In the United States Court of Federal Claims

Case No. 00-665C
(Filed: February 20, 2007)
(Not for Publication)

* *

JOHN M. ELLISON,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant

* *

John M. Ellison, Claremore, OK. *pro se.*

Steven Mager, Commercial Litigation Branch, Department of Justice, Washington, D.C., Counsel of Record for the Defendant. With him on the briefs were ***David M. Cohen***, Director, ***Bryant G. Snee***, Assistant Director, and ***Peter D. Keisler***, Assistant Attorney General.

Stephanie Wilson, law clerk.

OPINION

BASKIR, **Judge.**

Plaintiff, Sergeant First Class ("SFC") John M. Ellison, was a United States Army Reserve paratrooper who had been seriously injured during a regularly scheduled airborne exercise on February 23, 1987. Plaintiff brings this action seeking damages of approximately $50,000 arising from the United States Army's denial of incapacitation pay for the period of February 23, 1987 through April 30, 1990, the date he was restored to "jump status." Defendant filed a first Motion to Dismiss for lack of jurisdiction on March 12, 2001. On July 17, 2006, Defendant filed a second Motion to Dismiss for Failure to Prosecute and Failure to Comply with an Order of this Court. Because the Court finds that Plaintiff's action is barred by the statute of limitations, **Defendant's first Motion to Dismiss is GRANTED and Defendant's second Motion to Dismiss is DENIED as moot.**

BACKGROUND

I. SFC Ellison's Injury and Request for Incapacitation Pay

SFC Ellison suffered numerous injuries to his left leg, including a broken ankle and a torn meniscus, while participating in a regularly scheduled and mandatory military parachute jump with his unit. Plaintiff's Complaint in this case states that this injury occurred on February 23, 1987. Compl. ¶¶ 1, 4, 5, 8, 9. However, Plaintiff's opposition and the earlier Oklahoma litigation state that the date of his injury was February 23, 1986. Because under a Rule 12 motion we take the facts as they are presented in the pleadings as true and accurate, we operate under the assumption that Plaintiff's injury occurred on February 23, 1987, for the purposes of this opinion. We note that the date of Plaintiff's injury does not affect our analysis of the statute of limitations issue.

On March 19, 1990, SFC Ellison had orthopedic surgery on his left knee. Compl. ¶ 5. On April 30, 1990, he was restored to "jump status," meaning he could actively participate in all training, including airborne training. *Id.* SFC Ellison submitted a request for incapacitation pay for the period of February 23, 1987 through April 30, 1990. Compl. ¶ 6. On November 5, 1992, the Army, acting through its Deputy Chief of Staff for Personnel (designated "DAPE-MBB-C"), granted his request for incapacitation pay only for the period of March 19, 1990 (the date of his surgery) through April 30, 1990. Compl. ¶ 8. The Army denied his request for incapacitation pay for the period between the date of his injury and his surgery. SFC Ellison alleges that the Army reported this decision to him on January 25, 1993. *Id.*

On November 23, 1995, SFC Ellison petitioned the Army Board for the Correction of Military Records ("ABCMR") for relief. Compl. ¶ 9. The ABCMR denied his request for relief on November 11, 1998. *Id.* SFC Ellison alleges that he did not receive notice of this decision until April 12, 1999. *Id.*

II. Earlier Litigation

On August 30, 1989, Plaintiff filed a claim in the United States District Court for the Northern District of Oklahoma regarding Fort Sill's obligation to provide medical care for his injured knee. Plaintiff's suit to compel medical care was mooted when Fort Sill accepted the findings of a formal line-of-duty investigation that determined that his torn meniscus was the result of the February 23, 1987 jump, and subsequently approved the surgery.

On August 23, 1990, Plaintiff filed an amended complaint in the Northern District of Oklahoma litigation, seeking to compel his supervisor to certify that he was unable to perform parachute jumps after his injury. *See* Pl. App. E1, *Ellison v. Gonzalez*, No. 89-C-711-B (N.D. Okla. March 15, 1991). The Northern District of Oklahoma determined that Plaintiff's claim "that his military record should reflect medical incapacity for parachute jumping for the period in question is a matter that is properly

reviewable and correctable by the ABCMR." *Id.* at E3. The District Court then dismissed Plaintiff's complaint without prejudice, concluding that it lacked jurisdiction on the ground that Plaintiff failed to exhaust his administrative remedies. *Id.*

The District Court reiterated this reason for its dismissal in its October 4, 1991 Order denying Plaintiff's Motion for Attorney's fees as premature and directing the Defendant to file a response to Plaintiff's Motion for a New Trial, *see* Pl. App. F1, and in its April 9, 1992 Order denying Plaintiff's Motion for a New Trial. Pl. App. H2. In a May 14, 1993 Order granting Plaintiff's application for attorney's fees, the District Court – for what appears to be the first time – stated that it did not have jurisdiction because "Plaintiff's claim for incapacitation pay for in excess of $10,000.00, is for the United States Court of Claims." Pl. App. I1.

Plaintiff appealed the District Court's dismissal of his complaint. The United States Court of Appeals for the Tenth Circuit affirmed the District Court's decision in an unpublished opinion, stating:

> We agree with the district court that plaintiff in this case is required to exhaust his administrative remedies and that the proper appeal route is to the Unites States Court of Claims. . . .
>
> In his brief on appeal, plaintiff argues that the administrative route for seeking incapacity pay is replete with delay, excess discovery, and might be an ineffective remedy. Even if all of these allegations were true, they do not excuse the necessity of exhausting the internal service remedies and the jurisdictional requirement that the appeal therefrom is to the United States Court of Claims.

Ellison v. Gonzales, No. 92-5116, 1994 WL 75825, at *1.

III. Litigation in the Court of Federal Claims

Plaintiff filed this action on November 13, 2000. The United States filed a Motion to Dismiss on March 12, 2001, alleging that Plaintiff's claim is barred by the statute of limitations. During the briefing of that motion, the case was stayed pending the outcome of *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1177 (2004). The United States Federal Circuit issued an *en banc* decision in *Martinez* on June 13, 2003, and the Supreme Court denied the petition for writ of certiorari on February 23, 2004. The stay was lifted in this case on April 6, 2004, and the Defendant filed its reply, which addressed the effect of the *Martinez* decision on the instant case, on August 6, 2004. We granted Plaintiff's unopposed motion to file a surreply, and ordered that the surreply be filed by November 30, 2004. This deadline was extended once to January 31, 2005, and no surreply was filed by that date.

On August 22, 2005, Plaintiff's counsel, Mr. Fred Gilbert, filed a Motion for Leave to Withdraw on the grounds that Plaintiff desired to retain other counsel or proceed *pro se*. We held a telephonic status conference on this matter on October 21, 2005. At this status conference, we received Plaintiff's personal contact information, including a mailing address and telephone number. Plaintiff assured the Court that he would obtain a new attorney by November 22, 2005, and file a surreply by December 23, 2005. Consequently, we granted Mr. Gilbert's Motion for Leave to Withdraw and ordered Plaintiff to obtain a new attorney by November 22, 2005, and file a surreply by December 23, 2005. This Order also provided Plaintiff with a list of attorneys who have expressed a willingness to represent *pro se* plaintiffs in matters before the Court. Unfortunately, Plaintiff never received the Order or the list. It was returned November 22, 2005, by the U.S. Postal Service with the notation "Box Closed–No Order." Our attempts to reach Plaintiff by telephone also failed. The number he provided had been disconnected.

With the assistance of Plaintiff's former attorney, we were able to furnish Plaintiff with the documents and speak directly with Plaintiff during an unscheduled telephonic status conference on December 21, 2005. Plaintiff represented to the Court that the post office box address he initially supplied us was again operational. He also provided new phone numbers at which he could be reached. The Court then advised Plaintiff that it would give him one more opportunity to seek representation, and ordered that by February 1, 2006, the Court must either be contacted by an attorney who intended to represent Plaintiff, or Plaintiff was to file a surreply brief on his own.

To date, Plaintiff has never obtained new counsel, nor filed a surreply. On July 17, 2006, Defendant filed a Motion to Dismiss for Failure to Prosecute and Failure to Comply with an Order of this Court. It has been more than two years since we first granted Plaintiff's unopposed motion to file a surreply, and over a year since we last ordered Plaintiff to either seek new representation or file a surreply brief on his own. Given this lapse of time without any response from Plaintiff, we conclude that Plaintiff has waived his right to file a surreply. We now resolve Defendant's first Motion to Dismiss.

DISCUSSION

The Tucker Act's six-year statute of limitations operates as an express limitation on the Federal Government's waiver of sovereign immunity for non-tort monetary claims against the United States. *See* 28 U.S.C. § 2501; *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990). Under the Tucker Act, a claim accrues, and the statute of limitations begins to run, "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Brighton Vill. Assocs. v. United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (quoting *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988)); *see also Martinez*, 333 F.3d at 1303 (Fed. Cir. 2003). In military pay cases, "the date of accrual . . . is the date on which the service member was denied the pay to which he claims entitlement." *Martinez*, 333 F.3d at

1314. In *Martinez*, the Federal Circuit rejected the argument that, for claims filed in the Court of Federal Claims, the cause of action in military pay cases does not accrue until the correction board issues a final decision denying relief.

Defendant contends that Plaintiff's cause of action accrued when the DAPE-MBB-C denied, in part, Plaintiff's incapacitation pay request on November 5, 1992. Plaintiff filed this action on November 13, 2000, more than eight years after his incapacitation pay request was first denied and more than seven years after Plaintiff received notice of the decision. In his reply brief, which was filed while he was still represented by counsel, Plaintiff does not dispute that ordinarily the six-year statute of limitations would have begun when the DAPE-MBB-C first denied his incapacitation pay request.

However, Plaintiff contends that his suit is not time barred because both the District Court and the Tenth Circuit held that he was required to exhaust his administrative remedies before filing his claim for incapacitation pay and that the proper forum for appeal was the United States Court of Claims. He argues that these holdings should either have a res judicata effect or constitute the law of the case in the instant proceedings, and therefore resort to the ABCMR before filing with the Court of Federal Claims was obligatory for Plaintiff. Alternatively, Plaintiff argues that the Government's conduct compels a finding that the statute of limitations should have been equitably tolled for the period that he pursued relief before the ABCMR. Pl. Br. at 27 ("[S]ince the Government was urging that the "Tulsa" litigation really belonged in the Court of Claims, then why was not the Court of Claims case-law [on the statute of limitations] now relied on by the Government disclosed back during the Tulsa case?"). These issues are distinct from the one presented in *Martinez*, which addressed only the point at which a claim for military pay in the Court of Federal Claims accrues.

I. *Res Judicata*

Plaintiff argues that, under the doctrine of res judicata, this Court is bound by the earlier decisions of the Northern District of Oklahoma and the Tenth Circuit, which held that he was required to exhaust his administrative remedies before filing a claim and that this Court is the proper forum for an appeal of the administrative decision.

Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979) (citations omitted). The Federal Circuit has stated that "res judicata applies if (1) the prior decision was rendered by a forum with competent jurisdiction; (2) the prior decision was a final decision on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases." *Carson v. Dep't of Energy*, 398 F.3d 1369, 1375 (Fed. Cir. 2005).

Both the Northern District of Oklahoma and the Tenth Circuit determined that the District Court lacked jurisdiction over Plaintiff's claim for incapacitation pay because it exceeded $10,000 and thus belonged in the Court of Claims. Therefore, neither court could properly reach a decision on whether Plaintiff was required to exhaust his administrative remedies before filing his incapacitation claim in this Court. Because neither the District Court nor the Tenth Circuit had jurisdiction over Plaintiff's claim, the Federal Circuit's res judicata requirement that the prior decision be rendered by a forum with competent jurisdiction is not satisfied. Accordingly, res judicata does not bind us to accept their statements that Plaintiff was required to pursue his claim before the ABCMR before appealing an adverse decision to this Court. *See generally Christopher Village v. United States*, 360 F.3d 1319, 1333 (Fed. Cir. 2004) (ruling of the United States Court of Appeals for the Fifth Circuit on substance of claim was void where that court lacked jurisdiction over the claim in the first instance).

Furthermore, a dismissal for lack of subject matter jurisdiction is not considered a final judgment on the merits for res judicata purposes. *Vink v. Schijf*, 839 F.2d 676, 677 (Fed. Cir. 1988) ("A dismissal for lack of subject matter jurisdiction, on the other hand, is not a disposition on the merits and thus permits a litigant to refile in an appropriate forum."); *Saladino v. United States*, 62 Fed.Cl. 782, 790 (2004) ("It is well established that a dismissal for lack of jurisdiction does not constitute a final judgment on the merits and therefore has no res judicata effect."). The Northern District of Oklahoma dismissed Plaintiff's claim on the grounds that it lacked subject matter jurisdiction and the case properly belonged in the Court of Claims. Therefore, the Federal Circuit's second res judicata requirement also is not met.

II. *Law of the Case*

Plaintiff also contends that under the law of the case doctrine, this Court is bound by the earlier determinations of the Northern District of Oklahoma and the Tenth Circuit that Plaintiff was required to exhaust his administrative remedies before filing his claim for incapacitation pay. "The law of the case doctrine prevents a court from 'reopen[ing] issues decided in earlier stages of the *same litigation*.'" *Taylor v. United States*, 73 Fed.Cl. 532, 538 (2006) (quoting *Agostini v. Felton*, 521 U.S. 203, 236 (1997)) (emphasis added). The law of the case doctrine also applies to a trial court following the decisions of an appellate court on remand. The law of the case doctrine is inapplicable here, because this litigation was separate and distinct from the Plaintiff's earlier litigation in the Northern District of Oklahoma and the Tenth Circuit.

III. Collateral Estoppel

Although Plaintiff expressly argues that the District Court and Tenth Circuit decisions have either a res judicata effect or constitute law of the case, his discussion also suggests that issue preclusion, or collateral estoppel, may apply. Plaintiff's brief implies that the decisions in the earlier litigation preclude any argument now that Plaintiff was not required to exhaust his administrative remedies before filing his claim

in this Court. *See* Pl. Br. at 7 ("[T]he District Court (in the Tulsa litigation) specifically ruled that Sergeant Ellison *could* seek judicial review if his petition to the Board was unsuccessful, and in affirming [the District Court's] ruling, the Tenth Circuit did not disturb that dismissal 'without prejudice' language. Thus, Plaintiff, individually, has an adjudicated right to seek judicial review of the Army's and/or the Board's actions.").

The Federal Circuit has established a four-factor test for determining when collateral estoppel should be applied:

> Collateral estoppel is appropriate only if: (1) the issue to be decided is identical to 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 parties had a full and fair opportunity to litigate the issue in the first action.

Applied Medical Resources Corp. v. U.S. Surgical Corp., 435 F.3d 1356, 1361 (Fed. Cir. 2006) (quoting *Arkla, Inc. v. United States*, 37 F.3d 621, 624 (Fed. Cir.1994)). Plaintiff's claim fails all four elements of this test.

First, the issue before this Court is not identical to the issue presented to the District Court and the Tenth Circuit. In the earlier litigation, the District Court and Tenth Circuit were faced with the issue of whether the District Court had jurisdiction over Plaintiff's claim for equitable relief. Here, the issue presented is whether this Court has jurisdiction over Plaintiff's claim for military incapacitation pay.

Second, in the earlier litigation, the parties did not actually litigate whether Plaintiff was required to exhaust his administrative remedies before filing a military incapacitation pay claim in the Court of Federal Claims. Throughout the earlier litigation, Plaintiff only argued that he was not required to exhaust his administrative remedies before filing a claim for equitable relief in the District Court. The Government took the position that if Plaintiff's claim was characterized as one for equitable relief, he was required to exhaust his administrative remedies before filing in the District Court, but that if his claim was actually one for incapacitation pay, it belonged before the Court of Federal Claims.

Third, even if the issue of whether Plaintiff was required to exhaust his administrative remedies before filing his claim in this Court had been decided in the earlier litigation, that decision was not essential to the final judgment in that action. The District Court concluded that it did not have jurisdiction to hear Plaintiff's claim because either he was required to resort to the ABCMR before filing a claim for equitable relief in the District Court, or jurisdiction over his monetary claim was exclusively in the Court of Federal Claims. Whether or not resort to the ABCMR was mandatory before filing a claim in this Court was not essential to the District Court's conclusion that it did not have jurisdiction over Plaintiff's earlier claims.

Finally, the parties did not have a full and fair opportunity in the earlier action to litigate whether exhaustion was mandatory before filing a claim in this Court. This, of course, was because that issue was irrelevant to whether the District Court had jurisdiction over Plaintiff's earlier claim.

IV. *Equitable Tolling of Statute of Limitations*

Plaintiff also argues that the Government's conduct in the earlier litigation compels a finding of an equitable tolling of the statute of limitations while he exhausted his administrative remedies. Pl. Br. at 5. He contends that the Government should have disclosed the Federal Circuit and Court of Federal Claims case law stating that resort to the ABCMR was optional in the earlier litigation, Pl. Br. at 27, and that it would be inequitable to allow the Government to argue in the District Court litigation that the exhaustion of administrative remedies was required and then use that against him here.

Whether equitable tolling is generally available under the Tucker Act has yet to be conclusively determined by the Federal Circuit. *See MacLean v. United States*, 454 F.3d 1334, 1339 (Fed. Cir. 2006); *Martinez*, 333 F.3d at 1318. In *Kirkendall v. Dep't. of the Army*, 412 F.3d 1273 (Fed. Cir. 2005), a split three-judge panel of the Federal Circuit recently applied the presumption of equitable tolling in a limited circumstance to grant the plaintiff a Merit Systems Protective Board hearing to pursue a Veterans Employment Opportunity Act claim. The Federal Circuit granted the Government's petition for *en banc* review of that case, vacated the panel decision, and held oral argument on November 9, 2006. An *en banc* decision has not yet been reached, but the broader issue of whether equitable tolling was generally available was a dominant theme at oral argument.

However, even assuming that equitable tolling is available against the Government under the Tucker Act, Plaintiff has not made a sufficient factual showing to invoke equitable tolling here. Filing a claim within the statute of limitations is a jurisdictional requirement in this Court and an express condition of the Government's waiver of sovereign immunity in the Tucker Act. *MacLean*, 454 F.3d at 1336. That statute provides:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

28 U.S.C. § 2501. Because filing within the statute of limitations is a jurisdictional requirement, the statute of limitations must be strictly construed. *MacLean*, 454 F.3d at 1336 (citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed.Cir.1988)).

The United States Supreme Court has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (footnote omitted). Plaintiff argues that the Government's failure to disclose the Federal Circuit and Court of Federal Claims case law that resort to the ABCMR was permissive warrants equitable tolling of the statute of limitations. Plaintiff contends that it would be inequitable to allow the Government to take the position in the District Court that the exhaustion of administrative remedies was mandatory, and then after Plaintiff pursued his claim before the ABCMR, argue in this Court that resort to the ABCMR was permissive.

Plaintiff mischaracterizes the Government's arguments in the District Court litigation. In that case, the Government argued that Plaintiff's amended complaint should be dismissed because the equitable relief he sought had "no significant prospective effect or considerable value apart from merely determining monetary liability of the government," and therefore "jurisdiction must be based on the Tucker Act." Pl. App. C4, Def. Br. at 4, *Ellison v. Gonzalez*, No. 89-C-711-B (N.D. Okla. August 31, 1990). Because Plaintiff's claim was in excess of $10,000, the Government argued that the Claims Court had exclusive jurisdiction over this Tucker Act claim. *Id.* The Government argued, alternatively, that if his amended complaint could be construed as one for *equitable relief* in the form of a writ of mandamus to the Army to certify that he was incapacitated to perform military duties, the District Court still did not have jurisdiction because he had not exhausted his administrative remedies. *Id.* at C6-C7. The Government never contended that Plaintiff was required to exhaust his administrative remedies before filing a claim for military incapacitation pay in this Court.

Moreover, it is not the Government's responsibility to disclose to Plaintiff the case law of the Court of Federal Claims and Federal Circuit on military pay claims. Plaintiff was represented by counsel at all times during the earlier litigation through October 21, 2005, when we granted Mr. Gilbert's motion to withdraw. It was Plaintiff's responsibility to investigate the applicable statutes and the case law of this Court and the Federal Circuit in pursuing his claim. It is not unusual for the circuit courts to have conflicting views on a matter such as this. Any erroneous statements made in the earlier litigation by the Government, the District Court, or the Tenth Circuit regarding this Court's jurisdiction do not relieve Plaintiff of this responsibility.

CONCLUSION

We are mindful of the fact that SFC Ellison may have had a legitimate claim for receiving military incapacitation pay and that his claim apparently has been mishandled at nearly every step of the way. Nonetheless, because this Court has very limited jurisdiction and the Government's waiver of sovereign immunity under the Tucker Act must be strictly construed, this Court has no authority to hear his claim.

We hold that Plaintiff's action is barred by the statute of limitations. Accordingly, it is **ORDERED that (1) Defendant's Motion to Dismiss for lack of subject matter jurisdiction is hereby GRANTED, and (2) Defendant's Motion to Dismiss for Failure to Prosecute is DENIED as moot.**

The Clerk of the Court is to enter judgment in favor of Defendant and dismiss the Complaint. The parties are to bear their own costs.

IT IS SO ORDERED.

FRANCIS M. ALLEGRA
Judge
for Judge Lawrence M. Baskir