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Respectively Submitted,

10/28/20

Stephen Durr
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APPENDIX A

U.S. Court Of Appeals Affirmance Of ~~Lower~~ Tribunal Denial Of The Petitioner Motion For Vacation Of Judgement

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5029 **September Term, 2020**

1:19-cv-01340-ABJ

Filed On: October 13, 2020

Stephen Durr,

Appellant

v.

Department of the Army and Office of the Attorney General,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Tatel, and Katsas, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief and the supplement thereto filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, the petition for writ of mandamus, the motion for summary reversal, and the supplements thereto, it is

ORDERED AND ADJUDGED that the petition for writ of mandamus and the motion for summary reversal be denied, and the district court's orders, filed January 30, 2020, and July 29, 2020, be affirmed. The district court correctly dismissed appellant's complaint for lack of subject matter jurisdiction because under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over a claim against the United States for a monetary award exceeding $10,000. See Palacios v. Spencer, 906 F.3d 124, 126-27 (D.C. Cir. 2018). Additionally, appellant has not shown that the district court abused its discretion in denying appellant's motion for reconsideration. See Peyton v. DiMario, 287 F.3d 1121, 1125 (D.C. Cir. 2002); Smalls v. United States, 471 F.3d 186, 191 (D.C. Cir. 2006). Finally, to the extent appellant seeks mandamus relief from this court, he has not shown that he has a clear and indisputable right to such relief. See In re Khadr, 823 F.3d 92, 97 (D.C. Cir. 2016).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5029 **September Term, 2020**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX B

Lower Tribunal Order Of Denial Of The Petitioner Motion For Vacation (Reconsideration) Of Judgement

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN DURR, Plaintiff, v. DEPARTMENT OF ARMY, Defendant.	Civil Action No. 19-1340 (ABJ)

MEMORANDUM OPINION AND ORDER

Pro se plaintiff Stephen Durr has filed a motion asking the Court to "vacate judgment and review the plaintiff['s] appeal on its merits" pursuant to Federal Rule of Civil Procedure 60(b)(1). Pl.'s Mot. for Vacation of Judgment [Dkt. # 24] ("Pl.'s Mot.") ¶ 4. Since the motion was filed within twenty-eight days of the Court's order dismissing this Administrative Procedure Act action against the Department of Army and Office of the Attorney General for want of subject matter jurisdiction, it is properly considered as a motion to alter or amend the judgment pursuant to

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Federal Rule of Civil Procedure 59(e).[1] Defendants oppose the motion. Defs.' Opp. to Pl.'s Mot. [Dkt. # 30] ("Defs.' Opp."). For the following reasons, plaintiff's motion is denied.

BACKGROUND

On May 6, 2019, plaintiff, a former soldier in the United States Army, filed a complaint against defendants pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06. Compl. [Dkt. # 1]. He alleged that he was wrongfully discharged from active duty after being diagnosed with schizophrenia. Compl. at 1; App. C. to Compl. [Dkt. # 1-1] at 13. His complaint sought judicial review of the decision made by the Army Board for Correction of Military Records ("ABCMR") to remove him from the Temporary Disability Retired List ("TDRL") and permanently discharge him from the Army, and he asked for $25 million in monetary relief for lost wages and other lost pecuniary benefits. Compl. ¶¶ 27, 29; App. D to Compl. [Dkt. # 1-1] at 18; Pl.'s Amendment to Addendum [Dkt. # 5] ¶ 2; Pl.'s Amendment to Relief Sought in Initial Appeal [Dkt. # 18] at 1. He also sought mandamus relief in the form of a court order directing the Army to reinstate him to military service as of the date of his permanent discharge, and to award

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1 If a post-judgment motion is filed within the twenty-eight-day time period allotted under Rule 59(e), courts in this district treat it as a 59(e) motion, "[r]egardless of the way a party characterizes" it. *See* Fed. R. Civ. P. 59(e); *Nyman v. FDIC*, 967 F. Supp. 1562, 1569 (D.D.C. 1997) (holding that motions filed within ten days of a judgment are treated as Rule 59(e) filings) (Rule 59(e) was amended in 2009 to provide for a 28-day post-judgment filing period), citing *Dove v. Codesco*, 569 F.2d 807, 809 (4th Cir. 1978) (explaining that construing post-judgment motions this way "is consistent with the functional approach to procedure taken by the draftsmen of the federal rules"); *Oladokun v. Corr. Treatment Facility*, 309 F.R.D. 94, 98 (D.D.C. 2015) ("When a motion for reconsideration is filed within twenty-eight days of the challenged order, courts treat the motion as originating under Rule 59(e) of the Federal Rules of Civil Procedure") (internal citation omitted).

Plaintiff filed his motion for reconsideration less than a week after this Court issued its judgment, well within the twenty-eight-day filing period required under Rule 59(e). *See* Fed. R. Civ. P. 59(e); Pl.'s Mot.; Mem. Op. The Court will, therefore, treat the motion as a Rule 59(e) motion to amend the judgment.

him various employment benefits he alleges he would have received had he not been separated from active duty. Compl. ¶¶ 27, 29. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction. *See generally* Defs.' Mot. to Dismiss [Dkt. # 9] ("Defs.' Mot."); Defs.' Mem. of P & A in Supp. of Defs.' Mot. to Dismiss [Dkt. # 9-1] ("Defs.' Mem.") at 1, 8–10.

On January 30, 2020, the Court granted defendants' motion to dismiss on two grounds. Mem. Op. at 1–2. First, it found that it lacked subject matter jurisdiction to entertain the case because section 702 of the APA, 5 U.S.C. § 702, which often serves as a waiver of sovereign immunity, does not apply to cases in which a party seeks money damages, and because the Tucker Act, 28 U.S.C. § 1491, grants the Court of Federal Claims exclusive jurisdiction over claims against the United States for money damages in excess of $10,000. *Id.* at 6–9. Second, the Court found that plaintiff did not meet the heavy burden of demonstrating a clear and indisputable entitlement to mandamus relief because he failed to identify any law that requires the Army to perform the actions requested, and both the ABCMR and Court of Federal Claims refused plaintiff's earlier attempts to change his records or be reinstated. *Id.* at 9–10.

STANDARD OF REVIEW

"Motions under Fed. R. Civ. P. 59(e) are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001), citing *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D.C. Cir. 1998). "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004), quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal quotations omitted). A motion to alter or amend the judgment under Rule 59(e)

"may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008), quoting 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995); *Nextel Spectrum Acquisition Corp. v. Hispanic Info. & Telecoms. Network*, 571 F. Supp. 2d 59, 62 (D.D.C. 2008). Rather, motions to alter or amend a judgment "are intended to permit the court to correct errors of fact appearing on the face of the record, or errors of law." *Hammond v. Kempthorne*, 448 F. Supp. 2d 114, 118 (D.D.C. 2006), quoting *Indep. Petroleum Ass'n of Am. v. Babbit*, 178 F.R.D. 323, 324 (D.D.C. 1998).

ANALYSIS

Here, plaintiff has failed to satisfy the high burden imposed by Rule 59(e) because he has not pointed to any change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice. *See Firestone*, 76 F.3d at 1208. In its memorandum opinion, the Court found that it lacked subject matter jurisdiction over plaintiff's claims because the Tucker Act vests the Court of Federal Claims with exclusive jurisdiction to hear actions against the United States for liquidated or unliquidated damages not sounding in tort. *See* Mem. Op. at 8, citing *Smalls v. United States*, 471 F.3d 186, 189 (D.C. Cir. 2006). Because plaintiff's complaint requested $25 million in backpay as one form of relief, the Court determined that only the Court of Federal Claims could hear plaintiff's claims. *Id.* at 8–9. It also found that section 702 of the APA does not waive the government's sovereign immunity in cases that seek monetary damages as a form of relief. *Id.* at 7–8.

Plaintiff's current motion does not identify any flaw in this analysis or change in controlling authority. He complains that he has lost twenty-five years of time in active duty due to his separation from the Army and the negative impact it had on his potential to rise through the

ranks and earn a higher pay grade. Pl.'s Mot. ¶¶ 2–3. But these matters were presented to the Court before, and they do not bear on the question of subject matter jurisdiction in any event.

Plaintiff also does not demonstrate that this Court made a "clear error" in its memorandum opinion. *See Ciralsky*, 355 F.3d at 671. Plaintiff asserts that he is only seeking reinstatement, and not monetary relief. Pl.'s Mot. ¶ 1. But plaintiff cannot make an argument for the first time in a Rule 59(e) motion that he did not raise prior to the entry of judgment. *Exxon*, 554 U.S. at 485 n.5. The record reflects that throughout the pendency of the case, plaintiff repeatedly sought various forms of monetary relief. *See* Mem. Op. at 4, 8; *see also* Compl. ¶ 27(c); Pl.'s Amendment to Addendum ¶ 2 (seeking $10 million in compensation for "the loss of over 24 years of military service career," as well as other lost opportunities); Pl.'s Amendment to Relief Sought in Appeal (increasing the amount sought for to $25 million). Based on the record before it at the time, the Court did not err in deciding the question of subject matter jurisdiction based on the plaintiff's request for monetary relief. *See* Mem. Op. at 6–9. And since the filing of the motion to vacate the judgment, plaintiff has docketed yet another pleading reiterating his interest in recovering lost pecuniary benefits. *See* Mot. to Clarify [Dkt. #33].

In addition, plaintiff does not show that the Court's judgment that it lacked subject-matter jurisdiction resulted in "manifest injustice." *Ciralsky*, 355 F.3d at 671. Plaintiff had the opportunity to litigate his claims in the proper forums – the Court of Federal Claims and the ABCMR – but they had already rejected his claims by the time the case reached this Court. *See* Ex. 2 to Def.'s Mot. to Dismiss [Dkt. # 9-3] at 2–3. In other words, this Court's ruling did not deprive plaintiff of an opportunity to be heard.

Finally, plaintiff's motion does not show how the Court erred in determining he was not entitled to mandamus relief. The Court found that plaintiff failed to demonstrate a clear and

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indisputable entitlement to relief because he did not direct the Court to any laws that require the Army to perform the actions requested, and because both the ABCMR and the Court of Federal Claims previously rejected his claims. *See* Mem. Op. at 9–10. In his motion for reconsideration, plaintiff does not bring any contrary authority to the Court's attention.

CONCLUSION

For the foregoing reasons, plaintiff's motion to vacate the judgment will be **DENIED**.[2] Since the case remains terminated, the motion to clarify is **DENIED AS MOOT**.

SO ORDERED.

Amy B Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: July 29, 2020

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2 Even if the Court were to construe plaintiff's motion as a Rule 60(b)(1) motion to vacate, he would still not be entitled to relief. Rule 60(b)(1) provides that "[o]n motion, and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). The rule applies to "obvious error[s]" committed by a district court, "such as basing its legal reasoning on case law that it failed to realize had recently been overturned, or in the very limited situation when the controlling law of the circuit changed between the time of the court's judgment and the Rule 60 motion." *Avila v. Dailey*, 404 F. Supp. 3d 15, 23 (D.D.C. 2019) (internal quotations and citations omitted).

Rule 60(b)(1) also affords relief for errors made by a party to a judgment, if the party can "make some showing of why he was justified in failing to avoid mistake or inadvertence." *Munoz v. Bd. Of Tr. of D.C.*, 730 F. Supp. 2d 62, 66 (D.D.C. 2010) (citations and internal quotations omitted). The party seeking relief bears the burden of demonstrating he is entitled to relief under Rule 60(b). *Norris v. Salazar*, 277 F.R.D. 22, 25 (D.D.C. 2015).

Plaintiff's motion does not demonstrate any instances of mistake by the Court. His motion is based on his belated assertion that he is only seeking reinstatement and not monetary relief. Pl.'s Mot. ¶ 1. But this does not undermine the Court's ruling. Compl. ¶ 27. Furthermore, plaintiff's motion does not raise any instances of "inadvertence, surprise, or excusable neglect" on his part throughout the proceedings leading up to this Court's judgment. *See* Fed. R. Civ. P. 60(b)(1); *see* Pl.'s Mot. Thus, he has not met the burden of demonstrating he is entitled to relief under Rule 60(b)(1).

APPENDIX C

Lower Tribunal Order Of Dismissal Of The Petitioner Appeal

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN DURR, Plaintiff, v. DEPARTMENT OF ARMY, Defendant.	Civil Action No. 19-1340 (ABJ)

ORDER

Pursuant to Federal Rules of Civil Procedure 12 and 58, and for the reasons stated in the accompany Memorandum Opinion, it is hereby

ORDERED that defendants' Motion to Dismiss [Dkt. # 9] is **GRANTED**. This is a final appealable order.

SO ORDERED.

Amy B Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: January 30, 2020

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN DURR, Plaintiff, v. DEPARTMENT OF ARMY, *et al.*, Defendants.	)	Civil Action No. 19-1340 (ABJ)

MEMORANDUM OPINION

Pro se plaintiff Stephen Durr, a former soldier in the United States Army, brings this action under the Administrative Procedure Act, 5 U.S.C. §§ 701–706 ("APA"), against the Department of Army and the Office of Attorney General ("defendants"). Plaintiff contends he was wrongfully separated from the Army in 1994. Since that time, he has brought a series of appeals, requests for correction of his military record, and requests for reinstatement in the Army, each of which has been denied. Now, plaintiff seeks judicial review of a 2014 decision by the Army Board for Correction of Military Records ("ABCMR") denying his requests for the correction of his military record, reinstatement to active duty, a promotion, and receipt of back pay and other pecuniary benefits. Among other forms of relief, plaintiff requests that the Court set aside the decision of the ABCMR, order the Army to reinstate him to an appropriate position in the Army, and award him monetary damages. Defendants have moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1). For the reasons stated below, the Court agrees that it lacks subject matter jurisdiction over the APA claim and that plaintiff has

failed to show his right to mandamus relief. Therefore, defendants' motion to dismiss will be granted.

BACKGROUND

I. Factual Background

Plaintiff served in the Army from July 6, 1989, until September 9, 1994. Compl. [Dkt. # 1] ¶¶ 1, 5. On January 9, 1993, he was discharged from active duty after being diagnosed with schizophrenia, App. C to Compl. [Dkt. #1-1] at 13,[1] and was placed on the Temporary Disability Retired List ("TDRL" or "the list") effective January 8, 1993. Compl. ¶ 2; App. B to Compl. [Dkt. # 1-1] at 6–10. Placement on the TDRL requires a minimum disability rating of 30%, and it enables disabled service members to remain in the Army and collect retired pay and benefits. App. B to Compl. at 7–8. To remain on the list, Plaintiff was required to have periodic physical examinations. *Id.*

On May 24, 1994, a medical evaluator observed that plaintiff's disability "does not appear stabilized." Compl. ¶ 3; App. C to Compl. at 13–14; Defs.' Mem. of P & A in Supp. of Defs.' Mot. to Dismiss [Dkt. # 9-1] ("Defs.' Mem.") at 3. The medical evaluator recommended that plaintiff remain on the TDRL. App. C to Compl. at 14. On August 9, 1994, the Army's Physical Evaluation Board ("PEB" or "the board") notified plaintiff that it had "informally reviewed [his] recent periodic medical examination and other available records," Compl. ¶ 4; App. D to Compl. [Dkt. # 1-1], and determined that plaintiff's condition had not improved sufficiently to make him fit for duty. App. D to Compl. at 18. The board found that plaintiff's disability rating was 10%, too low to remain on the disability list. Compl. ¶ 13; App. D to

1 A document outside the complaint may be considered on a motion to dismiss if it is "referred to in the complaint" and is "integral to" the plaintiff's claim. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004). All documents referred to by an Appendix number ("App. #") were attached to the complaint at Exhibit 1.

Compl. at 18. It informed plaintiff that he would, therefore, be removed from the TDRL with severance pay. App. D to Compl. at 18. The PEB included information about plaintiff's rights to either concur or disagree with the findings, receive guidance from a Physical Evaluation Board Liaison Officer, and have a hearing on his case. *Id.* at 16–17. Plaintiff concurred with the findings. Compl. ¶ 9, App. D to Compl. at 19. Based on the determination of the Physical Evaluation Board, the Army issued an order separating plaintiff from military service on September 9, 1994, citing plaintiff's "permanent physical disability" and 10% disability rating. Compl. ¶¶ 5; App. E to Compl. [Dkt. # 1-1] at 21.

Plaintiff now contends that the PEB provided him with "false and misleading information with regard for [sic] the requisites for separation from service," which caused him to "unknowingly" agree to its determination. Compl. ¶¶ 6, 9. In addition, plaintiff asserts that the Army inappropriately cited a permanent disability as grounds for his separation from service when the medical evaluation had simply stated that his disability did "not appear stabilized." *Id.* ¶¶ 10–11, 12b. Plaintiff claims that due to these errors, the Army is required to reinstate him to service. *Id.* ¶ 14.

Plaintiff filed claims with the Army Board for the Correction of Military Records in March 1999 and February 2011, asking unsuccessfully to be reinstated. Ex. 2 to Defs.' Mem. [Dkt. # 9-3] at 2.[2] Plaintiff then filed the ABCMR appeal at issue here on March 21, 2014. Compl. ¶ 17. The ABCMR dismissed the action on October 28, 2014, citing plaintiff's failure to provide "any medical evidence to demonstrate an injustice or error with regard to the separation of the plaintiff." Compl. ¶ 18, citing App. F to Compl. [Dkt. # 1-1] at 3. Plaintiff contends,

2 Ex. 2 is the Court of Federal Claims Order of Dismissal of a 2018 complaint filed by plaintiff (discussed further below). Though plaintiff fails to mention the interim ABCMR decisions, for purposes of detailing the history of this matter, the information is included here.

however, that he submitted the original findings of the Army medical board as evidence, and thus the ABCMR decision was arbitrary, capricious and an abuse of discretion in violation of the APA. Compl. ¶¶ 19–20.

Since 2014, plaintiff has filed a second claim for the correction of his military record with the ABCMR which remains outstanding. Compl. ¶¶ 23–24. Additionally, plaintiff brought an action in of the Court of Federal Claims seeking reinstatement to active duty, payment of lost benefits, and other forms of monetary relief. Pl.'s Resp. To Defs.' Mot. to Dismiss [Dkt. #12] ("Pl.'s Resp.") ¶ 15(a); Ex. 2 to Defs.' Mem. [Dkt. # 9-3] at 1.[3] The Court of Federal Claims dismissed the case, holding that the claim was barred by the court's six-year statute of limitations. Ex. 2 to Defs.' Mem. at 3.

II. Procedural History

Plaintiff initiated this action on May 6, 2019, seeking judicial review of the ABCMR's 2014 decision and monetary relief in the amount of $25 million for lost wages and other pecuniary benefits. Compl. ¶¶ 27, 29; Pl.'s Amendment to Addendum [Dkt. # 5] ¶ 2; Pl.'s Amendment to Relief Sought in Initial Appeal [Dkt. # 18] at 1.[4] He argues that because the ABCMR failed to consider the medical evidence he submitted, including the 1994 medical evaluation and PEB determination, its decision denying his request to correct his military record was arbitrary, capricious, and an abuse of discretion. Compl. ¶ 20.

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3 Although plaintiff failed to include information regarding the Court of Federal Claims action in his complaint, defendants raised it in their Memorandum of Points & Authorities in Support of Motion to Dismiss at 4–5 and attached the Court of Federal Claim's Order of Dismissal at Ex. 2 to their Motion to Dismiss, and plaintiff acknowledged the action in his Response at ¶ 15.

4 Plaintiff filed a Supplement to the Complaint [Dkt. # 2] and an Amendment to the Complaint ("Amendment to Addendum") [Dkt. #5], which are read as part of the Complaint.

In addition, plaintiff appears to seek mandamus relief under 28 U.S.C. § 1361. Compl. ¶ 29. He urges the Court to direct the Army to reinstate him to military service as of the date of his permanent separation from the Army and to award him various employment benefits he claims he would have received had he not been separated. Compl. ¶ 27.[5]

On August 13, 2019, defendants filed their motion to dismiss for lack of subject matter jursidiction, arguing that the APA does not waive sovereign immunity for actions seeking monetary relief. Defs.' Mem. at 8. In addition, defendants argue that should the Court find that it lacks jurisdiction over the case, it should not transfer the case back to the Court of Federal Claims for review of plaintiff's petition for mandamus, as that court has already determined plaintiff's claims are time barred. *Id.* at 10.

Plaintiff filed a response on August 21, 2019, arguing among other things, that this Court maintain jurisdiction through the Mandamus Statute and can, therefore, order the relief he seeks. Pl.'s Resp. [Dkt. # 12] at 15(d)–16.

STANDARD OF REVIEW

In evaluating a motion to dismiss under Rule 12(b)(1), a court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000), quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979) (citations omitted). Nevertheless, the court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the court accept plaintiff's legal conclusions. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). In addition, where

5 Plaintiff does not refer to 28 U.S.C. § 1361 in the complaint or either supplements. He first references it in the Pl.'s Resp. ¶ 15(b). However, reading the complaint liberally, the Court finds that plaintiff's request that the Court order defendants to take actions to correct plaintiff's record and grant him other forms of relief, Compl. ¶ 29, makes out a claim for mandamus relief.

the action is brought by a plaintiff proceeding *pro se*, "the court must take particular care to construe plaintiff's filings liberally, for such complaints are held 'to less stringent standards than formal pleadings drafted by lawyers.'" *Cheeks v. Fort Myer Constr.*, 722 F. Supp. 2d 93, 107 (D.D.C. 2010), quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

Unlike when deciding a motion to dismiss under Rule 12(b)(6), a court "is not limited to the allegations of the complaint in deciding a Rule 12(b)(1) motion." *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, a court "may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F.Supp.2d 18, 22 (D.D.C. 2000), citing *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *see also Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

ANALYSIS

I. The Court lacks subject matter jurisdiction under the APA and Tucker Act.

Under Federal Rule of Civil Procedure 12(b)(1), a plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). Federal courts are courts of limited jurisdiction, and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court with limited jurisdiction, we begin, and end, with examination of our jurisdiction."). Because "subject-matter jurisdiction is an 'Art[icle] III as well as a statutory requirement [. . .] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339

F.3d 970, 971 (D.C. Cir. 2003), quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Subject matter jurisdiction is a necessary predicate to an exercise of this Court's Article III power. *See Kokkonen*, 511 U.S. at 377. It is statutory in nature, and the party seeking federal judicial review must establish that it has satisfied at least one of the statutory bases. *See Lujan*, 504 U.S. at 561. Additionally, in cases like this one where the defendant is an agency of the United States of America, the plaintiff also bears the burden of establishing that the federal government has waived its sovereign immunity. *See Roum v. Bush*, 461 F. Supp. 2d 40, 46 (D.D.C. 2006).

Here, plaintiff asserts that the Court has subject matter jurisdiction under the APA and Mandamus Statute. Compl. ¶¶ 20, 27. Defendants, on the other hand, argue that the APA does not waive the government's sovereign immunity for an action seeking monetary relief. Defs.' Mem. at 8. They maintain that the Tucker Act, 28 U.S.C. § 1491(a), divests the Court of jurisdiction over the APA claim because it confers the Court of Federal Claims with exclusive jurisdiction over requests for monetary relief in excess of $10,000. Defs.' Mem. at 8–9.

Although section 702 of the APA often serves as a waiver of sovereign immunity because it "waives that immunity for any claim brought by an individual who 'suffer[ed] legal wrong because of agency action, or [was] adversely affected or aggrieved by agency action,'" *Nat'l Motor Freight Traffic Assoc., Inc. v. Gen. Services Admin.*, 25 F. Supp. 3d 52, 61 (D.D.C. 2014), citing 5 U.S.C. § 702, it does not apply to cases in which a party seeks monetary damages. 5 U.S.C. § 702. Congress expressly "restricted section 702's waiver of sovereign immunity by stating that nothing in the APA 'confers authority to grant relief if any other statute that grants

consent to suit expressly or impliedly forbids the relief which is sought.'" *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 892–93 (D.C. Cir. 1985), quoting 5 U.S.C. § 702.

Moreover, "the Tucker Act vests exclusive jurisdiction in the United States Court of Federal Claims over claims against the United States for 'liquidated or unliquidated damages in cases not sounding in tort." *Smalls v. United States*, 471 F.3d 186, 189 (D.C. Cir. 2006), citing 28 U.S.C. § 1491. "The Little Tucker Act provides an exception, vesting concurrent jurisdiction in district courts for civil actions or claims against the United States for $10,000 or less." *Id.*, citing 28 U.S.C § 1346(a)(2). "So the operative question is whether [plaintiff's] claim is one for over $10,000 in 'money damages.'" *Palacios v. Spencer*, 267 F. Supp. 3d 1, 5 (D.D.C. 2017), *aff'd Palacios v. Spencer*, 906 F.3d 124 (D.C. Cir. 2018).

In *Palacios*, the plaintiff sought review of a decision by the Board of Correction of Naval Records as well as back pay and other benefits "that would naturally flow from" the correction of his military record. 267 F. Supp. 3d at 5. Despite the plaintiff's assertion that "primarily his complaint sought to correct his military records and that the essence of his complaint was therefore not monetary," *Palacios*, 906 F.3d at 127, the Circuit Court upheld the lower Court's determination that it did not have subject matter jurisdiction because "[t]he complaint expressly demanded the entry of a judgment including an award of back pay exceeding $10,000," and, therefore, the Court of Federal Claims had exclusive jurisdiction over the claim under the Tucker Act. *Id.* at 126–27.

Here, as in *Palacios*, plaintiff seeks both monetary and non-monetary relief. And given plaintiff's express demand for pecuniary damages in excess of $10,000, the Court is not required to evaluate the "essence" of the complaint. *See id.* ("We 'look only to the essence of a complaint in the *absence* of an explicit request for monetary relief.'"), quoting *Schwalier v. Hagel*, 734

F.3d 1218, 1221 (D.C. Cir. 2013). Because the Court of Federal Claims has exclusive jurisdiction over claims exceeding $10,000 under the Tucker Act, defendants' motion to dismiss for want of subject matter jurisdiction is granted.[6]

II. Plaintiff is not entitled to mandamus relief.

Even if the Court was to read plaintiff's demand for the correction of his military record and reinstatement to the Army separately from his demand for pecuniary relief, which is not required, plaintiff would still not meet the heavy burden of showing he is owed mandamus relief.

The extraordinary remedy of a writ of mandamus is available to compel an "officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff." 28 U.S.C. § 1361. Plaintiff bears a heavy burden of showing that his right to a writ of mandamus is "clear and indisputable." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (internal citation omitted). "'The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.'" *Lozada Colon v. Dep't of State*, 170 F.3d 191, 191 (D.C. Cir. 1999), quoting *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931). Furthermore, under D.C. Circuit case law, review of the actions of military corrections boards is "unusually deferential." *Piersall v. Winter*, 435 F.3d 319, 324 (D.C. Cir. 2006), citing *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989).

Here, plaintiff asserts that to correct his wrongful separation from the Army twenty-four years ago, the Court should order the Army to reinstate him effective from the date of his separation and make the appropriate corrections to his record, rank, and pay. Compl. ¶ 27. However, plaintiff fails to show that his entitlement to that extraordinary relief is clear and

6 This decision would not differ if it considered plaintiff's earlier request for $10 million in damages instead of the $25 million request submitted in his November 25, 2019 Amendment to Relief Sought in Initial Appeal [Dkt. # 18].

indisputable – he does not direct the Court to any law that requires the Army to perform the requested actions, and prior attempts to seek correction of his record and reinstatement have been rejected by both the Army Board for Correction of Military Records and the Court of Federal Claims. Accordingly, plaintiff's request for a writ of mandamus is denied.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted. A separate order will issue.

Amy B Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: January 30, 2020