NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

BRUCE R. TAYLOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-2211

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-2390, Judge Amanda L. Meredith, Judge Joseph L. Falvey, Jr., and Judge William S. Greenberg.

SUA SPONTE

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, REYNA, WALLACH, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

Order for the court filed by PER CURIAM.

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[1] Circuit Judge O'Malley retired on March 11, 2022.

CONCURRENCE

DYK, *Circuit Judge,* with whom REYNA and WALLACH, *Circuit Judges*, join, concurs.

MOORE, *Chief Judge*, with whom PROST, C*ircuit Judge*, joins, concurs.

PER CURIAM.

O R D E R

Upon consideration of the Supreme Court's recent decision in *Arellano v. McDonough*, 143 S. Ct. 543 (2023),

IT IS ORDERED THAT:

(1) The stay of proceedings put in place by this court's February 22, 2022, order is lifted.

(2) The parties are directed to file supplemental briefs, not to exceed fifteen pages each, addressing the impact of the Supreme Court's decision in *Arellano* on this case. Appellant's brief shall be filed no later than 14 days from the date of filing of this order. Appellee's brief shall be filed no later than 14 days after the filing of appellant's brief.

FOR THE COURT

March 1, 2023
Date

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

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I

We join the order but offer an additional thought. In their supplemental briefing, in light of *Arellano v. McDonough*, 143 S. Ct. 543 (2023), we suggest that the parties may wish to further consider the application of other equitable doctrines, particularly equitable estoppel.

In *Arellano*, the Supreme Court invited this court to consider non-constitutional equitable doctrines as an

alternative to equitable tolling in the 38 U.S.C. § 5110 context, stating that it did not "address the applicability of other equitable doctrines, such as waiver, forfeiture, and estoppel." *Id*. at 552 n.3. This is in keeping with our strong obligation to avoid the decision of constitutional issues whenever possible. *See Bond v. United States*, 572 U.S. 844, 855 (2014). We find the Court's reference to equitable estoppel to be particularly significant, and to invite us to further consider that doctrine.

II

In this case the veteran has argued, following the original panel decision, that the doctrine of equitable estoppel should excuse his late filing because "unlike most veterans, he was not free to file for benefits as soon as his claim ripened," and in fact "was affirmatively prevented from doing so—by the executive itself," which enjoined him from discussing the events giving rise to his disability claim. Appellant's En Banc Br. 40 (emphasis omitted). The government responded that equitable estoppel is not available in such circumstances under the Supreme Court's decision in *OPM v. Richmond*, which held that "judicial use of the equitable doctrine of estoppel cannot grant . . . a money remedy that Congress has not authorized." 496 U.S. 414, 426 (1990); *see* Gov't En Banc Br. 19. And yet the Supreme Court in *Arellano* appears to assume that in some circumstances equitable estoppel might be available, even in the money-remedy context of § 5110.

We suggest that, in light of *Arellano*'s invitation to further consider equitable estoppel, the parties may wish to consider a line of this court's cases which have distinguished *Richmond* on the ground that equitable remedies such as estoppel are appropriate in the limited circumstances where the government's actions violate another federal statute—a theory mentioned in Mr. Taylor's brief but not fleshed out. *See* Appellant's En Banc Br. 36 ("When the executive misuses its powers to thwart Congress's clear

dictates, the injury to separation of powers is different not only in degree, but in kind to that which occurred in *Richmond*.").

III

We have held that when the Office of Personnel Management ("OPM") violates its statutory duty to inform annuitants of their right to elect a survivor annuity, and there is evidence that the recipient would have so elected, the government's failure excuses missing a statutory election deadline. *See Dachniwskyj v. OPM*, 713 F.3d 99, 102 (Fed. Cir. 2013).[1] We held in *Brush v. OPM*, a case cited by appellant here, and later cases that *Richmond* does not prevent us from interpreting statutory time bars such as § 5110 in light of a Congressional requirement that an agency inform beneficiaries of their rights. 982 F.2d 1554, 1564 (Fed. Cir. 1992) ("There is no indication that the holding in *Richmond* was meant to apply when an agency fails to carry out a statutory duty at a detriment to the other party and a benefit to itself."); *see* Appellant's En Banc Br. 34–35, 47; En Banc Reply Br. 11–13, 15, 17–18.[2] In other words, these cases suggest that when the government violates a statutory duty, equitable estoppel may be available. *See also Barber v. United States*, 676 F.2d 651, 658 (Ct. Cl. 1982) (government failed to provide statutorily mandated notice and counsel to servicemember's spouse); *Kelly v. United States*, 826 F.2d 1049, 1053 (Fed. Cir. 1987) (same).

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[1] *See also Nixon v. OPM*, 452 F.3d 1361 (Fed. Cir. 2006); *Simpson v. OPM*, 347 F.3d 1361 (Fed. Cir. 2003); *Wood v. OPM*, 241 F.3d 1364 (Fed. Cir. 2001); *Vallee v. OPM*, 58 F.3d 613 (Fed. Cir. 1995); *Brush v. OPM*, 982 F.2d 1554 (Fed. Cir. 1992).

[2] *See also Wood*, 241 F.3d at 1367; *Nixon*, 452 F.3d at 1367.

IV

There appears to potentially be a relevant federal statute that the government may have violated here. The Department of Veterans Affairs ("VA") has been obligated since 1970 to inform veterans about their benefit rights. *See* 38 U.S.C. § 241 (1970), *recodified as amended at* 38 U.S.C. § 6303 (2021).[3] In its dealings with Mr. Taylor, the VA may have violated that duty by effectively instructing him that he could not file a claim.

The government maintains that if Mr. Taylor had "filed a minimal claim before 2006 without divulging classified information," "it is possible that the claim could have served as the basis for an earlier effective date" under § 5110. Gov't En Banc Br. 48. But, as the government concedes, the VA failed to "communicat[e] to Mr. Taylor that he could file a minimal claim." Gov't En Banc Br. 10, 53. And indeed, it may have advised him that to file a sufficient claim he had to provide "evidence" of a service connection or show an injury with a presumed service connection. *See* VA Form 21-526EZ, Dep't of Veterans Aff. (2023), https://www.vba.va.gov/pubs/forms/VBA-21-526EZ-ARE.pdf at 4 ("To support a claim for service

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[3] *See* 38 U.S.C. § 6303(b) ("[The VA] shall by letter advise each veteran at the time of the veteran's discharge . . . of all benefits and services under laws administered by the Department for which the veteran may be eligible."); *id*. § 6303(c)(1)(A) ("[The VA] shall distribute full information to eligible veterans . . . regarding all benefits and services to which they may be entitled under laws administered by [the VA] . . . ."); *id*. § 6303(d) ("[The VA] shall provide, to the maximum extent possible, aid and assistance (including personal interviews) to . . . veterans . . . with respect to subsections (b) and (c) and in the preparation and presentation of claims under laws administered by the [VA].").

connection, the evidence must show[, *inter alia*,] . . . . A relationship exists between your current disability and an injury, disease, symptoms, [*sic*.] or event in service.").[4] That requirement, under Mr. Taylor's non-disclosure obligation enforced by a threat of court martial, would have made filing a complete claim impossible, and the form likely suggested that filing a minimal claim would not satisfy the VA's requirements. *See* En Banc J.A. 10, 77. Our OPM line of cases may suggest that his late filing here should be excused, and he should be granted the benefit of an earlier eligibility date.

To be sure, we have said in different circumstances that the VA's obligation to inform veterans about their benefits is not judicially enforceable. *See Rodriguez v. West*, 189 F.3d 1351, 1355 (Fed. Cir. 1999); *Andrews v. Principi*, 351 F.3d 1134, 1137 (Fed. Cir. 2003). But neither *Rodriguez* nor *Andrews* involved the government effectively preventing veterans, via an official document such as a government form, from receiving benefits—let alone pairing such communications with the threat of criminal sanctions. In this case, by contrast, the VA itself, in an official form, arguably communicated that Mr. Taylor was barred from seeking disability compensation while his secrecy oath was in effect. And that secrecy oath threatened Mr. Taylor with court martial should he violate it. *See* En Banc J.A. 10.

There is at least a question as to whether *Rodriguez* and *Andrews* are in tension with our OPM precedent, and it could be argued that they are out of step with subsequent

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[4] There is no reason to believe that the form at the time of Mr. Taylor's discharge differed in relevant respects from its current instantiation as VA Form 21-526EZ.

cases enforcing the VA's related duty to assist under 38 U.S.C. § 5103A.[5]

We have repeatedly reversed and remanded cases in which the Veterans Court "require[ed] an impermissibly high threshold to trigger the VA's duty to assist" under § 5103A, and given instructions to correct the error. *Jones v. Wilkie*, 918 F.3d 922, 926 (Fed. Cir. 2019). For example, in *Sullivan v. McDonald*, 815 F.3d 786, 790–91 (Fed. Cir. 2016), we held that § 5103A's implementing regulations required the agency to attempt to obtain all VA medical records adequately identified by the claimant, even those that were not relevant to the claim, and remanded to enforce that requirement. We have reached similar results in other cases. *See Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009); *McGee v. Peake*, 511 F.3d 1352 (Fed. Cir. 2008); *Hayre v. West*, 188 F.3d 1327 (Fed. Cir. 1999), *overruled on other grounds*, *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002) (en banc).[6]

V

As to whether equitable estoppel applies here, we offer no conclusions. We suggest only that, as the Supreme

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[5] Contrary to Chief Judge Moore's concurring opinion, we are not suggesting that the VA must, every time one of its employees interacts with a veteran, assist him or her in filing a claim. *See* Concurrence at 2–3 n.1. We suggest only that it is arguable that the VA in its official forms, or where there is an official governmental non-disclosure instruction, must not mislead the veteran about his or her benefits.

[6] This line of cases predated the 2017 amendment to the statute that explicitly made the duty to assist enforceable. *See* Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 2(d), 131 Stat. 1105, 1105–06 (codified at 38 U.S.C. § 5013A(f)).

Court has invited us to consider the application of equitable estoppel to § 5110, the court should receive further briefing on that issue.

VI

Chief Judge Moore's opinion suggests that we propose a new ground not raised by the veteran here. The ground is not new. We invited briefing on equitable estoppel flowing from the government non-disclosure orders. *See Taylor v. McDonough*, 4 F.4th 1381 (Fed. Cir. 2021) (en banc). The government responded that the Supreme Court's decision in *Richmond* barred equitable estoppel. *See* Gov't En Banc Br. 19. The veteran urged that *Richmond* did not prevent the application of equitable estoppel where the government's actions supporting equitable estoppel violated a statute. *See* Appellant's En Banc Br. 36. Our only suggestion is that an additional statute (§ 6303) might be relevant to that argument. This is no more introducing a new ground than was the en banc court's suggestion that the parties consider additional case authority regarding a right of access, case authority not mentioned in the panel briefing by the veteran. *Compare Taylor*, 4 F.4th at 1382, *with* Appellant's Panel Br.; Appellant's Panel Reply Br.

The fact is that we are all doing our best to properly consider a difficult case where the asserted facts and ultimate ground for relief—elimination of the § 5110 bar because of the government's non-disclosure orders—are clear, but the underlying legal authorities have not been briefed as comprehensively as they might have been.

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MOORE, *Chief Judge*, with whom PROST, *Circuit Judge*, joins, concurring.

The concurrence authored by Judge Dyk (the concurrence) invites the parties to address a new statutory argument that would have sweeping consequences for Veterans law. The concurrence suggests Mr. Taylor may be entitled to an earlier effective date because the VA violated its statutory duty under § 6303 to aid Mr. Taylor in filing for benefits. This is a new ground for relief that has never been presented. We cannot devise new statutory grounds under the guise of constitutional avoidance. *See Zobrest v.*

Catalina Foothills School District, 509 U.S. 1, 7–8 (1993) ("The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke this rule.").

The concurrence conflates the equitable estoppel arguments in this case – which were already briefed at the panel stage, decided by the panel, and briefed extensively at the en banc stage – with its new statutory duty to assist argument. There is no need for additional briefing on whether equitable estoppel should lie against the government given the facts of this case – that has been briefed in hundreds of pages already.

The concurrence's new statutory argument is that the VA has an enforceable statutory duty under § 6303 to aid veterans in filing claims for benefits, and if the VA violates this duty, § 5110's effective date is unenforceable. *See* Dyk Concurrence at 3–5. The concurrence suggests that we interpret § 6303 as creating a VA duty to assist veterans regarding filing for benefits even before they have filed claims. This contrasts with the duty to assist *claimants* set forth in § 5103A. As the concurrence acknowledges, its new statutory argument is at odds with settled precedent. *Rodriguez v. West*, 189 F.3d 1351, 1355 (Fed. Cir. 1999); *Andrews v. Principi*, 351 F.3d 1134, 1137 (Fed. Cir. 2003).

Importantly, this interpretation would eliminate the claim filing as the triggering effective date for benefits. It is unclear precisely how the new effective date for benefits would be ascertained under the concurrence's construction – presumably at the time the VA had the duty to help the veteran file a claim and did not.[1] And since the

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[1] Though the concurrence claims its § 6303 statutory duty to assist would only apply to official VA forms or official VA non-disclosures, there are no such limiting

concurrence keys the duty to assist in this case to the standard notice form every veteran receives upon discharge, if that notice was deficient, *every* veteran could claim benefits back to their notice date. Nobody in this case suggested that standard notice was deficient. In fact, the Board found the VA satisfied its duty to assist under § 5103A, a finding that was not appealed. En Banc J.A. 84–86.

"Our adversary system is designed around the premise that the parties know what is best for them and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). A judge's ruminations about how this appeal should have been argued should not guide our limited en banc review. And the ruminations in this case have a potential unexplored breadth of consequences that could be quite profound indeed.

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principles in § 6303. For example, nurses and doctors who see veterans at VA hospitals or administrators within the VA to whom the veteran may make a comment could trigger the duty of the VA to assist in filing the claim.