In the United States Court of Federal Claims

No. 10-861C
(Filed: May 11, 2012)

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EFRAIN E. FUENTES,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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ORDER

On December 14, 2010, Plaintiff Efrain Fuentes filed a Complaint alleging that he is entitled to back pay because the United States Army improperly separated him from active duty while he was injured. Plaintiff claims that, under the Military Pay Act, 37 U.S.C. § 204 (2006), he is entitled to active-duty pay for the period of his wrongful discharge.

On March 1, 2012, Plaintiff filed a Motion to Supplement the Administrative Record with two documents written by two of his commanding officers. On March 9, 2012, the Government filed a response opposing the motion because it asserted that the documents played no role in the Army's decision-making process. On March 19, 2012, Plaintiff filed a reply. For the reasons that follow, the Court grants Plaintiff's Motion to Supplement the Administrative Record.

I. Background

On April 15, 2011, the Government filed a Motion to Dismiss for lack of subject matter jurisdiction. Along with his Response to the Motion to Dismiss, and thus before the Government filed the administrative record, Plaintiff filed 13 exhibits to support his argument that jurisdiction was proper. On September 21, 2011, this Court denied the Government's Motion to Dismiss, finding that Plaintiff had established the jurisdictional predicates for a back-pay claim under the Military Pay Act. *See Fuentes v. United States*, 100 Fed. Cl. 85, 92 (2011).

On October 19, 2011, the Government filed the administrative record and a Motion for Judgment upon the Administrative Record. The administrative record, however, did not contain all the exhibits Plaintiff had filed in his Response to the Motion to Dismiss. In particular, it did not contain the two memoranda, which are contained in Plaintiff's Exhibit 4, that are at issue

here. The first memorandum was written by Plaintiff's Battalion Commander requesting a letter of release for redeployment. The Battalion Commander wrote, "Soldier is not physically fit for deployment or to be retained in the military due to his multiple medical conditions that prevent him from performing even the most basic Soldier duties." The second memorandum was by Plaintiff's Brigade Commander, who wrote, "the soldier is no longer physically fit for deployment or to be retained in the military due to multiple medical conditions that prevents him from performing the most basic soldier duties." Each memorandum was one-page long.

On December 5, 2011, Plaintiff filed a Response and a Cross-Motion for Judgment on the Administrative Record. In his response and cross-motion, Plaintiff cited to and partially relied upon Exhibit 4, arguing the evidence showed he failed to meet retention standards, and the Army therefore was required to refer him to a medical examination board ("MEB").

On January 19, 2012, the Government filed a reply and alleged that Plaintiff improperly relied on evidence outside of the administrative record. The Court agreed that it was improper for Plaintiff to rely on evidence outside of the administrative record. The Court stayed the briefing on the motions and ordered Plaintiff to file a motion to supplement the administrative record if he wished to rely on the evidence in Exhibit 4.

II. Discussion

A. Legal Standard

In general, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). As the Federal Circuit has explained, judicial review is focused on the administrative record in accordance with the principle that "parties must make the administrative record before the agency . . . ." *Walls v. United States*, 582 F.3d 1358, 1367-68 (Fed. Cir. 2009). If a plaintiff could have submitted evidence to the agency, but did not, the evidence is properly excluded by the Court of Federal Claims. *Id.*; *accord Barnick v. United States*, 591 F.3d 1372, 1382 (Fed. Cir. 2010).

A court may supplement the administrative record, however, if it finds that supplementation is necessary to ensure that "effective judicial review" is not frustrated. *Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009). Such supplementation should occur "if the existing record is insufficient to permit meaningful review consistent with the [Administrative Procedure Act]." *Id.* "The purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to convert the arbitrary and capricious standard into effectively de novo review." *Id.* at 1380 (quotations omitted).

B. Plaintiff's Motion

Before determining whether to allow Plaintiff to supplement the administrative record, this Court must first address what information is necessary for effective judicial review of Plaintiff's claim for back pay. The Court will review the Army's decision to determine whether

it is arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *See Martinez v. United States*, 333 F.3d 1295, 1314 (Fed. Cir. 2003) (*en banc*).

The issue to be decided on the merits is whether the Army violated Army Regulations when releasing Plaintiff from active duty by not keeping him on active duty and referring him to be processed through the disability system. Plaintiff argues that (1) when a soldier fails to meet retention standards or has certain medical conditions, Army Regulations require MEB referral before the soldier is released from active duty; (2) he had medical conditions that required MEB referral; (3) he failed to meet retention standards; and (4) therefore, the Army acted arbitrarily and capriciously in not referring him to an MEB before discharging him. The Government argues that the Army followed its regulations and that the regulations only require MEB referral when a soldier is no longer reasonably performing his duties. The Government further argues that the final doctor to evaluate Plaintiff before his release, Dr. Larry Bell, determined that a MEB evaluation was not necessary and his decision should be given deference by this Court.

Under the APA, a court should set aside an agency's decision if the agency "'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Ala. Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Without deciding the merits of either party's argument, the Court finds that effective judicial review in this case requires consideration of the two documents created by Plaintiff's commanding officers. Plaintiff asserts that he was redeployed out of theater because, due to his medical condition, he failed to meet retention standards. In arguing that the Army's determination that he met retention standards was arbitrary and capricious, Plaintiff may assert that the Army did not consider the records and it therefore failed to evaluate an important part of the problem. Plaintiff never had the opportunity to present the documents to the agency, and so he is not barred from presenting the two documents to this Court. *See Walls*, 582 F.3d at 1368. To properly review the decision, the Court will need to consider whether the Army's failure to consider the documents was arbitrary and capricious.

The administrative record, as filed by the Government, contains 592 pages. The two documents Plaintiff wishes to add are each 1-page long. The documents contain brief statements by two of Plaintiff's commanding officers, and they were created in the ordinary course of duty. Although Army decision-makers and Dr. Bell may not have considered the documents, both memoranda would have been at their disposal. The Government argues that the Army's decision is well supported because the record contains 19 different physical evaluations by medical doctors, making consideration of the two documents unnecessary. To the contrary, the Court cannot discern how, given the circumstances, its consideration of the two documents proffered by Plaintiff would alter the standard of review. The Court will review the Army's decision to determine if is supported by substantial evidence or is arbitrary and capricious; the addition of the two memoranda will not alter that standard.

III. Conclusion

For the reasons set forth above, the Court **GRANTS** Plaintiff's motion to supplement the administrative record. Accordingly, Exhibit 4 of Plaintiff's Response to the Motion to Dismiss shall be considered part of the administrative record.

Plaintiff shall file his Reply to the Government's Response to the Cross-Motion for Judgment on the Administrative Record by June 1, 2012.

s/ Edward J. Damich
EDWARD J. DAMICH
Judge