No. 10-1405

In the Supreme Court of the United States

LARRY G. TYRUES, PETITIONER

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to challenge in the Court of Appeals for Veterans Claims a prior, final decision of the Board of Veterans' Appeals from which petitioner had failed to take a timely appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 631 F.3d 1380. The opinion of the en banc United States Court of Appeals for Veterans Claims (Pet. App. 11-88) is reported at 23 Vet. App. 166. The decisions of the Board of Veterans' Appeals (Pet. App. 105-128, 164-178) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2011. The petition for a writ of certiorari was filed on May 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served on active duty in the United States Army, including service in the Persian Gulf War. Pet. App. 2. In March 1995, petitioner filed a claim with the Department of Veterans Affairs (VA) for disability benefits for a lung disorder, asserting a direct service connection under 38 U.S.C. 1110. Pet. App. 3. In December 1996, following a VA hearing officer's suggestion that his lung disability and other symptoms might warrant a claim for disability due to "Persian Gulf Syndrome," petitioner filed a claim for presumptive service-connected disability under 38 U.S.C. 1117.[1] Pet. App. 13.

2. The VA regional office determined that petitioner had not demonstrated a connection between his symptoms and his military service, and it accordingly denied compensation. Pet. App. 15-16. Petitioner appealed to the agency's Board of Veterans' Appeals (Board). In September 1998, the Board denied petitioner's claim for a direct service-connected lung disability under Section 1110, but it remanded petitioner's Section 1117 claim to the VA regional office for further factual findings. *Id.* at 3; see *id.* at 164-178.

Together with its decision, the Board mailed petitioner a "Notice of Appellate Rights." Pet. App. 3, 177-178. The notice explained that, under 38 U.S.C. 7266, "a decision of the [Board] granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120

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[1] Section 1117 authorizes compensation for Persian Gulf veterans who suffer from a chronic disability not attributable to any known clinical diagnosis. Pet. App. 3, 13; see 38 U.S.C. 1117; 38 C.F.R. 3.317(a).

days." Pet. App. 3, 177-178. The notice further explained that "[a]ppellate rights do not attach to those issues addressed in the remand portion of the Board's decision, because a remand * * * does not constitute a decision of the Board on the merits of your appeal." *Id.* at 3-4, 178. Petitioner did not appeal. *Id.* at 4.

3. In April 2004, based on the factual record assembled on remand, the Board denied petitioner's Section 1117 claim for undiagnosed illness resulting from service in the Persian Gulf War. Pet. App. 4, 121.

Petitioner appealed to the Court of Appeals for Veterans Claims (Veterans Court), seeking review not only of the Board's April 2004 decision denying his Section 1117 claim, but also of the Board's September 1998 decision denying his claim under Section 1110. The Veterans Court affirmed as to the Section 1117 claim. Pet. App. 93-104. The court held that it lacked jurisdiction to consider petitioner's Section 1110 claim because petitioner had failed to file a timely appeal from the Board's September 1998 decision denying that claim. See *id.* at 98-100.

Petitioner sought review in the Federal Circuit. On the government's motion, the court of appeals vacated the Veterans Court's decision and remanded for reconsideration in light of two intervening decisions concerning the finality of Board decisions. See Pet. App. 89-92 (remanding for reconsideration in light of *Joyce* v. *Nicholson*, 443 F.3d 845 (Fed. Cir. 2006), and *Roebuck* v. *Nicholson*, 20 Vet. App. 307 (2006)).

4. The Veterans Court, sitting en banc, held that it lacked jurisdiction to review the Board's 1998 decision

denying relief on petitioner's Section 1110 claim.[2] Pet. App. 11-88. The court explained that "the September 1998 Board decision was final concerning the issue of [S]ection 1110 compensation for direct service connection for a lung disability." *Id.* at 45; see *id.* at 41-44. The court concluded that "[b]ecause [petitioner] did not file [a notice of appeal] within 120 days after VA mailed notice of the Board's final September 1998 decision, the Court lacks jurisdiction to review the September 1998 Board decision." *Id.* at 45 (citing 38 U.S.C. 7266(a)).

The Veterans Court further held that the Board's definitive rejection of petitioner's Section 1110 claim was not rendered non-final by the Board's contemporaneous remand of petitioner's Section 1117 claim. See Pet. App. 19-45 & n.6. The court explained that, under the informal, nonadversarial administrative scheme governing veterans' benefits, "there is no requirement that a veteran's various claims for relief be simultaneously filed and adjudicated, either upon initial review or on appeal." *Id.* at 32 (quoting *Elkins* v. *Gober*, 229 F.3d 1369, 1375 (Fed. Cir. 2000)). The court noted that the Board's 1998 decision had specifically denied relief on the Section 1110 claim, and thus constituted a complete decision of the Board on that claim for purposes of 38 U.S.C. 7104(d)(2), which provides that each decision of the Board shall include "an order granting appropriate relief or denying relief." See Pet. App. 24. The court also observed that petitioner had been notified, at the time of the 1998 decision, that he had the right to appeal the Board's denial of his Section 1110 claim. See *id.* at

[2] On the merits of petitioner's Section 1117 claim, the court held that the Board had not adequately explained its reasons for rejecting certain medical evidence, and it remanded the issue to the agency for further proceedings. Pet. App. 46-53.

42-43. The court noted, in that regard, that petitioner had "not raise[d] any argument that challenges * * * the sufficiency of the notice of appellate rights." *Id.* at 43. The court accordingly held that it lacked jurisdiction to review the Board's 1998 decision. *Id.* at 45.[3]

5. The court of appeals affirmed. Pet. App. 1-10. The court explained that administrative finality differs from judicial finality, and that "there is not always 'a precise congruence between the classical jurisdictional requirements applied to appeals from district courts and the jurisdictional standards applicable to review of administrative proceedings.'" *Id.* at 6 (quoting *Dewey Elecs. Corp.* v. *United States*, 803 F.2d 650, 654 (Fed. Cir. 1986)). In the administrative context, the court observed, an agency decision is sufficiently "final" to permit judicial review when "the process of the administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and * * * rights or obligations have been determined or legal consequences will flow from the agency action." *Id.* at 6-7 (quoting *Elkins*, 229 F.3d at 1373). Thus, when a veteran's claim for relief is conclusively resolved by the Board, it is "distinct for jurisdictional purposes" and subject to immediate appeal, even if other matters remain pending before the agency. *Id.* at 7.

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[3] Judge Kasold concurred, emphasizing that the Veterans Court "historically has considered * * * a Board decision denying benefits for a disability based on one particular theory, while another theory is still being developed below, to be final for purposes of appeal." Pet. App. 54. Judge Hagel concurred in the result but dissented from aspects of the majority's reasoning. *Id.* at 59-74. Judge Lance, joined by Judge Schoelen, dissented from the court's conclusion that it lacked jurisdiction to review the 1998 Board decision. *Id.* at 74-88.

The court of appeals rejected petitioner's argument that immediate appeal should be optional when the Board definitively resolves one claim but remands another. Pet. App. 9. The court explained that the governing statute "plainly forewarns" that an appeal must be filed within 120 days of a "final decision" of the Board "[i]n order to obtain review." *Id.* at 10 (quoting 38 U.S.C. 7266(a)). Accordingly, the court concluded, "all final decisions, even those appearing as part of a mixed decision, must be appealed within 120 days from the date of mailing of notice of the decision." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly held that the Board's 1998 decision denying petitioner's claim for benefits under 38 U.S.C. 1110 was a "final decision" subject to the 120-day deadline for appeal in 38 U.S.C. 7266(a). A veteran seeking benefits for a service-connected disability must file a "specific claim" for compensation at one of the VA's regional offices. 38 U.S.C. 5101(a). An adverse decision by the regional office is "subject to one review on appeal" by the Board, whose decisions constitute the final determinations of the Secretary. 38 U.S.C. 7104(a).

"Each decision of the Board" must include "a written statement of the Board's findings and conclusions" and "an order granting appropriate relief or denying relief." 38 U.S.C. 7104(d). The statute specifies that, absent an order granting reconsideration, a "decision of the Board determining a matter" that has been appealed from a regional office "is final." 38 U.S.C. 7103(a). VA regula-

tions likewise specify that "all Board decisions are final on the date stamped on the face of the decision." 38 C.F.R. 20.1100(a).

In this case, the Board's September 1998 decision definitively rejected petitioner's claim for compensation under 38 U.S.C. 1110. See Pet. App. 164-178. The opinion included a written statement of the Board's findings and conclusions, see *id.* at 166-173, as well as an order expressly denying relief on petitioner's Section 1110 claim. See *id.* at 173 ("The claim for entitlement to service connection for a lung disorder on a direct basis is denied."). This constituted a "final" decision of the Board under the plain terms of the statute and VA regulations. See 38 U.S.C. 7103(a), 7104(d); 38 C.F.R. 20.1100(a); see also 38 U.S.C. 7102(a) (directing the Board member or panel to which a claimant's appeal is assigned to issue a determination that "shall constitute the final disposition of the proceeding"). "In order to obtain review" by the Veterans Court, petitioner was therefore required to file a notice of appeal within 120 days after the mailing date of the Board's decision. 38 U.S.C. 7266(a).

b. In a separate section of its 1998 decision, the Board remanded petitioner's "Persian Gulf Syndrome" claim under 38 U.S.C. 1117 for further factual development. Pet. App. 173-177. Petitioner contends that the Board's remand of that claim eliminated his obligation to appeal any aspect of the Board's 1998 decision until the remand was complete. That is incorrect.

Although a judicial order resolving fewer than all of a plaintiff's claims is generally not final under 28 U.S.C. 1291, see, *e.g.*, *Cunningham* v. *Hamilton County*, 527 U.S. 198, 203 (1999); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373-374 (1981); Fed. R. Civ.

P. 54(b), this case does not involve a conventional appeal of a judicial order. Rather, it concerns the finality of an administrative order subject to review "by an Article I tribunal as part of a unique administrative scheme." *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1204 (2011). The statute specifically provides that a decision entered by the Board on a matter appealed from a regional office "is final," 38 U.S.C. 7103(a), and it stipulates that a notice of appeal must be filed within 120 days "[i]n order to obtain review" of any "final decision" by the Veterans Court, 38 U.S.C. 7266(a). The VA's regulations likewise provide that, although a remand "is in the nature of a preliminary order and does not constitute a final decision of the Board," a Board decision is otherwise "final on the date stamped on the face of the decision." 38 C.F.R. 20.1100(a) and (b). Under this scheme, the fact that the Board separately remanded petitioner's Section 1117 claim for further proceedings has no bearing on the finality of the Board's decision denying relief on his Section 1110 claim.

Even if the statute and applicable regulations did not specifically address the finality of Board decisions, administrative finality differs significantly from finality under 28 U.S.C. 1291. See *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). Because "there are wide differences between administrative agencies and courts," this Court has "warned against reflexively assimilat[ing] the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts." *Sims* v. *Apfel*, 530 U.S. 103, 109-110 (2000) (internal quotation marks and citations omitted). This Court has therefore "interpreted pragmatically the requirement of administrative finality," focusing not on whether all related questions before the agency have been resolved, but "on

whether judicial review at the time will disrupt the administrative process." *Bell* v. *New Jersey*, 461 U.S. 773, 779-780 (1983) (citing *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239 (1980), and *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Review by the Veterans Court of a Board decision denying relief to a veteran on one claim does not disrupt, or even affect, the capacity of the VA's regional office to determine the veteran's entitlement to compensation on a different statutory basis.

The traditional doctrines of finality that govern appeals in adversarial civil litigation are particularly ill-suited to the Veterans Court's review of benefit determinations by the Secretary. As this Court recently observed, "[t]he contrast between ordinary civil litigation * * * and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." *Henderson*, 131 S. Ct. at 1205-1206. Proceedings before the agency are informal and nonadversarial. *Id.* at 1206. A veteran faces no statute of limitations for filing an initial claim for benefits, *ibid.*, and unlike in traditional civil litigation, "there is no requirement that a veteran's various claims for relief be simultaneously filed and adjudicated, either upon initial review or on appeal." *Elkins* v. *Gober*, 229 F.3d 1369, 1375 (Fed. Cir. 2000). To the contrary, "the unique statutory process through which veterans seek benefits may necessarily require that the different issues or claims of a case be resolved at different times, both by the agency of original jurisdiction and on appeal." *Ibid.* A rule of finality that ascribed dispositive significance to the number of claims simultaneously presented by a veteran, or to the pendency before the agency of unresolved claims

filed by the same veteran, would be out of keeping with this scheme. See *ibid.*; see also Pet. App. 6-7.

c. Petitioner appears to recognize that he was *entitled* to take an immediate appeal from the Board's September 1998 denial of his Section 1110 claim. He contends, however, that he was not *required* to do so, but rather possessed "discretion" to appeal either at that time or after the Board's subsequent disposition of the remanded claim. See Pet. 11, 15-16, 21. That argument has no basis in the text of 38 U.S.C. 7266(a), which authorizes appeals to the Veterans Court from a "final decision" of the Board. Because no statutory provision permits appeals as of right from non-final Board decisions, petitioner's right to immediate appeal from the September 1998 denial of his Section 1110 claim necessarily depends on the premise that the denial was a "final decision" of the Board at the time it was issued, notwithstanding the Board's contemporaneous remand on petitioner's Section 1117 claim. Section 7266(a) specifies, however, that, "[i]n order to obtain review by the" Veterans Court, a veteran "shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed." If the Board's September 1998 denial was appealable at all, it was necessarily a "final decision" that petitioner was required to appeal within the 120-day deadline.

Neither the statute nor the Board's rules include any parallel to Federal Rule of Civil Procedure 54(b). Rule 54(b) authorizes a district court in civil litigation to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." In the absence of such a determination, an order adjudicating fewer than all of a plaintiff's claims "does

not end the action as to any of the claims" and "may be revised at any time." Rule 54(b) thus vests the district court with significant discretion to determine whether and when to issue decisions that are "final," for purposes of appellate review under 28 U.S.C. 1291, with respect to some but not all claims in a multi-claim action. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956).

Congress adopted a different model for the adjudication of veterans' benefits, specifying that an order by the Board denying relief on a claim "is final" and that a claim once denied generally "may not thereafter be reopened."[4] 38 U.S.C. 7103(a), 7104(b). The Board's rules likewise provide that, except for remanded matters, "all Board decisions are final on the date stamped on the face of the decision." 38 C.F.R. 20.1100(a). Section 7266(a) then requires that a notice of appeal be filed within 120 days of any "final decision" by the Board "[i]n order to obtain review" by the Veterans Court. See Pet. App. 10 (noting that Section 7266(a) "plainly forewarns" that a timely appeal is required). This scheme contemplates no role for discretionary appeals.

When it issued its September 1998 decision in this case, the Board provided petitioner with a "notice of appellate rights." Pet. App. 177-178. That notice specifically cautioned that a notice of appeal is due 120 days after the mailing of a Board decision "granting less than the complete benefit, or benefits, sought on appeal." *Ibid*. The notice clarified, however, that "[a]ppellate

[4] Although a claim, once denied, may not be reopened as to the same facts, a veteran may reopen a claim by presenting "new and material evidence." 38 U.S.C. 5108. In addition, a veteran may request at any time that a prior VA ruling be set aside for "clear and unmistakable error." 38 U.S.C. 5109A.

rights do not attach to those issues addressed in the remand portion of the Board's decision, because a remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal." *Id.* at 178. The clear import of the Board's notice was that any appeal from the Board's denial of petitioner's Section 1110 claim was required to be taken within 120 days, even though the "remand portion of the Board's decision" was not yet ripe for appellate review. Because petitioner failed to file a timely notice of appeal on the Section 1110 issues that had been finally resolved in the Board's decision, the court of appeals correctly held that petitioner was foreclosed from seeking review of those issues later.

2. Petitioner argues (Pet. 9-11, 19-22) that the court of appeals' ruling is inconsistent with this Court's subsequent decision in *Henderson*, which held that the 120-day deadline in Section 7266(a) "does not have jurisdictional attributes." 131 S. Ct. at 1206. That argument is misconceived. This Court in *Henderson* did not discuss principles of finality, nor did it decide the circumstances in which a Board determination constitutes a "final decision" subject to the requirements of Section 7266(a). That Section 7266(a) is not jurisdictional does not mean that claimants may ignore a deadline that Congress established by statute. See *ibid.* (describing Section 7266(a) as "an important procedural rule").

Consistent with Federal Circuit precedent at the time, the court of appeals referred to the statutory deadline in Section 7266(a) as "jurisdictional." See Pet. App. 5, 9. That mistaken characterization, however, formed no substantial part of the court's reasoning, which turned instead on the meaning of the term "final decision" in the unique context of the administrative scheme

governing veterans' benefits. See *id.* at 5-10. Indeed, to the extent *Henderson* is relevant here, it only underscores the error of petitioner's reliance on concepts of finality developed for purposes of 28 U.S.C. 1291. See *Henderson*, 131 S. Ct. at 1205, 1206 (emphasizing the "singular characteristics of the review scheme that Congress created," and observing that the contrast with ordinary civil litigation "could hardly be more dramatic").

Relying on *Henderson*, petitioner also argues (Pet. 16-19), that Section 7266(a) constitutes a "statute of limitations" for commencing a suit against the VA. The significance of that contention is unclear. The filing of a timely notice of appeal, though not a "jurisdictional" requirement, is a statutory prerequisite to Veterans Court review. 38 U.S.C. 7266(a). Even if the 120-day deadline is viewed as a "statute of limitations," it commenced to run when the notice of the Board's September 1998 decision was mailed to petitioner, and it expired long before petitioner filed his notice of appeal. And while statutes of limitations are typically subject to waiver and equitable tolling, see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008), petitioner does not contend that either of those doctrines applies in this case.

Petitioner further contends that the court of appeals disregarded "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." Pet. 21 (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991)). But by construing Section 7266(a) to allow an immediate appeal of the Board's denial of one claim, even when other claims are remanded for further agency proceedings, the court of appeals' interpretation of the statute

expedites veterans' access to Veterans Court review. To be sure, the statutory scheme would be even more favorable to veterans if (as petitioner urges) it permitted an appeal to be taken *either* promptly after the Board's denial of a claim *or* after the completion of additional remand proceedings. Petitioner points to nothing in the statutory text, however, that could be read to authorize the "discretionary" appellate scheme he advocates. See pp. 10-11, *supra*.

Petitioner also contends (Pet. 19-20) that the decision below is inconsistent with the Federal Circuit's prior decision in *Brownlee* v. *DynCorp*, 349 F.3d 1343 (2003). An intra-circuit conflict of that kind would not warrant this Court's review. In any event, as the court of appeals recognized, see Pet. App. 9, *Brownlee* is inapposite here.

Brownlee did not involve the finality of veterans' benefits determinations, but rather the finality of decisions by the Armed Forces Board of Contract Appeals under the Contract Disputes Act of 1978 (CDA), Pub. L. No. 95-563, 92 Stat. 2383. The court in *Brownlee* concluded that, in the context of the CDA's adversarial scheme, it made sense to adopt rules of finality drawn from ordinary civil litigation, and to allow a litigant to defer appeal until entry of a judgment that was "truly final in the section 1291 sense." 349 F.3d at 1347-1348. The "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," by contrast, require the opposite conclusion here. *Henderson*, 131 S. Ct. at 1205.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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