No. 11-437

In the Supreme Court of the United States

DONALD E. BITZER, 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 the United States has waived its sovereign immunity from suit for interest on retroactive veterans disability benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 8a-11a) is unreported. The decision of the Board of Veterans' Appeals (Pet. App. 12a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2011. The petition for a writ of certiorari was filed on October 5, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, petitioner was injured in a motorcycle accident while he was on active duty in the United States Navy. Pet. App. 2a, 8a-9a. In rating decisions of

August and November 1979, petitioner was awarded disability benefits, effective from November 14, 1978, the day after his discharge. *Id.* at 49a-58a, 59a-62a.

In 2006, petitioner filed a claim contending that the November 1979 decision contained clear and unmistakable error and was therefore subject to reopening. Pet. App. 36a-40a; see 38 U.S.C. 5109A. In a March 2006 rating decision, the Department of Veterans Affairs (VA) agreed, finding that the November 1979 rating decision contained clear and unmistakable error in that it had not granted petitioner (1) service connection and special monthly compensation for the total loss of use of both legs and (2) a higher level of special monthly compensation for the loss of use of both legs and loss of bowel and bladder control. Pet. App. 27a-28a, 29a-31a. The VA awarded petitioner retroactive benefits of approximately $700,000. *Id.* at 9a, 10a.

2. Petitioner appealed to the Board of Veterans' Appeals, asserting that he was also entitled to interest on the retroactive benefits. The Board rejected that argument, explaining that the retroactive award was "in accordance with specific rates of entitlement provided by statute," and that the VA had "no legal authority to provide additional compensation for payment of interest on that retroactive disability compensation." Pet. App. 13a.

3. The United States Court of Appeals for Veterans Claims affirmed. Pet. App. 8a-11a. The court applied the rule announced in *Sandstrom* v. *Principi*, 358 F.3d 1376 (2004), and *Smith* v. *Principi*, 281 F.3d 1384, cert. denied, 537 U.S. 821 (2002), in which the Federal Circuit had held that the United States has not waived sovereign immunity for interest on retroactive disability compensation. Pet. App. 9a-10a.

4. The court of appeals affirmed. Pet. App. 1a-5a. The court explained that, under its prior decisions in *Sandstrom* and *Smith*, interest could not be awarded because no statute expressly authorized the payment of interest on petitioner's retroactive benefits. *Id.* at 4a. Petitioner argued, *inter alia*, that "the 'commercial activity' exception to the 'no interest rule' applies to his claim." *Ibid.* The court of appeals explained that "*Smith* expressly rejected application of the commercial enterprise exception to the [VA] as an administrator of veterans' benefits." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-18) that he is entitled to interest on his award of retroactive veterans disability benefits. The court of appeals correctly rejected that argument, holding that the United States has not waived its sovereign immunity from suit for such interest. Its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Sovereign immunity insulates the United States from suit "in the absence of an express waiver of this immunity by Congress." *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). Waivers of sovereign immunity must be "strictly construed * * * in favor of the sovereign," *Lane* v. *Pena*, 518 U.S. 187, 192 (1996), and a limited waiver of sovereign immunity may not be "enlarge[d] . . . beyond what the language requires." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (quoting *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983)). In particular, a waiver of sovereign immunity does not permit an award of interest against the government unless that waiver expressly extends to interest.

See *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986) ("In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award."); accord, *e.g.*, *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251, 260 (1888).

No statute waives the government's sovereign immunity from an award of interest on retroactive veterans disability benefits. The court of appeals therefore correctly held that such an award is barred by sovereign immunity. Pet. App. 3a-4a; see *Sandstrom* v. *Principi*, 358 F.3d 1376, 1381 (Fed. Cir. 2004) ("The existing statutory language does not waive sovereign immunity, either explicitly or by implication."); *Arnesen* v. *Principi*, 300 F.3d 1353, 1358-1359 (Fed. Cir. 2002).

Petitioner cites (Pet. 8-9) 38 U.S.C. 503(a) and 5109A(b), but neither of those provisions mentions interest, much less contains a clear waiver of the government's sovereign immunity. Section 503(a) provides that, in cases of administrative error, "the Secretary [of Veterans Affairs] may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys." And Section 5109A(b) states that an administrative decision reversing an earlier decision on the basis of clear and unmistakable error "has the same effect as if the decision had been made on the date of the prior decision." As the court of appeals has explained, referring to both Sections 503(a) and 5109A(b), "only express language can waive the no-interest rule, and the statutes asserted in this case lack such express language of waiver." *Smith* v. *Principi*, 281 F.3d 1384, 1388 (Fed. Cir.), cert. denied, 537 U.S. 821 (2002).

Petitioner argues (Pet. 6-11) that, because the VA's administrative scheme has a uniquely pro-veteran orientation, any ambiguity in Sections 503(a) and 5109A(b) should be resolved in his favor. But even if those provisions are construed in accordance with a pro-veteran interpretive canon, they cannot reasonably be viewed as containing the *express* waiver of immunity that would be required to permit an award of interest. See *Smith*, 281 F.3d at 1387-1388.

Petitioner also contends (Pet. 12-13) that Congress waived sovereign immunity for interest in 38 U.S.C. 5315, which authorizes the Secretary to charge and collect interest on erroneously awarded benefits. Petitioner forfeited that argument by failing to raise it in the court of appeals, and the contention lacks merit in any event. The fact that Congress authorized the Secretary to collect interest does not mean that it directed him to pay interest. Indeed, this Court long ago rejected the proposition that an individual and the government are on an equal footing when it comes to interest. See *United States* v. *Verdier*, 164 U.S. 213, 218-219 (1896).

2. Petitioner argues (Pet. 13-16) that the denial of interest on his retroactive disability award violated his rights under the Just Compensation Clause of the Fifth Amendment. In certain contexts, an award of interest may be necessary to provide the level of compensation mandated by that provision. See *Shaw*, 478 U.S. at 317 n.5. Without more, however, a statutory right to be paid veterans benefits is not a protected property interest under the Just Compensation Clause. See *Schism* v. *United States*, 316 F.3d 1259, 1268 (Fed. Cir. 2002) ("Benefits for retired military personnel * * * depend upon an exercise of legislative grace, not upon principles of contract, property, or 'takings' law."), cert. denied,

539 U.S. 910 (2003). Although the VA found that the 1979 rating decision was erroneous, the VA did not suggest, and petitioner identifies no sound reason for concluding, that the rating decision effected a Fifth Amendment taking. The rule that interest may sometimes be a required element of just compensation for a taking of property is therefore inapplicable here. Petitioner cites no contrary authority.

3. Petitioner next invokes (Pet. 16) the commercial-activity exception to the no-interest rule. Under that exception, the United States is deemed to have waived sovereign immunity for the normal incidents of suit, such as interest, when Congress has created an agency as a "sue and be sued" entity. *Loeffler* v. *Frank*, 486 U.S. 549, 554 (1988); *Shaw*, 478 U.S. at 317 n.5. The court of appeals correctly held, however, that the VA is not engaged in a commercial activity when it performs its duties as an administrator of veterans benefits. Pet. App. 4a. That conclusion is consistent with the court's prior decision in *Smith*, in which the Federal Circuit observed that the VA is a "sue and be sued" entity only when it acts in its limited capacity as a lender and guarantor of housing and small-business loans. 281 F.3d at 1388. In response, petitioner cites (Pet. 16) *Loeffler* and *National Home for Disabled Volunteer Soldiers* v. *Parrish*, 229 U.S. 494 (1913), but those cases did not involve the VA, much less hold that the commercial-activity exception requires the VA to award interest on retroactive disability compensation.

4. Finally, petitioner asserts (Pet. 16-18) that the "facts and circumstances" of his case, including what he describes as the "sheer magnitude" of the error in the VA's initial decision, warrant an exception to the no-interest rule. The court of appeals properly rejected

that argument, which is no more than an appeal to the same policy or equitable considerations that the Court has repeatedly held are insufficient to overcome the no-interest rule. Pet. App. 4a; see *Shaw*, 478 U.S. at 320-321; *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 663 (1947). Petitioner's disagreement with that settled rule does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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