UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Richard C. Boone,	)	
Appellant,	)	
v.	)	Vet.App. No. 08-1257
James B. Peake,, M.D., Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLANT'S REPLY TO THE MEMORANDUM OF LAW FILED BY THE DEPARTMENT OF VETERANS AFFAIRS ON NOVEMBER 13, 2008

SUMMARY OF ARGUMENT

The Department of Veterans Affairs (VA) asserts that the Supreme Court's opinion in *Bowles v. Russell*, 551 U.S. __, 127 S.Ct. 2360 (2007), held that equitable tolling is not available under 38 U.S.C.A. § 7266(a) (West 2002) in this Court. VA is mistaken.[1] VA is mistaken because the Supreme Court's decision in *Bowles* did not so much as mention, let alone overrule, the Supreme Court's decisions establishing the existence of equitable tolling. Indeed, *Bowles* could not rule that § 7266(a) is not subject to equitable tolling because equitable tolling was

[1] Most of VA's arguments are based on *Henderson v. Peake*, 22 Vet.App. 217 (2008). Thus, this panel may not have authority to consider the substance of Mr. Boone's arguments in reply regarding *Bowles*.

not even an issue in *Bowles*. Equitable tolling only applies when the federal Government is a defendant in a suit. However, in *Bowles*, the federal Government was not the defendant. Equitable tolling, therefore, was entirely beside the point in *Bowles* – which explains exactly why the Supreme Court in *Bowles* did not cite *Irwin,* did not overrule *Irwin*, and could not conclude that § 7266(a) is not subject to equitable tolling.

VA also essentially asserts that the Supreme Court in *Bowles* announced a new rule that statutory limitations periods cannot be equitably tolled. VA Memo at 2-5. This is not true. Far from abandoning the *Irwin* "rebuttable presumption," that equitable tolling is available in suits against the federal Government, the Supreme Court in *John R. Sand and Gravel* explicitly recognized that *Irwin* continues to be good law. *See* 128 S.Ct. at 735. In *John R. Sand and Gravel*, the Supreme Court observed that *Irwin* announced a "prospective rule" governing future limitations inquiries – not a retrospective mandate that compelled courts to "revisit" established precedents holding that certain time limits were jurisdictional. *See John R. Sand & Gravel*, 128 S.Ct. at 755-56; *see also John R. Sand & Gravel*, 128 S.Ct at 760-61 (Ginsburg, J. dissenting) (observing that under the majority's decision, "*Irwin* governs the interpretation of all statutes we have not yet construed"). The Supreme Court in 1883 had found the limitations provision at issue in *John R. Sand and Gravel* – governing suits in the Court of Claims – to be

jurisdictional. *See* 128 S.Ct. at 754 (citing *Kendall v. United States*, 107 U.S. 123 (1883)). The *John R. Sand and Gravel* Court in 2007 simply concluded that *Kendall* is still good law; that the Court in *Irwin* did not silently overrule that precedent without explicitly stating its intention to do so; and that it also would not revisit *Kendall*. 128 S.Ct. at 755, 756-57 (refusing to "overturn [*Kendall*] . . . simply because we might believe that the decision is no longer "'right'").

ARGUMENT

I. *BOWLES* DID NOT HOLD – AND COULD NOT HOLD – THAT EQUITABLE TOLLING IS NOT AVAILABLE TO MR. BOONE UNDER § 7266 BECAUSE EQUITABLE TOLLING WAS NOT EVEN AN ISSUE IN *BOWLES* SINCE THE FEDERAL GOVERNMENT WAS NOT THE DEFENDANT IN *BOWLES* AND EQUITABLE TOLLING ONLY APPLIES WHEN THE FEDERAL GOVERNMENT IS THE DEFENDANT IN A CIVIL SUIT.

"Where Congress has enacted an express waiver of sovereign immunity, there is a presumption that the rule of equitable tolling applies against the government." 4 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure, § 1056 n. 38 (3d ed. 2002 & Supp. 2007); *see John R. Sand & Gravel v. United States*, 128 S.Ct. 750, 755 (Jan. 8 2008); *Bailey v. Principi*, 160 F.3d 1360 (Fed. Cir. 1998). Contrary to VA' arguments, *Bowles* undermines no significant premise of the Supreme Court's decision in *Irwin*. VA Memo at 2-5. *Bowles* simply held, based on the specific structure of the statute before the Supreme Court and based on treating notices of appeal from Article III district

courts to Article III appellate courts as jurisdictional, that the time for reopening an appeal from a district court's decision is mandatory and jurisdictional. 127 S.Ct. at 2366. Yet, VA contends that the Article III appellate deadline that *Bowles* held to be "mandatory and jurisdictional" shows that § 7266(a)'s 120-day appeal period is as well. But the Supreme Court has repeatedly held that time limits set forth in statutes duly enacted by Congress are not "jurisdictional prerequisites" to suit, but instead are subject to "waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). In effect, VA asserts that the 120-day time limit of § 7266(a), like the one in *Bowles*, governs the transfer of a case from one tribunal to another and thus defines the class of cases that the appellate tribunal is competent to hear. But *Bowles* cannot mean that any statute that governs the transfer of a case from one tribunal to another in any case is mandatory and jurisdictional. To the contrary, where, as here, the claimant is seeking review after the decision of an administrative adjudicator, as opposed to the Article III district court as in *Bowles*, the Supreme Court has held in *Irwin* – as did the Federal Circuit in *Bailey* – that the time for seeking review in this Court under § 7266(a) is subject to equitable tolling.

In adopting the "rebuttable presumption" in favor of equitable tolling, the *Irwin* Court made clear that it intended to resolve "the general question whether principles of equitable tolling apply against the Government when [a case]

involves a statutory filing deadline." *Irwin*, 489 U.S. at 94. As the Supreme Court recently said, the *Irwin* Court was adopting a more general rule "to replace [its] prior ad hoc approach for determining whether a Government-related statute of limitations is subject to equitable tolling." *John R. Sand & Gravel*, 128 S.Ct. at 755 (quoting *Irwin*, 498 U.S. at 95). The 120-day limitations period in § 7266(a) is exactly the kind of time-bar provision that the *Irwin* Court contemplated would be subject to equitable tolling, which is exactly what the Federal Circuit held in *Bailey v. Principi.* Section 7266(a) authorizes suits against the United States; and it waives the federal Government's sovereign immunity. It is this waiver of sovereign immunity that the *Irwin* Court held triggers the "rebuttable presumption" that equitable tolling applies to the applicable limitations period. *See Irwin*, 498 U.S. at 95; *see also Scarborough v. Principi*, 541 U.S. 401, 422 (2004) (presumption applies to limitations periods in statutes that create "claims for relief against the United States or its agencies"). The *Irwin* rebuttable presumption, applicable whenever the United States is a defendant in a suit, plainly applies to the limitations period at issue here. *Kirkendall v. Dep't of the Army*, 479 U.S. 830 (Fed. Cir. 2007) (en banc). This is what the Federal Circuit held in *Bailey*: "[Equitable] tolling should be presumed absent a clear contrary intent of Congress to limit jurisdiction created by a particular statute [.]" *Bailey*, 130 F.3d at 1368. *Bowles* did not change this presumption.

In the end, VA's arguments attempt to set up a conflict between *Bowles* and *Irwin* and the cases that explain and apply *Irwin's* strong presumption of equitable tolling. However, contrary to VA's arguments, those cases are perfectly consistent with *Bowles*. The *Irwin* presumption "govern[s] the applicability of equitable tolling in suits against the [federal] Government," 498 U.S. at 95, and only then, when there is a sufficiently analogous private lawsuit to that federal-government suit. *Scarborough*, 541 U.S. at 422. *Bowles*, however, involved a federal habeas corpus petition by a state prisoner. The federal Government was not the defendant in that case, and even if it had been, there is no arguable private-suit analogue to a habeas corpus action. *Irwin* and equitable tolling were entirely beside the point in *Bowles* – which is why the Court in *Bowles* did not cite *Irwin*. But, *Irwin* squarely governs this case and compels the conclusion that the time limit in § 7266(a) is subject to equitable tolling as the Federal Circuit held in *Bailey*.

II. AS THE FEDERAL CIRCUIT RULED IN *BAILEY*, THE MANDATORY LANGUAGE OF § 7266 IS INSUFFICIENT TO REBUT THE *IRWIN* PRESUMPTION AND *BOWLES* DOES NOT OVERRULE *IRWIN* – AND INDEED IT COULD NOT – GIVEN THE CONTEXT AND HISTORY SURROUNDING § 7266.

In 1990, the Supreme Court clarified a drafting rule against which Congress has legislated ever since. Absent clear indication to the contrary, statutory time limits governing suits against the federal Government – even those that are phrased in mandatory terms – may be equitably tolled in lawsuits that are analogous to a

private lawsuit. *Irwin*, 498 U.S. at 95. Congress amended 38 U.S.C.A. § 7266 just eight years after the Supreme Court issued *Irwin.*[2] When Congress amended § 7266(a), it did so against the background of *Irwin's* settled presumption that equitable tolling is available in suits against the federal Government. Nothing in the text of the current version of § 7266 rebuts this presumption, much less clearly so. Since Congress did not prohibit equitable tolling when it amended § 7266(a) in 1998, the presumption must be that Congress authorized the use of equitable tolling under § 7266(a). Therefore, since the context and history of § 7266(a) establish that Congress did not overcome *Irwin's* presumption that equitable tolling applied to § 7266(a), the Court must conclude that equitable tolling remains available under § 7266(a).

Indeed, Mr. Boone respectfully submits that assuming *arguendo*, that *Bowles* did hold that filing a timely notice of appeal is necessary in all civil cases is the rule, this rule would not apply in Mr. Boone's case. The assumed rule would not apply because the rule would be inconsistent with Congress's intent as shown by Congress's failure to act in 1998 to amend § 7266(a) to overcome *Irwin's* presumption that equitable tolling is available in civil suits against the federal Government. Stated another way, if Congress in 1998 had intended to overrule the *Irwin* presumption, it would have amended § 7266(a) in some relevant manner to

[2] *See* Veterans Programs Enhancements Act of 1998, Pub. L. No. 105-368, 11 Stat. 3315 (Nov. 11, 1998).

implement that intent as required by the Supreme Court's opinion in *Irwin*. By not doing so, the Court must assume that Congress intended for equitable tolling to be available under § 7266(a).[3]

III. *IRWIN* IS STILL GOOD LAW AND § 7266 IS SUBJECT TO EQUITABLE TOLLING AS THE FEDERAL CIRCUIT HELD IN *BAILEY*.

VA argues that the Supreme Court in *Bowles* announced a new rule that statutory limitations periods cannot be equitably tolled. This is not true. Far from abandoning the *Irwin* "rebuttable presumption," the Supreme Court made clear in *John R. Sand and Gravel* that *Irwin* continues to be good law. *See* 128 S.Ct. at 735. The Supreme Court noted in *John R. Sand and Gravel* that *Irwin* announced a "prospective rule" governing future limitations inquiries – not a retrospective mandate that compelled courts to "revisit" established precedents holding that certain time limits were jurisdictional. *See John R. Sand & Gravel*, 128 S.Ct. at 755-56; *see also John R. Sand & Gravel*, 128 S.Ct at 760-61 (Ginsburg, J. dissenting) (observing that under the majority's decision, "*Irwin* governs the interpretation of all statutes we have not yet construed"). The Supreme Court in 1883 had found the limitations provision at issue in *John R. Sand* – governing suits in the Court of Claims – to be jurisdictional. *See* 128 S.Ct. at 754 (citing *Kendall*

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[3] The cardinal purpose of statutory construction is to determine and interpret statutes in accordance with legislative intent. *See*, *e.g.*, *Norfolk Redevelopment and Housing Authority v. C & P Telephone Co.*, 464 U.S. 30, 36 (1983).

v. United States, 107 U.S. 123 (1883)). The *John R. Sand and Gravel* Court in 2007 concluded that *Kendall* is still good law; that the Court in *Irwin* did not silently overrule that precedent without explicitly stating its intention to do so; and that it also would not revisit *Kendall*. 128 S.Ct. at 755, 756-57 (refusing to "overturn [*Kendall*] . . . simply because we might believe that the decision is no longer "'right'").

Mr. Boone submits that the Supreme Court took much the same approach in *Bowles*. Declining to "repudiate[e] . . . a century's worth of precedent and practice," the Court reaffirmed the long line of cases holding that the time prescribed for taking an appeal to an Article III federal appellate court is "mandatory and jurisdictional." *Bowles*, 127 S.Ct. at 2363-64 & n. 2 (citing cases); *see* 127 S.Ct at 2364-65 (noting that "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century"). Therefore, contrary to VA's arguments, the *Irwin* "rebuttable presumption" applies in cases where the question whether a particular limitations period is jurisdictional – or not – has yet to be resolved. *See John R. Sand & Gravel*, 128 S.Ct. at 755. This is not such a case. This is not such a case because the Federal Circuit held in *Bailey* that § 7266(a) is subject to equitable tolling. 130 F.3d at 1368. Thus, under the precedent decisions of the Supreme Court, *see John R. Sand & Gravel*, *Bowles*,

Irwin, and the Federal Circuit, *Bailey*, *Jaquay*,[4] *Barrett*,[5] this Court must conclude that § 7266(a) is subject to equitable tolling.

CONCLUSION

For these reasons, the Court must reject VA's arguments and should find that Mr. Boone filed a timely notice of appeal.

Respectfully submitted,

/s/ Michael P. Horan

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[4] 304 F.3d 1276 (Fed. Cir. 2002).

[5] 363 F.3d 1316 (Fed. Cir. 2004).