

In the United States Court of Federal Claims

HAROLD W. VAN ALLEN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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No. 11-706C

(Filed: April 24, 2012)

OPINION

MARGOLIS, *Senior Judge*.

This matter comes before the Court on defendant’s Motion to Dismiss, filed December 27, 2011. The Court finds that it lacks subject-matter jurisdiction because it has already held that 28 U.S.C. § 2501’s statute of limitations bars plaintiff’s claims, and the doctrine of issue preclusion prevents plaintiff from relitigating this issue. Thus, the Court grants defendant’s motion.

I. BACKGROUND

The United States Navy honorably discharged plaintiff Harold W. Van Allen from active duty on June 20, 1978. *Van Allen v. United States (“Van Allen I”)*, 70 Fed. Cl. 57, 59 (2006) (Merow, J.), *aff’d*, 236 Fed. Appx. 612 (Fed. Cir. 2007). The Navy did not provide a medical reason for this action. *Id.* Seeking retroactive disability benefits, plaintiff applied to the Board for Correction of Naval Records (“BCNR”) on February 25, 1985 to correct his record to state that the Navy released him due to medical conditions – “undiagnosed systemic lupus E. symptoms.” *Id.* On March 21, 1986, the BCNR denied plaintiff’s application, finding that plaintiff had failed to establish probable material error or injustice. *Id.* On June 24, 1988, plaintiff notified the BCNR by letter that he recently learned that he had a large suprasellar arachnoid cyst, or “cerebral lesion.” *Id.* at 59-60. The BCNR treated this submission as a request for reconsideration and denied it on January 13, 1989. *Id.* at 60. Plaintiff submitted additional medical information, and on July 24, 1991, the BCNR granted plaintiff’s request for reconsideration. *Id.* However, on June 1, 1995, the BCNR denied plaintiff’s application to correct his record, finding again that plaintiff failed to establish probable material error or

injustice. *Id.* at 61. Plaintiff made additional requests for reconsideration, but the BCNR denied them. *Id.* at 61-62.

Plaintiff filed suit against the United States in this Court on January 25, 2005 (“*Van Allen I*”), seeking retroactive military disability retirement pay and healthcare reimbursement. 66 Fed. Cl. 294, 294, 297 (2005) (Merow, J.) In its July 13, 2005 Opinion and Order, the Court dismissed the healthcare reimbursement claim for lack of subject-matter jurisdiction. *Id.* at 295-296. The Court held that plaintiff could proceed with his disability retirement pay claim if he filed an amended complaint, but observed that 28 U.S.C. § 2501’s six-year statute of limitations would bar plaintiff’s claim unless he could show that he was entitled to equitable tolling. *Id.* at 296-299. The Court explained the various circumstances under which equitable tolling is available, specifically noting that they include a defendant’s misconduct that induces a plaintiff to miss the deadline. *Id.* at 298.

In “*Van Allen II*,” the Court considered plaintiff’s amended disability retirement pay claim, and on February 27, 2006, it held that § 2501’s statute of limitations did in fact bar it. 70 Fed. Cl. at 58, 65. The Court held that plaintiff’s claim accrued on March 21, 1986 – the first time that a competent board, the BCNR, issued a final determination on his claim. *Id.* at 63. The Court held that because plaintiff did not apply for reconsideration within a short or reasonable time after the March 21, 1986 decision, the BCNR’s July 24, 1991 decision to reconsider did not restart the filing period. *Id.* at 63-64. Further, it rejected plaintiff’s argument that he suffered a cognitive impairment sufficient to toll the filing period under either equitable tolling principles or § 2501’s “legal disability” provision. *Id.* at 64. It specifically held that plaintiff did not establish equitable tolling and that defendant had not induced plaintiff to miss the deadline. *Id.* Thus, the statute of limitations barred plaintiff’s suit on March 21, 1992. *Id.* The Court dismissed plaintiff’s amended complaint and the U.S. Court of Appeals for the Federal Circuit affirmed. *Id.* at 65; 236 Fed. Appx. 612 (Fed. Cir. 2007).

On July 14, 2010, plaintiff filed another suit in this Court (“*Van Allen III*”) alleging: (1) a May 1975 lower-jaw surgery that caused sleep apnea and sleep hypoxemia, and (2) service connected brain injuries. No. 10-467C, slip op. at 2 (Fed. Cl. September 12, 2011) (Baskir, J.) Plaintiff sought damages and an order that the BCNR correct the record. *Id.* Defendant moved to dismiss for lack of subject-matter jurisdiction because either issue preclusion or the statute of limitations barred these claims. *Id.* at 4.

The Court held in *Van Allen III* that issue preclusion barred plaintiff’s claims. *Id.* at 6. First, as the Court held in *Van Allen I*, it does not have jurisdiction over healthcare reimbursement claims. *Id.* at 4-5. Second, the Court already held in *Van Allen II* that plaintiff’s claim for disability retirement benefits accrued on March 21, 1986, that plaintiff had not provided evidence to extend the filing period, and that his claim was thus untimely. *Id.* at 5.

Although plaintiff alleged new medical facts, these underlying issues remained the same. *Id.* at 6. Thus, the Court dismissed plaintiff's suit for lack of subject-matter jurisdiction. *Id.*

Plaintiff then moved the Court to reconsider its decision, alleging "multiple unauthorized agency denials of reconsideration since 1987," and requesting that the Court transfer the case to the U.S. District Court for the District of Columbia to review the statute of limitations on litigating reconsideration. Pl.'s Motion to Reconsider, at 1-2 (September 19, 2011). However, the Court denied plaintiff's motion, holding that the U.S. District Court for the District of Columbia also lacked jurisdiction. September 22, 2011 Order. On October 11, 2011, plaintiff moved the Court to reconsider or clarify its September 22, 2011 Order, stating that he intended to file a class action complaint on behalf of individuals that lost BCNR reconsideration and U.S. Court of Federal Claims jurisdiction because of the BCNR's unauthorized actions. Pl.'s Motion for Reconsideration/Clarification. The Court did not rule on this motion, and plaintiff appealed on October 21, 2011.¹

On October 25, 2011, plaintiff filed the suit against the United States now before the Court. His Complaint requests that the Court:

- Focus on the threshold question of this US Court of Federal Claim having jurisdiction of determining its own jurisdiction of a class of previously denied BCNR disability retirement cases in the face of statutory and constitutional equitable tolling of statute of limitation constraints.
- -e.g. to what extent should the agency(s) BCMRs/BCNR be allowed to avoid USCFC jurisdiction and therefore review since the BCNR/agency staff exceeded statutory authority to deny reconsideration of new materials submitted -- rather than the "Board".

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(Compl.) Defendant argues that issue preclusion bars these claims, and the Court thus lacks subject-matter jurisdiction. In response, plaintiff argues that "the sole issue" in this case is that the BCNR's unauthorized handling of disability retirement cases has caused money damages to a class of similarly situated Navy veterans with service-connected cognitive/behavioral impairments prevented from timely filing. (Pl.'s Response and Cross Mot. for a Stay at 1.) Plaintiff also argues that the class includes "an already well defined class" of this Court's decisions that relied on the equitable tolling issue in *Van Allen II*. (Pl.'s Mot. to file Sur-Reply at 1.) Finally, plaintiff seeks a stay pending a mandamus petition he intends to file in the U.S. Court of Appeals for the Federal Circuit seeking review of due process issues in all of his cases in this Court and the U. S. Court of Appeals for Veterans Claims. (Pl.'s Response and Cross Mot. for a Stay at 1-2.)

¹ The U.S. Court of Appeals for the Federal Circuit dismissed this appeal for failure to prosecute in a December 7, 2011 Order. *Van Allen III*, No. 2012-5012.

II. STANDARD FOR DISMISSAL UNDER RCFC 12(b)(1)

RCFC 12(b)(1) allows a party to move to dismiss a claim for lack of subject-matter jurisdiction. In determining whether there is subject-matter jurisdiction, the Court must take the allegations in the complaint as true and decide on the face of the pleadings. *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004). While the Court holds *pro se* litigants to less stringent standards with respect to mere formalities, this does not relieve them from the burden of meeting jurisdictional requirements. *Minehan v. United States*, 75 Fed. Cl. 249, 253 (2007).

III. ANALYSIS

The doctrine of issue preclusion holds that a party may not relitigate an issue that a court has previously decided. *Young v. United States*, 92 Fed. Cl. 425, 430, 433 (2010), *aff'd*, 417 Fed. Appx. 943 (Fed. Cir. 2011). Issue preclusion applies where: (1) the issue is identical to the one decided in the first action, (2) the issue was actually litigated in the first action, (3) resolution of the issue was essential to a final judgment in the first action, and (4) the party against whom issue preclusion is being asserted had a full and fair opportunity to litigate the issue in the first action. *Id.* at 433. An issue was “actually litigated” if the parties disputed the issue and the trier of fact decided it. *In re Freeman*, 30 F.3d 1459, 1466 (Fed. Cir. 1994). Issue preclusion applies to jurisdictional issues, including whether a statute of limitations bars a claim, unless the jurisdictional defect has been cured. *Young*, 92 Fed. Cl. at 433-434. Issue preclusion applies even where an appeal to the first court’s decision is pending. *Rice v. Department of the Treasury*, 998 F.2d 997, 999 (Fed. Cir. 1993); *but see Berman v. Department of the Interior*, 447 Fed. Appx. 186, 195 (Fed. Cir. 2011) (prudence may suggest that a court stay a proceeding rather than apply issue preclusion during the pendency of the appeal).

Issue preclusion bars plaintiff’s suit. Plaintiff is essentially alleging that the BCNR denied his and other veterans’ applications for reconsideration without authorization, that this prevented him and others from timely filing suit in this Court, and that equitable tolling should prevent this result. However, this Court already decided these issues against plaintiff in *Van Allen II* and *III*.

In *Van Allen II*, the Court held that plaintiff had not established equitable tolling and that his claim was untimely. 70 Fed. Cl. at 63-65. In doing so, it specifically found that defendant did not induce plaintiff to miss the deadline. *Id.* at 64. The parties litigated whether equitable tolling applied and whether plaintiff’s claim was untimely, these issues were essential to the Court’s judgment, and plaintiff had a full and fair opportunity to litigate them. Plaintiff may not now relitigate them by asserting a new theory for equitable tolling.

In *Van Allen III*, plaintiff put the issue of the BCNR’s allegedly unauthorized reconsideration denials before the Court. Nevertheless, the Court held that issue preclusion prevented plaintiff from relitigating the equitable tolling and statute of limitations issues and that

it thus lacked subject-matter jurisdiction. Plaintiff may not now relitigate whether the BCNR's allegedly unauthorized reconsideration denials create subject-matter jurisdiction in this Court.

Plaintiff's class action allegations do not create jurisdiction, because a party cannot bring a class action if its own claims are time-barred. *Piazza, Jr. v. Ebsco Industries, Inc.*, 273 F.3d 1341, 1349 (11th Cir. 2001). Nor does plaintiff's intended mandamus petition warrant a different conclusion. *See Rice*, 998 F.2d at 999.

IV. CONCLUSION

The Court grants defendant's Motion to Dismiss and denies plaintiff's Cross Motion for a Stay. The Clerk shall dismiss the Complaint and enter judgment for the defendant. The parties shall bear their own costs.



LAWRENCE S. MARGOLIS
Senior Judge, U.S. Court of Federal Claims