In the United States Court of Federal Claims

No. 07-715 C

(Filed June 6, 2008)

UNPUBLISHED

* * * * * * * * * * * * * * * * *	*	
EUGENE C. SMALLS, *Pro Se*,	*	
	*	Disability Retirement Benefits; 10
Plaintiff,	*	U.S.C. § 1201 (2006); Time-barred
	*	by 28 U.S.C. § 2501 (2000); RCFC
v.	*	12(b)(1); RCFC 12(b)(6); No Subject
	*	Matter Jurisdiction; Curable Defect
THE UNITED STATES,	*	Doctrine; *Res Judicata*; Equal
	*	Protection Clause of the Fourteenth
Defendant.	*	Amendment.
	*	
* * * * * * * * * * * * * * * * *	*	

Eugene C. Smalls, *pro se* plaintiff.

Joseph A. Pixley, United States Department of Justice, with whom were *Jeffery S. Bucholtz*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Kirk T. Manhardt*, Assistant Director, Washington, D.C., for defendant.

OPINION

Bush, *Judge*.

The court has before it defendant's motion to dismiss this suit for lack of jurisdiction and for failure to state a claim upon which relief may be granted. Defendant's motion has been fully briefed, and oral argument was neither requested by the parties nor required by the court. For the reasons stated below, defendant's motion is granted.

BACKGROUND

The parties' briefs include Defendant's Motion to Dismiss (Def.'s Mot.) dated January 9, 2008, Plaintiff's Answer to Defendant's Motion to Dismiss Plaintiff's Amended Complaint or in the Alternative Plaintiff's Motion For Summary Judgment (Pl.'s Opp.) dated January 29, 2008, and Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss (Def.'s Reply) dated March 13, 2008.

Prior to the above-listed filings, on January 7, 2008, Mr. Smalls submitted a filing entitled, "Plaintiff's Answer to Motion to Dismiss Plaintiff's Amended Complaint or in the Alternative Plaintiff's Alter Motion for Summary Judg[]ment; Memorandum in Support of Motion; Declaration; Certificate of Service." In its Order dated January 14, 2008, the court deemed plaintiff's filing to include a motion for summary judgment and a response to defendant's motion to dismiss. Order at 2. The court refused to consider the response to the motion to dismiss because at that time, defendant had not yet filed a motion to dismiss. *Id*. The court, however, accepted the summary judgment motion because it presented "plaintiff's arguments for a judgment in its favor." *Id*.

Although the court accepted plaintiff's motion for summary judgment, it ruled that it would not consider the substantive arguments submitted therein until it had resolved the jurisdictional issues presented by this case:

> The court is bound by precedent which states that a jurisdictional challenge must be resolved before turning to the merits of a plaintiff's claim. *See Deponte Invs. v. United States*, 54 Fed. Cl. 112, 114 (2002) ("Subject matter jurisdiction is a threshold matter which must be addressed before the Court reaches the merits of the plaintiff's claims.") (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)). Defendant's motion to dismiss filed January 9, 2008 challenges this court's jurisdiction over plaintiff's claims. Accordingly, the court must resolve defendant's motion to dismiss before considering plaintiff's motion for summary judgment.

Id. at 2.

Therefore, the court directed plaintiff to "respond to the government's motion to dismiss filed January 9, 2008, addressing the arguments therein." *Id*. The court further ruled that it "suspends briefing on plaintiff's motion for summary judgment and shall not require defendant to respond to plaintiff's motion until this court's jurisdiction over the subject matter has been established." *Id*. Despite the court's order of January 14, 2008 plaintiff filed his opposition on January 29, 2008 and included another motion for summary judgment. As this court has already informed Mr. Smalls, the court will not consider the arguments made in any motion for summary judgment until it resolves the jurisdictional issues raised by the defendant's motion to dismiss.

The court is mindful of the lenient principles that pertain to *pro se* litigants. *See infra*. In that regard, the court, in making its decision, will review and consider plaintiff's motion for summary judgment with its accompanying declaration and exhibits to the extent that they have any bearing on plaintiff's response to the issues raised in the defendant's motion to dismiss.

I. Facts[1]

Mr. Eugene Smalls served in the United States Marine Corps (Marine Corps or USMC) on active duty from June 28, 1978 through December 4, 1980. Am. Compl. ¶ 38; Def.'s Mot. at 3. Mr. Smalls was honorably discharged from the Marine Corps on December 4, 1980 for "physical disability without service pay as existing prior to service and not aggravated by service 790402-790408." *See* Declaration of Eugene Smalls (Decl.), ¶ 32 & Ex. 23 (Certificate of Release or Discharge from Active Duty, DD214).

Plaintiff claims that prior to his service in the USMC, he was not suffering from any mental or physical health problems. Pl.'s Opp. at 2. In fact, Mr. Smalls'

---

[1]/ The court makes no findings of fact in this opinion. The facts recited here are taken from the amended complaint, plaintiff's opposition, and defendant's motion to dismiss. The court relies largely on the defendant's motion to dismiss because plaintiff's amended complaint is not organized in a manner which would aid the court's understanding of the chronology of the factual events. For the purposes of resolving defendant's motion, the facts set forth are undisputed unless otherwise indicated.

entrance medical report, dated February 24, 1978, indicates that plaintiff did not have any preexisting mental or physical conditions. Decl. ¶ 23 & Ex. 14 (Report of Medical Examination dated February 24, 1978). However, in July 1979, Mr. Smalls began experiencing pain in his feet. *See* Decl. ¶ 16 & Ex. 7 (VA Rating Decision dated October 4, 2002). Plaintiff sought medical assistance, and on October 9, 1980, Mr. Smalls was diagnosed by a podiatrist at the Pearl Harbor Naval Regional Medical Clinic as having "*bilateral pes valgo planus, and chronic plantar fasciitis*." Pl.'s Opp. at 2; *see also* Decl. ¶14 & Ex. 5 (VA Rating Decision dated January 18, 2005) ("Service medical records note chronic problems with your feet with referrals to Podiatry. In 3/80 pes plano valgus was assessed. Report subsequent to October 9, 1980, indicated that Tripler Podiatrist examination diagnosed bilateral pes valgo planus and chronic plantar fasciitis.").[2]

After the podiatrist's diagnosis, plaintiff's condition continued to deteriorate. On November 18, 1980, the podiatrist made a request in plaintiff's medical report that Mr. Smalls should be evaluated as to whether "this marine legitimately merits a medical board for discharge from U.S.M.C. for pes planus." Decl. ¶ 24 & Ex. 15 (Medical Report dated November 18, 1980). On November 25, 1980, the Medical Board declared plaintiff "unfit for duty." Pl.'s Opp. at 2. "This Medical Board finds the member unfit for duty for a condition not incurred in or aggravated by service and that the member be discharged from the Naval Service by reason of physical disability in accordance with MARCORSEPMAN, paragraph 6011 and BUMEDINST 1910.2.C." *Id*. Because of his physical disability, Mr. Smalls was honorably discharged on December 4, 1980.

Following his discharge, between the years of 1986 and 1992, Mr. Smalls requested that the Board for Correction of Naval Records (BCNR) have his military record corrected to reflect that plaintiff retired because of a physical disability, and that he is entitled to disability retirement benefits. Def.'s Mot. at 2-3. Plaintiff wanted his military record to reflect that his physical disability

---

[2]/ Pes valgo planus is defined as a "flat type of foot that exhibits some or all of the following characteristics: everted heel, abduction of the forefront of the rear-front, collapse of the medical column and flexibility of the foot with reducibility of the deformity." Ex. 2 (Medical Report from Doctor Michael K. Lee, D.P.M. dated October 11, 2005). Chronic plantar fasciitis is defined as "a long-standing inflammation of the deep fascia under the feet. It can occur in one or both feet due to excess stretching or tension. This can occur in a flat type of foot in compensation to a myriad of abnormal osseus foot types." *Id*.

occurred during his service as a marine. Am. Compl. ¶ 38; Def.'s Mot. at 3-4. The BCNR denied plaintiff's appeals on June 26, 1986, and again on November 13, 1992. Def's Mot. at 3. Mr. Smalls appealed the BCNR's decisions to the Secretary of the Navy. *Id*. The Secretary of the Navy affirmed the BCNR's decisions denying plaintiff's appeals to upgrade his discharge status on April 11, 1997, and again, on January 5, 1998. *Id*.

Mr. Smalls filed suit in this court on October 4, 2007. A month later, on November 13, 2007, plaintiff filed a motion to "Amend His Complaint" with this court. Plaintiff requested the amendment on the basis that his original complaint contained "typographical mistakes, problematic factual errors, clarification of the complaint." *See* Pl.'s Mot. To Amend at 2. The court granted plaintiff's motion to amend his complaint on November 26, 2007. *See* Order, at 1. Plaintiff's amended complaint was filed as of that date.

In his amended complaint, plaintiff alleges "[t]hat his rights were violated when the Executive Director of the BCNR *refused to submit* Small's applications for reconsideration to the three member panel for correction of Smalls' military records." Am. Compl. ¶ 6 (emphasis in original). Plaintiff alleges that the Executive Director's refusal to submit his applications to the three member panel of the BCNR for a merit review violated his rights under 10 U.S.C. §§ 1201, 1552 (2006), and his equal protection rights under the Fourteenth Amendment of the United States Constitution. *Id*. ¶¶ 31, 33, 35.

Mr. Smalls seeks injunctive relief to compel the three member panel of the BCNR to review his applications and alleged new evidence regarding his discharge status. Am. Compl. ¶ 37. Plaintiff believes that a merit review by the three member panel of the BCNR will amend his military record to "rightfully" state that he was "medically retired from the United States Marine Corps for injuries suffered while in uniform and subject to *Disability Pay* or place on the *Temporary Disability Retired List*." *Id*. (emphasis in original). Plaintiff wants his military record to also reflect that because of "these service-related conditions," Mr. Smalls was "unfit for further military duty, with the effected dated [sic] of

retirement on December 4, 1980."[3] *Id*. ¶ 38. In the alternative, plaintiff requests the court to remand the case "back to the three member panel of the BCNR to apply all applicable rules, regulations and laws along with the new material." *Id*. ¶ 40.

II. Procedural History

The procedural history in this case is lengthy, wide-ranging and repetitive. Prior to filing suit in this court, Mr. Smalls sought relief in the United States District Court for the District of Hawaii (Hawaii district court). Plaintiff filed his action in the Hawaii district court on November 12, 1998. *Smalls v. United States*, 87 F. Supp. 2d 1055, 1057 (D. Haw. 2000). That initial complaint was dismissed without prejudice for failure to comply with Rule 8(a) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and plaintiff filed a verified amended complaint on November 9, 1999.[4] *Smalls*, 87 F. Supp. 2d at 1057. Mr. Smalls' amended complaint before the Hawaii district court sought judicial review of the BCNR's refusal to correct his military record under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2) (2006), monetary damages for negligent infliction of

---

[3]/ Plaintiff seeks a correction of his military record to reflect that he "was permanently and medically retired for a service related condition rated 30% for *Chronic bilateral plantar fasciitis* rated 30%, *aggravated bilateralpes valgo planus III* rated 30% & *PTSD or a stresses* service-related condition rated at 30% and for a moderate condition of *pseudofoliculitis barbae* rated 10% . . . . " Am. Compl. ¶ 38 (emphasis and punctation in original).

[4]/ Fed. R. Civ. P. 8(a) provides:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Id.

emotional distress, and defamation.[5] *Id*. The government moved to dismiss plaintiff's complaint on the basis that it was time-barred under the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) (2000).[6] *Smalls*, 87 F. Supp. 2d at 1057. The government asserted that plaintiff's disability claim should be dismissed because Mr. Smalls' claim accrued on December 4, 1980, and plaintiff

---

[5]/ 5 U.S.C. § 706(2) (2006) provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> © in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
> *Id*.

[6]/ 28 U.S.C. § 2401(a) (2000) provides:

> (a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

Id.

did not file his complaint until nearly eighteen years later. Defendant also argued that plaintiff's emotional distress and defamation claims should be dismissed because Mr. Smalls failed to comply with the jurisdictional requirements of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 (2000) *et seq*. *Smalls*, 87 F. Supp. 2d at 1057.

On November 29, 2000, the district court granted in part and denied in part defendant's motion to dismiss. *Smalls*, 87 F. Supp. 2d at 1060. The district court held that Mr. Smalls' disability claim accrued when the BCNR rendered its final decision in November 1992, and it was thus timely under 28 U.S.C. § 2401. *Smalls*, 87 F. Supp. 2d at 1058. The district court dismissed plaintiff's emotional distress claim because Mr. Smalls failed to exhaust his administrative remedies prior to filing suit, a prerequisite under the FTCA. *Id*. at 1060. The district court also dismissed plaintiff's defamation claim, holding that FTCA provisions specifically barred defamation claims. *Id*.

As previously stated, plaintiff's amended complaint before the district court also sought judicial review of the BCNR's refusal to correct his military record. *Id*. The district court, viewing plaintiff's request for judicial review as a motion for judgment on the administrative record, denied plaintiff's motion on December 15, 2000. *Smalls v. United States*, No. 98-00908 SPK-BMK (D. Haw. Dec. 15, 2000). The Hawaii district court determined that the BCNR's denial of Mr. Smalls' "various petitions for correction of his service record was not arbitrary or capricious, an abuse of discretion, contrary to law or regulation, or unsupported by substantial evidence." *Id*.

Plaintiff appealed to United States Court of Appeals for the Ninth Circuit which upheld the district court's decision on July 22, 2002. *Smalls v. England*, 41 Fed. Appx. 989 (9th Cir. 2002). Four months later, on November 7, 2002, the Ninth Circuit withdrew its decision, and remanded the case to the Hawaii district court for a clarification of whether the district court had exercised jurisdiction "under 28 U.S.C. § 1331 and the waiver of sovereign immunity in § 702 of the Administrative Procedure Act, or under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), or under both." [7] *Smalls v. England*, 50 Fed. Appx. 379 (9th Cir.

---

[7]/ 28 U.S.C. § 1331 (2000) provides:

(continued...)

2002). On November 19, 2002, the Hawaii district court responded to the Ninth Circuit, explaining that it had jurisdiction, in part, under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and § 702 of the APA. Based on that response, the Ninth Circuit, on April 14, 2003, transferred plaintiff's appeal to the Federal Circuit pursuant to 28 U.S.C. § 1631(2000). *See Smalls v. United States*, No. 01-15827 (9th Cir. Apr. 14, 2003). The Ninth Circuit stated in its Order that because the Hawaii district court's jurisdiction was based partly on 28 U.S.C. § 1346(a)(2), "[e]xclusive jurisdiction therefore lies in the U.S. Court for the Appeals for the

---

[7](...continued)

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1346(a)(2) (2000) provides:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, 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, except that the district courts shall not have jurisdiction of any civil action or claim against the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1)and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Id.

Federal Circuit." *Id*.

On January 14, 2004, the Federal Circuit held that the Hawaii district court lacked jurisdiction to adjudicate Mr. Smalls' disability claim. *Smalls v. United States*, 87 Fed. Appx. 167 (Fed. Cir. 2004). The Federal Circuit ruled that the district court lacked jurisdiction because plaintiff's claim was time-barred under *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003) (*en banc*). *Smalls*, 87 Fed. Appx. at 168. In *Martinez*, the Federal Circuit had previously ruled that the statute of limitations in a military pay action for back pay accrues at the time of plaintiff's discharge from service. *Martinez*, 333 F.3d at 1309. Therefore, relying on its decision in *Martinez*, the Federal Circuit found that Mr. Smalls' claim was time-barred because he had been discharged on December 4, 1980, and he did not bring suit in the Hawaii district court until November 12, 1998, almost eighteen years later.

Based on the foregoing, the Federal Circuit vacated the Hawaii district court's December 15, 2000 judgment, and directed the district court to dismiss plaintiff's amended complaint for lack of jurisdiction. *Smalls*, 87 Fed. Appx. at 168. In compliance with the Federal Circuit's ruling, the Hawaii district court dismissed plaintiff's case on February 3, 2004. *Smalls v. United States*, No. 98-00908 SPK-BMK (D. Haw. Feb. 3, 2004).

On May 25, 2004, Mr. Smalls appealed the Federal Circuit's decision to the United States Supreme Court. The Supreme Court denied plaintiff's writ of *certiorari* on October 18, 2004. *Smalls v. United States*, 543 U.S. 942 (2004). Mr. Smalls appealed again to the Supreme Court by filing a petition for rehearing on October 22, 2004. The Supreme Court denied plaintiff's petition for rehearing on January 10, 2005. *Smalls v. United States*, 543 U.S. 1083 (2005).

In the meantime, plaintiff had filed a complaint in the United States District Court for the District of Columbia (DC district court) on December 22, 2003, alleging the same disability claim. An amended complaint was filed on April 9, 2004. At the DC district court, plaintiff alleged that the Secretary of the Navy acted "arbitrarily" when he affirmed the "Correction Board's decisions of November 13, 1992 and July 25, 2001, holding that Plaintiff was not entitled to have his naval record correct[ed] and to be place[d] on the disability retirement status upon his release from active duty." Am. Compl. at 6, *Smalls v. United States*, No. 03-2620 (JDB) (D.D.C. April 4, 1990). Defendant moved to dismiss

plaintiff's claim on June 3, 2004 on three grounds: (1) that it was barred by the doctrine of *res judicata*, (2) it was untimely pursuant to 28 U.S.C. § 2401, and (3) it sought monetary damages in excess of $ 10,000. Brief for Defendant at 1, *Smith v. United States*, No. 03-2620 (JDB) (D.D.C. June 3, 2004). On December 8, 2004, the DC district court granted defendant's motion to dismiss, on the ground that *res judicata* barred plaintiff's amended complaint. *Smalls v. United States*, No. 03-2620 (JDB), slip op. at 7 (D.D.C. Dec. 8, 2004). The DC district court concluded that plaintiff had "simply repackaged in this action, in virtually identical form, the same claim that he earlier unsuccessfully pursued through a final adverse judgment in the District of Hawaii, the Ninth Circuit, the Federal Circuit, and ultimately the Supreme Court." *Id*.

Mr. Smalls disagreed with the DC district court's decision, and filed a motion for reconsideration on December 27, 2004, claiming that the DC district court's decision "represents a manifest error of law or fact in granting dismissal of Smalls' Amended Compliant on the grounds of res judicata." *See* Brief for Plaintiff at 1, *Smalls v. United States*, No. 03-2620 (JDB) (D.D.C. Dec. 27, 2004). The DC district court denied the motion for reconsideration on February 8, 2005 on the grounds that plaintiff had not provided sufficient reasons to disturb the court's earlier determination that "*res judicata*, or claim preclusion bars this action." *Smalls v. United States*, No. 03-2620 (JDB) (D.D.C. Feb. 8, 2005). Plaintiff moved again for reconsideration on March 4, 2004. *See* Brief for Plaintiff at 1, *Smalls v. United States*, No. 03-2620 (JDB) (D.D.C. March 4, 2004). The DC district court denied the motion for reconsideration on March 11, 2005, relying on its initial reason for dismissing the amended complaint. *See Smalls v. United States*, No. 03-2620 (JDB) (D.D.C. March 11, 2005).

Still undeterred, Mr. Smalls filed a notice of appeal on February 9, 2005 with the United States Court of Appeals for the District of Columbia Circuit (DC Circuit), appealing the DC district court's December 2004 decision. *Smalls v. United States*, 471 F.3d 186, 189 (D.C. Cir. 2006). The DC Circuit dismissed the notice of appeal as untimely. A month later, on March 25, 2005, plaintiff filed an amended notice of appeal with the DC Circuit. *Id*. The DC Circuit found the amended notice of appeal timely and reviewed the district court's denial of plaintiff's motions for reconsideration for abuse of discretion. *Id*. Based on its review, the DC Circuit found that the district court did not abuse its discretion in denying plaintiff's motions for reconsideration, and affirmed the dismissal of Mr. Smalls' amended complaint on *res judicata* grounds. *Id*. at 193.

Mr. Smalls was also persistent in the continuance of his pursuit of a remedy before the BCNR. On June 15, 2005, the Executive Director of the BCNR denied plaintiff's May 20, 2005 request for reconsideration on the ground that Mr. Smalls' evidence, although new, was not "material" to warrant a reconsideration of the BCNR's decision. Am. Compl. ¶ 23. In decisions dated March 26, 2007 and March 30, 2007, the Executive Director denied plaintiff's application for correction of his military record, ruling that "pseudofolliculitis barbae is not considered to be a disability under the laws administered by the military departments. Accordingly, and as the issues of service connection and disability compensation for that condition are matters within the jurisdiction of the Department of Veterans Affairs, your case has been closed administratively without further consideration by the Board."[8] *Id*. ¶ 24. Finally, on June 12, 2007, the Executive Director, in response to another request from plaintiff, stated that: "Mr. Smalls has applied for correction of his record on numerous occasions. . . . There are no applications from Mr. Smalls awaiting action by the Board at this time." *Id*. ¶ 26.

After years of filing claims before the BCNR and other federal courts, plaintiff has turned to the United States Court of Federal Claims in yet another attempt to correct his military record. Mr. Smalls filed suit in this court on October 4, 2007 and an amended complaint was filed on November 26, 2007, asking that this court compel the BCNR to reconsider plaintiff's applications and alleged new evidence. Am. Compl. ¶ 37.

DISCUSSION

I. *Pro se* Complaint

The court acknowledges that Mr. Smalls is proceeding *pro se*, and is "not expected to frame issues with the precision of a common law pleading." *Roche v. U. S. Postal Serv.*, 828 F.2d 1555, 1558 (Fed. Cir. 1987). *Pro se* plaintiffs are entitled to a liberal construction of their pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (requiring that allegations contained in a *pro se* complaint be held to "less stringent standards than formal pleadings drafted by lawyers"). In that regard, the court has examined the complaint and briefs thoroughly and has

[8]/ Pseudofolliculitis barbae is commonly known as "shaving bumps." Decl. ¶ 19 & Ex. 10 (Letter from the Executive Director of the BCNR, W. Dean Pfeiffer dated March 26, 2007).

attempted to discern all of plaintiff's legal arguments. However, while "[t]he fact that [a plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, . . . it does not excuse its failures, if such there be." *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir.1995). In other words, the leniency afforded to a *pro se* litigant with respect to mere formalities does not relieve the burden to meet jurisdictional requirements. *Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987); *Biddulph v. United States*, 74 Fed. Cl. 765, 767 (2006).

II. Jurisdiction

Pursuant to 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) (2000). The Tucker Act, however, "does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976) (citation omitted). A plaintiff coming before the United States Court of Federal Claims, therefore, must also identify a separate provision of law conferring a substantive right for money damages against the United States. *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) (citing *Testan*, 424 U.S. at 398).

In the present case, plaintiff alleges that the Executive Director of the BCNR violated his rights under 10 U.S.C. §§ 1201, 1552, and under the Fourteenth Amendment to the United States Constitution, by refusing to submit his applications to a three member panel of the BCNR to correct his military record to reflect his entitlement to disability retirement benefits. Am. Compl. ¶¶ 31, 33, 35. The money-mandating statute that provides a basis for Mr. Smalls' Tucker Act claim is 10 U.S.C. § 1201. *See Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005). Mr. Smalls is requesting military disability retirement pay which falls squarely within 10 U.S.C. § 1201. *Id*. Section 1201(a) provides:

> Upon a determination by the Secretary that a member described in subsection (c) 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 or while absent as described in subsection (c)(3), *the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also makes the determinations with respect to the member and that disability specified in subsection (b).*

10 U.S.C. § 1201(a) (emphasis added). Claims for military disability retirement pay based on § 1201 are within the jurisdiction of this court. *See Chambers*, 417 F.3d at 1223; *Fisher v. United States*, 402 F.3d 1167, 1174 (Fed. Cir. 2005). Thus, the court has jurisdiction to hear plaintiff's case provided that the requisite jurisdictional requirements are satisfied.

III. Standards of Review

A. Motion to Dismiss for Lack of Jurisdiction under RCFC 12(b)(1)

Defendant requests the court to dismiss plaintiff's amended complaint for lack of subject matter jurisdiction. In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), this court must presume all undisputed factual allegations to be true and construe all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). However, plaintiff bears the burden of establishing subject matter jurisdiction. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and must do so by a preponderance of the evidence, *Reynolds*, 846 F.2d at 748. If jurisdiction is found to be lacking, this court must dismiss the action. RCFC 12(h)(3).

B. Motion Filed under RCFC 12(b)(6)

Defendant also asks that plaintiff's amended complaint be dismissed for failure to state a claim upon which relief can be granted, a request which is governed by RCFC 12(b)(6). *White & Case LLP v. United States*, 67 Fed. Cl. 164, 168 (2005). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "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 this rule, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer*, 416 U.S. at 236. The court must inquire whether the complaint meets the "plausibility standard" recently described by the United States Supreme Court, *i.e.*, whether it adequately states a claim and provides a "showing [of] any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007).

IV. **Analysis**

Defendant argues that this court does not have jurisdiction to entertain plaintiff's disability claim because it is time-barred by the six-year statute of limitations set forth in 28 U.S.C. § 2501(2006). To support its argument, the government relies upon the holding in *Chambers v. United States*, 417 F.3d 1218 (2005) in which the Federal Circuit ruled that "claims for entitlement to disability retirement pay generally do not accrue until the appropriate military board either finally denies such a claim or refuses to hear it." *Id*. at 1224 (citations omitted). Applying the holding in *Chambers*, the government asserts that plaintiff's disability claim accrued on November 13, 1992, the date that the BCNR issued its final decision denying plaintiff's appeal to correct his military record. Thus, defendant asserts the six-year period began to run on November 13, 1992. Mr. Smalls did not file suit in this court until November 26, 2007, fifteen years later. The six-year limitations period had already expired in November 1998.

Although plaintiff does not dispute the fact that the BCNR issued a final decision on his disability claim on November 13, 1992, Mr. Smalls argues that his disability claim is not time-barred for two reasons. First, the six-year limitations period was "restarted" because Mr. Smalls submitted a petition for reconsideration

before the BCNR in May 2005 "*alleging new evidence* rather than mere material error." Pl.'s Opp. (Standard of Review at 6-7) (emphasis in original). Second, the subsequent Federal Circuit decision in *Chambers* cured the jurisdictional defect relating to the six-year limitations period. Pl.'s Opp. at 16-17, 32-33. *See infra* for discussion.

The court agrees with the government that plaintiff's disability claim is time-barred. Plaintiff did not file suit within the six-year statute of limitations set forth in 28 U.S.C. § 2501, which is also applicable to military pay cases. *See Martinez*, 333 F.3d at 1303-04. Section 2501 provides: "Every claim of which the United States Court of Federal claims has jurisdiction shall be barred unless the petition is filed within six years after such claim first accrues." 28 U.S.C. § 2501. "The six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1352 (2006), *aff'd*, 552 U.S. _, 128 S. Ct. 750 (2008); *see also Martinez*, 333 F.3d at 1316 ("It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature."); *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002) ("Section 2501 constitutes a jurisdictional limit on the authority of the Court of Federal Claims.").

Because of the jurisdictional nature of § 2501, it "must be strictly construed" and cannot be waived. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) ("[S]ince the 6-year limitations period of section 2501 serves as a jurisdictional limitation rather than simply as an affirmative defense, such statutes of limitations have been held as not capable of waiver or subject to an estoppel, whether pled or not."). A plaintiff bears the burden of establishing jurisdiction within this court, "including compliance with the six-year statute of limitations, and must do so by a preponderance of the evidence." *Entines v. United States*, 39 Fed. Cl. 673, 678 (1997) (citing *Reynolds*, 846 F.2d at 748). Although Mr. Smalls is proceeding *pro se*, plaintiff must still satisfy the jurisdictional requirement of § 2501. *See Kelley*, 812 F.2d at 1380 (stating that "a court may not take a liberal view of that jurisdictional requirement and set a different rule for *pro se* litigants only").

A. Mr. Smalls' Disability Retirement Claim is Time-Barred

(1) Accrual of the Disability Retirement Claim

It is well-settled that a Tucker Act claim accrues "as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.'" *Martinez*, 333 F.3d at 1303 (citation omitted). For a disability retirement claim, the claim accrues when "the appropriate military board either finally denies such a claim or refuses to hear it." *Chambers*, 417 F.3d at 1224 (citing *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990)). "The decision by the first statutorily authorized board that hears or refuses to hear the claim invokes the statute of limitations." *Id*.

In the instant case, the Federal Circuit previously ruled on January 14, 2004 that Mr. Smalls' disability case accrued on December 4, 1980, the date of his discharge from the service. *See Smalls*, 87 Fed. Appx. at 167. The Federal Circuit applied the standard in *Martinez* which states that a plaintiff's "cause of action for military back pay accrues at the time of the plaintiff's discharge." *Martinez*, 333 F.3d at 1303. At that time, *Martinez* was the controlling law. However, subsequent to its decision in *Martinez*, on August 1, 2005, the Federal Circuit held in *Chambers* that disability retirement claims like the one in Mr. Smalls' case are governed by the money-mandating statute, 10 U.S.C. § 1201, and thus, have a different accrual rule. *See Chambers*, 417 F.3d at 1224. The accrual date in such a disability retirement case is the date "an appropriate military board either finally denies such a claim or refuses to hear it." *Id*.; *see also Colon v. United States*, 71 Fed. Cl. 473, 481 (2006).

In light of the accrual rule set forth in *Chambers*, Mr. Smalls' disability retirement claim is deemed to have accrued on November 13, 1992, when the BCNR issued its final decision denying plaintiff's appeal to correct his military record. Nevertheless, plaintiff's disability claim remains time-barred because Mr. Smalls did not file his amended complaint in this court until November 2007. Plaintiff took fifteen years from the date of accrual to file his claim. Accordingly, plaintiff's disability claim is time-barred in the absence of some legal doctrine which might have served to protect or preserve plaintiff's claim.

(2) The Accrual Date of November 13, 1992 Remains the Relevant Date

(a) Plaintiff's Motion for Reconsideration Alleging "New and Material Evidence" Does not Re-start the Six-Year Statute of Limitations

Plaintiff argues that his May 2005 motion for reconsideration which alleged "new and material evidence" should compel the BCNR to reopen the case, and issue a new final decision that would "restart the six-years statute of limitations." Pl.'s Opp. at 2, 9, 32. To support his argument, Mr. Smalls relies primarily on *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270 (1986) to persuade this court that his submission of "new evidence" to the BCNR should result in a new final decision that would toll the six-year statute of limitations:

> In Smalls's case, he has petitioned for reconsideration of the BCNR's previous decision with a properly submitted petition *alleging new evidence* rather than mere material error. Therefore, in accordance with *Interstate Commerce Commission V. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1986) the BCNR must either reopen and grant a merit review or issue a decision to "refuse to reopen." In either case, the U.S. Supreme Court's decision in *Interstate Commerce Commission V. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1986) means that the six-year time limit would be restarted.

Pl.'s Opp. (Standard of Review at 6-7) (emphasis in original); *see also* Pl.'s Opp. (Memorandum in Support of Motion at 2, 9, 32, 33-34).

Mr. Smalls' reliance on *Interstate Commerce* is misplaced. In that case, the Interstate Commerce Commission (Commission) denied the petitioners' motion for reconsideration under the Interstate Commerce Act, 49 U.S.C. § 10327(g) (1990)

(repealed 1995),[9] although timely filed, on the ground that petitioners did not present any "new evidence, or substantially changed circumstances" to warrant a review of the Commission's final decision. *Id*. at 276-78. In reviewing the Commission's refusal of the petitioners' motion for reconsideration, the Supreme Court explained that the Commission's refusal to reconsider the petitioners' case was unreviewable because it was based on "material error" rather than new evidence or change of circumstances. *Id*. at 279-80. The Supreme Court explained that a petition to reopen consideration based on "material error" is rarely granted because it would have the effect of extending "indefinitely" the sixty day limitation period for judicial review "within which *seriously* mistaken agency orders can be judicially overturned." *Id*. at 280. As the Supreme Court noted,

---

[9]/ 49 U.S.C. § 10327(g)(1990) provides:

> (g)(1) The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances--
> (A) reopen a proceeding;
> (B) grant rehearing, reargument, or reconsideration of an action of the Commission; and
> © change an action of the Commission.
>
> An interested party may petition to reopen and reconsider an action of the Commission under this paragraph under regulations of the Commission.
> (2) The Commission may grant a rehearing, reargument, or reconsideration of an action of the Commission that was taken by a division designated by the Commission if it finds that--
> (A) the action involves a matter of general transportation importance; or
> (B) the action would be affected materially because of clear and convincing new evidence or changed circumstances.
>
> An interested party may petition for rehearing, reargument, or reconsideration of an action of the Commission under this paragraph under regulations of the Commission. The Commission may stay an action pending a final determination under this paragraph. The Commission shall complete reconsideration and take final action by the 120th day after the petition is granted.

Id.

> Even if our search for statutory construction were limited to the text of the Hobbs Act, it seems to us not inventiveness but the most plebeian statutory construction to find implicit in the 60-day limit upon judicial review a prohibition against the agency's permitting, or a litigant's achieving, perpetual availability of review by the mere device of filing a suggestion that the agency has made a mistake and should consider the matter again . . . .

Id. at 281. Thus, Mr. Smalls' assertion that the holding in *Interstate Commerce* supports his position that his petition for reconsideration will necessarily "re-start the six-year limitations period" fails. The Supreme Court was clear in its determination that the sixty-day limitations period under the Hobb's Act will not be extended because of a plaintiff's mere allegation that an agency made a "material error" in its decision. The Supreme Court emphasized that an action might be reopened if based on serious allegations such as "new evidence" or "substantially changed circumstances." *Id*. at 278-79.

In the present case, the record reflects that Mr. Smalls has not made a showing of new evidence or changed circumstances that would compel the BCNR to reopen his case and conduct a merits review. On June 15, 2005, the Executive Director of the BCNR rejected plaintiff's application to amend his military record on the basis that "[a]lthough at least some of the evidence you have submitted is new, it is not material." Am. Compl. ¶ 23; *see Aubre v. United States*, 40 Fed. Cl. 371, 377 (1998)(stating that the "'mere presentation of new evidence to a reviewing board does not constitute such a "reopening" [so as to deprive an earlier decision of finality] where the board does not accept that new evidence as sufficient to overturn the adverse decision of the prior board.'") (quoting *Robinson v. United States*, 163, Ct. Cl. 235, 237 (1963)). Accordingly, plaintiff's motion for reconsideration did not re-start the six-year statute of limitations and Mr. Smalls' disability retirement claim remains time-barred.

(b) Plaintiff's Motion for Reconsideration Was Not Filed Within A Reasonable Time, And Thus Does Not Displace The BCNR's Final Decision of November 13,

1992

Defendant asserts that because "Mr. Smalls submitted his petition for reconsideration to the BCNR in 2005, thirteen years after the BCNR had denied his claim in November 1992, the petition for reconsideration did not affect the finality of the earlier BCNR decision." Def.'s Reply at 7. Defendant's argument appears to suggest that if Mr. Smalls' motion for reconsideration had been filed within a reasonable time, the limitations period would no longer commence to run of as November 13, 1992. Thus, the court will turn to and address the issue of whether plaintiff's motion for reconsideration was filed within a reasonable time.

The government relies on *Van Allen v. United States*, 70 Fed. Cl. 57 (2006) to support its argument that plaintiff's motion for reconsideration does not change the accrual date of November 13, 1992. In *Van Allen*, the BCNR's decision denying plaintiff's request to amend his military record to reflect his disability status was issued on March 21, 1986. *Id*. at 59. In 1988, plaintiff Van Allen filed a motion for reconsideration alleging new evidence of a "previously undiagnosed" condition. *Id*. at 59-60. Although the BCNR granted the motion to reopen in 1991, it concluded that plaintiff's 1988 request for reconsideration did not disturb the BCNR's March 1986 decision because the request was not filed within a reasonable period of time:

> The period of time between the March 21, 1986 BCNR decision denying plaintiff's record correction and the 1988 reconsideration application, resulting in the June 24, 1991 decision to reconsider, clearly exceeds the short or reasonable period which serves to deprive an administrative decision of finality for statute of limitations purposes. . . . It is concluded that the reconsideration by the BCNR which resulted in the decision, dated June 9, 1995, again denying record correction, did not serve to deprive the prior March 21, 1986 BCNR decision of finality for the purpose of filing suit within the limits set by 28 U.S.C. § 2501.

Van Allen, 70 Fed. Cl. at 63-64.[10] (citations omitted).

Defendant is correct that motions for reconsideration must be filed within a reasonable time to have any effect on a final administrative decision. *See Cooley v. United States*, 324 F.3d 1297, 1305 (Fed. Cir. 2003) (stating that "[r]econsideration of an agency's decision must arise within a reasonable period of time . . . ."); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (stating "that absent contrary legislative intent or other affirmative evidence, this court will sustain the reconsidered decision of an agency, as long as the administration action is conducted within a short and reasonable time period"); *Dayley v. United States*, 169 Ct. Cl. 305, 309 (1965) (stating that "it is the inherent right of every tribunal to reconsider its own decisions within a short period after the making of the decision and before an appeal has been taken or other rights vested").

Therefore, based on well established precedent, Mr. Smalls' May 2005 motion for reconsideration to the BCNR was untimely. The BCNR made its final decision on November 13, 1992, and plaintiff did not submit his petition for reconsideration to the BCNR until May 20, 2005. In *Van Allen*, plaintiff delayed two years before petitioning the BCNR for reconsideration of its prior decision. The *Van Allen* court considered these two years unreasonable. Here, Mr. Smalls delayed thirteen years before submitting his motion for reconsideration to the BCNR.[11] This court, likewise, considers such an excessive amount of time to

---

[10]/ The *Van Allen* court noted that when a party wants relief from a final judgment in federal court based on "newly discovered evidence" under Fed. R. Civ. P. 60(b), that party is required to file a motion within a "reasonable time" - "no more than a year after the entry of the judgment or order or the date of the proceeding was entered or taken." *Van Allen*, 70 Fed. Cl. at 63. The *Van Allen* court also noted that "[t]o affect the finality of the judgment, such a motion must be filed within ten days after the entry of the judgment." *Id*.; Fed. R. Civ. P. 59.

[11]/ This court notes that in *Van Allen*, the BCNR did accept plaintiff's motion for reconsideration based upon alleged new evidence. *Id*. at 63. However, the BCNR denied plaintiff Van Allen's petitions for reconsideration because plaintiff failed to provide "new material evidence." *Id*. at 64. In that regard, Mr. Smalls' motions for reconsideration might have been accepted by the BCNR if he had provided not only "new evidence," but evidence that was relevant and material to his disability claim. *See also Barney v. United States*, 57 Fed. Cl. 76, 86 (2003) (stating that the AFBCMR was willing to consider plaintiff's petitions for reconsideration (continued...)

constitute unreasonable delay. Accordingly, plaintiff's disability claim remains time-barred for the purpose of filing suit within the time limits set forth in 28 U.S.C. § 2501.

(3) Jurisdictional Defect Is Not Cured Because Of The Federal Circuit's Decision In *Chambers*

The final argument raised by plaintiff is based on the doctrine of "curable defect." Pl.'s Opp. at 16-17, 32-33. Mr. Smalls argues that the jurisdictional defect in his case has been cured by the Federal Circuit's decision in *Chambers*. By use of the term jurisdictional defect, plaintiff is referring to his untimely disability claim. Mr. Smalls, in essence, argues that the court's application of *Chambers* will cure the untimeliness of his claim and thus, plaintiff's claim will no longer be time-barred:

> In [S]malls' case it is cured because in the first case the District of Hawaii was directed by the mandate from a higher body to dismiss for lack of jurisdiction. However, this direction to dismiss was based on the notion that Smalls case presented one akin to *Martinez* when in fact Smalls case is one for disability pay and not one for military back pay as in *Martinez*.

Id. at 32.

(a) Mr. Smalls Has Provided Insufficient Legal Evidence to Support An Application Of The Curable Defect Doctrine

Plaintiff has provided insufficient legal evidence to support his argument that the jurisdictional defect in his case has been cured. Mr. Smalls relies on two

---

[11](...continued)
in his disability claim if plaintiff had submitted "newly discovered relevant evidence")

cases, *Citizen Elecs. Co. v. OSRAM GmBH*, 225 Fed. Appx. 890 (Fed. Cir. 2007) (*Citizen III*) and *Vink v. Hendrikus Johannes Schijf Rolkan*, 839 F.2d 676, 677 (Fed. Cir. 1988), both distinguishable from plaintiff's case.

The court in *Citizen* explains that "'[t]he "curable defect" exception applies where a "precondition requisite" to the court's proceeding with the original suit was not alleged or proven, and is supplied in the second suit – for example, the Government's filing of an affidavit of good cause in a denaturalization proceeding, proper service of process, or residency adequate to invoke diversity jurisdiction.'" *Citizen III*, 225 Fed. Appx. at 893 (quoting *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983)) (internal citations omitted). The "cure defect" doctrine is regarded as an exception to "the *res judicata* effect of jurisdictional dismissals." *Dozier*, 702 F.2d at 1192. It applies to cases in which the "jurisdictional deficiency could be remedied by *occurrences subsequent to the original dismissal.* The deficiency pertained to a fact (filing of affidavit, service of process or present residence) separate and apart from the past and completed transactions that constituted the cause of action. " *Id*. (internal footnotes omitted).

This court has ruled that the "curable defect" doctrine is applicable to jurisdictional issues, and that it will operate to cure a jurisdictional deficiency. *See Lowe v. United States*, 79 Fed. Cl. 218, 229 (2007) (stating that the "jurisdictional determinations underlying a dismissal do not have preclusive effect if after the initial dismissal, plaintiff has 'cured' the jurisdictional deficiency identified in the first suit"). The doctrine will cure a jurisdictional defect in a situation in which the underlying claim was not adjudicated in a previous suit, and thus, was not a final judgment on the merits:

> In summary, a prior dismissal on jurisdictional grounds does not prohibit a subsequent claim on the merits, because those merits have not been heard by the court; the prior dismissal *does* preclude the same action based on the same facts unless the jurisdictional flaw that necessitated dismissal of the first suit has been cured. . . . If the alleged "cure" is sufficient to repair the prior jurisdictional defect, collateral estoppel does not apply to the prior jurisdictional determination because the issue of

> the court's subject matter jurisdiction over the case as *situated post – "cure"* has not yet been litigated.

Lowe, 79 Fed. Cl. at 230.

In the present case, the Federal Circuit held that Mr. Smalls' disability claim was barred by the statute of limitations. *See Smalls*, 87 Fed. Appx. at 168. Accordingly, the Federal Circuit remanded the case back to the Hawaii district court, and directed the district court to dismiss the case for lack of jurisdiction. *Id*. The dismissal of Mr. Smalls' disability claim was thus based on the statute of limitations. A dismissal of a claim based on the statute of limitations is considered to be a final judgment on the merits. *See Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 228 (1995) ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of limitations-grounds the same way they treat a dismissal for failure to state claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits."); *Martin v. United States*, 30 Fed. Cl. 542, 548 (1994), *aff'd*, 41 F.3d 1519 (Fed. Cir. 1994) (table) ("It appears settled that a statute of limitations dismissal should be construed as a final 'judgment on the merits.'"); *see also Tindle v. United States*, 56 Fed. Cl. 337, 345 (2003) ("Dismissal on statute of limitations is an adjudication on the merits."); *Southern Cal. Fed. Sav. & Loan Ass'n v. United States*, 51 Fed. Cl. 114, 115 (2001) ("A dismissal on statute of limitations grounds constitutes a final judgment on the merits.").

In light of the foregoing, the dismissal of Mr. Smalls' disability claim constitutes a final judgment on the merits, and the curable defect doctrine is therefore inapplicable. The issue of jurisdiction was determined by the Hawaii district court, and is thus precluded from further litigation under the principles of *res judicata*. *See infra*.

Moreover, Mr. Smalls' reliance upon *Vink* to cure his jurisdictional defect is misplaced. In *Vink*, the Court of Federal Claims converted the motion to dismiss under Fed. R. Civ. P. 12(b)(1) into a motion for summary judgment, and then proceeded to dismiss the case "without prejudice." *Vink*, 839 F.2d at 677. The Federal Circuit found that the lower court's action was not "consistent with its

stated action of converting the motion to one for summary judgment." *Id*. Based on that determination, the Federal Circuit ruled that it would treat the lower court's action as one of granting a motion to dismiss without prejudice. The *Vink* plaintiff, thus, had the opportunity to "refile" the case in an "appropriate forum."[12] *Id*.

Unlike the *Vink* plaintiff, Mr. Smalls' jurisdictional defect is not curable. The dismissal of Mr. Smalls' claim, as previously discussed, was based on the statute of limitations. Case-law has established that a dismissal on statute of limitations is an adjudication on the merits. *See supra*. In that regard, Mr. Smalls is precluded from refiling the same claim.

Mr. Smalls' reliance on *Citizen III* is also unfounded.[13] In that case, the Federal Circuit held that the suit was barred by the doctrine of *res judicata* because the issue of subject matter jurisdiction had already been litigated. *Citizen III*, 225 Fed. Appx. at 893. The Federal Circuit affirmed the lower court's finding that plaintiff's jurisdictional defect was not cured by subsequent events after its initial filing date of January 18, 2005. *Id*. In *Citizen III*, the curable defect doctrine did not cure the jurisdictional defect, and likewise, the *Citizen III* case fails to support Mr. Smalls' argument that the jurisdictional defect in his case is curable. Thus,

---

[12]/ It is significant to note that the court's reasoning in *Vink* did not rely upon or even mention the curable defect doctrine.

[13]/ In *Citizen Elecs. Co. v. OSRAM GmBH*, 377 F. Supp. 2d 149 (D.D.C. 2005) (*Citizen I*), plaintiff filed a declaratory judgment action on January 18, 2005, seeking a declaratory judgment "that its white light emitting diodes" did not infringe on the patents owned by the defendants. *Id*. at 150. The court granted defendant's motion to dismiss on the grounds that plaintiff had failed to prove that there was an actual controversy under the Declaratory Judgment Act, 28 U.S.C. § 2201(a)(2000). *Id*. at 156. The court dismissed plaintiff's claim with prejudice for lack of subject matter jurisdiction. *Id*. On July 14, 2005, plaintiff initiated a second suit seeking the same relief but relying upon new facts, in an attempt to establish subject matter jurisdiction. *Citizen Elecs. Co. v. OSRAM GmBH*, No. Civ. A-05-1560 (ESH), 2005 WL 3484202 (D.D.C. Dec. 20, 2005) (*Citizen II*). The court held that the issue of subject matter jurisdiction had already been litigated, and thus, was barred by the principles of *res judicata*. *Citizen II*, 2005 WL 3484202, at *1. The court also noted that the new alleged facts did not cure the jurisdictional defect. *Id*. at *3-4. Plaintiff appealed the district court's decision to the Federal Circuit. *Citizen Elecs. Co. v. OSRAM GmBH*, 225 Fed. Appx. 890 (Fed. Cir. 2007) (*Citizen III*). The Federal Circuit upheld the lower court's decision, and barred plaintiff's claim on *res judicata* grounds. *Id*. at 894.

even if a non-precedential case such as *Citizen III* could be cited as precedent, which it cannot, *Citizen III* offers no support to plaintiff.

(b) This Court Cannot Overturn the Federal Circuit's Decision

The court also rejects plaintiff's "curable defect" argument because it suggests that this court should overturn a Federal Circuit decision on the basis that the Federal Circuit erred in applying *Martinez* rather than *Chambers*. It is beyond cavil that the Court of Federal Claims is not empowered to overturn a final judgment entered by the Federal Circuit. It is well-settled under the "law of the case" doctrine that "when a judgment of a trial court has been appealed, the decision of the appellate court determines the law of the case, and the trial court cannot depart from it . . . . " *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991):

> "A Court that makes a decision has the power to reconsider it, so long as the case is within its jurisdiction. But after the law of the case has been determined by a superior court, the inferior court lacks authority to depart from it, and any change, must be made by the superior court that established it, or by a court to which it, in turn, owes obedience."

Id. at 877 n.5 (citation omitted).

Applying the above doctrine to this case, the Court of Federal Claims must follow the decision issued by the Federal Circuit. *See Exxon Corp*., 931 F.2d at 877 ("Law of the case, then, merely requires a trial court to follow the rulings of an appellate court. It does not constrain the trial court with respect to issues not actually considered by an appellate court."). The record shows that, on or about January 14, 2004, the Federal Circuit concluded that Mr. Smalls' disability claim was time-barred under *Martinez*. To that effect, the Federal Circuit mandated that the Hawaii district court dismiss plaintiff's claim for lack of subject matter jurisdiction. *See Smalls*, 87 Fed. Appx. at 168. Because a final disposition of

plaintiff's case has been rendered by the Federal Circuit, this court cannot alter the Federal Circuit's ruling.[14] *See Exxon*, 931 F.2d at 877. Plaintiff's curable defect argument cannot serve to salvage plaintiff's claim from being time-barred by any assertion that this court may overturn a Federal Circuit ruling.

B. Plaintiff's Disability Claim Is Barred By the Principles of *Res Judicata*

Defendant also argues that plaintiff's disability retirement claim is barred under the doctrine of *res judicata*, or claim preclusion. The court agrees that the doctrine of *res judicata* is an alternative basis for dismissal of the instant case. The government asserts that Mr. Smalls' disability retirement claim should be barred by *res judicata* because plaintiff "alleges the same wrongs as in his prior suits-that the Marine Corps improperly discharged him without any medical disability retirement pay or benefits." Def.'s Mot. at 12. Because plaintiff's disability retirement claim is based on the same facts as the Hawaii and DC cases, the government asserts that this court should dismiss Mr. Smalls' claim on *res judicata* grounds for failure to state a claim.

Plaintiff, on the other hand, argues that the elements of *res judicata* have not been satisfied to warrant dismissal of his disability claim. Plaintiff argues that *res judicata* does not apply to his circumstances because the current amended complaint is different from the prior complaints in the Hawaii and DC cases:

> [T]he two Amended Complaints filed by Smalls are very different from the current Complaint. The current complaint is strictly based on failure to have Smalls'

---

[14]/ The Hawaii district court, like the Court of Federal Claims, was required to abide by the Federal Circuit's ruling. The Federal Circuit, as previously discussed, remanded the case to the Hawaii district court with instructions to dismiss plaintiff's claim for lack of jurisdiction. *See Smalls*, 87 Fed. Appx. at 168. Based on the doctrine of the law of the case, the Hawaii district court was required to comply with the Federal Circuit's instructions.

> application be given full consideration by the tribunal panel of the Board which is empowered to act on behalf of the Secretary of the Navy.

Pl.'s Opp. at 21.

Under the doctrine of *res judicata*, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The application of the *res judicata* doctrine ensures "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the partes." *Id*. at 401 (quoting *Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931)). In sum, the doctrine of *res judicata* "precludes litigants from contesting matters that they have already had a full and fair opportunity to litigate, protects defending parties from the expense of duplicitous litigation, conserves judicial resources, and minimizes the possibility of inconsistent decisions by multiple forums asked to resolve the same matter." *Tindle*, 56 Fed. Cl. at 345 (citing *Montana v. United* States, 440 U.S. 147, 153-54 (1979)).

In order for a party to prevail on a defense of *res judicata*, the party must prove that: "(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first." *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003) (citations omitted). In the present case, defendant has proved all three elements of *res judicata*.

(1) The Parties Are Identical Or In Privity

It is undisputed that the first element of *res judicata* has been met. The parties, Mr. Smalls and the United States, are the same parties in the first action before the Hawaii district court and the Federal Circuit, and in the second action before the DC district court and the DC circuit. *See Smalls v. United States,* 87 F. Supp. 2d 1055 (D. Haw. 2000); *Smalls v. United States*, 87 Fed. Appx. 167 (Fed.

Cir. 2004); *Smalls v. United States*, 471 F.3d 186 (D.C. Cir. 2006). Thus, defendant has satisfied the first element of *res judicata.*

(2) The First Suit Proceeded to A Final Judgment On The Merits

Defendant argues that the second element of *res judicata* is satisfied because plaintiff's first suit in the Hawaii district court proceeded to a final judgment on the merits. Defendant concludes that the Hawaii district court's dismissal of plaintiff's disability claim was a final judgment on the merits because it was based on the statute of limitations.

Mr. Smalls is not convinced that the government has proved the second element of *res judicata*. Mr. Smalls argues the Hawaii district court's judgment was not a final judgment on the merits because it was vacated by the Federal Circuit. Pl.'s Opp. at 13, 31. Plaintiff made this argument in his prior cases before the Hawaii district court and the DC district court:

> It is well established that for res judicata to prevail, it must rest on a *final decision*. It has not been successfully argued by any court of competent jurisdiction having reviewed the claims Smalls has brought in an effort to have the BCNR correct the record, that the vacated judgment of the District Court of Hawaii is a final judgment on the merits. If this were the case it would hardly have been necessary for the Court of Appeals for the Federal Circuit to direct the District Court for the District of Hawaii to enter a *new and separate judgment* for dismissal for lack of jurisdiction. Rather, the Court of Appeals for the Federal Circuit implicitly ruled that this *vacated judgment* could have no preclusive effect when it issued instructions directing the District Court of Hawaii to enter a new judgment of dismissal for lack of jurisdiction (final in that jurisdiction).

Pl.'s Opp. at 13.

The court agrees with the government's argument. On February 3, 2004, the Hawaii district court dismissed Mr. Smalls' case for lack of jurisdiction. The Hawaii district court's dismissal of plaintiff's case was based on the Federal Circuit's ruling that Mr. Smalls' claim was barred by the statute of limitations. *See Smalls*, 87 Fed. Appx. at 168. As previously discussed, a dismissal of a claim based on the statute of limitations is considered a final judgment on the merits. *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003) (holding that the dismissal of the a suit was a final judgment on the merits because it was based on the statute of limitations); *Tindle*, 56 Fed. Cl. at 345 ("Dismissal on statute of limitations is an adjudication on the merits."). Based on its determination that Mr. Smalls' complaint was time-barred by the six-year statute of limitations, the Federal Circuit vacated the Hawaii district court's judgment of December 15, 2000, and directed the district court to dismiss plaintiff's claim for lack of jurisdiction.

Similarly, the DC district court, in its consideration of Mr. Smalls' second suit, determined that the judgment entered by the Hawaii district court was a "final judgment on the merits," and thus, dismissed the claim on *res judicata* grounds. *Smalls v. United States*, No. 03-2620 (JDB), slip op. at 6 (D.D.C. Dec. 8, 2004). The DC Circuit upheld the lower court's decision as follows:

> The Federal Circuit directed the Hawaii district court to dismiss Smalls's claims based on the bar of the statute of limitations. The Hawaii district court, is like the D.C. district court, an Article III court, and, for purposes of res judicata, "the rules of finality . . . treat a dismissal on statute-of-limitations grounds . . . as a judgment on the merits."

Smalls, 471 F.3d at 192 (citations omitted).

In view of the binding case-law, plaintiff's argument fails. The Hawaii district court's dismissal of Mr. Smalls' disability claim constituted a final

judgment on the merits, and this court is bound by that decision.[15] Accordingly, the second element of *res judicata* is satisfied.

(3) The Second Claim is Based On The Same Set Of Transactional Facts As The First

Finally, the government argues that the third element of *res judicata* is satisfied because the present case and the prior Hawaii and DC district court cases are based on the same transactional facts. Defendant contends that "Mr. Smalls alleges the same wrongs as in his two prior suits – that the Marine Corps improperly discharged him without any medical disability retirement pay or benefits." Def.'s Mot. at 12. Defendant also asserts that Mr. Smalls is seeking the same remedies as in the prior suits-correction of his military record to show that he was medically retired for "service-related condition[s]." *Id*.

Mr. Smalls, however, does not accept the assertion that his present disability claim is similar to those adjudicated in the Hawaii and DC district courts. Plaintiff argues that the amended complaint in this case is "strictly based on failure to have Smalls' application be given full consideration by the tribunal panel of the Board which is empowered to act on behalf of the Secretary of the Navy." Pl.'s Opp. at 21.

To determine whether two causes of action have the same transactional facts, the Federal Circuit looks to Restatement (Second) of Judgments § 24 (1982) for guidance. *See Ammex,* 334 F.3d at 1056 (noting that the Federal Circuit is guided by Restatement (Second) of Judgments § 24 to analyze the transactional facts in a case). Section 24(2) of the Restatement (Second) of Judgments provides:

> What factual grouping constitutes a "transaction," and what groupings a "series," are to be determined

---

[15]/ It is also well-settled that the Court of Federal Claims does not have the authority to review decisions by federal district or federal appellate courts. *See Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) ("[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts . . . . ").

> pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24(2). Relying on the Restatement, the term "transaction" is defined as the "'core of operative facts,'" the "'same operative facts,'" or the "'same nucleus of operative facts,'" and "'based on the same, or nearly the same factual allegations.'" *Ammex*, 334 F.3d at 1056 (quoting *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 226 (7th Cir. 1998)) (citations omitted).

Here, plaintiff made the same factual allegations and sought the same remedies as in his prior suits before the Hawaii district court and the DC district court. In his suit before the Hawaii district court, Mr. Smalls pled for "judicial review of the BCNR's refusal to correct his military record . . . ." *Smalls*, 87 F. Supp. 2d at 1057. In his suit before the DC district court, plaintiff asked the district court to "correct plaintiff's military record to show that plaintiff 'is medically retired' from the United States Marine Corps with a thirty percent or more disability rating for a service-connected condition . . . . " *Smalls v. United States*, No. 03-2620 (JDB), slip op. at 1 (D.D.C. Dec. 8, 2004). In the present litigation, Mr. Smalls clarifies in his opposition brief that "THIS CLAIM IS STRICTLY ABOUT CORRECTION OF SMALLS' MILITARY RECORDS. . . . " Pl.'s Opp. at 2. (emphasis in original). In all three lawsuits, Mr. Smalls' disability retirement claim is based on the same transactional facts. Mr. Smalls has alleged that he was discharged from the navy without disability pay, he has requested the administrative agencies to reconsider his discharge, and he has appealed to the courts to correct his military record to reflect his entitlement to disability pay. As the DC Circuit succinctly stated it:

> [T]he record shows that both the D.C. and Hawaii lawsuits arise from the same underlying transaction and in both Smalls alleged he was improperly discharged without medical disability benefits, challenged agency decisions relating to his discharge and subsequent administrative challenges, and sought correction of his

> military record so as to qualify him for medical disability retirement benefits.

Smalls, 471 F.3d at 193. Given that the amended complaint is based on the same transactional facts as the cases before the Hawaii district court and the DC district court, defendant has proved the third element of *res judicata*.[16] Accordingly, plaintiff's amended complaint is subject to dismissal under the doctrine of *res judicata*.

C. This Court Does Not Have Jurisdiction Over Plaintiff's Constitutional Claim

Finally, plaintiff asserts that the Executive Director of the BCNR violated Mr. Smalls' rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by "failing to submit Smalls' applications to the BCNR to correct Smalls' military record to show entitlement to retirement benefits." Am. Compl. ¶ 35.

It is well-settled that the Court of Federal Claims does not possess subject matter jurisdiction to hear constitutional claims, with the exception of claims under the Takings Clause of the Fifth Amendment. *See Elkins v. United States*, 229 Ct. Cl. 607 (1981): *see also LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that the court has no jurisdiction over plaintiff's constitutional claims under the Due Process Clauses of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment "because they do not mandate payment of money by the government ").

Mr. Smalls does concede in his opposition brief that the Court of Federal Claims does not possess jurisdiction to hear his constitutional claim under the Equal Protection Clause of the Fourteenth Amendment. Pl.'s Opp. at 28. Plaintiff explains that he asserted the constitutional claim in his amended complaint because

---

[16]/ A recent decision of this court, *Chisolm v. United States*, No. 07-505C, slip op. (Fed. Cl. May 30, 2008), presents a different analysis of *res judicata*. That case appears to be distinguishable from the facts in the instant case.

he wanted to "preserve constitutional issues on appeal." *Id*. Regardless of Mr. Smalls' reasons for asserting his Equal Protection claim, this court does not have the jurisdiction to entertain plaintiff's constitutional claim.[17] Accordingly, plaintiff's constitutional claim is dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, plaintiff's amended complaint must be dismissed because it is barred by the statute of limitations set forth in 28 U.S.C. § 2501. In the alternative, plaintiff's claim is dismissed under the doctrine of *res judicata*.

Accordingly, it is hereby **ORDERED** that

(1) Defendant's Motion to Dismiss and Memorandum in Support Thereof, filed on January 9, 2008, is **GRANTED**;

(2) The Clerk's Office is directed to **ENTER** final judgment in favor of defendant **DISMISSING** plaintiff's amended complaint, with prejudice; and

(3) Each party shall bear its own costs.

LYNN J. BUSH
Judge

[17]/ To the extent that Mr. Smalls' constitutional claim is deemed to be strictly a procedural challenge to the BCNR's decision, it is time-barred as discussed *supra*.