

**In the United States Court of Federal Claims**

NOT FOR PUBLICATION

No. 10-224C

(Filed October 29, 2010)

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**JOHN GARY ROSE,**

Plaintiff,

v.

**THE UNITED STATES,**

Defendant.

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**MEMORANDUM OPINION AND ORDER**

WOLSKI, Judge.

Pending before the Court is defendant’s motion to dismiss this case for lack of subject matter jurisdiction, filed under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”). For the reasons that follow, the motion to dismiss this case is **GRANTED**.

**I. BACKGROUND**

On April 12, 2010, plaintiff John Gary Rose filed a *pro se* complaint purportedly on behalf of himself and U.S. veterans who fought in the Vietnam War.<sup>1</sup> Plaintiff contends that for forty years the U.S. Department of Veterans Affairs and its predecessor, the Veterans Administration (collectively, “VA”), withheld disability benefits and health care from Vietnam veterans. Compl. at 1-2. Plaintiff alleges that from 1971 through 2010 the VA and its hospitals

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<sup>1</sup> Understandably, as a *pro se* litigant Mr. Rose neglected to include in his complaint the necessary averments to maintain a class action under RCFC 23. In any event, under our Court’s rules, a non-lawyer may represent only himself and immediate family members. RCFC 83.1(a)(3). Thus, plaintiff may not maintain a class action on behalf of other unrepresented veterans. See *Fuselier v. United States*, 63 Fed. Cl. 8, 11 (2004).

“conspired to keep down costs for benefits for veterans by neglect.” *Id.* at 2.<sup>2</sup> He generally alleges that benefits and information about benefits were denied veterans, who were turned away from VA hospitals without receiving treatment. *Id.* In particular, he alleges that the VA followed a procedure of not paying “benefits that were earned by combat veterans with . . . combat fatigue, PTSD [(post-traumatic stress disorder)] and any other brain injuries.” *Id.* at 2-3. He adds that veterans were harassed, embarrassed, subjected to armed force, and had their complaints denied or ignored by the VA. *Id.* at 5. Unspecified civil and constitutional rights are allegedly violated by the defendant. Compl. at 3, 5-6.<sup>3</sup> Plaintiff characterizes the alleged neglect of veterans as a “genocide,” *id.* at 9, and seeks an award of over \$5 million for himself and of \$150 billion for Vietnam veterans. *Id.* at 8-9.

Plaintiff may not, as a *pro se* litigant, advance the claims of other veterans. *See supra* note 1. He has, however, included in his complaint some specific allegations of facts pertaining to his own claim, which are assumed true for purposes of the pending motion. Plaintiff is a Vietnam veteran who served in the U.S. Army. Compl. at 3. His service included six months in Korea and two tours in Vietnam. *Id.* Plaintiff was discharged under honorable conditions on August 23, 1970. *Id.* at 3-4. While in the military, plaintiff suffered from combat fatigue or PTSD. *Id.* at 3. Although he requested treatment, his medical problems persisted even after discharge. *Id.* On July 1, 1971, plaintiff’s father, John E. Rose, verbally complained to the staff at a VA hospital in Sepulveda, California that nothing was being done to treat plaintiff. Compl. at 3-4. His father was then told to leave. *Id.* at 4. Plaintiff has repeatedly sent to defendant and its officers evidence supporting his allegations concerning the denial of rights by the VA, and the government has failed to resolve his claims. *Id.* at 5, 7-8.

On July 30, 2010, the government filed a motion to dismiss this case for lack of subject matter jurisdiction, under RCFC 12(b)(1). The government argues that veterans health and disability benefits do not come within our court’s jurisdiction, and that the six-year time period in which to file a claim for disability retirement pay appears to have long expired. Def.’s Mot. at 4-8. Plaintiff has submitted a document entitled “Motion by Plaintiff to Continue in the United States Court of Cl[ai]ms” (“Pl.’s Opp’n”), filed on September 15, 2010, which the Court construes as Mr. Rose’s opposition to defendant’s motion to dismiss the case. In this document, plaintiff seems to contend that due process is denied when veterans’ claims must be re-filed by family members after the veterans’ deaths. Pl.’s Opp’n at 2. He also states that Vietnam veterans suffered the “neglect of their basic rights under the Constitution for life, liberty and the pursuit of happiness” at the hands of the government. *Id.* at 3. And plaintiff argues that the

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<sup>2</sup> For ease of reading, quotes from the Complaint are converted from the all-capital format used by plaintiff to a more conventional display.

<sup>3</sup> Plaintiff does describe his “right to a speedy trial,” Compl. at 5, but not in a criminal law context in which the Sixth Amendment would apply. The allegation appears to relate to the VA’s failure to act satisfactorily in response to his complaints, so perhaps Mr. Rose has in mind the First Amendment right to petition the government.

government's actions and inactions constitute "murder," to which no statute of limitations would apply. *Id.* at 3-4.<sup>4</sup>

## II. DISCUSSION

### A. Applicable Legal Standard

Whether a federal court has jurisdiction to decide the merits of a case is a threshold matter. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. at 514. The parties or the court *sua sponte* may challenge the existence of subject matter jurisdiction at any time. *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804); *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004); *James v. United States*, 86 Fed. Cl. 391, 394 (2009).

When considering whether to dismiss a complaint for lack of jurisdiction, a court assumes that the allegations in the complaint are true and construes those allegations in plaintiff's favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). A *pro se* plaintiff's complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers' . . ." *Hughes v. Rowe*, 449 U.S. 5, 10 n.7 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). But although "leniency with respect to mere formalities should be extended to a *pro se* party," *Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987), a *pro se* plaintiff is not excused from his or her burden of proving, by a preponderance of the evidence, that the court possesses jurisdiction. See *Henke*, 60 F.3d at 799; *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

### B. Analysis

Under the Tucker Act, the United States Court of Federal Claims has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2006). Congress has thus given our Court the power to hear and award claims for money damages to which parties are entitled by virtue of specific laws, usually referred to as "money-mandating statutes." See *Contreras v. United States*, 64 Fed. Cl. 583, 588 (2005).

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<sup>4</sup> Plaintiff also supplied an exhibit with a video montage set to SSgt Barry Sadler's "The Ballad of the Green Berets," with descriptions of his maladies and interactions with the VA. Pl.'s Opp'n Ex. A.

Plaintiff has not identified any money-mandating statute that may serve as the basis for his claim.<sup>5</sup> His complaint does, however, generally allege the withholding of veterans' health and disability benefits, *see* Compl. at 2-4, and presumably the laws relating to these benefits are the basis for his claim to \$5,000,000.50 in damages "for loss of wealth." *Id.* at 8. The problem for plaintiff, however, is that Congress may specify, in a particular statute that mandates payment of money, that review is restricted to a court other than ours. This is the case for veterans' disability or health benefits.

When seeking these benefits, a former servicemember must first apply to the Secretary of the VA. 38 U.S.C. § 5101(a) (2006); *see Pope v. United States*, 77 Fed. Cl. 737, 740 (2007). A VA regional office decides whether benefits will be granted. *Pope*, 77 Fed. Cl. at 740 (citing 38 U.S.C. § 511 (2006)). Appeals of those decisions go first to the Secretary and then to the Board of Veterans Appeals ("Board"). 38 U.S.C. § 7104(a) (2006). Under the Veterans' Judicial Review Act of 1988 ("VJRA"), 38 U.S.C. §§ 7251-7298, Congress gave exclusive jurisdiction for appeals of Board decisions to the Court of Appeals for Veterans Claims. 38 U.S.C. § 7252(a) (2006). In turn, the Federal Circuit was given exclusive jurisdiction over appeals from decisions by the Court of Appeals for Veterans Claims. 38 U.S.C. § 7292(a), (c) (2006). Therefore, this Court is precluded from hearing veterans' disability or health benefits claims. *See Pope*, 77 Fed. Cl. at 740; *Davis v. United States*, 36 Fed. Cl. 556, 559 (1996).

Plaintiff's complaint does not contain any allegations that he has been deprived of military disability retirement pay, which can be within our Court's subject matter jurisdiction. *See Fisher v. United States*, 402 F.3d 1167, 1174-75 (Fed. Cir. 2005) (holding that 10 U.S.C. § 1201 is money-mandating). But even if his complaint were construed as seeking military disability retirement pay, he alleges to have been suffering from PTSD when he was discharged nearly forty years before filing the complaint. Plaintiff has provided no reason why the six-year statute of limitations period of 28 U.S.C. § 2501 would not have expired on such a claim. Thus, even a claim for military disability pay would be beyond our jurisdiction. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136-39 (2008) (affirming the jurisdictional nature of 28 U.S.C. § 2501).

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<sup>5</sup> Nor has he alleged the violation of a money-mandating provision of the Constitution, such as an uncompensated taking in violation of the Fifth Amendment, *see United States v. Causby*, 328 U.S. 256, 267 (1946), or an illegal exaction, *see Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996).

### **III. CONCLUSION**

For the foregoing reasons, defendant's motion to dismiss this case for lack of subject matter jurisdiction, pursuant to RCFC 12(b)(1), is hereby **GRANTED**. The Clerk shall close the case. No costs shall be awarded.

**IT IS SO ORDERED.**

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**VICTOR J. WOLSKI**  
Judge