyton from December 3, 2014 supports that your residuals of your post traumatic stress disorder with schizo-affective disorder are related to your military stressful event of the crash on the USS Midway. More weight is given to Dr. Douytons assessment due to the fact that he cited his ratinale, along with this clinical assessment of your mental status over the past 15 years. We considered the articles, and the photograghs of the crash in July 1980. Your VA treatment reports from Orlando from 05/30/1994 to 12/17/2014 were considered. You are rountinely seen for therapy, and medication administration to assist with the control of your residual symptoms to include altered thought

patterns. Medical assessment also supports that you are shown to be compenent for VA purposes.

An evaluation of 100 percent is assigned from June 3, 2011, the date we received your original claim for service connection with numerous documents to support your altered claim for mental disorder, also claimed as traumatic brain injury. Informal assessments were received on June 3, 2011, with a formal claim received on June 13, 2011.

The effective date is June 3, 2011, and no eariler, as this is the first time that you formal claim was submitted. Your claims folder does not support a claim prior to this date. The mere fact that you were being treated for a mental disorder within your VA treatment reports does not support a claim. Therefore, there is no entitlement for compensation prior to the date of June 3, 2011.

We have assigned a 100 percent evaluation for your schizoaffective disorder bipolar type, with post traumatic stress disorder based on:

- Intermittent inability to perform activities of daily living
- Gross impairment in thought processes
- Persistent hallucinations
- Persistent delusions
- Difficulty in adapting to stressful circumstances
- Inability to establish and maintain effective relationships
- Difficulty in adapting to a worklike setting

- Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood
- Flattened affect
- Difficulty in establishing and maintaining effective work and social relationships
- Impairment of short- and long-term memory
- Impaired judgment
- Depressed mood
- Mild memory loss
- Chronic sleep impairment
- Anxiety
- Suspiciousness
- The examiner's assessment of your current mental functioning, which is partially reflected in your Global Assessment of Function score found below. .

Your Global Assessment of Function (GAF) score is 40. A range of 31-40 indicates some impairment in reality testing or communication; or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood. Your VA treatment reports do support that when medicated properly your judgment is intact. Upon review of all the medical assessments, with clinical assessments supports that your residuals of your schizo-affective disorder with post traumatic stress disorder warrants a 100 percent evaluation. Under the law, separate evaluations for mental disorders are not warranted,

and would be considered parymiding. Your residuals for your overall residuals are shown as assigned, with an evaluation of 100 percent.

The overall evidentiary record shows that the severity of your disability most closely approximates the criteria for a 100 percent disability evaluation.

This is the highest schedular evaluation allowed under the law for schizo-affective disorder with post traumatic stress disorder.

2. Service connection for tardive dyskinesia (also claimed as the shakes") as secondary to the service-connected disability of schizoaffective disorder bipolar type, with post traumatic stress disorder.

Service connection for tardive dyskinesia (also claimed as the shakes") has been established as related to the service-connected disability of schizoaffective disorder bipolar type, with post traumatic stress disorder.

A noncompensable evaluation is assigned from January 31, 2012, the date we received your claim for this contention. We have considered the statement in support of claim, with medical assessment from Dr. Douyton. His clinical assessment supports that it is as likely as not that your residuals of your tardive dyskinesia as secondary to the medications used to treat your mental disorder. We have reviewed your VA treatment reports from 1994 to 2014. Your residuals are shown as mild, with clinical neurological assessments are shown as normal. Your VA treatment reports supports some hand tremors, which is controlled with medications.

A noncompensable evaluation is assigned for tics which are mild in severity. A higher evaluation of 10 percent is not warranted unless tics are moderate.

This is a complete grant of this issue under appeal status, as the benefit has been granted.

3. Eligibility to Dependents' Educational Assistance under 38 U.S.C. chapter 35.

Eligibility to Dependents' Educational Assistance is derived from a veteran who was discharged under other than dishonorable conditions; and, has a permanent and total service-connected disability; or a permanent and total disability was in existence at the time of death; or the veteran died as a result of a service-connected disability. Also, eligibility exists for a serviceperson who died in service. Finally, eligibility can be derived from a service member who, as a member of the armed forces on active duty, has been listed for more than 90 days as: missing in action; captured in line of duty by a hostile force; or forcibly detained or interned in line of duty by a foreign government or power.

Basic eligibility to Dependents' Education Assistance is granted as the evidence shows the veteran currently has a total service-connected disability, permanent in nature. The effective date is June 3, 2011, the date you met reequirements for this benefit.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

RATING DECISION
Department of Veterans Affairs
St Petersburg VA Regional Office

[Filed December 23, 2014]

———

NAME OF VETERAN: ADOLFO R. ARELLANO

VA FILE NUMBER: [REDACTED]

SOCIAL SECURITY NR: [REDACTED]

POA AGENT OR PVT ATTY-EXCLUSIVE CONTACT NOT REQUESTED

COPY TO:

———

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
11/01/1977	10/29/1981	Navy	Honorable

Legacy Codes			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		None

JURISDICTION: Substantive Appeal Received 12/17/2014

ASSOCIATED CLAIM(s): 172; Partial Grant - Form 9; 12/17/2014

SUBJECT TO COMPENSATION (1. SC)

9411-9211	SCHIZOAFFECTIVE DISORDER BIPOLAR TYPE, WITH POST TRAUMATIC STRESS DISORDER Service Connected, Peacetime, Incurred Static Disability 100% from 06/03/2011 Original Date of Denial: 08/13/2013
5203-5201	STATUS POST REPAIR OF ACROMIOCLAVICULAR JOINT SEPARATION LEFT SHOULDER (CLAIMED AS LEFT SHOULDER) Service Connected, Peacetime, Incurred Static Disability 20% from 06/03/2011
5237	L3L4 AND L4-L5 SPONDYLOSIS (CLAIMED AS LUMBAR CONDITION) Service Connected, Peacetime, Incurred Static Disability 10% from 06/03/2011
8103	TARDIVE DYSKINESIA (ALSO CLAIMED AS THE SHAKES") ASSOCIATED WITH SCHIZOAFFECTIVE DISORDER BIPOLAR TYPE, WITH POST TRAUMATIC STRESS DISORDER Service Connected, Peacetime, Secondary Static Disability 0% from 01/31/2012 Original Date of Denial: 08/13/2013

COMBINED EVALUATION FOR COMPENSATION :
100% from 06/03/2011

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Peacetime)

8045 HEAD INJURY
Not Service Connected, Not
Incurred/Caused by Service
Original Date of Denial: 03/14/2012

ANCILLARY DECISIONS

Basic Eligibility under 38 USC Ch 35 from 06/03/2011

I certify that I have reviewed and electronically signed this decision /s/ M.Aprile, DRO

OMB Approved No. 2900-0736
Respondent Burden: 5 minutes

Department of Veterans Affairs

(DO NOT WRITE IN THIS SPACE)
(VA DATE STAMP)

RECEIVED VARO
ST PETERSBURG (317)
2011 AUG 29 A 8: 31

AUTHORIZATION TO DISCLOSE PERSONAL INFORMATION TO A THIRD PARTY

INSTRUCTIONS: Use this form if you want to give the Department of Veterans Affairs permission to release your personal beneficiary or claim information to a third party. This form may not be executed by any beneficiary recognized as incompetent for VA purposes, nor can VA accept this form from any beneficiary recognized as incompetent for VA purposes.

1. FIRST, MIDDLE, LAST NAME OF VETERAN *(Print clearly)*	2. FIRST, MIDDLE, LAST NAME OF BENEFICIARY/CLAIMANT WHO IS NOT THE VETERAN *(Print clearly)*
ADOLFO R. ARELLANO	PEDRO ARELLANO LAMAR (BROTHER)

3. ADDRESS OF BENEFICIARY/CLAIMANT *(No. and Street or rural route, City or P.O., State and ZIP Code)*
[redacted]

4. VA FILE NUMBER	5. SOCIAL SECURITY NUMBER
[redacted]	[redacted]

6. CONTACT INFORMATION

A. DAYTIME PHONE NUMBER	B. CELL PHONE NUMBER	C. E - MAIL ADDRESS *(If applicable)*
[redacted]	[redacted]	

7. I (beneficiary/claimant) authorize the Department of Veterans Affairs (VA) to contact the person or organization listed below for the purposes of providing the following information pertaining to my VA record. *(Check only one box below to tell VA the specific benefit or claim information you want disclosed.)*

☑ Any Information (Go to Item 9) ☐ Limited Information (Go to Item 8)

8. IF YOU SELECTED "LIMITED INFORMATION", CHECK ALL THAT APPLY

☐ Status of pending claim or appeal ☐ Amount of money owed VA ☐ Other
☐ Current benefit and rate ☐ Request a benefit payment letter _____
☐ Payment history ☐ Change of address or direct deposit _____

9. IF YOU SELECTED "ANY INFORMATION", THE TERMS OF SUCH RELEASE OF INFORMATION WILL BE:

☐ One time only ☐ From the date of signing below until _____
☑ Ongoing until written notice is given to VA to terminate (Specify date - month, day, year)

10. VA IS AUTHORIZED TO DISCLOSE THE INFORMATION AS SPECIFIED ABOVE TO THE PERSON OR ORGANIZATION LISTED BELOW. NOTE: IF AUTHORIZATION IS FOR AN ORGANIZATION, PLEASE PROVIDE THE FIRST AND LAST NAME OF THE ORGANIZATION'S REPRESENTATIVE. *(Please print clearly)*

A. NAME OF PERSON OR ORGANIZATION	B. ADDRESS OF PERSON OR ORGANIZATION
PEDRO ARELLANO LAMAR	[redacted]
	[redacted]

11. SPECIFY THE SECURITY QUESTION YOU WANT USED WHEN VERIFYING THE IDENTITY OF YOUR DESIGNATED THIRD PARTY. CHECK ONLY *ONE* SECURITY QUESTION BOX IN 11A AND PROVIDE THE ANSWER IN 11B.

A. SECURITY QUESTION	B. ANSWER
☐ The city and state your mother was born in	
☐ The name of the high school you attended	
☑ Your first pet's name	[redacted]
☐ Your favorite teacher's name	
☐ Your father's middle name	

12A. SIGNATURE *(Do NOT print)*	12B. DATE SIGNED
[signature]	AUGUST 25, 2011

PRIVACY ACT INFORMATION: VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration as identified in the VA system of records, 58VA21/22/28 Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is voluntary. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect.

RESPONDENT BURDEN: We need this information to release your private benefit and/or claim information to a designated third party(ies). The execution of this form does not authorize the release of information other than that specifically described. The information requested on this form will authorize release of the information you specify. Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 5 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.whitehouse.gov/omb/library/OMBINV.VA.EPA.html#VA. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

VA FORM MAY 2010 **21-0845** SUPERSEDES VA FORM 21-0845, DEC 2009, WHICH WILL NOT BE USED.

[This page intentionally left blank]

Report from MIAMI VAME——Station #546

Medical Record PROBLEM LIST

	Date Recorded	Problems	Date of Onset	Date Resolved
1.	6/7/11	Prolonged posttraumatic stress disorder (309.81)		
2.	5/17/11	Schizoaffective Disorder, unspecified (195.70)		
3.	2/16/11	Sensorineural hearing loss, asymmetrical (ICD-9-CM 389.16) (389.16)		
4.	2/14/11	Screening Colonoscopy with Fam Hx of Colon CA (V76.51)		
5.	5/14/10	Neuroleptic-Induced Tardive Dyskinesia (333.82)		
6.	1/26/10	Actinic Keratosis (ICD-9-CM 702.0) (702.0)		
7.	1/26/10	Personal History of other Malignant Neoplasm of Skin (ICD-9-CM v10.83) (V10.83)		
8.	3/11/00	Fuchs' Endothelial Dystrophy (ICD-9-02a 371.57) (371.57)		
9.	3/1/07	Left Nasal Defect, hx Moh's Resection for Cancer (799.9) re-excision skin margins, debridement, FTSG to defect	2/1/07	
10.	10/19/06	Hypertension, Essential (401.9)		
11.	3/21/06	Psoriasis (696.1)		

12.	12/6/04	Disorders of refraction and accommodation (ICD-9-CM 367.9) (367.9)	
13.	11/13/02	HYPERLIPIDEMEIA (272.2)	
14.	8/21/02	OBESITY (278.00)	
15.	7/3/01	BIPOLAR I D/O (296.7)	
16.	8/5/02	$ ANXIETY STATE NOS (300.00)	5/14/07

$ = Requires verification by provider

ARELLANO, ADOLFO [redacted]	MIAMI VAMC Pt Loc: OUTPATIENT	Printed: 7/26/11 VA FORM 10-1415