# In the United States Court of Federal Claims

No. 10-504C
(Filed: September 8, 2011)
**NOT FOR PUBLICATION**



JOE EARL MORGAN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Joe Earl Morgan, Grady, Arkansas, appearing *pro se*.

Lauren S. Moore, Trial Attorney, Kenneth M. Dintzer, Assistant Director, Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, Tony West, Assistant Attorney General, Department of Justice, Washington, D.C., for defendant. Captain John G. Doyle, Litigation Attorney, U.S. Army Litigation Division, Department of the Army, Arlington, Virginia, of counsel.

## OPINION AND ORDER

GEORGE W. MILLER, Judge

Mr. Morgan filed a motion for judgment on the administrative record on the basis that the Army Board for Correction of Military Records ("ABCMR") acted arbitrarily and capriciously when it denied his application for disability retirement pay, disability severance pay, and his request to change the result of a criminal investigation report (docket entry 6, Aug. 20, 2010) ("Pl.'s Mot."). The United States filed a motion to dismiss asserting that Mr. Morgan's claims are outside the Court's jurisdiction, either because they do not rest on a money-mandating provision of law or because they are barred by the statute of limitations (docket entry 13, Nov. 30, 2010) ("Def.'s Mot."). In the alternative, defendant sought judgment in its favor on the administrative record. For the reasons set forth below, defendant's motion to dismiss is **GRANTED IN PART** because Mr. Morgan's constitutional claims based on the equal protection clause and due process clause as well as Mr. Morgan's claim that the Army improperly concluded his eye injury was the result of an accident are not with the Court's jurisdiction. However, defendant's 12(b)(1) motion to dismiss is **DENIED IN PART** because Mr. Morgan's claims are not barred by the statute of limitations. With respect to the claims that are within the Court's jurisdiction and are not barred by the statute of limitations, namely the claim that the ABCMR acted arbitrarily and capriciously when it denied Mr. Morgan's request

for disability retirement pay and disability severance pay, Mr. Morgan's motion for judgment on the administrative record is **DENIED**, and defendant's cross-motion for judgment on the administrative record is **GRANTED** because the Court finds that substantial evidence of record supports the ABCMR's decision, which was reasonable, rational, and in accordance with law.

## I. Background

### *A. Mr. Morgan's Military Service and Injury*

Mr. Morgan was enlisted in the Army from August 8, 1976 until May 4, 1983. He served an initial three-year term followed by a four-year reenlistment and worked as a wire-systems installer-operator. Administrative Record ("AR") at 207, 244-46, 261 (docket entry 9, Oct. 26, 2010). Upon his entry into the Army, Mr. Morgan was given a physical rating using the PULHES profile of 111121,[1] with a "2" in the "E" (eye) category due to his farsightedness. Pl.'s Mot. at 2; Def.'s Mot. at 2. During his service, Mr. Morgan had some disciplinary issues that ultimately caused him to lose credit for 34 days of service time. AR 123.

On May 23, 1981, Mr. Morgan was participating in a training exercise when a nearby soldier fired an improperly loaded M-16 rifle, causing an explosion that injured Mr. Morgan's eyes. Pl.'s Mot. at 2-3. Mr. Morgan required surgery to remove foreign bodies from his eyes, and he suffered corneal scarring. AR 161, 168. The corneal scars caused light sensitivity such that upon his release from the hospital, he was instructed to participate in "light duty indoors; sunglasses outdoors." AR 173; *see also* AR 169 (listing "indoor" and "light" under activity limitations); AR 48 ("P2 profile: light sensitivity secondary to corneal scars [left eye]"); AR 48 ("May wear dark glasses when on duty outdoors."); AR 218 (noting that Mr. Morgan "[m]ay wear dark glasses when on duty outdoors"). Mr. Morgan's PULHES profile after his injury was 111121, with a "P2" rating for his eyes.[2] AR 28.

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[1] PULHES is a physical profiling system that rates individuals on a numerical scale from one to four in the following categories: Physical capacity, Upper extremities, Lower extremities, Hearing and ears, Eyes, and Psychiatric. Def.'s Mot. at App. 11-12 (Army Regulation 40-501, Ch. 9-3 (Aug. 1971)); Pl.'s Mot. at Ex. 2 (Army Regulation 40-501, Ch. 7-3(c) (Dec. 2007)). A "1" indicates that a service member possesses a high level of medical fitness and is fit to perform any military assignment. Army Regulation 40-501, Ch. 7-3(d)(1) (Dec. 2007). A "2" indicates that a service member has a medical condition that may impose a limitation on the person's assignment. Army Regulation 40-501, Ch. 7-3(d)(2) (Dec. 2007).

[2] Mr. Morgan has argued before the ABCMR and in his filings with the court that his eyes should not have been rated "P2" because that rating indicated that Mr. Morgan had been assigned a "2" in the physical category rather than the eyes category of his PULHES profile. The ABCMR did not directly address the "P2" rating, but the Board examined Mr. Morgan's entire medical record and concluded that it did not support Mr. Morgan's contention that he was disabled at the time of his discharge. As explained in Part IV.A.1, the Court finds that the Board's conclusion, which was based on Mr. Morgan's entire medical record, was supported by substantial evidence, reasonable, and in accordance with law.

Upon his release from the hospital, Mr. Morgan reported the shooting incident to the U.S. Army Criminal Investigation Division ("CID") on June 8, 1981. AR 92; Pl.'s Mot. at 3. Mr. Morgan claims he was unaware of the outcome of the investigation until after his discharge from the Army. Pl.'s Mot. at 5.

Mr. Morgan's term of service expired in 1983, and he received a medical examination in connection with his discharge. AR 49. The examining physician noted that there were no significant changes to his medical history, and again gave him a PULHES rating of 111121, with a "2" rating for his eyes. AR 50. Mr. Morgan was honorably discharged at the expiration of his service term on May 4, 1983. AR 203 (order for revocation of Mr. Morgan's term of service); AR 159 (certificate of release or discharge from active duty providing reason for discharge as "JBK," a code used when a soldier is discharged because he has completed his term of service). Mr. Morgan also received a code "RE-3/B" on his discharge certificate, which designated that he was ineligible for reenlistment due to his disciplinary problems.[3] AR 159.

*B. Proceedings Before the ABCMR*

On April 4, 2008, Mr. Morgan applied to the ABCMR for correction of his military records. AR 138. He contended that the restriction to "indoors duty only, light sensitivity, sunglasses outdoors" made him unable to perform his assigned duties as a wire-systems installer-operator. AR 143-44 (citing AR 169 (clinical record dated May 26, 1981)). He also asserted that he should have been discharged due to a disability, rather than due to expiration of his term of service, because his record contains the notation, "corneal scar, left eye . . . NOT QUALIFIED FOR REENLISTMENT." AR 144 (citing AR 162 (Mr. Morgan's personnel qualification record)).

Mr. Morgan requested that the ABCMR find that he was entitled to disability retirement pay because his eye injury made him unable to perform his assigned duties.[4] AR 138. But if the ABCMR were to find that he was less than 30% disabled, Mr. Morgan asked that his records be corrected to show that he was eligible for disability severance pay.[5] AR 138. Mr. Morgan

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[3] Among the codes for reenlistment, code "RE-3" designates soldiers who are separated but do not meet reentry criteria, and "RE-3B" designates soldiers who lost time for disciplinary reasons during their prior period of service. AR 78.

[4] A solider is entitled to disability retirement pay if the solider is disabled while on active duty, and the disability is permanent in nature, not the result of the soldier's intentional misconduct or willful negligence, and at least 30% disabling based on the standard schedule of rating disabilities used by the Department of Veterans Affairs. 10 U.S.C. § 1201(b)(1) – (3).

[5] A solider is entitled to disability severance pay if the solider has served less than twenty years, is disabled while on active duty, and the disability is permanent in nature, not the result of the soldier's intentional misconduct or willful negligence, and less than 30% disabling based on the standard schedule of rating disabilities used by the Department of Veterans Affairs. 10 U.S.C. § 1203(b)(1) – (4).

further maintained that at the time of his discharge he was entitled to separation pay because the Army determined that he was ineligible for reenlistment.[6] AR 152.

The ABCMR reviewed events that took place after Mr. Morgan's May 1981 eye injury, including the June 17, 1981 record of proceedings of the Physical Profile Board, the hospital discharge instructions, and his promotion to Specialist Four on April 1, 1982. AR 135. The ABCMR observed that the existence of an injury, in and of itself, does not require a finding of unfitness, and that "continued performance of assigned duty commensurate with his or her rank or grade until the Solider is scheduled for separation or retirement indicates that a Soldier is fit." AR 136. The minimum PULHES rating required for promotion to Specialist Four was 121222, and Mr. Morgan exceeded that standard when he was promoted. AR 136-37. Because Mr. Morgan continued to perform his assigned duties after his injury and was promoted, the ABCMR found, on July 22, 2008, that there was not sufficient evidence to establish that Mr. Morgan was disabled and therefore eligible for either disability retirement pay or disability severance pay at the time of his discharge. AR 134, 136-37.

On October 11, 2008, Mr. Morgan requested reconsideration of the July 2008 ABCMR decision because (1) the ABCMR did not address Mr. Morgan's claim for separation pay and (2) he had new evidence that his eye injury was the result of criminal behavior. AR 81-83. Mr. Morgan claimed that he now had documents showing that the soldier who had fired the rifle "actually admitted [a] crime, but the commissioned officers involved covered up the crime due to their possible negligent supervision during the exercise." AR 82. He asked the ABCMR to order a new investigation into the incident. AR 84.

On February 12, 2009, the ABCMR ruled on Mr. Morgan's request for reconsideration. The Board correctly stated that to be eligible for separation pay, a soldier had to be involuntarily discharged or denied reenlistment, serve for more than six but less than twenty years, and agree to join the Ready Reserve for at least three years. AR 79 (citing 10 U.S.C. § 1174); *see also* Dep't of Def. Fin. Mgmt. Regulation, Vol. 7A, Chpt. 35, § 350201(A)(4) (June 2010). The ABCMR concluded that Mr. Morgan was not eligible for separation pay because he had not agreed to join the Ready Reserve for at least three years. AR 79.

With respect to Mr. Morgan's second claim, the ABCMR explained that it was not an investigative body and would not alter the report of the criminal investigation, which Mr. Morgan sought in order to establish eligibility for post-traumatic stress disorder benefits from the United States Department of Veterans Affairs ("VA"). AR 80.

Mr. Morgan then filed a second request for reconsideration, asserting that the ABCMR had failed in its original decision to explain why he was not entitled to at least a 30% disability rating at the time of his discharge. AR 32, 36. Mr. Morgan contended that his physical

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[6] Separation pay is compensation provided to a member who is involuntarily discharged or denied reenlistment, has served for more than six but less than twenty years, and has agreed to join the Ready Reserve for at least three years. 10 U.S.C. § 1174; *see also* Dep't of Def. Fin. Mgmt. Regulation, Vol. 7A, Chpt. 35, § 350201(A)(4) (June 2010).

evaluation on June 17, 1981, incorrectly assigned him a profile of 111121 even though his vision in his left eye had deteriorated as a result of the shooting incident.[7] AR 38.

Before the ABCMR responded to his second request for reconsideration, Mr. Morgan filed a supplemental letter raising a new argument. Order Supplementing the Administrative Record at Ex. A (docket entry 15, Dec. 7, 2010) ("Suppl. AR"). Mr. Morgan contended that Dr. Craig Weeks, his post-hospitalization physician, assigned Mr. Morgan a "P2" rating at his June 15, 1981 medical examination. Suppl. AR 8. Mr. Morgan claimed that the June 17, 1981 record of the Physical Profile Board Proceeding erroneously placed the "P2" rating where Mr. Morgan's "E," or eye rating, should have been. Suppl. AR 8 (citing AR 218). Mr. Morgan contended that the "P2" rating was actually meant for the "P" category (Physical) in the PULHES profile. Suppl. AR 8-9. A physical rating of "2" would have rendered him ineligible to perform his assigned duties, which required a physical rating of "1," and he therefore claimed that this alleged error entitled him to disability retirement pay. Suppl. AR 9.

The ABCMR considered both the second request for reconsideration and the supplemental letter, and the Board found that Mr. Morgan's medical records consistently noted that Mr. Morgan's eyes should be rated "2" in his PULHES profile. AR 18. In reaching this conclusion, the ABCMR examined: (1) Mr. Morgan's SF 600 form, which detailed his medical treatment between November 10, 1980 and June 17, 1981; (2) Mr. Morgan's post-hospitalization medical records; and (3) Mr. Morgan's April 12, 1983 final medical examination, which also rated his eyes "2." AR 18.

The ABCMR found no indication that Mr. Morgan's eye injury prevented him from performing his duties. AR 20. The Board found that Mr. Morgan's promotion and continued performance of his duties created a presumption that he was fit to perform his duties, a presumption that was corroborated by his final medical examination. AR 20. On these grounds, the ABCMR denied Mr. Morgan's request for reconsideration. AR 21.

Mr. Morgan then filed a request for reconsideration of the decision on his request for reconsideration. AR 10. Although Mr. Morgan conceded that he had initially asked the ABCMR to conduct an investigation into the shooting incident, he argued that the sworn, though partially redacted, statement that the shooter gave as part of the criminal investigation, demonstrated that there was an aggravated assault. AR 12. He asserted that it was clear error for the investigating officer to have determined otherwise in light of the shooter's statement, and he asked the ABCMR to release the statement of the shooter in its unredacted form. AR 13.

In January 2010, Mr. Morgan filed a third request for reconsideration, maintaining that the ABCMR should consider two post-discharge eye examinations conducted by the VA, which

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[7] Mr. Morgan claimed that at the time he entered the Army he was given a PULHES rating of 111121 with vision of 20/25 in his right eye and 20/20 in his left eye when using corrective lenses. AR 36. After his eye injury, Mr. Morgan's vision was 20/100 in his left eye, which, he contended, entitled him to a disability rating of at least 30%. AR 37-38. The ABCMR reviewed Mr. Morgan's medical records in their entirety and concluded that Mr. Morgan had not demonstrated he was disabled at the time of his discharge. AR 20.

demonstrated that his eyes retained foreign bodies after his discharge from the hospital in May 1981. AR 5. Mr. Morgan argued that the VA eye examinations were newly discovered evidence that countered the ABCMR's decision that Mr. Morgan did not produce evidence demonstrating that his injuries prevented him from performing his military duties. AR 5. He asserted that these retained foreign bodies were present at the time of discharge and, if discovered, would have made him unfit for duty for medical reasons. Pl.'s Mot. at 19 (citing Army Regulation 40-501, Chpt. 2-12(i)(8) (stating a person is ineligible for service if he or she has retained intraocular foreign bodies)).

Mr. Morgan contended that either his eyes were not properly evaluated by the examining physician during his discharge medical examination or that his eyes were examined and the doctor did not properly report that there were retained foreign bodies in his eyes. AR 6. On this basis, Mr. Morgan argued that the Army improperly discharged him for expiration of term of service rather than for medical reasons and that the ABCMR should change his records to reflect a medical discharge and award Mr. Morgan disability retirement or disability severance pay. AR 7. Mr. Morgan also reiterated his request that the ABCMR modify his records to show that he was the victim of an aggravated assault. AR 7.

In February 2010, Mr. Morgan filed an amended brief in support of reconsideration informing the ABCMR that "the VA found the applicant's/veteran's injuries . . . disabling at a rate of zero percent back to the date of May 5, 1983." AR 4. Mr. Morgan asserted that this supported his claim that if he had received a comprehensive medical examination at the time of his separation, he "more likely tha[n] not" would have been referred to a Medical Examination Board for medical discharge and awarded disability retirement or disability severance pay. AR 4.

The ABCMR denied these requests for reconsideration because it had already reconsidered Mr. Morgan's claims, and under the Board's rules he was not eligible for further reconsideration. AR 1.

## II. Procedural History

On August 2, 2010, Mr. Morgan filed a complaint in this court (docket entry 1), followed by a "Civil Action Complaint and Memorandum of Law" (docket entry 6, Aug. 20, 2010), which the Court construed as a motion for judgment on the administrative record (docket entry 7, Aug. 25, 2010). In response, the Government filed a RCFC 12(b)(1) motion to dismiss or, in the alternative, a cross-motion for judgment on the administrative record.

Mr. Morgan asserts that (1) the Army violated his Fifth and Fourteenth Amendment due process and equal protection rights in its handling of his medical treatment and the criminal investigation into his injury, and (2) that the ABCMR violated his equal protection and due process rights when it misconstrued his medical records and did not correct his records to reflect that he was entitled to a medical discharge. Mr. Morgan further claims that the ABCMR arbitrarily and capriciously declined to (1) grant his request for disability retirement pay; (2) grant his request for disability severance pay; and (3) find that he was a victim of an aggravated assault.

The Government argues that the court lacks jurisdiction over Mr. Morgan's constitutional claims and the ABCMR's refusal to change the criminal investigation report to reflect an aggravated assault because those claims do not rest on money-mandating provisions of law. Def.'s Reply at 5-6 (docket entry 19, Jan. 27, 2011). In addition, defendant contends that the Court may not hear Mr. Morgan's claims regarding the ABCMR's decisions on his right to disability severance pay or disability retirement pay because the claims are barred by the statute of limitations. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1574 (Fed. Cir. 1988) (holding that an action that was not filed within the statute of limitations should be dismissed for lack of jurisdiction). In the alternative, the Government contends that the ABCMR's decisions were reasonable, were supported by substantial evidence, and should be upheld.

## III. Motion to Dismiss

When considering a motion to dismiss for lack of subject matter jurisdiction, the Court assumes that all Mr. Morgan's unchallenged factual allegations are true and draws all reasonable inferences in Mr. Morgan's favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). *Pro se* plaintiffs' pleadings are read liberally, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), but like all plaintiffs, *pro se* plaintiffs bear the burden to establish that their claims are within the Court's jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("[T]he burden of establishing [jurisdiction] rests upon the party asserting jurisdiction . . . ."); *Biddulph v. United States*, 74 Fed. Cl. 765, 767 (2006) (holding that despite liberal construction of their pleadings, *pro se* plaintiffs must establish jurisdiction).

### *A. Mr. Morgan's Claims of Inadequate Medical Treatment and Claims Relating to the Criminal Investigation Are Not Within the Court's Jurisdiction.*

This Court has jurisdiction over claims based upon constitutional provisions, statutes, or regulations that are "money-mandating," meaning that they expressly create a right to money damages for their violation. 28 U.S.C. § 1491(a); *United States v. Testan*, 424 U.S. 392, 398 (1976). If a claim is not based on a provision of law that is money-mandating, then the Court must dismiss the claim for lack of jurisdiction. *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) ("If the court's conclusion is that the source . . . is not money-mandating, the court . . . shall dismiss the cause for lack of jurisdiction . . . .").

Mr. Morgan claims that the Army violated his Fifth and Fourteenth Amendment due process and equal protection rights by inadequately treating his eye injury and mishandling the criminal investigation into his injury. Pl.'s Mot. at 7. The due process and equal protection clauses are not money-mandating, and Mr. Morgan's constitutional claims, insofar as they are based on alleged inadequate medical treatment and mishandling of the criminal investigation, are not within the Court's jurisdiction. *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that the Court of Federal Claims does not have jurisdiction over claims based on the due process clause of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth Amendment because they are not money-mandating); *Mullenberg v. United States*, 857 F.2d 770, 773 (Fed. Cir. 1988) (holding that claims for damages based on violations of the due process clause and the equal protection clause are not within the Court's jurisdiction).

Mr. Morgan argues that *Holley v. United States*, 124 F.3d 1462 (Fed. Cir. 1997) provides the Court jurisdiction over his constitutional claims because they are inseparable from his claims for disability retirement or disability severance pay. Pl.'s Resp. at 8 (docket entry 16, Dec. 27, 2010). In *Holley*, an Army officer sued for back pay and reinstatement, alleging that he was illegally discharged, and the Federal Circuit held that this Court possessed jurisdiction to determine whether the officer was illegally discharged, including whether the due process clause entitled him to a hearing prior to discharge. *Holley*, 124 F.3d at 1464, 1467.

Unlike in *Holley*, Mr. Morgan's claims regarding the Army's investigation into the incident that caused his eye injury and the Army's handling of his medical treatment for the same injury are separable from his claim that the Board acted arbitrarily and capriciously in concluding that he was not entitled to disability retirement or disability severance pay. The Court is able to evaluate Mr. Morgan's claims for disability retirement or disability severance pay without regard to his constitutional claims. Because there is no independent basis for jurisdiction in this Court over those claims, they must be **DISMISSED** for lack of jurisdiction pursuant to RCFC 12(b)(1).

Mr. Morgan also asserts that the Army improperly conducted its criminal investigation into the incident that resulted in his eye injury and that the Board improperly failed to correct the conclusion of the CID investigation that Mr. Morgan's eye injury was the result of an accident. Pl.'s Mot. at 8-9. Although never argued in his filings before this Court, Mr. Morgan contended before the ABCMR that if his records were changed to show that he was a victim of an aggravated assault rather than a training accident, then he would be entitled to benefits from the VA for post-traumatic stress disorder. There is, however, no indication in the administrative record that Mr. Morgan submitted documents to the ABCMR showing either that he filed a claim for post-traumatic stress disorder with the VA or that the VA denied such a claim because Mr. Morgan's injury was the result of an accident rather than an aggravated assault. Mr. Morgan has failed to demonstrate how such claims are within the Court's jurisdiction, and they must therefore be **DISMISSED** pursuant to RCFC 12(b)(1).

Mr. Morgan requested that the Court transfer to an appropriate federal district court any of his claims not properly brought here. Pursuant to 28 U.S.C. § 1631, the Court may transfer claims that are not within its jurisdiction if doing so is in the interest of justice. The decision to transfer is within the Court's discretion. *Phillips v. Seiter*, 173 F.3d 609, 610 (7th Cir. 1999). In making a decision to transfer, a court can "take a peek at the merits," because "whether or not the suit has any possible merit bears significantly on whether the court should transfer or dismiss it." *Phillips*, 173 F.3d at 610-11. Based upon its review of the record, the Court finds insufficient support for Mr. Morgan's assertions to justify a transfer of his claims that are beyond this court's jurisdiction to a United States District Court that would have jurisdiction over those claims. Mr. Morgan has not shown that transferring the claims in question would be in the interest of justice, and the Court therefore declines to do so.

*B. Mr. Morgan's Claims Are Not Barred by the Statute of Limitations.*

Any claim against the United States in the Court of Federal Claims must be "filed within six years after such claim first accrues." 28 U.S.C. § 2501. In a military pay case for disability retirement pay, "[t]he generally accepted rule is that [such] claims . . . do not accrue until the

appropriate board either finally denies such a claim or refuses to hear it." *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990) (citing *Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962)); *accord Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005). When a service member has "neither requested nor been offered consideration by a retiring board prior to discharge, the later denial of his petition by the corrections board [is] the triggering event, not his discharge." *Real*, 906 F.2d at 1560. The general rule is subject to an exception, however, when a claimant's "knowledge of his condition [is] sufficient to justify a finding that he . . . waived the right to review by the appropriate board prior to discharge." *Real*, 906 F.2d at 1560-61 (citing *Miller v. United States*, 361 F.2d 245 (Ct. Cl. 1966); *Huffaker v. United States*, 2 Cl. Ct. 662 (1983)).

Mr. Morgan alleges that he is entitled to disability retirement pay due to the injuries he sustained in May 1981. Under *Real*, his claims did not accrue until the ABCMR denied his application on July 24, 2008. Mr. Morgan filed his case in this Court with respect to these claims on August 2, 2010, well within the six-year limitations period provided by 28 U.S.C. § 2501.

The Government contends that Mr. Morgan's awareness of his eye injury at the time he was discharged in April 1983 caused his claim to accrue at that time. Def.'s Reply at 2-4. But the relevant question is not whether Mr. Morgan knew of his disabling condition, but whether "at the time of his separation from the Army . . . [Mr. Morgan] knew that he was entitled to disability retirement due to a permanent disability." *Chambers*, 714 F.3d at 1226.

Although Mr. Morgan knew that his eye had been injured in 1981, the record does not support a finding that he knew or should have known that his condition entitled him to disability benefits. Mr. Morgan returned to regular duty after his hospitalization and was subsequently promoted. *Cf. Chambers*, 714 F.3d at 1227 (finding that plaintiff's return to regular duty demonstrated that he did not know he was permanently disabled). Mr. Morgan's eye rating had been "2" while he was on active duty and therefore receiving an eye rating of "2" upon discharge was insufficient by itself to alert Mr. Morgan to the basis for a claim that his eye injury caused him to be permanently disabled and entitled to disability benefits.

The *Real* exception is not applicable to Mr. Morgan's case because the record does not demonstrate that he knew or should have known at the time of his separation from the Army in 1983 that he was entitled to disability retirement or disability severance pay due to his eye injury. The usual rule of accrual therefore applies, and Mr. Morgan's claims are not barred by the statute of limitations.

## IV. Review of the Administrative Record

As noted above, the Court will not disturb a decision of the ABCMR unless it is "arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Chambers*, 417 F.3d at 1227 (citing *Haselrig v. United States*, 333 F.3d 1354, 1355 (Fed. Cir. 2003)). To prevail, Mr. Morgan must "overcome the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith." *Sanders v. United States*, 219 Ct. Cl. 285, 302 (1979).

When deciding motions for judgment on the administrative record, the Court limits its review to the administrative record developed before the ABCMR. *See Bateson v. United States*, 48 Fed. Cl. 162, 164 (2000) ("[J]udicial review in military pay cases is normally limited to the administrative record developed before the military board."). The applicable standard of review "does not require a reweighing of the evidence, but a determination whether the conclusion being reviewed is supported by substantial evidence." *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983). Because the Court does not sit as a "super correction board," where reasonable minds might reach differing conclusions on the evidence, the Court will not substitute its judgment for that of the board. *Van Cleave v. United States* 70 Fed. Cl. 674, 678-79 (2006) (quoting *Skinner v. United States*, 594 F.2d 824, 829-30 (Ct. Cl. 1979)).

*A. The ABCMR Did Not Act Arbitrarily or Capriciously When It Denied Mr. Morgan's Application for Disability Retirement or Disability Severance Pay.*

Mr. Morgan asserts that the ABCMR's decision to deny his application for disability retirement or disability severance pay was arbitrary and capricious on four counts: (1) in June 1981 Dr. Weeks assigned Mr. Morgan a rating of "P2," which Mr. Morgan argues was a PULHES classification of "2" in the physical capacity category, rather than the eye category, and such a rating would have made him ineligible to continue to serve in his current position; (2) the ABCMR erroneously found that there was no evidence that Mr. Morgan's eye condition prevented him from performing his duties; (3) Mr. Morgan's January 2010 request for reconsideration was improperly denied because Mr. Morgan proffered newly discovered medical evidence that the ABCMR should have considered; and (4) based on this newly discovered evidence, Mr. Morgan should have been referred to a Medical Examination Board before he was discharged.

1. <u>The ABCMR Did Not Act Arbitrarily or Capriciously When It Considered Mr. Morgan's Medical Records as a Whole And Determined That He Was Not Entitled to a Medical Discharge Despite the "P2" Designation He Received During His July 15, 1981 Medical Examination.</u>

Mr. Morgan first argues that the ABCMR arbitrarily and capriciously failed to consider the "P2" rating he was assigned after his eye injury during his June 15, 1981 medical examination. Pl.'s Mot. at 14; AR 48. Mr. Morgan interprets this "P2" to mean that he was given a rating of "2" in the physical capacity category of the PULHES rating system. Because his assigned duty required a physical rating of "1," the "2" rating in the physical capacity category would have made him ineligible for his assigned duty. Pl.'s Mot. at 14-15.

Mr. Morgan's contention that the "P2" rating meant he was assigned a "2" in the physical capacity category is not consistent with the administrative record. Dr. Weeks's notes from Mr. Morgan's June 15, 1981 medical evaluation indicated that Mr. Morgan's eyes should be rated "P2." AR 48. This "P2" designation was then recorded in the June 17, 1981 Physical Profile Board Proceeding, which was also signed by Dr. Weeks. AR 218. Although Mr. Morgan relies on these records to argue that he was given a "2" in the physical category of his PULHES profile, he does not offer an explanation why Dr. Weeks would have approved the record listing "P2" for his eyes if Dr. Weeks had assigned him a physical rating of "2."

Furthermore, in its October 6, 2009 decision, the ABCMR considered Mr. Morgan's medical records in their entirety and found that Mr. Morgan had consistently received a "2" rating for his eyes. AR 18. Although the ABCMR did not specifically address the "P2" designation included in the June 17, 1981 examination record, the Board concluded that there was no indication in Mr. Morgan's medical records that he was unable to perform his duties due to a physical disability. AR 20. In reaching that conclusion, the Board found that Mr. Morgan was able to perform his duties after the eye injury, and in fact was promoted. AR 20.

The ABCMR's conclusion that Mr. Morgan failed to demonstrate that he was disabled at the time of his discharge was not arbitrary or capricious. On the contrary, Mr. Morgan's medical records contain substantial evidence supporting the Board's decision.

2. The ABCMR's Reliance on Mr. Morgan's Discharge Medical Examination Was Not Arbitrary or Capricious.

Mr. Morgan further argues that the ABCMR incorrectly relied on Mr. Morgan's medical discharge examination because it was "incomplete."[8] Pl.'s Mot. at 18. Mr. Morgan argues that the final examination was either never conducted or was inadequately conducted because the discharge medical examination form does not mention foreign objects in his eyes. Pl.'s Resp. at 22.

The very existence of the discharge medical examination record refutes Mr. Morgan's contention that an exit medical examination was never performed. AR 50. Furthermore, the record indicates that the examining physician measured Mr. Morgan's near and distance vision, noted that there had been no changes in his medical history, and gave him a "2" rating for his eyes in his PULHES evaluation. AR 50. The record is thus inconsistent with Mr. Morgan's assertion that the medical examination was inadequate. The failure of the examining physician to specifically mention Mr. Morgan's eye injury is inconsequential because the examining physician noted that Mr. Morgan's medical history had not changed, and the medical history includes the eye injury. AR 50.

Mr. Morgan's contentions are inconsistent with the medical records as a whole and therefore fail to demonstrate that the ABCMR acted arbitrarily or capriciously in relying upon the discharge medical examination form.

[8] Mr. Morgan first argues that the medical examination was perfunctory because the examining physician drew lines through several of the criteria he was evaluating, and Mr. Morgan contends the physician did not, therefore, medically evaluate these physical criteria. Pl.'s Resp. at 22 (citing AR 49). This argument is without merit because the line drawn through the criteria is in a column labeled "Normal," which indicates that an examination was conducted and that Mr. Morgan's condition was found to be normal with respect to each of the criteria. AR 49.

3. The ABCMR Did Not Act Arbitrarily or Capriciously When It Declined to Consider Mr. Morgan's "Newly Discovered Evidence" Regarding His Eye Injury in Its January 2010 Denial of Mr. Morgan's Application for Reconsideration.

Mr. Morgan contends that the ABCMR arbitrarily and capriciously refused to consider newly discovered evidence, specifically records of eye examinations by the VA.[9] Pl.'s Mot. at 18. Pursuant to 32 C.F.R. § 581.3(g)(4)(i) (2010), the ABCMR will review requests for reconsideration "if the ABCMR has not previously reconsidered the matter." Thus, the question before the Court is not whether Mr. Morgan proffered newly discovered evidence, but whether the newly discovered evidence was proffered in support of a claim that had already been reconsidered by the ABCMR.

The ABCMR originally considered Mr. Morgan's claim that he was entitled to disability retirement or disability severance pay in its July 2008 decision, AR 136-37, and the ABCMR reconsidered that claim in its October 2009 decision, AR 20. The ABCMR did not act arbitrarily or capriciously when it followed its own regulations and denied Mr. Morgan's second request for reconsideration. 32 C.F.R. § 581.3(g)(4)(i); *Roberts v. Geren*, 530 F. Supp. 2d 24, 37-38 (D.D.C. 2007) (holding that ABCMR's decision to deny a fourth request for reconsideration was not arbitrary, capricious, or contrary to law).

4. The ABCMR Did Not Act Arbitrarily or Capriciously When It Declined to Find That Mr. Morgan Was Entitled to a Medical Examination Board Proceeding Prior to His Discharge.

Finally, Mr. Morgan contends that the "newly discovered" VA medical records demonstrate that he should have been referred to a Medical Examination Board for examination prior to his discharge. The Court has already concluded that the ABCMR did not act arbitrarily or capriciously when it declined to consider Mr. Morgan's claim for disability retirement or disability severance pay for a third time based on the alleged newly discovered VA medical records. Therefore, the ABCMR did not act arbitrarily or capriciously when it declined to consider Mr. Morgan's claim that he should have been referred to a Medical Examination Board before his discharge. That claim was founded upon evidence that was not newly discovered, and the ABCMR, consistent with its own rules, therefore properly declined to consider it in connection with Mr. Morgan's third request for reconsideration.

To the extent Mr. Morgan has alleged additional perceived defects in the ABCMR's decisions, the Court has considered them and found them to be unpersuasive. The record demonstrates that Mr. Morgan's claims have been thoroughly considered by the ABCMR, and

[9] Moreover, the "newly discovered" evidence consisted of records of examinations conducted by the VA in 1984 and 1992, which Mr. Morgan requested be done specifically to determine whether there were foreign bodies retained in his eyes. Suppl. AR 15, 17. To suggest that these results were "newly discovered" in 2010 strains credulity.

the Board's rulings are based on substantial evidence of record and are not arbitrary, capricious, or contrary to law. Indeed, the Court finds that the ABCMR reasonably interpreted Mr. Morgan's medical records and properly analyzed the other evidence of record when it determined that Mr. Morgan was not entitled to disability retirement or disability severance pay.[10]

## CONCLUSION

In view of the foregoing, defendant's 12(b)(1) motion to dismiss Mr. Morgan's claims is **GRANTED IN PART** because Mr. Morgan's constitutional claims based on the equal protection clause and due process clause as well as Mr. Morgan's claim that the Army improperly concluded his eye injury was the result of an accident are not within the Court's jurisdiction. Defendant's 12(b)(1) motion to dismiss is **DENIED IN PART** because Mr. Morgan's claims are not barred by the statute of limitations. With respect to his claims that are within the Court's jurisdiction, Mr. Morgan's motion for judgment on the administrative record is **DENIED**, and defendant's cross-motion for judgment on the administrative record is **GRANTED** because the Court finds that substantial evidence of record supports the ABCMR's decision, which was reasonable, rational, and in accordance with law. The ABCMR did not act arbitrarily or capriciously when it denied Mr. Morgan's requests for disability retirement pay and disability severance pay. The Clerk shall enter judgment for defendant.

**IT IS SO ORDERED.**

George W. Miller

GEORGE W. MILLER
Judge

[10] Mr. Morgan also seeks severance pay pursuant to 10 U.S.C. § 1174, but the ABCMR reasonably denied plaintiff's claim on the basis that he was not eligible because he did not agree to join the Ready Reserve for at least three years. The ABCMR's decision in this respect was consistent with applicable law.