

In the United States Court of Federal Claims

No. 06-690 C
(Filed July 31, 2007)

RICKIE J. YOUNG,	*
Plaintiff,	*
	*
v.	*
	*
THE UNITED STATES,	*
Defendant.	*

ORDER

This military compensation matter is before the court on dispositive motions filed by the parties.

Plaintiff, Rickie J. Young, served in the United States Army pursuant to a series of enlistments which terminated with his honorable discharge on April 25, 1998. Upon discharge he held the rank of sergeant (E-5), having completed fourteen years, one month and four days of creditable active service. His honorable discharge in 1998 was considered “involuntary” because he was precluded from reenlisting. Under applicable Army Regulations, plaintiff had reached the service time (Retention Control Point) which prevented further enlistment in the E-5 rank. He had not been promoted to E-6 despite an excellent record in his assigned work in food service activities. Plaintiff’s record included winning numerous high-level culinary competitions and obtaining very favorable Army recognition. A representative example is the commendation plaintiff received in 1989 from Lieutenant General Ronald L. Watts, which stated as follows (Administrative Record [“AR”] 237):

1. It gives me great pleasure to commend you for winning a gold medal as a member of the United States Army, Europe Culinary Arts Team. The All - Army Culinary Arts Show, held annually at Fort Lee Virginia, is the pinnacle of military culinary competition. To win an award at this level of competition is an achievement attained by less than one percent of all Army food service personnel. The entire chain of command is

justifiably proud of your outstanding achievement. Food Service Specialists of your expertise and dedication are an invaluable asset to the Army.

2. Again you have my heartiest congratulations. Best of luck in all future undertakings.

In a subsequent filing with the Army Board for Correction of Military Records (“ABCMR”) plaintiff described his reaction to his 1998 discharge as follows:

After the Olympics calmed down it was time to reenlist. I was denied reenlistment due to I was within 10 months of reaching retention control. This was the 1st time I heard of this term. There was no appeal, no way to object period. I was completely devastated. After all of the success in the last 6 years, winning an Olympic gold and silver medal, I was not good enough to reenlist, and I could not retire. Let me be the first to tell you I was not pleased.

(AR 22.)

In November of 2002, plaintiff filed an original disability claim with the Department of Veterans Affairs (“VA”). By a decision, dated April 23, 2003, the VA granted a ten percent evaluation as follows (AR 148):

1. Service connection for gastroesophageal reflux due to esophagitis is granted with an evaluation of 0 percent effective November 22, 2002.
2. Service connection for gastritis is granted with an evaluation of 0 percent effective November 22, 2002.
3. Entitlement to a 10 percent evaluation based upon multiple, noncompensable, service-connected disabilities is granted effective November 22, 2002.
4. Service connection for hiatal hernia is denied.

Plaintiff appealed the ten percent evaluation and the denial of service connection for hiatal hernia and on December 3, 2003, obtained a favorable opinion from the VA as follows (AR 144):

Service connection for a hiatal hernia is granted. An overall increased evaluation is established for the gastritis, esophagitis, and gastro-esophageal reflux disease. An evaluation of 30 percent is assigned from November 22, 2002 for the gastritis, esophagitis, gastro-esophageal reflux disease with hiatal hernia.

Plaintiff's Army medical records show that he was hospitalized from July 6 - July 17, 1992, with a final diagnosis of "upper G.I. bleed secondary to severe gastritis." (AR 120.) Plaintiff was prescribed Zantac and iron, and urged to stop smoking. (AR 120, 131.) The Army records show that plaintiff reported to Army medical treatment facilities and received treatment for abdominal problems on numerous occasions from 1992-1997. At no time did the military physicians who treated him initiate a referral to a Medical Evaluation Board ("MEB"). (AR 31, 120-41.)

On May 20, 1994, plaintiff was assigned to the Noncommissioned Officers Academy at Fort Lee, Virginia to attend the "Food Service Specialist Basic Noncommissioned Officer 94-9" course. (AR 152.) This course was scheduled from May 20, 1994 through August 9, 1994. (*Id.*) Plaintiff was "academically relieved from the course for his failure of the Army Physical Fitness Test (APFT), a course requirement." (*Id.*) Plaintiff had passed the APFT subsequent to his 1992 hospitalization and passed the test on at least two occasions subsequent to his failure to complete the 1994 Basic Noncommissioned Officer Course. (AR 155, 159, 163, 167.)

On November 20, 2003, plaintiff submitted an application to the Army Board for Correction of Military Records ("ABCMR") seeking a change in his 1998 honorable discharge to "Disability Separation or Medical Retirement." (AR 86.) Plaintiff's VA claim records were listed in support of his application. (*Id.*) Plaintiff was familiar with the ABCMR as on November 29, 1991, he had obtained a favorable ABCMR decision on an application requesting that his military records be corrected to show he was enlisted on October 4, 1990, in the rank of sergeant, vice specialist. (AR 344-348.)

On March 29, 2005, the ABCMR in an eight-page decision denied plaintiff's application concluding as follows (AR 85):

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined that the evidence presented does not demonstrate the existence of probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.
2. As a result, the Board further determined that there is no evidence provided which shows that it would be in the interest of justice to excuse the applicant's failure to timely file this application within the 3-year statute of limitations prescribed by law. Therefore, there is insufficient basis to waive the statute of limitations for timely filing or for correction of the records of the individual concerned.

Plaintiff sought reconsideration of the March 29, 2004 ABCMR decision and on May 6, 2004, received an unfavorable decision, denying reconsideration, in which the Board's Discussions and Conclusions stated as follows (AR 6):

DISCUSSION AND CONCLUSIONS:

1. The applicant requests that his records be corrected to show he retired by reason of physical disability. He states he was treated for a massive gastrointestinal bleed in 1992 and was treated for various related medical conditions between 1992 and 1998. He contends that Army Regulation 40-501, paragraph 3-3 states his medical conditions – gastritis, hernia, and esophagitis – were causes for referral to an MEB, but his physicians failed to initiate an MEB.
2. However, the evidence of record, as confirmed by the applicant himself, indicates he was never unable to perform his military duties. Paragraph 3-1 of Army Regulation 40-501, states that chapter 3 gives the various medical conditions which may render a Soldier unfit for further military service. Army Regulation 635-40 states a Soldier is referred for medical evaluation when the Soldier is believed to be unable

to perform the duties of his or her office or grade and rank. Again, all the evidence of record and the applicant himself fail to indicate he could not perform his military duties. Failure to pass the APFT did not render him unfit to perform his military duties. (In addition, his NCOER for the period ending March 1997 shows he passed the APFT.)

3. Based on the above, the applicant has not submitted sufficient evidence to show he was eligible for referral to the physical disability processing or that he was ever unfit by reason of physical disability.

On October 4, 2006, plaintiff initiated litigation in this court, seeking a remand to the ABCMR.

The defendant moves to dismiss, or, in the alternative, for judgment upon the administrative record. Plaintiff opposes defendant's motion and seeks judgment in his favor on the administrative record.

Defendant's Motion to Dismiss is premised upon the applicable statute of limitations 28 U.S.C. § 2501 which provides "[e]very 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."

A claim for military disability retirement pay requires a determination that a service member is "unfit to perform the duties of the member's office, grade, rank or rating because of physical disability incurred while entitled to basic pay." 10 U.S.C. § 1201(a). A claim of entitlement to the disability retirement pay generally does not accrue until the appropriate military board either finally denies such a claim or refuses to hear it. *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005). Where a service member is released from service without a board hearing and then files a claim for disability retirement before a military correction board, the correction board becomes the first proper board to act on the matter and the claim accrues when that board's action is final. *Id.* at 1225.

Were plaintiff now seeking disability retirement pay, the claim would first accrue with the final correction board decision in 2004 and this litigation, commenced in 2006, would be timely. The question to resolve would be whether the Correction Board's decision was arbitrary, capricious, contrary to law, or unsupported by

substantial evidence. *Id.* at 1227. Based on the material in the board's record which demonstrated plaintiff's excellent performance of his duties at all times up to his discharge in 1998, the board's decision to deny disability retirement relief to plaintiff would have to be upheld on review were plaintiff still claiming that compensation. The record evidence supports the board's conclusions regarding plaintiff's disability retirement compensation claim.

However, plaintiff has clarified that he is not seeking disability retirement compensation. (*See* Motion, filed Jan. 29, 2007, 4; Response, filed Mar. 1, 2007, 1.) Plaintiff is, essentially, seeking the back pay for the time required to reach longevity retirement which requires twenty years of creditable service. *See* 10 U.S.C. § 3914. Plaintiff claims that he should have been properly "profiled" when he reported to Army Medical Treatment Facilities and had this occurred, by reference to a Medical Evaluation Board, he would have been afforded a version of the Army Physical Fitness Test consistent with his medical condition. Plaintiff states (Motion, filed Jan. 29, 2007, 14):

A proper profile consistent with the medical deficiency noted on Mr. Young's medical records would have altered the type of APFT he would be given. This test would have fit the requirements imposed on him as a soldier, required to do his duty, train within the limits of this profile and continue to retirement eligibility.

Upon his honorable discharge on April 25, 1998, at the end of his last enlistment term, plaintiff had fourteen years, one month and four days of creditable active service. To reach retirement eligibility, plaintiff would require credit for over five years of additional service. Plaintiff claims he would have accrued this service had he been provided a proper physical profile which would have permitted him to complete the Basic Noncommissioned Officer's Course, to be promoted to E-6 and to be reenlisted instead of being honorably discharged.

Unlike a claim for disability retirement compensation which requires a proper board decision for its first accrual, a monetary claim for military service, asserted to be wrongfully denied by a discharge, first accrues on the discharge date. *Martinez v. United States*, 333 F.3d 1295, 1301-05 (Fed. Cir. 2003). Any monetary claim, within the subject matter jurisdiction of this court, asserting entitlement to the additional denied service required for longevity retirement would first accrue with

plaintiff's honorable discharge on April 25, 1998. *See Martinez*, 333 F.3d at 1320; *James v. Caldera*, 159 F.3d 573, 582 (Fed. Cir. 1998). While plaintiff and defendant take divergent positions on whether plaintiff was entitled to be referred to a Medical Evaluation Board for a physical profile during his active duty service after his hospitalization in 1992, the issue cannot be resolved in this litigation as any monetary claim premised on denied service after April 25, 1998, due to lack of a profile is barred by 28 U.S.C. § 2501, the applicable statute of limitations.

Accordingly, it is **ORDERED** that final judgment be entered **DENYING** Plaintiff's Motion for Judgment and **GRANTING** Defendant's Motion to Dismiss Plaintiff's Complaint, with no costs to be assessed.

James F. Merow
Senior Judge