

*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. Barenly, Esq.

VA General Counsel (027)

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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,<sup>1</sup> 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 (what we will refer to as the "mental disorder").<sup>2</sup> 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.

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<sup>1</sup> See 38 U.S.C. §§ 7252(a), 7266(a).

<sup>2</sup> 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.

## 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.<sup>3</sup> This foundational principle is also set forth in VA regulations.<sup>4</sup> The Court reviews the Board's assignment of an appropriate effective date for clear error.<sup>5</sup> We will reverse a factual finding of the Board when, after reviewing the evidence of record, the Court is left with "a definite and firm conviction that a mistake has been committed."<sup>6</sup> However, and importantly for this appeal, the Court reviews legal questions de novo.<sup>7</sup> 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.<sup>8</sup> If the Board failed to do so, remand is appropriate.<sup>9</sup>

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.<sup>10</sup> The Board used that date for the assignment of the effective date for service connection for his mental disorder.<sup>11</sup> 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.

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<sup>3</sup> 38 U.S.C. § 5110(a).

<sup>4</sup> 38 C.F.R. § 3.400(b).

<sup>5</sup> *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).

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

<sup>7</sup> *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (en banc).

<sup>8</sup> 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

<sup>9</sup> *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

<sup>10</sup> *See* Appellant's Br. at 2.

<sup>11</sup> R. at 10-11.

Appellant's argument is squarely foreclosed by binding precedent. In *Andrews v. Principi* the Federal Circuit addressed whether section 5110 was subject to equitable tolling.<sup>12</sup> It rejected that argument.<sup>13</sup> 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.<sup>14</sup>

Appellant attempts to avoid the clear holding in *Andrews* by arguing that it did not establish a broad rule that equitable tolling can never apply to section 5110, but was limited only to the factual situation before the court in that case.<sup>15</sup> And he makes similar arguments<sup>16</sup> concerning this Court's decision in *Noah v. McDonald*, in which we interpreted *Andrews* to foreclose the application of equitable tolling to section 5110.<sup>17</sup> 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.<sup>18</sup> 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."<sup>19</sup>

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<sup>12</sup> 351 F.3d 1134, 1137-38 (Fed. Cir. 2003).

<sup>13</sup> *Id.*

<sup>14</sup> *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)).

<sup>15</sup> *See, e.g.*, Appellant's Br. at 7-9.

<sup>16</sup> *See id.* at 9-10.

<sup>17</sup> 28 Vet.App. 120, 128 (2016)).

<sup>18</sup> 31 Vet.App. 147 (2019).

<sup>19</sup> *Id.* at 154.

If we were writing on a blank slate, appellant's arguments would be worth exploring.<sup>20</sup> 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.

## 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:

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<sup>20</sup> 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).