UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

ADOLFO R. ARELLANO, Appellant,	:	
v.	:	INFORMAL *AMICUS* BRIEF
ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS, in his official capacity, Appellee.	:	CASE 20-1073

Submitted by Paul Wright, *pro se*, *Amicus*

Supporting Appellant Adolfo R. Arellano, seeking reversal

Rule 47.4 Certificate of Interest

Mr. Wright's individual interest in this matter is to protect his own rights as a disabled veteran, by ensuring that the Court, the Veterans Court and the Secretary recognize that 38 U.S.C. § 503(a), and traditional equity principles as addressed in Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990); and Henderson v. Shinseki, 562 U.S. 428 (2011), entitle each disabled veteran to equitable tolling of the deadline in 38 U.S.C. § 5110(b)(1) unless the government proves it provided the veteran a proper discharge process.

Mr. Wright's authority to file this Informal *Amicus* Brief derives from the Court's solicitation of *amicus* briefs in the order dated August 5, 2020, which order expressly waives any requirement of *amici* to obtain consent or authority to file.

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Mr. Wright's Responses to Questions on Informal Brief Form:

1. Yes. Mr. Wright is the Appellant in Case 20-1982, which is presently pending before the Court. Case 20-1982 does not directly involve the issues in this case. Case 20-1982 indirectly impacts effective date of benefits, which the Secretary has adjudicated in Mr. Wright's favor as a matter of law pursuant to 38 U.S.C. §§ 5103 and 5104.
2. Yes. The Veterans Court interpreted 38 U.S.C. § 5110(b)(1). Please *see* Mr. Wright's Addendum to Informal Brief Questions for further discussion.
3. No. The Veterans Court did not decide constitutional issues.
4. Yes. The Veterans Court failed to recognize that 38 U.S.C. § 503(a), and traditional equity principles as addressed in Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990); and Henderson v. Shinseki, 562 U.S. 428 (2011), entitle each disabled veteran to equitable tolling of the deadline in 38 U.S.C. § 5110(b)(1) unless the government proves it provided the veteran a proper discharge process. Please *see* Mr. Wright's Addendum to Informal Brief Questions for further discussion.
5. No. Mr. Wright's Informal *Amicus* Brief fully addresses question A as posed in the Court's order dated August 5, 2020.
6. The Court should issue a precedential opinion overturning Andrews, and holding that section 503(a), and traditional equity principles as addressed in Irwin and Henderson, entitle each disabled veteran to equitable tolling of the deadline in section 5110(b)(1) unless the government proves it provided the veteran a proper discharge process.
7. Yes. Argument will aid the Court. While Mr. Wright has not argued a case since 2007 (when disability resulting from in-service injury ended his career in law), Mr. Wright is willing to serve the Court and the parties as an *amicus* by presenting argument from the perspective of a *pro se* disabled veteran with meaningful input to offer on this case of vital importance to disabled veterans, especially Mr. Wright's peers who also left active duty before Congress enacted the Veterans Judicial Review Act of 1988.

Mr. Wright's Addendum to Informal Brief Form

In its order dated August 5, 2020 ("Order"), the Court invited *amici* to submit briefs on questions posed. In his Informal *Amicus* Brief, Mr. Wright addresses question A in support of Appellant Adolfo R. Arellano, seeking reversal:

> **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)?**

"YES" is the answer to both parts of question A.

Question A implicates Congress's "longstanding solicitude for veterans," *see* U.S. v. Oregon, 366 U.S. 643, 647 (1961); and "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," *see* King v. St. Vincent's Hospital, 502 U. S. 215, 220–221, n. 9 (1991).

Congress answered the first part of question A in the affirmative in 38 U.S.C. § 503(a), which entitles veterans to equitable relief in the event of administrative error on the part of the government. The Supreme Court also answered in the affirmative in Henderson v. Shinseki, 562 U.S. 428 (2011).

Henderson stands for the proposition that equitable tolling applies to non-jurisdictional claim-processing deadlines under Title 38.[1] Section 5110(b)(1) imposes a non-jurisdictional claim-processing deadline, indistinguishable in that regard from the deadline addressed in Henderson.

Section 5110(b)(1) allows veterans to preserve the day after discharge as the effective date for disability benefits, by filing a claim within a year after discharge. Congress thus formalized its clear intent that disabled veterans will accrue benefits immediately upon leaving active duty. As section 503(a) makes clear, Congress intends that government errors will not block such immediate accrual.

For example, the government owes veterans both (1) a thorough discharge physical examination report disclosing all disabilities, *see, e.g.*, MILPERSMAN 1900-808; and (2) a thorough briefing on the disability benefits thus available and the procedures for securing such benefits, *see, e.g.*, 10 U.S.C. § 1142(b)(17) and (19). In formalizing its clear intent that disabled veterans will accrue benefits immediately upon leaving active duty, Congress necessarily presumed that the government would conduct such a proper discharge process for each veteran – which would allow the clock to begin running on the section 5110(b)(1) post-discharge deadline in a manner fair to all concerned.

[1] Footnote 4 in Henderson explains why the Supreme Court did not formally hold that equitable tolling applies to non-jurisdictional claim-processing deadlines. But the government did not dispute that conclusion, and the Henderson rationale leaves no room for a contrary conclusion.

When the government fails to conduct a proper discharge process, section 503(a) and traditional equity principles as addressed in Irwin and Henderson require tolling of the section 5110(b)(1) deadline. The government must therefore affirmatively prove that each disabled veteran was provided a proper discharge process, in order to rebut the presumption of tolling in that veteran's case.

As to the second part of question A, the Court must overrule Andrews.

Andrews relied on the express assumption that equitable tolling applies only to statutes of limitation. As section 503(a) makes abundantly clear, however, equitable tolling applies to any claim-processing deadline under Title 38.

Andrews misapplied Irwin, by treating the nature of the government's error as a barrier to equitable tolling. But Andrews was flatly wrong to assume that government error must amount to "trickery or misconduct" in order to toll a deadline.

The standard in section 503(a) is very clear: veterans are entitled to equitable relief in the event of any "administrative error on the part of the Federal Government or any of its employees." Under that section 503(a) standard, the government's inability to prove a proper discharge process results in the presumption of equitable tolling remaining unrebutted – without regard to any alleged "trickery or misconduct" on the part of the government.

Andrews serves literally as a "case study" proving the entrenched anti-veteran bias that has existed in the administration of veteran benefits since the very founding of our nation, and which Congress intended to root out with judicial oversight under the Veterans Judicial Review Act of 1988. That anti-veteran bias is a threat not only to veterans, but to our national defense – given that veterans constitutes the "surge capacity" our nation needs in order to turn out sufficient numbers of combat-ready warriors in time of need. The Court's posing of question A is proof that this Court, at least, now takes seriously the intent of Congress to right old wrongs committed to the detriment of veterans and our national defense.

Those for whom the overall result and afore-mentioned errors in Andrews are insufficient evidence of the entrenched anti-veteran bias need only consider the specific point that Andrews minimized the Secretary's duties under 38 U.S.C. § 7722 – similar to duties under 10 U.S.C. § 1142 – as merely "hortatory" guidance, breach of which leaves veterans with no remedy. But section 503(a) affords a very specific remedy in the event of such administrative error – equitable relief as may be necessary to ensure that veterans receive all the benefits Congress intends.

The fact that Andrews simply ignores a clear statutory remedy is direct proof of the anti-veteran bias Congress enacted the Veterans Judicial Review Act of 1988 to root out. It is irrelevant whether that bias is willful or the result of mere ignorance, Andrews amply proves that the bias is real.

In summary, "YES" is the answer to both parts of question A, as posed in the Court's order dated August 5, 2020.

Mr. Wright hereby humbly requests an exemption from the requirement to file 26 paper copies. As a disabled veteran under Extreme Financial Hardship as the Secretary has formally found, Mr. Wright simply does not have available funds to pay for printing and shipping of paper copies.

Very respectfully submitted, this 22nd day of September, 2020

Paul Wright

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