No. 11-329

In the Supreme Court of the United States

PAUL M. DEAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, for purposes of applying the statute of limitations set out in 28 U.S.C. 2501, a former service member's claims in an action seeking monetary relief under the Tucker Act, 28 U.S.C. 1491(a)(1), first accrued when he was discharged and denied disability-retirement status, or when a military review board subsequently denied his application for review of those actions.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the Court of Federal Claims (Pet. App. 5a-52a) is reported at 92 Fed. Cl. 133.

JURISDICTION

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

STATEMENT

1. Petitioner was a staff sergeant in the United States Air Force. Pet. App. 7a. In 2000, an Air Force physical evaluation board assigned petitioner a temporary disability rating for various medical conditions, and

the Air Force placed petitioner on a Temporary Disability Retired List (TDRL). *Id.* at 8a.

In 2002, the Air Force convened another physical evaluation board to determine whether petitioner would remain on the TDRL, permanently retire, or be discharged. Pet. App. 9a-10a. Although the evaluation board reduced petitioner's disability rating for one of his medical conditions, it concluded that he was nonetheless unfit due to physical disability and recommended discharge with disability severance pay (as opposed to disability retirement pay). *Id.* at 10a. On August 25, 2002, petitioner was removed from the TDRL and discharged from the Air Force by reason of physical disability with entitlement to disability severance pay. *Id.* at 12a.

2. Petitioner then applied to the Air Force Board for Correction of Military Records (Board), asking the Board to restore his disability rating and place him in retirement status. Pet. App. 12a; see 10 U.S.C. 1552. In 2003, the Board denied the application. Pet. App. 13a. In January 2008, petitioner again applied to the Board, seeking disability retirement and other benefits. *Id.* at 15a-16a. In November 2008, the Board denied that application. *Id.* at 16a.

3. In June 2009, petitioner filed suit against the United States in the Court of Federal Claims (CFC), alleging that the Board's 2003 and 2008 decisions violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 17a. Because the CFC lacks jurisdiction to hear APA claims, the court construed petitioner's claims as seeking monetary relief for wrongful discharge and disability-retirement pay under the Tucker Act, 28 U.S.C. 1491(a)(1). Pet. App. 26a. Relying on the Federal Circuit's decision in *Martinez* v. *United States*, 333 F.3d 1295 (2003) (en banc), cert. de-

nied, 540 U.S. 1177 (2004), the court held that petitioner's monetary claims had "accrued no later than August 25, 2002, the date on which [petitioner] was discharged from the Air Force." Pet. App. 28a-29a. The court therefore concluded that petitioner's claims were untimely under 28 U.S.C. 2501, which requires that a claim in the CFC must be filed "within six years after such claim first accrues." Pet. App. 51a. The court held that petitioner had failed to demonstrate a legal disability or other basis for tolling the statute of limitations, and it therefore dismissed petitioner's claim. *Id.* at 35a-40a.

4. The court of appeals affirmed without opinion. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 8-21) that his claim under the Tucker Act was filed within the applicable statute of limitations. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly affirmed the CFC's determination that the limitations period for petitioner's claim for recovery of the monetary losses resulting from his discharge ran from the date when he could first have brought suit. Petitioner could first have brought suit in 2002 when he was discharged and denied entitlement to disability retirement. Pet. App. 12a; see *Martinez* v. *United States*, 333 F.3d 1295, 1303-1304 (Fed. Cir. 2003) (en banc) (A service member "has the right to sue immediately upon discharge for the funds improperly being withheld," and such a claim accrues "at one time, once and for all.") (citation omitted), cert. denied, 540 U.S.

1177 (2004). Because petitioner's complaint was not filed until June 2009—more than six years after his claim accrued—it was barred by the statute of limitations. Pet. App. 17a.

Petitioner contends (Pet. 9-10) that his claims did not accrue until the Board issued its decisions in 2003 and 2008, and that his complaint was therefore timely. That is incorrect. As the Federal Circuit explained in *Martinez*, the only pay that a discharged service member can claim in a Tucker Act proceeding is the military pay he would have received but for the challenged discharge. See 333 F.3d at 1311-1312. It is thus the military pay statute, 37 U.S.C. 204, not the correction-board statute, 10 U.S.C. 1552, that gives rise to a monetary claim. The Board's review is not a precondition to suit but rather an optional administrative remedy available to service members. See Pet. App. 25a. In *Soriano* v. *United States*, 352 U.S. 270 (1957), this Court held that the limitations period of Section 2501 begins to run when suit can first be brought, not when an optional administrative remedy has been exhausted. *Id.* at 273-275. Accordingly, the possibility of Board review did not postpone the date when petitioner first could have asserted his monetary claims under the Tucker Act.

The Federal Circuit and its predecessor have consistently rejected arguments similar to petitioner's, and this Court has repeatedly denied review of those decisions. See *Martinez*, 333 F.3d at 1315, cert. denied, 540 U.S. 1177 (2004); *Smalls* v. *United States*, 87 Fed. Appx. 167 (Fed. Cir.), cert. denied, 543 U.S. 942 (2004); *Shaffer* v. *United States*, 89 Fed. Appx. 265 (Fed. Cir.), cert. denied, 543 U.S. 942 (2004); *Pacyna* v. *Marsh*, 617 F. Supp. 101 (W.D.N.Y. 1984), aff'd, 809 F.2d 792 (Fed. Cir. 1986) (Table), cert. denied, 481 U.S. 1048 (1987);

Bonen v. *United States*, 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); *Friedman* v. *United States*, 310 F.2d 381, 396-403 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963). There is no reason for a different result here.

2. Petitioner contends (Pet. 13) that this Court's decision in *Henderson* v. *Shinseki*, 131 S. Ct. 1197 (2011), justifies what he calls an "equitable construction" (Pet. 15) of the statute of limitations. In *Henderson*, the Court held that the time limit prescribed in 38 U.S.C. 7266(a) for appealing an administrative decision denying a veterans benefits claim is not jurisdictional. 131 S. Ct. at 1199-1200. That decision is inapposite because the applicable statute of limitations in this case is 28 U.S.C. 2501, and this Court has held that Section 2501 is "not susceptible to equitable tolling," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 136 (2008). Reviewing the history of Section 2501 and its predecessors since the Civil War, the Court in *John R. Sand & Gravel* explained that the statute establishes a deadline for commencing suit that is "more absolute" than the typical limitations period. See *id.* at 134, 135. The Court in *Henderson* cited *John R. Sand & Gravel* with approval, and it expressly distinguished 38 U.S.C. 7266(a) from 28 U.S.C. 2501. 131 S. Ct. at 1202-1203. *John R. Sand & Gravel* forecloses petitioner's "equitable" construction of Section 2501.

3. Petitioner asserts (Pet. 11-12) that the decision below conflicts with decisions of other courts of appeals that have required exhaustion of a correction-board remedy. The cited decisions are distinguishable, however, because none of them involved a claim for money damages under the Tucker Act or a challenge to the dis-

charge itself. Instead, they involved challenges to the Board's subsequent refusal to correct a military record.

The plaintiffs who challenged the actions of the Board in those cases generally brought suit under the APA to obtain relief "other than money damages" (5 U.S.C. 702), alleging that they were "adversely affected or aggrieved" (*ibid.*) by "final agency action" (5 U.S.C. 704). Such claims are different from Tucker Act claims for money damages, and as the court explained in *Martinez*, "[t]he difference is important." 333 F.3d at 1313. Because petitioner seeks money damages based upon his discharge and disability-retirement determination in 2002, the Board's subsequent decisions are not relevant to his claims. Petitioner cites no decision holding that exhaustion of Board remedies is a prerequisite to commencement of a Tucker Act suit for monetary relief. There is consequently no inter-circuit conflict presented in this case.

4. Petitioner's remaining arguments are similarly without merit. Petitioner contends (Pet. 14) that the statute of limitations should be tolled pending exhaustion of a military correction-board remedy because the statute of limitations for habeas corpus review is tolled pending an inmate's exhaustion of state-court remedies. The analogy is inapt. While an inmate is required to exhaust state-court remedies before seeking habeas relief, see 28 U.S.C. 2254(b), petitioner was not required to exhaust his Board remedies before filing a Tucker Act claim. Pet. App. 24a-25a. The justification for tolling the habeas limitations period pending exhaustion of other remedies is therefore absent here.

Second, petitioner asserts (Pet. 20) that he had a mental impairment that justifies equitable tolling. Under Section 2501, however, equitable tolling is not available. See *John R. Sand & Gravel*, 552 U.S. at 134. And although the statute does provide for tolling in cases where a claimant is under a "legal disability," the CFC determined that petitioner "has not presented any evidence that he suffered from a legal disability at any time prior to filing his complaint." Pet. App. 40a. Petitioner's factbound challenge to that conclusion does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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