What Kinds of Appellate Deadlines Are Jurisdictional?

CASE AT A GLANCE

38 U.S.C. § 7266(a) allows a veteran to appeal a final decision of the Board of Veterans' Appeals to the Court of Appeals for Veterans Claims, an independent Article I federal court, within 120 days after the date on which notice of the Board's decision is mailed. In this case, a veteran missed that deadline but argued that the deadline was subject to equitable tolling. The Supreme Court is being asked to decide whether that Article I federal court deadline is a limitation on federal court subject-matter jurisdiction.

Henderson v. Shinseki
Docket No. 09-1036

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From: The Federal Circuit

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ISSUE

Is 38 U.S.C. § 7266(a) a limitation on federal court subject-matter jurisdiction, such that it is not subject to equitable tolling, or an interruption in the running of the statutory time limit for filing?

FACTS

David L. Henderson served on active military duty from 1950 to 1952, when he was discharged after being diagnosed with paranoid schizophrenia, for which he has established a service connection and a 100 percent disability rating.

In 2001, Henderson filed a claim for monthly compensation with the U.S. Department of Veterans Affairs (VA) based on the need for in-home care. The regional office denied the claim, and Henderson appealed to the Board of Veterans' Appeals (Board), which denied his appeal on August 30, 2004. Upon that denial, Henderson had 120 days to file a notice of appeal with the independent Article I federal court charged with overseeing such claims, the Court of Appeals for Veterans Claims (Veterans Court). See 38 U.S.C. § 7266(a) ("In order to obtain review by the [Veterans Court] of a final decision of the [Board], a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed. …").

Henderson appealed to the Veterans Court on January 12, 2005, fifteen days after the expiration of the § 7266(a) deadline. Henderson explained that his tardiness was a direct result of his illness, and he asked that the court allow for equitable tolling. Prior Federal Circuit precedent established that equitable tolling was available under § 7266(a). See *Jaquay v. Principi,* 304 F.3d 1276 (Fed. Cir. 2002) (en banc); *Bailey v. West,* 160 F.3d 1360 (Fed. Cir. 1998) (en banc). Henderson argued that his circumstances fit within that precedent.

While the appeal was pending, the U.S. Supreme Court decided *Bowles v. Russell,* 551 U.S. 205 (2007), which held that the deadline for filing a notice of appeal in a civil case in the U.S. Courts of Appeals under 28 U.S.C. § 2107(c), general federal appellate jurisdiction statute, was a jurisdictional deadline not subject to equitable exceptions or tolling.

In 2008, the Veterans Court ruled in a 2-1 decision that the 120-day deadline under § 7266(a) was a jurisdictional limit not subject to equitable tolling. The Veterans Court concluded that, because § 7266(a) was a notice-of-appeal provision in a civil case, *Bowles* was controlling and effectively abrogated *Jaquay* and *Bailey*. Accordingly, the Veterans Court affirmed the dismissal of Henderson's appeal.

Henderson timely appealed to the Federal Circuit, which affirmed in a 9-3 en banc decision. The Federal Circuit held that § 7266(a) is a notice-of-appeal provision in a civil case made jurisdictional by *Bowles*. The court held that the deadline was unlike a statute of limitations, which governs the timing of a case initiated in the first instance, and more like an appellate deadline, which governs the time to seek review of an inferior tribunal's determination. The court also held that the adjudicatory proceedings before the Article I Veterans Court were functionally akin to civil actions heard in Article III federal courts. Finally, the court held that the statutory language provided no exceptions for equitable tolling.

Judge Mayer, joined by Chief Judge Michel and Judge Newman, dissented. Judge Mayer would have found equitable tolling available under the long tradition of allowing equitable tolling to statutory deadlines in cases against the U.S. government. Judge Mayer also would have limited *Bowles* to the particular statute at issue in that case—28 U.S.C. § 2107(c). Finally, Judge Mayer distinguished Henderson's case from a typical § 2107(c) appeal in that § 7266(a) filing

represents the first opportunity to initiate independent, adversarial adjudication in a formal court.

CASE ANALYSIS

The general issue in this case involves "jurisdictional characterization"—whether a particular limitation is jurisdictional or not. Prior to 1998, the Supreme Court and many lower courts unthinkingly used the term "jurisdictional" to describe limitations that were not actually limitations on federal court subject-matter jurisdiction. In a string of cases decided in the last twelve years, the Supreme Court attempted to clarify what limitations were and were not jurisdictional, but its decisions were inconsistent. In the 2006 case of *Arbaugh v. Y&H Corp.,* 546 U.S. 500, for example, the Court held that the statutory requirement that only employers with more than 15 employees are subject to Title VII is not a jurisdictional limitation but rather a nonjurisdictional element of the claim that could be waived by a defendant. But just one year later, in *Bowles,* the Court held that the time limit for filing a notice of appeal in a civil action is a jurisdictional limitation not subject to equitable tolling. Courts and commentators have struggled to reconcile these two lines of cases.

In this case, the general issue of jurisdictional characterization is intertwined with two specific implications. The first is that this case involves deadlines limiting access to Article I federal courts, rather than Article III federal courts.

The second implication is that this case involves deadlines regarding a veteran's claims, which are given special solicitude. Congress has long provided for a special, nonadversarial administrative procedure for veterans to file disability claims and seek compensation for disabilities obtained during service to their country. Ordinarily, no government official opposes the veteran throughout the administrative process, and the Veterans Administration is obligated to assist the veteran in developing the claim within the agency. The agency must resolve doubts in adjudicating the merits in favor of the veteran.

The Supreme Court has not explained how these features might affect the broader jurisdictional characterization analysis.

Henderson argues that the text, structure, and purpose of § 7266(a) support a nonjurisdictional characterization of § 7266(a). According to Henderson, the text supports a nonjurisdictional characterization under *Arbaugh* and *Reed Elsevier v. Muchnick,* 559 U.S. ____ (2010), which erected a presumption that courts should treat a statutory limitation as nonjurisdictional unless Congress clearly states otherwise. Henderson argues that because § 7266(a) does not refer to jurisdiction at all, it must be nonjurisdictional.

Henderson reasons that § 7266(a) instead is directed to the claimant, instructing that an aggrieved "person … shall file a notice" within the deadline. Because the requirement speaks to the obligations of a party rather than the power of the court, Henderson concludes that the deadline provision is nonjurisdictional.

Henderson next argues that the structure of the statutory framework supports a nonjurisdictional characterization because the deadline provision is remote from the explicit jurisdictional grant. Section 7252(a) gives the Veterans Court "exclusive jurisdiction to review decisions of the Board. The Court shall have the power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." That provision is titled "Jurisdiction; finality of decisions" and is located in a subchapter titled "Organization and Jurisdiction." By contrast, the deadline provision of § 7266(a) is contained within an entirely separate subchapter titled "Procedure." Accordingly, Henderson argues that § 7266(a) was not meant to be a jurisdictional provision.

Henderson next argues that the pro-veteran purpose of the statute supports a nonjurisdictional characterization. He asserts that an inflexible jurisdictional bar to untimely claims would be an anti-veteran rule within an otherwise pro-veteran scheme. He argues that this is especially contrary to congressional intent when missing the deadline is due to no fault of the veteran's—or, worse, where the agency deliberately misleads the veteran as to the filing deadline. Henderson further contends that because so many veterans pursue their claims without counsel, the need for a flexible filing deadline is even more important to the pro-veteran scheme.

Henderson next argues that analogous deadlines have been characterized as nonjurisdictional limits subject to equitable tolling. He points to the 60-day time limit for a claimant to seek judicial review of an agency decision denying social security disability benefits under 42 U.S.C. § 405(g), which was held nonjurisdictional and subject to equitable tolling in *Bowen v. City of New York,* 476 U.S. 467 (1986). Henderson reasons that Congress could not have meant to treat disabled veterans more harshly than social security disability claimants.

Finally, Henderson argues that any doubts about the characterization of § 7266(a)'s deadline should be resolved in his favor under the pro-veteran canon of statutory construction recognized in *Brown v. Gardner,* 513 U.S. 115 (1994).

Several amici curiae in support of Henderson assert that military veterans often suffer debilitating illnesses caused by their service, and that the illnesses often make it more difficult for veterans to comply with the timing deadline imposed by § 7266(a). The American Legion, in particular, argues that disabilities such as post-traumatic stress disorder—common among veterans—can disrupt the effective pursuit of a veteran's claims. As a result, the amici contend, the deadline imposed by § 7266(a) should be amenable to equitable tolling to take those disabilities into account when they cause a veteran to miss the deadline.

The government argues that *Bowles* controls the characterization inquiry because, as in that case, the provision in § 7266(a) is a time limit for taking an appeal. *Bowles* held that the deadline to file a notice of appeal on a civil case before U.S. Courts of Appeals, codified in 28 U.S.C. § 2107, was a jurisdictional requirement. The government distinguishes analogous cases like *Bowen* as applying to new "civil actions" rather than "appeals."

Henderson attempts to distinguish *Bowles* in several ways. First, Henderson characterizes *Bowles* in light of *Reed Elsevier,* arguing that *Bowles* merely confirmed that context—including a consistent, long-standing characterization—is relevant to the characterization inquiry. Because no such long-standing characterization has been applied to § 7266(a), Henderson argues, *Bowles* is fully consistent with a nonjurisdictional characterization of that deadline.

The government counters that the animating justification of *Bowles* was not the long-standing characterization of the particular statutory provision at issue but rather the long-standing characterization of appellate deadlines *in general.* Accordingly, the government reasons, if § 7266(a) is an appellate deadline, *Bowles* is not distinguishable on the ground of differences in the historical treatment of the specific deadlines at issue in the two cases.

Second, Henderson argues that, to the extent *Bowles* suggests more, it is distinguishable. The statutory mechanism at issue in *Bowles* was a generalized, court-to-court, equal-footing, and adversarial procedure for taking an appeal in a civil case. By contrast, § 7266(a) involves a specialized, agency-to-court, proclaimant, and nonadversarial procedure for initiating judicial action over a veteran's claim. These differences, claims Henderson, take § 7266(a) outside of *Bowles*'s purview.

Third, Henderson conceptualizes the deadline in § 7266(a) as more akin to a limitations period for filing an original action rather than (as was the issue in *Bowles*) a deadline for filing a notice of appeal. In particular, Henderson characterizes the nonadversarial proceedings before the Board as merely administrative steps that culminate in a final agency decision. Because a veteran's "appeal" of that decision to the Veterans Court is the first invocation of federal court jurisdiction, and because it is the commencement of adversarial federal court proceedings against the agency, the deadline is more properly akin to an original-action limitations period than an appellate deadline. By contrast, Henderson offers, an appeal from the Veterans Court to the Federal Circuit is more akin to a civil appeal.

The government counters these arguments by asserting that § 7266(a) is an appellate deadline. The government stresses that the statute itself characterizes the deadline as a limitation on the time to file a "notice of appeal," and the provision is titled "Notice of appeal." The government also argues that the structure of the review process is appeal-like because the Veterans Court applies a deferential standard of review. Finally, the government points out that the legislative history shows that Congress viewed the Veterans Court as analogous to a federal court of appeals. As a result, the government characterizes the deadline as indistinguishable from the one at issue in *Bowles* and therefore jurisdictional.

Henderson acknowledges that § 7266(a) characterizes itself as speaking to a "notice of appeal," but he argues that Congress did not mean through that generalized language to imbue § 7266(a) with effects identical to the general appellate provisions at issue in *Bowles*. To the contrary, Henderson argues the phrase "notice of appeal" is less a term of art and more a colloquial term that encompasses a variety of contexts, particularly outside of the court-to-court context. Henderson also acknowledges that the proceeding in the Veterans Court has characteristics of appellate review, such as a deferential standard of review that includes the rule of prejudicial error, but he stresses that the Veterans Court has unique standards that are different from a common appellate court.

SIGNIFICANCE

This case has both doctrinal and practical significance. Doctrinally, the Court has struggled in recent years to develop a consistent and coherent doctrine on jurisdictional characterization issues. In 1998, the Court first noted that "jurisdiction is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998). From 2004–2007, the Court decided a series of cases that ostensibly began scaling back the reach of jurisdictional determinations. *Kontrick v. Ryan,* 540 U.S. 443 (2004), held nonjurisdictional Bankruptcy Rule 4004, which gives a creditor 60 days to object to a debtor's discharge. *Scarborough v. Principi,* 541 U.S. 401 (2004), held nonjurisdictional the requirements governing attorney-fee applications under the Equal Access to Justice Act. *Eberhart v. United States,* 546 U.S. 12 (2005), held nonjurisdictional the time limit for filing a post-verdict motion for a new trial under Federal Criminal Rule of Procedure 33. And *Arbaugh* held nonjurisdictional the statutory requirement that only employers with more than 15 employees are subject to Title VII. In *Arbaugh,* the Court imposed a bright-line presumption against jurisdictionality in statutory coverage cases unless the statute clearly said otherwise.

Beginning in 2007, however, the Court abruptly shifted course and decided two cases that returned to jurisdictional labels and created new confusion in this area. *Bowles* held jurisdictional the time limit for filing a notice of appeal in a civil action before a U.S. Court of Appeals. And *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130 (2008), held that the six-year limitations period for suits against the U.S. government in the Court of Federal Claims was a "more absolute" time bar than normal statutes of limitations, though it appears that the Court meticulously avoided characterizing the statute "jurisdictional."

In 2010, *Reed Elsevier* presented an opportunity for the Court to bring some stability to jurisdictional characterization doctrine. *Reed Elsevier* seemingly did so by holding nonjurisdictional the registration requirement of § 411(a) of the Copyright Act. In so doing, the Court reaffirmed, with some modification, the *Arbaugh* presumption that a statutory limitation is presumed nonjurisdictional absent a clear statement or context (such as long-standing interpretive precedent) to the contrary. The Court also distinguished *Bowles* as limited either to the specific appellate deadline at issue in that case or to appellate deadlines generally.

Henderson thus presents a new opportunity for the Court to clarify the reach of *Bowles* and the doctrinal analysis for jurisdictional characterization questions in deadlines for transferring a case from one adjudicatory body to a reviewing court. However, because Justice Kagan has recused herself from this case, it is possible that the Court will affirm by an even 4-4 split and thus provide no clarification at all.

Practically, this case could have wide impact. Today, almost 4 million veterans and their dependents receive benefits from the VA. When they receive a hearing on the merits, veterans prevail on their claims in the Veterans Court in a significant percentage of cases—according to Henderson, approximately 80 percent. But most claimants proceed pro se before the Veterans Court, and, as a result, may not be fully aware of the procedural limits on asserting their claims. Characterizing the deadline at issue in this case as jurisdictional would limit access of veterans to the Veterans Court.

The government does not seriously contest this result. Instead, it primarily argues that the problem, if it is one, should be resolved by Congress rather than the Court. Indeed, earlier this year, the VA urged Congress to amend the appellate deadline to provide an extension of 120 days upon a showing of good cause, and a bill with similar effect currently is pending in the Senate. S. 3517, 111th Cong., 2d Sess.

§ 212 (2010). If the Court determines that the deadline is jurisdictional (or even mandatory), perhaps Congress will act to ameliorate its harsh results.

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