In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 05-20C
(Filed November 7, 2005)

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*
MATTHEW E. LEVINE, *
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Plaintiff, *
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v. *
*
THE UNITED STATES, *
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Defendant. *
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MEMORANDUM OPINION AND ORDER

On January 6, 2005, the plaintiff, Matthew E. Levine, filed a complaint in this Court seeking back retired pay and an increase in monthly retired pay. The defendant United States ("Government") filed a motion to dismiss under Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC") for failure to state a claim upon which relief can be granted. In the alternative, the Government has moved pursuant to RCFC 56.1 for judgment upon the administrative record. For the following reasons the Government's motion to dismiss is **GRANTED**.[1]

I. BACKGROUND

The plaintiff, a retired United States Army physician, filed a complaint in this Court challenging the decision of the Army Board for the Correction of Military Records ("ABCMR") to deny his application for the correction of his military record. Before the ABCMR, and in this Court, the plaintiff seeks a recalculation of his total service in the Army for purposes of computing his retirement pay. Compl. ¶ 7. The Army has credited the plaintiff with twenty-two years and twenty-two days of active service based upon his service from August 1964 to August 1966, and from May 1979 to May 1999. Compl. ¶ 1; Admin. R. at 52. The plaintiff was also credited with five years of constructive service for the time he spent in medical school and in an internship. Compl. ¶ 6; Admin. R. at 53. Finally, the Army credited the plaintiff with three

[1] Because the Court finds that plaintiff has failed to state a claim, the Government's motion for judgment on the administrative record is **MOOT**.

months and six days service for service he performed in the Organized Reserve Corps ("Reserve"). In total, for the purpose of calculating retired pay, the Army has credited the plaintiff with twenty-seven years, three months and twenty-eight days of service. Admin. R. at 53. The plaintiff claims he should have been credited with thirty years, ten months and twenty-three days of service. Admin. R. at 24, 26 (memorandum from plaintiff's counsel to ABCMR).

The dispute revolves around the amount of time plaintiff should be credited for his service in the Reserve. Plaintiff contends he should be credited with three years, ten months and twenty-three days for his service in the Reserve; the Government contends the plaintiff should be credited three months and six days for his service in the Reserve. Admin. R. at 26. The difference results from the plaintiff's position that he should be given year-for-year credit for the time period during which he served in the Reserve. Compl. ¶ 5.

II. DISCUSSION

A. Legal Standard

The dismissal of a complaint for failure to state a claim upon which relief may be granted is governed by RCFC 12(b)(6). The granting of a motion to dismiss for failure to state a claim "is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss under RCFC 12(b)(6) the "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Although this Court accords a *pro se* plaintiff leniency in presenting his case, the plaintiff's *pro se* status does not render him immune from the requirement that he plead facts upon which a valid claim can rest. *Paalan v. United States*, 57 Fed. Cl. 15, 16 (2003); *see also Hains v. Kerner*, 404 U.S. 519, 520 (1972).

B. Statutory Framework

The plaintiff and the Government have reached different conclusions as to how the plaintiff's time in the Reserve should be calculated for the purpose of retired pay. The plaintiff contends that under a savings provisions in the Defense Officer Personnel Management Act of 1980 ("DOPMA"), Pub. L. No. 96-513, 94 Stat. 2835, he is entitled to year-for-year credit for his time in the Reserve, rather than at the rate of "one day for each point credited to him . . . under [10 U.S.C. §] 1332(a)(2)." 10 U.S.C. § 1333(3) (1976) (transferred to 10 U.S.C. § 12733(3)).

The savings provision that the plaintiff asserts supports his claim is section 626 of DOPMA.[2] The provision states that:

> Sec. 626, (a) For the purpose of computing the years of service for pay and allowances of an officer of the Army . . . including retired pay . . . the total years of service of such officer shall be computed by *adding to that service so creditable on the day before the effective date of this Act* all subsequent service as computed under title 10, United States Code, as amended by this Act.

Pub. L. No. 96-513, 94 Stat. at 2952 (emphasis added).[3] Thus, this savings provision instructs that for the purpose of computing the retirement pay of an officer, such as the plaintiff, who served both before and after the enactment of DOPMA, years of service are calculated by adding: 1) the years of service that an officer served and would have been credited with for purposes of retired pay the day before the enactment of DOPMA, and 2) the years of service the officer performed after the enactment of DOPMA as computed under title 10, United States Code, as amended by DOPMA. Pub L. No. 96-513, 94 Stat. at 2952. As the plaintiff is only disputing the computation of his years of service prior to the enactment of DOPMA, the Court need only examine the years of service the plaintiff served and would have been credited pre-DOPMA.

Prior to the enactment of DOPMA, 10 U.S.C. § 1405 stated in pertinent part that "the years of service of a member of the armed forces are computed by adding":

> (1) his years of active service:
> (2) the years of service credited to him under section 205(a)(7) and (8) of title 37;
> (3) the years of service, not included in clause (1) or (2) with which he was entitled to be credited, on the day before the effective date of this section, in computing his basic pay; and
> (4) the years of service, not included in clause (1), (2), or (3), with which he would be entitled to be credited under section 1333 of this title, if he were entitled to retired pay under section 1331 of this title.

10 U.S.C. § 1405 (1976). The plaintiff asserts that this pre-DOPMA version of 10 U.S.C. § 1405 when combined with the pre-DOPMA version of 37 U.S.C. § 205 entitled him to have his service in the Reserve counted on a year-for-year basis. Compl. ¶ 3. This is because, according to the

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[2] In the plaintiff's complaint and he incorrectly cites this savings provision as 10 U.S.C. § 626. The savings provision was only codified as a note to 10 U.S.C. § 611; its codification as a note in section 611 probably led to the plaintiff's confusion.

[3] The DOPMA also contained a savings provision related to constructive service for time spent in medical school and as a medical intern; however, as the plaintiff has been credited with that time, it is not an issue in this case. *See* 94 Stat. at 2952 (saving the years of service creditable under 37 U.S.C. § 205(a) clauses (7) and (8))

plaintiff, under section 37 U.S.C. § 205(a)(9), as it read pre-DOPMA, a service member could count "all periods while . . . (C) a member of the Honorary Reserve Corps or the Organized Reserve Corps" in computing basic pay, which under section 1405(3) then counted towards years of service for retired pay. Compl. ¶ 6. In other words, according to the plaintiff, a combination of 10 U.S.C. § 1405(3) and 37 U.S.C. § 205(a)(9), as those sections read pre-DOPMA, entitle the plaintiff to receive year for year credit for the time he served in the Reserve.

C. Plaintiff Not Entitled to Relief

Even assuming that the DOPMA savings provision applies to the plaintiff in the manner he asserts it does, the plaintiff fails to state a claim, because pre-DOPMA 10 U.S.C. § 1405(3) did not apply to him. Section 1405 clause (3) states that the years of service includes "the years of service, not included in clause (1) or (2) *with which he was entitled to be credited, on the day before the effective date of this section*, in computing basic pay." 10 U.S.C. § 1405(3) (1976). Put quite simply, the plaintiff was not *entitled to be credited* with any years of service *on the day before the effective date* of section 1405. *See* Compl. ¶ 1 (stating that plaintiff first joined the Army in 1963). Clause (3) of pre-DOPMA section 1405 was a savings provision for service members that served prior to May 20, 1958. As the plaintiff did not serve prior to May 20, 1958, the plaintiff's pre-DOPMA years of service are computed by adding: 1) "his years of active service," 2) "the years of service credited to him under section 205(a)(7) and (8) of title 37," and 3) "the years of service, not included in clause (1), (2), or (3) [of this section], with which he would be credited under section 1333 of this title, if he were entitled to retired pay under section 1331 of this title." 10 U.S.C. § 1405 (1976).

The Army has given the plaintiff the retired pay he is entitled to under DOPMA. Under the current version of 10 U.S.C. § 1405 the plaintiff has been credited with: 1) twenty-two years and twenty-two days of active service, *see* 10 U.S.C. § 1405(a)(1); and 2) three months and six days of reserve service, *see* 10 U.S.C. § 1405(a)(3).[4] In addition, the plaintiff has been credited, under section 625 of DOPMA, with five years of constructive service for the four years he spent in medical school and the one year he spent in a medical internship. *See* 37 U.S.C. § 205(a)(7); *id*. at 205(a)(8). The plaintiff has not been credited with any years of service under section 626 of DOPMA, as the plaintiff is not entitled to be credited with any additional service by virtue of that particular savings provision. Because the plaintiff has been credited with the years of service he is entitled to be credited with for purposes of retired pay, the plaintiff fails to state a claim upon which relief can be granted.[5]

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[4] Presumably, the Reserve service could also be credited under the pre-DOPMA version of 10 U.S.C. § 1405 as saved through section 625 of DOPMA; however, either way plaintiff is only entitled to three months and six days worth of Reserve service.

[5] Moreover, the plaintiff's attempted reliance on 10 U.S.C. § 1401 is unavailing. Section 1401 merely requires that a retiring service member be given the "best deal" when choosing which statutory scale to use in computing retirement pay. The provision pertains to the various

III. CONCLUSION

For the foregoing reasons, the Government's motion to dismiss is **GRANTED**, and its motion for judgment of the administrative record is thereby rendered moot. The Clerk is directed to close the case. The parties will bear their own costs.

IT IS SO ORDERED.

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VICTOR J. WOLSKI
Judge

pay computation formulae set forth in the table at section 1401(a). As the ABCMR correctly noted, only one formula in the table applied to the plaintiff; therefore, the plaintiff received the "best deal," or more aptly, the only deal that applied to him. Admin. R. at 22. Thus, as with the plaintiff's other arguments, his argument regarding section 1401 entitling him to further service credit is incorrect.