

No. 22A271

In The

**SUPREME COURT OF THE UNITED STATES**

Kevin L. McGhee - Petitioner

v.

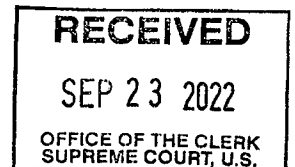
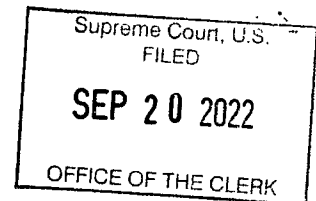
United States of America - Respondent

*On Petition For Writ Of Certiorari  
To The United States Court  
Of Federal Claims*

**PETITION FOR WRIT OF CERTIORARI**

Chaplain (LTC) Kevin L. McGhee, USA Retired  
*Pro se*

6465 Hadden Bay Drive  
Florissant, Missouri 63033  
314.223.9233  
Dr\_KLM@me.com



## **QUESTIONS PRESENTED**

The Fifth and the Fourteenth Amendment of the Constitution, “Due Process” clause, guarantees a citizens’ rights to “life, liberty, and property,” and the opportunity to be heard when the federal government acts in a way that denies these rights. Petitioner understands, by Rule 10 of the Supreme Court, that it has “discretion” to hear or deny any petition for writ of certiorari. I pray that the questions presented are compelling reasons to grant this Petition.

This case concerns correction of records, 10 U.S.C. § 1552, military, and military that affects civilian disability pay, rights, and benefits as a retired federal technician. Petitioner is a military medical disability retiree with the effective disability retirement date of January 20, 2015, with 30 years of service under 10 U.S.C. Chapter 61 § 1204 (70%, Permanent Disability Retirement List (PDRL), and authorized by Army Regulation (AR) 635-40, from post-traumatic stress disorder (PTSD) with co-morbid Major Depressive Disorder (MDD), whose disability resulted from a “combat related injury during a war period” as defined in 26 U.S.C. § 104. Petitioner is a former dual-status military federal technician (chaplain) with the Missouri Army National Guard (13 years and 8 months of federal civil service) on Federal Employee Retiree System (FERS) immediate annuity since October 2019.

This Petition requests review, based on the United States Court of Federal Claims dismissal for “lack of subject matter jurisdiction” and the Army/Army Board for Correction of Military Records final action/decision of “partial relief,” when it is in convincing conflict with another executive agency.

Answers to the following three questions presented, are paramount:

- I. Whether a Court and an armed forces board of corrections, can invalidate disability laws, disregard a service member’s permanent disability combat-related injury, and violate his right to sue for causing permanent disability while on inactive-duty training drills.
- II. Whether this case, for disability pay, rights, and benefits, military and civilian, correction of records, can harmonize future decisions, in lower courts and armed forces’ boards for correction of records, that would ensure the full rights of America’s Patriots with disabilities, and their families’ service to the country, realizing that some paid the “ultimate sacrifice.”
- III. Whether this case can have precedential value to clarify and help decide other disability pay, rights, and benefits’ cases across executive government agencies,

federal statutes, with their regulations, and policies for America's patriots with disabilities.

### **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

### **RELATED PROCEEDINGS**

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Kevin L. McGhee*, No. AR20170005933, U.S. Army/Army Board for Correction of Military Records (ABCMR). Application for Correction of Military Record (DD 149) partial relief granted, June 24, 2020.
- *McGhee v. United States*, No. 19-629C, United States Court of Federal Claims (USCFC). Review and suit dismissed for lack of subject matter jurisdiction. Judgement entered September 3, 2021.
- *McGhee v. United States*, No. 22-1082, United States Court of Appeals for the Federal Circuit (CAFC). Petition for rehearing. Judgement affirmed, April 6, 2022.
- *McGhee v. United States*, No. 22-1082, United States Court of Appeals for the Federal Circuit (CAFC). Petition for rehearing en banc. Petition denied, June 24, 2022.

**TABLE OF CONTENTS**

Questions Presented.....i  
Related Proceedings.....iii  
Table of Contents.....iv  
Table of Authorities.....v  
Opinions Below.....1  
Jurisdiction.....1  
Statutory and Regulatory Provisions.....2  
Statement.....4  
Reasons the Petition Should Be Granted.....13  
    1. Court and Board Violated Disability Laws  
    2. Clear Substantial Evidence in Record (AR)  
    3. Clearly Erroneous  
    4. Clearly “Arbitrary, Capricious, etc.”  
    5. Clear and Convincing Standard Met  
    6. Irreparable Harm will Occur  
Conclusion.....31  
APPENDIX A: U.S. Army/United State Army  
    Physical Disability Agency (USAPDA) Medical  
    Permanent Disability Retirement Order  
    (D 350-50, Dec. 16, 2014, Army-VA IDES)..1a  
APPENDIX B: Army Board for Correction of  
    Records Final Decision/Action.....5a  
APPENDIX C: Court of Federal Claims  
    Judgment.....8a  
APPENDIX D: Court of Appeals for the Federal  
    Circuit (CAFC) Judgment Affirmed.....24a  
APPENDIX E: Court of Appeals for the Federal  
    Circuit (CAFC) Denial of Petition for  
    Rehearing En Banc.....26a

## TABLE OF AUTHORITIES

### CASES

|  |        |
|--|--------|
| <i>Barnick v. U.S.</i> ,<br>591 F.3d 1372, 1378 (Fed. Cir. 2010).....      | 31     |
| <i>Fisher v. U.S.</i> ,<br>401 F.3d 1167, 1172 (Fed. Cir. 2005).....       | 15, 31 |
| <i>Florida Power &amp; Light Co. v. Lorion</i> ,<br>470 US 729.....        | 33     |
| <i>Heisig v. U.S.</i> ,<br>719 F.2d 1153, 1156 (Fed. Cir. 1983) .....      | 33     |
| <i>James v. Caldeia</i> ,<br>159 F.3d 573, 581 (Fed. Cir. 1998) .....      | 32     |
| <i>McHenry v. U.S.</i> ,<br>367 F.3d 1370, 1376 (Fed. Cir. 2004) .....     | 31     |
| <i>Sanders v. U.S.</i> ,<br>594 F.2d 804, 810, 219 Ct.Cl. 285 (1979).....  | 30     |
| <i>Sawyer v. U.S.</i> ,<br>930 F.2d 1577.....                              | 30     |
| <i>Torres v. Texas Depart. of Public Safety</i> ,<br>597 U.S. 20-603 ..... | 34     |
| <i>U.S. v. Testan</i> ,<br>424 U.S. 392, 398 (1976) .....                  | 32     |
| <i>Wall v. U.S.</i> ,<br>582 F.3d 1358, 1368 (Fed. Cir. 2009) .....        | 31     |

**STATUTES**

5 U.S.C. § 706

5 U.S.C. §§ 7511, 7512, & 7513

10 U.S.C. Chapter 61 §§ 1201 – 1222 (1204)

10 U.S.C. § 1552

10 U.S.C. § 10216

26 U.S.C. § 104

32 U.S.C. § 709

37 U.S.C. § 204

**REGULATIONS**

Army Regulation (AR) 15-135

Army Regulation (AR) 635-40

Army Regulation (AR) 135-381

Army Regulation (AR) 600-8-4

Department of the Army (DA) PAM 135-381 (2008)

(1)

**PETITION FOR WRIT OF CERTIORARI**

Petitioner, Chaplain Lieutenant Colonel Kevin Llewellyn McGhee, U.S. Army, medically retired, respectfully prays that a writ of certiorari is granted to review the proceedings and judgement below.

**OPINIONS BELOW**

The final decision/action of the U.S. Army/Army Board for Correction of Military Records (ABCMR) “partial relief,” dated June 24, 2020 is captioned as *Lieutenant Colonel Kevin L. McGhee* AR20170005933 and is provided in the Appendix to the Petition. [Appx. A]. The opinion and order of the United States Court of Federal Claims is captioned as *McGhee v. United States*, No. 19-629c, dated September 3, 2021, and is provided in the Appendix to the Petition. [Appx. B]. A petition for rehearing to the United States Court of Appeals for the Federal Circuit denial petition for rehearing Judgment Affirmed is captioned as *McGhee v. United States*, No. 22-1082, and is provided in the Appendix to the Petition [Appx. C], dated April 6, 2022, with a petition for rehearing en banc [Appx. D], denial is dated June 24, 2022.

**JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



**CONSTITUTIONAL AND  
STATUTORY PROVISIONS**

The Fifth and the Fourteenth Amendment to the United States Constitution provides that no one shall be “deprived of life, liberty or property without due process of law.” 28 U.S.C. § 1491, the Tucker Act, provides that “The United States Court of Federal Claims shall have jurisdiction upon any claim against the United States founded either upon the Constitution or any regulation of an executive department . . . or for liquidated or unliquidated damages in cases not sounding in tort.” The Tucker Act waives the federal government’s sovereign immunity and provides that the Court of Federal Claims have exclusive jurisdiction for monetary claims over \$10,000.

Title 10 U.S.C. § 1552(a)(1) and (5)(c)(1), *Correction of military records: claims incident thereto* provides:

*The Secretary of a military department may correct any military record of the Secretary’s department when the Secretary considers it necessary to correct an error or remove an injustice.*

*The Secretary concerned may pay, from applicable current appropriations, a emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, . . . as the case may be, or account of his or another's service as a civilian employee.*

Title 10 U.S.C. Chapter 61 § 1204, *Retirement or Separation for Physical Disability, Members on active duty for 30 days or less or on inactive-duty training:* retirement and 26 U.S.C. 104, *Compensation for injuries or sickness*, with Special Rules for Combat-Related Injuries (3)(A)(B) provides:

*For purposes of this subsection, the term "combat-related injury" means personal injury or sickness –*

*(A) which is incurred –*

- (i) as a direct result of armed conflict,*
- (ii) while engaged in extra-hazardous service, or*

- (iii) *under conditions simulating war; or*
- (B) *which is caused by an instrumentality of war.*

Title 37 U.S.C. § 204(g)(1)(A)(B), *Entitlement, The Military Pay*, states that “a member of a reserve component of a uniformed service is . . .

*entitled to the pay and allowances provided by law or regulation for a regular component of a uniformed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred [and/] or aggravated –*

*(A) In line of duty while performing active duty; [. . . and]*

*(A) In line of duty while performing inactive -duty training . . .*

#### **STATEMENT**

Petition is medical disability retiree from a combat related PTSD-MDD Iraq War (2005 – 2006) “injury,” “aggravated” while on inactive duty training (IDT) with the Missouri Army National Guard at 70 percent on the Permanent Disability Retirement List (PDRL).

McGhee retired with 30 years with the U.S. Army and 13 years and 8 months with the U.S. Office of Personnel Management (OPM) Federal Employee Retirement System (FERS) as an Immediate Annuitant as a dual status military federal technician.

McGhee is permanently retired with three (3) executive government agencies: (1) The U.S. Army, (2) The U.S. Veterans' Administration (VA) and (3) The U.S. Social Security Administration (SSA). McGhee seeks correction of his records based on his U.S. Army retirement ORDER D 350 dated December 16, 2014, related to (1) Incapacitation Pay Back Pay from October 19, 2012, to November 8, 2013, and (2) actual and general compensatory/monetary damages, from "aggravation of injury" causing permanent injury/disability for life" per McGhee military medical disability order D 350-50, dated December 16, 2014.

### **BACKGROUND**

McGhee enlisted as an Airman (E-2) in the U.S. Air Force in June 1984.

In January 1989 McGhee was selected, as a Cadet in R.O.T.C. at the University of Nebraska at Omaha (UNO) in Omaha, Nebraska and, simultaneously, in the Nebraska National Guard.

In December 1990, McGhee was commissioned as a Second Lieutenant in the U.S. Army and the Army National Guard of the United States (ARNGUS).

In March 1991, McGhee was selected as an Area Office Manager with the Selective Service System in the Nebraska Army National Guard and was branched in the Adjutant General (AG) Corps.

In August 1993, McGhee was selected as a Chaplain Candidate in the U.S. Army and the Army National Guard of the U.S. while he attended Saint Paul School of Theology (SPST) in Kansas City, Missouri. After graduation, in May 1996, he moved to Missouri and became a member of the Missouri Army National Guard. In February 2002, transferred to the Missouri National Guard Headquarters (JFHQ-MO).

In February 2002, McGhee was hired as a full-time dual status military federal technician (chaplain) under 32 U.S.C. §709/10 U.S.C. §10216 with the Missouri Army National Guard. This was the first in the state's National Guard across the nation.

In July 2005, McGhee was mobilized/called to active duty from the Missouri Army National Guard and arrived at Balad, Iraq in September 2005 with the 35<sup>th</sup> Area Support Group (ASG) Mayoral Cell as the Installation and Gospel Service Chaplain.

McGhee returned from Iraq in August 2006 to his full-time dual status military federal technician (Chaplain) position with the Missouri Army National Guard Headquarters in Jefferson City, Missouri.

From July 1, 2008, until June 30, 2010, McGhee was on active duty as a Chaplain Project Officer with the National Guard Bureau (NGB) in Arlington, Virginia.

On March 21, 2010, prior to his return to his dual-status military federal technician chaplain position, McGhee submitted a USERRA “protected communication” email to his chain-of-command within the Missouri Army National Guard stating “Sirs, Attached is the Uniformed Services Employment and Reemployment Rights Act:

*What someone has advised you for my reemployment . . . ‘freezing my position and/or pay scale . . . , in opinion, is the violation. USERRA clearly states that I must, upon reemployment, retain my ‘seniority and seniority-based benefits.’ Also, the Escalator Principle’ must be applied. In fact, upon my return, I am due a ‘Step Increase’ to GS12 Step 5 but that my step increase should occur as if I had not left the civilian employment.*

Army/Army National Guard Officer Evaluation  
Reports (OERs),

4. Reducing supervisory responsibilities,
5. Changing job descriptions,
6. 15-6 Investigations,
7. General Order Memorandum of Reprimands  
(GOMORs),
8. Withholding Incapacitation (Disability) Pay  
Benefits . . .

On June 13, 2012, I received my first formal diagnosis for PTSD from a civilian medical doctor. On July 17, 2012, I emailed the full-time military physician assistant my diagnosis and asked him to place it in my military medical record and asked for an Army Chapter 3 Physical (U.S. Army (AR) 635-40, Disability Evaluation for Retention for Retention, Retirement, or Separation). The Military Medical Clinic was next door to my chaplain office.

On October 19, 2012, I presented myself to the Veterans' Affairs Medical Center at John Cochran (JC VAMC) for PTSD. This disability claim date is the date used by U.S. Army and the Veterans' Affairs (VA) for permanent disability retirement when McGhee went through the single system called the Integrated Disability Evaluation System.

In March 2013, with effective date of April 20, 2013, I was forced to resign (wrongful termination), as a federal technician with the Missouri National Guard with 13 years and 8 months of service.

On August 1, 2013, over one year (July 2012) reporting PTSD diagnosis, Petition had the Chapter 3 military physical examination he requested. The military physician confirmed PTSD with a Profile of 3, and immediately referred McGhee to IDES for processing out of the military (AR 635-40). A line of duty (LOD) investigation was initiated.

On August 2, 2013, reported to the Jefferson Barracks VAMC PTSD Clinic #2 for PTSD. A VA doctor, for a third time, diagnosed McGhee with PTSD. On September 10, 2013, military unit received the line of duty (LOD) determination for “anxiety disorder,” also called PTSD, from NGB by the authority of the Secretary of the Army (SA).

On November 9, 2013, the Missouri Army National Guard finally submitted my initial incapacitation pay packet. On February 8, 2014, the Missouri Guard denied my request for incapacitation pay. On March 5, 2014, McGhee submitted an incapacitation pay appeal packet. On January 2, 2014, McGhee began his disability evaluation out-processing through the Army medical evaluation board (MEB) and physical evaluation board (PEB). The disability evaluation process was from January 2, 2014, until December 16, 2014, with the U.S. Army Physical Disability Agency under the Army Review Boards Agency (ARBA), issuing medical disability order D 350-50.



for Post-Traumatic Stress Disorder (PTSD) with comorbid Major Depressive Disorder (MDD), active-duty injury and inactive duty training (IDT) aggravation at 70 percent on the Permanent Disability Retirement List (PDRL) under 10 U.S.C. Chapter 61 § 1204 with effective retirement date January 20, 2015.

McGhee did not receive any incapacitation that he requested during disability out-processing. In September 2016, Petitioner spoke with the equal opportunity (EO) officer who handled a discrimination claim of McGhee before he was retired. She congratulated McGhee on his “retirement” and on receiving my “incapacitation pay” while out-processing through the disability system. Petitioner told this officer that he had indeed “retired” but “had not received any incapacitation pay at any time.”

McGhee realized that the Missouri Guard was “willful” in withholding his disability pay benefits. In January 2017, pursuant to 10 U.S.C. § 1552, *Correction of military records: claims incident thereto*, McGhee submitted his DD Form 149, Application for Correction of Military Records.

In April 2019, McGhee filed suit for incapacitation pay back pay and an actual (civilian loss of pay, etc.), and general damages, per 28 U.S.C. § 1491, from “willful aggravation” of injury.

The Social Security Administration (SSA) and the Office of Personnel Management (OPM) determined that the effective forced resignation (wrongful termination) date of April 20, 2013 was the permanent disability date. On June 9, 2014, the Social Security Administration (SSA) awarded McGhee Early Retirement with Social Security Disability Insurance (SSDI).

On June 24, 2020, the Army Board for Correction of Military Records (ABCMR, AR20170005933) awarded McGhee "PARTIAL RELIEF" of incapacitation pay back pay from November 9, 2013 to January 20, 2015 (McGhee U.S. Army Medical Disability Retirement) of 14 months and 11 days. McGhee had requested incapacitation pay (Tier 1) from May 4, 2013 or from the same PTSD disability claim date of October 19, 2012.

On September 3, 2021, the Court of Federal Claims (USCFC, 19-629C), granted the government's motion to "dismiss for lack of subject matter jurisdiction." On June 24, 2022, and July 1, 2022, respectively, the Court of Federal Claims (CAFC, 22-1082, en banc), "affirmed" that "absence of a money-mandating source is fatal to the Court of Federal Claims' jurisdiction." Fisher, 402 F.3d at 1173 and issued its mandate.

**REASONS PETITION SHOULD BE GRANTED**

According to the U.S. Census Bureau, the American Community Survey Report (2018), World War II to the War on Terror, there were “18 million veterans living in the United States in 2018.” Of those 18 million veterans, “Post-9/11 Veterans had a 39 percent chance of having a disability rating of 70 percent or more [Department of Veterans’ Affairs], which is significantly higher than any other periods.”

This factually simple case has overwhelming implications for the health and health care for Department of Defense (DoD) government employees, military and civilian, and their families, related to their “correction of records” and possible “suits” related to disability pay, rights, and benefits across executive governmental agencies but specifically, as a dual-status military federal technician. This is the basis for my case.

This case is unprecedented for disability pay, rights, and benefits for McGhee as a retired dual-status military federal technician and a military (U.S. Army) medical disability retiree with 30 years of honorable service (U.S. Army Order D 350-50) under 10 U.S.C. Chapter 61 § 1204, 26 U.S.C. § 104, with authority U.S. Army Regulation (AR) 635-40. My claims are threefold:

(1) Incapacitation Pay Back Pay from either May 4, 2013 (the first inactive-duty training) or from October 19, 2012 (PTSD-MDD) disability claim date minus federal technician pay through April 20, 2013 through ABCMR “partial relief” beginning date of November 8, 2013.

(2) Actual Compensatory Damages, pursuant to 28 U.S.C. 1491, with money-mandating statutes provided above, and on McGhee military disability retirement order D 350-50, for “loss of federal civil service employment pay” at 10 percent interest since 2013, for “willful aggravation of service members’ combat-related injury” since July 1, 2010, until even now, totaling \$1.6 million dollars, and causing permanent disability, and “loss of pay.”

(3) General Compensatory Damages, pursuant 28 U.S.C. 1491, with the money-mandating statutes provided above, and on McGhee military disability retirement order D 350-50, for “willful aggravation” of service members’ combat-related injury, for \$4 million dollars, for causing permanent disability:

Petitioner Chaplain Lieutenant Colonel Kevin Llewellyn McGhee has received three permanent disability determinations, from executive government agencies and his case involves seven (7) additional executive government agencies:

- (1) U.S. Army – 70 percent permanent disability retirement list: for PTSD-MDD active-duty injury and National Guard inactive-duty training (IDT) aggravation, October 19, 2012.
- (2) Veterans' Affairs (VA) - 100% total and permanent: for PTSD injury with disability claim date of October 19, 2012,
- (3) Social Security Administration (SSA) – 100% Early Retirement with Social Security Disability Insurance (SSDI), from April 20, 2013, with benefits effective date of October 1, 2013.
- (4) Department of Defense (DoD): Federal Civil Service Employee since February 2002 until forced resignation date on April 20, 2013,
- (5) Defense Finance and Accounting Services: The Department of Defense (DoD), military and civilian pay services,

- (6) Office of Personnel Management (OPM): Receiving a FERS Immediate Retirement Annuity since October 1, 2019,
- (7) Department of Labor: McGhee filed complaints since June 2010 and received a “Right to Sue” letter from the DOL Office of the Assistant Secretary for Veterans’ Employment and Training Service (DOL-VETS) on September 17, 2012,
- (8) Federal Bureau of Investigation: McGhee reported in September 2013 to FBI from a AT&T Global Fraud Department eight-month investigation, that the Missouri National Guard “hacked his personal cell phone and emails. St. Louis Office of the FBI,
- (9) National Guard Bureau (NGB): McGhee worked on active duty with NGB from July 1, 2008 to June 30, 2010 and returned to his full-time military federal technician chaplain position on July 1, 2010,
- (10) Internal Revenue Service (IRS): McGhee received over \$41,000 in tax refunds, after he submitted a IRS Form 843 to “correct” the “errors” by DFAS to his Social Security Administration (SSA) record.

**I. THE QUESTIONS PRESENTED  
WARRANTS THIS COURT'S REVIEW**

- Violations of Law by Court and Board
- Substantial Evidence in the Record
- Clearly Erroneous
- Clearly Arbitrary
- Clear and Convincing Standard Met
- Irreparable Harm will Occur

**A. The Court of Federal Claims' Invalidation of Combat Related Disability Federal Statutes, Military Disability Regulations, and a Department of Defense (DoD) Retirement Order Warrants This Court's Review**

1

A disability medical retirement (McGhee ORDER D 350-50) under federal statute 10 U.S.C. Chapter 61 § 1204, 26 U.S.C. § 104 and authorized by U.S. Army Regulation (AR) 635-40, means a disability or "injury" that occurred while service member was on active duty (2010) and was "aggravated" while on inactive duty training (IDT, 2010 – 2015) in the National Guard.

**10 U.S. Code § 1204 – Members on active duty for 30 days or less or on inactive-duty training: retirement:**

*Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that it is based upon accepted medical principles, the disability is of a permanent nature and stable. It is a result of an injury, illness, or disease incurred [and]/or aggravated in line of duty after September 23, 1996. The disability is not the result of the member's intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence; and either, the disability is at least 30 percent under the standard schedule of rating disabilities in use by the [VA] . . . .*

**26 U.S. Code § 104 – Compensation for injuries or sickness:**

*Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include amounts received under workmen's compensation for personal injuries or sickness. The amount of any damages*



*(other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness; The amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action (as defined in section 692(c)(2)).*

**Army Regulation (AR) 635-40 – Disability Evaluation for Retention, Retirement, or Separation:**

*This regulation establishes the Army Disability Evaluation System (DES) according to the provisions of Title 10, United States Code, Chapter 61 (10 USC Chapter 61) and DODD 1332.18. It sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability, this regulation provides for disposition of the Soldier according to applicable laws and regulations.*

*The Director, Army National Guard (DARNG), on behalf of the Chief, National Guard Bureau (CNGB) will ensure that eligible Soldiers of the Army National Guard of the United States (ARNGUS) are*

*referred for evaluation by the MAR2 and DES, as applicable, in a timely manner, and in accordance with this regulation. This includes ensuring duty-related referrals for Army National Guard (ARNG) Soldiers not in an active status are regulated through the Medical Evaluation Board Tracking Office (MEBTO).*

The ABCMR Final Action under the Army Review Boards Agency (ARBA) clearly conflicts with the Secretary of the Army and its sister board, the USAPDA McGhee military combat-related disability active-duty injury and National Guard inactive-duty training aggravation of injury. The ABCMR Final Decision is clearly “arbitrary, capricious and unsupported by substantial evidence, or contrary to law.” Clear and convincing evidence was provided, since January 2017, in the McGhee Administrative Record. *See Biddle v. United States*, 186 Ct.Cl. 87, 94-95 (1968), *Boyd v. United States, supra*, 207 Ct.Cl at11, *Hodges v. Callaway*, 499 F.2d 417 (5<sup>th</sup> Cir. 1974):

The review of the McGhee Administrative Record by the Court of Claims “correction of records” and suit for “loss of pay” after “forced resignation/wrongful termination,” is “clearly erroneous.” The McGhee Disability Retirement Order D 350-50 dated

December 16, 2014, pursuant to federal disability statute, Title 10 U.S.C. Chapter 61 § 1204, and is “money-mandating,” provides “exclusive jurisdiction” to the Court of Federal Claims and was distributed to the following. *See Sanders v. United States*, 594 F.2d 804 (Fed. Cir. 1978):

1. Chaplain Lieutenant Colonel Kevin L. McGhee
2. Commander, MOARNG ELE JFHQ
3. The Adjutant General of Missouri
4. Chief, National Guard Bureau, Arlington, VA
5. Commander, Eisenhower Army Medical Center (EAMC), PEBLO, Fort Gordon, GA
6. Commander, EAMC, MSC, Fort Fordon, GA
7. Defense Fin. & Account. Serv., US Retired Pay

**A. The Court of Federal Claims, according to The Federal Court Improvement Act of 1982, 28 U.S.C. § 1491, has Exclusive Jurisdiction for Monetary Claims against the United States over \$10,000 founded on “. . . any regulation (10 U.S.C. Chapter 61 § 1204, 26 U.S.C. § 104, and**

**AR 635-40) of an Executive Department, especially if the “agency action” is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law” 5 U.S.C. § 706:**

**28 U.S.C. § 1491 – Claims against United States generally:**

*The United States Court of Federal Claims shall have 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. See 28 U.S.C. § 1491(a)(1).*

*To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of application records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any to any administrative or executive body or official with such direction as it may deem proper and just. See 28 U.S.C. § 1491(a)(2).*

According to 28 U.S.C. § 1491, Petitioner McGhee has a right to file suit for actual and general monetary claims against the United States, for the

“willful aggravation” of his post-traumatic stress disorder (PTSD) with comorbid major depressive disorder (MDD) causing “loss of pay” after forced resignation on April 20, 2013, as a federal technician and based on the U.S. Army Regulation (AR) 635-40 McGhee Army permanent medical disability retirement Order D 350-50, dated December 14, 2014, with disability retirement effective date of January 20, 2015.

**Informal Physical Evaluation Board (PEB)  
Proceedings, DA Form 199, March 2012,  
Sections II, III and V:**

*The Board finds the Soldier is physical UNFIT and recommends a rating of 70% and that the Soldiers disposition be permanent disability retirement.*

*9411 Post-Traumatic Stress Disorder (PTSD) with comorbid major depressive disorder (MDD). (MEB Dx 1,2). The Officer was deployed to Iraq 2005-2006. perform the specialty requirements of AOC (56A, Chaplain). (DA 3947, Behavioral Health NARSUM, RC SMSC Medical Validation Brief, LOD, DA 7652, DA 3349, VA C & P Exam, VA Rating Decision.*

*The Physical Evaluation Board (PEB) makes the following findings: The disability is based on disease or injury incurred in the line of duty in combat with*

*an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war (5 USC 8332, 3502, and 6303). (This determination is made for all compensable cases but pertains to potential benefits for disability retirees employed under Federal Civil Service.)*

*The disability did result from a combat-related injury under the provisions of 26 USC 104 or 10 USC 10216. See ABCMR McGhee Administrative Record pgs. 476 and 477 – 616.*

McGhee's disability pay, rights and benefits are undeniable and cannot be invalidated by the federal government or any courts. Petitioner McGhee's "correction of records," military and civilian, is based on the U.S. Army and VA permanent disability PTSD-MDD "injury and aggravation" claim date of October 19, 2012.

The U.S. Army/ABCMR final decision/action is in clear conflict with the U.S. Army/USAPDA McGhee Disability Retirement Order D 350-50, dated December 16, 2014. The Incapacitation Pay (Tier 1) of Partial Relief from November 9, 2014, is clearly erroneous, arbitrary, etc., and is in conflict with the McGhee Disability Retirement Order. DA PAM 135-381, 22 May 2008 clearly states:

*The unit commander or designated representative will issue an interim line of duty determination within sufficient time to ensure that military pay and*

*allowance will commence within 30 days of the date the injury, illness, or disease was reported . . . See ABCMR McGhee Administrative Record p. 262 of 616.*

The McGhee Incapacitation Pay (Tier 1) back pay was paid by Defense Finance and Accounting Service (DFAS) on December 28, 2020 or more than eight (8) years after the disability/injury was reported to the Missouri Guard on July 17, 2012, the VA on October 19, 2012, seven (7) years after the Army Regulation (AR) 635-40, Chapter 3 physical examination, by Guard military physician on August 1, 2013, per AR 635-40 and again, to the Jefferson Barracks Veterans' Affairs Medical Center (JB VAMC PTSD Clinic) in south St. Louis, Missouri on August 2, 2013. No ABCMR physician or psychologist reviewed my Case (AR20170005933), as per agency regulation when a mental disorder (PTSD) is involved.

**The Correction of Records, Military and Civilian, affects millions of service members and Department of Defense (DoD) civilian employees and is paramount to America's Patriots' and would greatly affect their Disability Pay, Rights, and Benefits**

The Secretary of the Army acting through its Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1552(a) (1998) may

correct a military record when he deems it necessary to correct an error or remove an injustice. The Secretary of the Army, though, has “no discretion” whether or not to pay service members whose disability retirement pay under 10 U.S.C. Chapter 61 §§ 1201 – 1222. See 37 U.S.C. § 204 (1998); *Sanders v. United States*, 594 F.2d 804, 810, 219 Ct.Cl. 285 (1979). And once he finds a disability qualifying, he likewise has “no discretion” whether to pay out retirement funds. The word “may” in section 1204 does not convey discretion whether to pay or not, it merely permits the Secretary to terminate a member’s active duty early and use the Treasury for the disability retired pay. Either way, the Secretary would statutorily be entitled to money, unless the disability is not in the line of duty.

#### **SUMMARY**

In *Sawyer v. United States*, No. 90-5101, to the United States Court of Appeal, Federal Circuit, Circuit Judge Mayer states that the Secretary of a department “once he finds a disability qualify, he likewise has no discretion whether to pay out retirement funds.” Sawyer fitness for duty and entitlement to disability benefits were under 10 U.S.C. § 1201-1221 (1998). See 37 U.S.C. § 204 (1988); *Sawyer v. United States*, 930 F.2d 1577; *Sanders v.*



*United States*, 594 F.2d 804, 810, 219 Ct.Cl. 285 (1979).

The lower Courts “erred” in their review of this substantial evidence. The ABCMR also “erred” when the McGhee Administrative Record included his medical permanent disability retirement order (D 350-50) that was issued by another sister agency, ARBA/USAPDA. McGhee’s permanent injury is from active duty but was aggravated in the national guard 10 U.S.C. Chapter 61 § 1204 and 26 U.S.C. § 104 (3)(A)(B) in a war zone.

In *Barnick v. United States*, in the United States Court of Federal Claims, Judge Firestone, in his opinion, clearly states that Barnick is bound by a board decision, unless the decisions were “arbitrary, capricious, unsupported by substantial, or contrary to law.” See *Barnick v. United States* 80 Fed. Cl. 545; *Lewis v. United States*, 458 F.3d 1372, 1376 (Fed. Cir. 2006); *Myers v. United States*, 50 Fed.Cl. 674 (2001); *Wall v. United States*, 582 F.3d 1358, 1368 (Fed. Cir. 2009); *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005); *McHenry v. United States*, 367 F. 3d 1370, 1376 (Fed Cir. 2004). McGhee’s claim for incapacitation pay (back pay) is from either May 4, 2013 or October 2012. The November 9, 2013 incapacitation pay (back pay) partial relief is “arbitrary, etc.”

In *United States v. Testan*, The Supreme Court “remanded” the case back to the Civil Service Committee (CSC) and “held” that The Tucker Act, merely confers jurisdiction to the Court of Claims but “it does not itself support the action taken by the Court of Claims in this case.” See *United States v. Testan* 424 U.S. 392, 397-398. Clarity is needed. Does The Tucker Act confer jurisdiction for suit when the military, already retired service member from an active-duty injury and National Guard inactive duty training aggravation? How does service members disability claim date with the U.S. Army and Department of Veterans’ Affairs (VA), through their integrated disability evaluation system (single system) impact dual-status military federal technicians state’s National Guard, who failed to correct the civilian record based on that disability claim date? Can service members, based on the medical disability retirement, file suit based on federal statutes and Army Regulation (AR) 635-40, clearly stated or provided? If the date used by the ABCMR for partial relief, is provided by the same agency that “aggravated the permanent disability/injury” by the substantial evidence in the administrative record, where is justice?

In *James v. Caldera* (159 F. 3d 573, 581 (Fed. Cir. 1998), Judge Mayer quoting from the Report of the Committee on Judicial Review of Administrative

Military Personnel Actions of the Department of Defense 4-10 (Dec. 15, 1996), states:

The report also found that . . . ] *complex, confusing, and at times inconsistent procedural and substantive rules among the federal district courts and the federal courts are the antithesis of an equitable and efficient system.*

I agree with Judge Mayer quoting this report. McGhee's substantial evidence, presented in the ABCMR administrative record, begs this Court's review. In *Florida Power & Light Company v. Lorion, etc., et al. United States Nuclear Regulation Commission*, Justice Brennan, writing for the Supreme Court, after granting petition for writ of certiorari concluded ". . . that agency rule would be arbitrary and capricious if the explanation runs counter to the evidence before the agency." See *Florida Power & Light Company v. Lorion, etc., et al. United States Nuclear Regulation Commission* 470 US 729.

In *Heisig v. U.S.*, in an appeal to the United States Court of Appeals, Federal Circuit, Judge Smith stated:

*The Federal Circuit is granted jurisdiction to review on appeal the judgments and decisions of over 100*

*lower tribunals. The standard of its review of their findings of facts are the clearly erroneous rule, unless provided otherwise by statute or by rule. See Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983).*

The Court of Federal Claims' review of the Army Board for Correction of Military Records (ABCMR), without reviewing completely the administrative record, with McGhee's Appeal to the Board on July 22, 2021 and within the 1-year requirement, and ignoring a "Motion for Expedited Status Conference," per Rule 6, filed on August 10, 2021 to clarify issues with a newly appointed Attorney and "to aid in resolving my case in the least adversarial and most efficient way possible," is curious and in conflict with the Board's mission of to "correct errors or remove injustices from Army military records."

In the recent and closely decided ruling by the Supreme Court, in *Torres v. Texas Department of Public Safety*, 597 U.S. 20-603, 5 justice majority vote, a military veteran, can sue his former state employer, for violation of his USERRA rights. McGhee, according to his military medical permanent disability retirement order D 350-50, issued on December 16, 2014, from active duty an "injury," (Iraq, 2005 – 2006) and National Guard "aggravation," (Missouri, July 1, 2010 – even now).

The ABCMR Administrative Record has substantial evidence showing “willful aggravation, causing permanent disability. McGhee’s claims of correction of records for (a) incapacitation pay back pay and (b) suit for actual and general compensatory damages is from 28 U.S.C. § 1491, 37 U.S.C. § 204, 10 U.S.C. Ch. 61 § 1204, 26 U.S.C. § 104 and AR) 635-40.

Finally, the landmark decision, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), provides the strongest argument grant this petition:

*If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action of the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.*

Justice Brennan provided the opinion of the Supreme Court in *Florida Power & Light Co. v. Lorion* uses this same argument but provides for a reviewing Court, according to 5 U.S.C. § 706, “The task of the reviewing court is to apply the appropriate APA standard of review.

The McGhee Order D 350-50 alone, is clear, convincing, and substantial evidence and the ABCMR final decision is clearly “arbitrary, etc.”

**CONCLUSION**

I pray that the Court grant this petition for writ of certiorari.

Respectfully submitted,

Chaplain (LTC) Kevin L. McGhee, U.S. Army,  
Retired, *Pro se*

6465 Hadden Bay Drive  
Florissant, Missouri 63033  
314.222.9233  
Dr KLM@me.com

No. \_\_\_\_\_

In The

**Supreme Court of the United States**

Kevin L. McGhee - Petitioner

v.

United States of America - Respondent

**PROOF OF SERVICE**

I, Kevin Llewellyn McGhee, do swear or declare that on this date, September 20, 2022, as required by Supreme Court Rule 29, I have served the

PETITION FOR A WRIT OF CERTIORARI on  
that party's counsel, and on every other person

33

required to be served, by depositing to each of them  
and with first-class postage prepaid, or by delivery  
to a commercial carrier for delivery within 3  
calendar days.

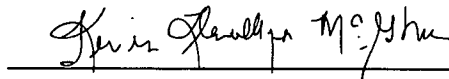
The name and address of those served are as  
followed:

Ms. Catharine Parnell, Trial Attorney  
Commercial Litigation Branch Civil Division  
USDOJ  
PO Box 480  
Ben Franklin Station  
Washington, D.C. 20044

Solicitor General of the United States  
Room 5614, Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

I declare under penalty of perjury that the  
foregoing is true and correct.

Executed on September 20, 2022

A handwritten signature in cursive script, appearing to read "Kevin Michael McHugh", written over a horizontal line.

(Signature)

1a  
Appendix A

ORDER D 350-50 16 December 2014  
McGhee, Kevin L. SSN LTC, MOARN ELE JFHQ,  
2302 Militia Drive, Jefferson City, MO 65101-1203

You are released from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit your retirement for permanent physical disability.

Date placed on retired list. 20 January 2015  
Retired grade of rank 0-5  
Authorized place of retirement: Not Applicable  
Percentage of disability  
DOB  
Sex- M  
Retirement type and allotment code 11  
Component: ARNG  
Authority AR 635-40  
Statute authorizing retirement • 1204  
Other eligible laws Not Applicable  
Disability retirement: 13 Years), 05 Months).  
00 Day(s)  
Basic Pay. 31 Year(s). 00 Month(s), 15 Day(s)  
Completed over 4 years of active service as Enl or  
WO: N/A  
Disability is based on injury or disease received in  
LOD as a direct result of Armed Conflict or caused



2a

by an instrumentality of war and incurred in the  
LOD during a war period as defined by law YES

Member of an armed force on 24 Sep 75:

Disability resulted from a combat related injury as  
defined in 26 USC 104 YES

Formal 687

3a

BY ORDER OF THE SECRETARY OF THE ARMY.  
KIRKPATRICK.CA  
SSADRA.DENIS.1104564611  
for DAVID M TURBAN  
Chief, Operations Division

DISTRIBUTION

LTC Kevin L McGhee

Commander, MOARNG ELE JFRO

2302 Militia Dr., Jefferson City. MO 65101-1203

The Adjutant General of Missouri

2302 Militia Dr., Jefferson City. MO 65101-1203

Chief, National Guard Bureau. ATTN. NGB-ARP.S,

111 South George Mason Drive

Arlington, VA 22204

Commander, Eisenhower Army Medical Center,

ATTN PEBLO, 300 Hospital Road.

Fort Gordon, GA 30905

Commander, Eisenhower Army Medical Center,

ATTN- MSC, 300 Hospital Road,

Fort Gordon, GA 30905

Defense Finance and Accounting Service.

US Retired Pay

P.O Box 7130

New London, KY 40742-7130

4a

Inquiries pertaining to this order should be directed to the USAPDA, Retirements and Separations help desk at (855) 793-3372 or by email at [usarmy\\_pentagon\\_hec\\_mbx\\_usapda-hq-ret-sep@mai.mil](mailto:usarmy_pentagon_hec_mbx_usapda-hq-ret-sep@mai.mil)

MEMORANDUM FOR Army National Guard  
Readiness Center, Appeals and Analysis (ARNG-  
HRH-A), 111 South George Mason Drive Building  
2, Arlington VA 22204-1382

SUBJECT: Army Board for Correction of Military  
Records Record of Proceedings for McGhee, Kevin  
L., SSN, AR20170005933

1. Under the authority of Title 10, United  
States Code, section 1552, the recommendation of  
the Army Board for Correction of Military Records  
is approved.

2. Insofar as the state records of the Army  
National Guard (ARNG) are concerned, it is  
recommended that the state Adjutant General  
correct the military records of the individual  
concerned as stated in the attached Record of  
Proceedings.

3. Request necessary administrative action be  
taken to effect the correction of records as indicated  
no later than **24 August 2020**. Further, request  
that the individual concerned and counsel, if any,  
as well as any Members of Congress who have  
shown interest be advised of the correction and  
that

6a

the Army Board for Correction of Military Records  
be furnished a copy of the correspondence.

BY ORDER OF THE SECRETARY OF THE  
ARMY:

Encl

CF:

( x ) OMPF ( x ) DFAS

Dennis Dingle

Director

Signed by:

DINGLE.DENNIS.WILLIAM.1073592077

7a

MAJ Kevin L. McGhee (RET)

Dear Major McGhee:

Pursuant to your request for reconsideration, the Army Board for Correction of Military Records (ABCMR) reviewed your case on 22 June 2020. After careful review of your application, partial relief to your request was granted. A copy of the Board's Record of Proceedings which explains the Board's reasons for denying a portion of your request is enclosed.

The decision in your case is final and final action has been directed in this matter under the provisions of Section 1552 of Title 10, United States Code and Army Regulation 15-185.

Sincerely,

Dennis Dingle

Director

Signed by:

DINGLE.DENNIS.WILLIAM.1073592077

Enclosure

**OPINION AND ORDER**

***SOLOMSON, Judge.***

In this military pay case, Plaintiff, Kevin Llewellyn McGhee, a medically retired United States Army Lieutenant Colonel who served as a dual-status military technician and chaplain with the Missouri Army National Guard (“MOANG”)<sup>1</sup> filed a complaint, on April 19, 2019, against Defendant, the United States.<sup>2</sup> ECF No. 1 (“Compl.”) at 1.

In his complaint, Mr. McGhee alleges that MOANG improperly failed to pay him incapacitation pay pursuant to 37 U.S.C. § 204, for

---

<sup>1</sup> “[D]ual-status’ technicians occupy a unique space between federal/state organizations and civilian/military status. Dual-status technicians work in a variety of roles with National Guards but are designated employees of the U.S. Army or Air Force. Even though dual-status technicians are federal employees, authority over dual-status technicians, including all hiring and firing decisions, remains with the National Guard at the state level.”

<sup>2</sup> This case originally was assigned to Judge Wheeler, ECF No. 2, but was transferred on February 5, 2020, to the undersigned Judge. ECF Nos. 8, 9.

twenty-one months, starting May 4, 2013, until January 20, 2015, when he was medically retired from service.<sup>3</sup> Compl. at 2. Mr. McGhee seeks \$230,837.04 in incapacitation pay. *Id.* at 2-3.

Prior to filing a complaint in this Court, Mr. McGhee initially filed a claim, in January 2017, for incapacitation pay with the Army Board for Correction of Military Records (“ABCMR”). ECF No. 1-2 at 3. Before the ABCMR rendered a decision, however, Mr. McGhee filed his complaint in this Court. *Id.* On June 28, 2019, the government filed an unopposed motion to remand this case to the ABCMR and to stay the proceedings of this case until the ABCMR issued a decision. ECF No. 5 at 1. This Court granted the government’s motion for a voluntary remand. ECF No. 6.

Despite consenting to the government’s June 28, 2019 request, Mr. McGhee, on April 1, 2020, filed a motion to transfer or reassign this matter, alleging bias on the part of the Court for granting the government’s motion to stay. ECF No. 14. On April 27, 2020, the government filed a status report, indicating that, on April 13, 2020, ABCMR

---

<sup>3</sup> Plaintiff also cites Army Regulation 135-381 (Incapacitation of Reserve



had reached a decision in Mr. McGhee's case and granted partial relief on his claims. ECF No. 15 at 1. The status report also explained, however, that the "[g]overnment and ABCMR believe[d] it necessary for the remand to continue for another sixty days, until June 26, 2020," to address the concerns that Mr. McGhee had raised after the ABCMR's April 13, 2020 decision. *Id.* Mr. McGhee agreed with this course of action. *See id.* at 2. The Court rejected Mr. McGhee's bias claim, denied his motion to transfer this case, and once again stayed and remanded the instant matter pending a final ABCMR decision. ECF No. 16 at 2-3.

On June 22, 2020, ABCMR rendered yet another decision, again recommending partial relief on Mr. McGhee's incapacitation pay claim. *See* ECF No. 17; AR<sup>4</sup> 42-43. This time, however, ABCMR increased its recommended payment from November 9, 2013 to January 20, 2015 (*i.e.*, for a total of 14 months and 11 days), instead of only from February 2014 to January 2015. *Compare* ECF No. 15 and AR 578, *with* ECF No. 17 and AR<sup>4</sup> 42-43. ABCMR concluded that the earliest date Mr. McGhee had applied for incapacitation pay was

---

<sup>4</sup> Citations to the administrative record (ECF No. 21-1) are denoted as "AR."

1a  
Appendix A

ORDER D 350-50 16 December 2014  
McGhee, Kevin L. SSN LTC, MOARN ELE JFHQ,  
2302 Militia Drive, Jefferson City, MO 65101-1203

You are released from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit your retirement for permanent physical disability.

Date placed on retired list. 20 January 2015  
Retired grade of rank 0-5  
Authorized place of retirement: Not Applicable  
Percentage of disability  
DOB  
Sex- M  
Retirement type and allotment code 11  
Component: ARNG  
Authority AR 635-40  
Statute authorizing retirement • 1204  
Other eligible laws Not Applicable  
Disability retirement: 13 Years), 05 Months).  
00 Day(s)  
Basic Pay. 31 Year(s). 00 Month(s), 15 Day(s)  
Completed over 4 years of active service as Enl or  
WO: N/A  
Disability is based on injury or disease received in  
LOD as a direct result of Armed Conflict or caused

2a

by an instrumentality of war and incurred in the  
LOD during a war period as defined by law YES

Member of an armed force on 24 Sep 75:

Disability resulted from a combat related injury as  
defined in 26 USC 104 YES

Formal 687

4a

Inquiries pertaining to this order should be directed to the USAPDA, Retirements and Separations help desk at (855) 793-3372 or by email at [usarmy\\_pentagon\\_hec\\_mbx\\_usapda-hq-ret-sep@mai.mil](mailto:usarmy_pentagon_hec_mbx_usapda-hq-ret-sep@mai.mil)

5a  
Appendix B

SAMR-RBA

24 June 2020

MEMORANDUM FOR Army National Guard  
Readiness Center, Appeals and Analysis (ARNG-  
HRH-A), 111 South George Mason Drive Building  
2, Arlington VA 22204-1382

SUBJECT: Army Board for Correction of Military  
Records Record of Proceedings for McGhee, Kevin  
L., SSN, AR20170005933

1. Under the authority of Title 10, United  
States Code, section 1552, the recommendation of  
the Army Board for Correction of Military Records  
is approved.

2. Insofar as the state records of the Army  
National Guard (ARNG) are concerned, it is  
recommended that the state Adjutant General  
correct the military records of the individual  
concerned as stated in the attached Record of  
Proceedings.

3. Request necessary administrative action be  
taken to effect the correction of records as indicated  
no later than **24 August 2020**. Further, request  
that the individual concerned and counsel, if any,  
as well as any Members of Congress who have  
shown interest be advised of the correction and  
that

6a

the Army Board for Correction of Military Records  
be furnished a copy of the correspondence.

BY ORDER OF THE SECRETARY OF THE  
ARMY:

Encl

CF:

( x ) OMPF ( x ) DFAS

Dennis Dingle

Director

Signed by:

DINGLE.DENNIS.WILLIAM.1073592077

7a

MAJ Kevin L. McGhee (RET)

Dear Major McGhee:

Pursuant to your request for reconsideration, the Army Board for Correction of Military Records (ABCMR) reviewed your case on 22 June 2020. After careful review of your application, partial relief to your request was granted. A copy of the Board's Record of Proceedings which explains the Board's reasons for denying a portion of your request is enclosed.

The decision in your case is final and final action has been directed in this matter under the provisions of Section 1552 of Title 10, United States Code and Army Regulation 15-185.

Sincerely,

Dennis Dingle

Director

Signed by:

DINGLE.DENNIS.WILLIAM.1073592077

Enclosure

**In the United States Court of Federal Claims**

No. 19-629C

(Filed: September 3, 2021)

---

|                                |   |
|--------------------------------|---|
| <b>KEVIN LLEWELLYN MCGHEE,</b> | ) |
| <i>Plaintiff,</i>              | ) |
|                                | ) |
| v.                             | ) |
| <b>THE UNITED STATES,</b>      | ) |
| <i>Defendant,</i>              | ) |

---

*Kevin L. McGhee, pro se*, Florissant, MO

*Catherine Parnell*, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for Defendant. On the briefs were *Brian M. Boynton*, Acting Assistant Attorney General, Civil Division, *Robert E. Kirschman, Jr.*, Director, *Stephen J. Gillingham*, Assistant Director, and *Sean L. King*, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C. Of counsel was Bernard E. Doyle, Office of General Counsel, National Guard Bureau, Arlington, VA.



**OPINION AND ORDER**

***SOLOMSON, Judge.***

In this military pay case, Plaintiff, Kevin Llewellyn McGhee, a medically retired United States Army Lieutenant Colonel who served as a dual-status military technician and chaplain with the Missouri Army National Guard (“MOANG”)<sup>1</sup> filed a complaint, on April 19, 2019, against Defendant, the United States.<sup>2</sup> ECF No. 1 (“Compl.”) at 1.

In his complaint, Mr. McGhee alleges that MOANG improperly failed to pay him incapacitation pay pursuant to 37 U.S.C. § 204, for

---

<sup>1</sup> “[D]ual-status’ technicians occupy a unique space between federal/state organizations and civilian/military status. Dual-status technicians work in a variety of roles with National Guards but are designated employees of the U.S. Army or Air Force. Even though dual-status technicians are federal employees, authority over dual-status technicians, including all hiring and firing decisions, remains with the National Guard at the state level.”

<sup>2</sup> This case originally was assigned to Judge Wheeler, ECF No. 2, but was transferred on February 5, 2020, to the undersigned Judge. ECF Nos. 8, 9.

twenty-one months, starting May 4, 2013, until January 20, 2015, when he was medically retired from service.<sup>3</sup> Compl. at 2. Mr. McGhee seeks \$230,837.04 in incapacitation pay. *Id.* at 2-3.

Prior to filing a complaint in this Court, Mr. McGhee initially filed a claim, in January 2017, for incapacitation pay with the Army Board for Correction of Military Records (“ABCMR”). ECF No. 1-2 at 3. Before the ABCMR rendered a decision, however, Mr. McGhee filed his complaint in this Court. *Id.* On June 28, 2019, the government filed an unopposed motion to remand this case to the ABCMR and to stay the proceedings of this case until the ABCMR issued a decision. ECF No. 5 at 1. This Court granted the government’s motion for a voluntary remand. ECF No. 6.

Despite consenting to the government’s June 28, 2019 request, Mr. McGhee, on April 1, 2020, filed a motion to transfer or reassign this matter, alleging bias on the part of the Court for granting the government’s motion to stay. ECF No. 14. On April 27, 2020, the government filed a status report, indicating that, on April 13, 2020, ABCMR

---

<sup>3</sup> Plaintiff also cites Army Regulation 135-381 (Incapacitation of Reserve

had reached a decision in Mr. McGhee's case and granted partial relief on his claims. ECF No. 15 at 1. The status report also explained, however, that the "[g]overnment and ABCMR believe[d] it necessary for the remand to continue for another sixty days, until June 26, 2020," to address the concerns that Mr. McGhee had raised after the ABCMR's April 13, 2020 decision. *Id.* Mr. McGhee agreed with this course of action. *See id.* at 2. The Court rejected Mr. McGhee's bias claim, denied his motion to transfer this case, and once again stayed and remanded the instant matter pending a final ABCMR decision. ECF No. 16 at 2-3.

On June 22, 2020, ABCMR rendered yet another decision, again recommending partial relief on Mr. McGhee's incapacitation pay claim. *See* ECF No. 17; AR<sup>4</sup> 42-43. This time, however, ABCMR increased its recommended payment from November 9, 2013 to January 20, 2015 (*i.e.*, for a total of 14 months and 11 days), instead of only from February 2014 to January 2015. *Compare* ECF No. 15 and AR 578, *with* ECF No. 17 and AR<sup>4</sup> 42-43. ABCMR concluded that the earliest date Mr. McGhee had applied for incapacitation pay was

---

<sup>4</sup> Citations to the administrative record (ECF No. 21-1) are denoted as "AR."

November 9, 2013, and consequently established that date as the beginning of his entitlement to incapacitation pay. AR 42. Mr. McGhee maintains that<sup>3</sup> Plaintiff also cites Army Regulation 135-381 (Incapacitation of Reserve Component Soldiers) and Department of Defense Instruction 1241.2 (Reserve Component Incapacitation System Management), but these regulations merely implement 37 U.S.C. § 204 and do not serve as an independent basis for compensation beyond whatever the statute provides. he is entitled to an additional six months and four days beyond the partial relief of 14 months and 11 days that ABCMR previously granted him. AR 230.

Since the filing of the original complaint in this case, Mr. McGhee has expanded his claims at ABCMR and before this Court.<sup>5</sup> *See* AR 500-12; ECF No. 18 at 2. In total, he now claims that he is entitled to compensation for: (1) incapacitation pay from May 4, 2013 to November 8, 2013 pursuant to the Military Pay Act, specifically 37 U.S.C. § 204; (2) discrimination pursuant to Uniformed Services

---

<sup>5</sup> Mr. McGhee attempted to file an amended complaint in August 2020, which the Court rejected as untimely. In any event, his proposed amended complaint raises the same four primary claims that the ABCMR addressed in its decision and that Mr. McGhee represented in the parties' August 24, 2020 joint status report. ECF Nos. 18, 20. In the government's motions, it addresses all of Mr. McGhee's claims. ECF No. 20 at 4 n.4.

Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. §§ 4301-4335; (3) disability retirement pay annuity under the Federal Employees’ Retirement System (“FERS”), 5 U.S.C. § 8451; and (4) federal and military whistleblower retaliation pursuant to provisions of the Whistleblower Protection Act, 5 U.S.C. § 2302, and the Military Whistleblower Protection Act, 10 U.S.C. § 1034. ECF No. 18 at 2. He now seeks \$5,000,000 as a result of these additional claims. *Id.*

On February 15, 2021, the government filed a motion to dismiss Mr. McGhee’s complaint pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”) for lack of subject matter jurisdiction and, in the alternative, a motion for judgment on the administrative record. ECF No. 20. On March 15, 2021, Mr. McGhee filed a response to the government’s motions and a cross-motion for judgment on the administrative record. ECF No. 22. The parties filed their respective response briefs. ECF Nos. 23, 26.

For the reasons explained below, the Court **GRANTS** the government’s motion to dismiss for lack of subject matter jurisdiction and **DENIES as MOOT** the government’s motion for judgment on the administrative record and Mr. McGhee’s cross-motion for judgment on the administrative record.

Mr. McGhee is proceeding *pro se*, and this Court generally holds a *pro se* plaintiff's pleadings to "less stringent standards." *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (per curiam); *see also Troutman v. United States*, 51 Fed. Cl. 527, 531 (2002). The Court, however, "may not similarly take a liberal view of [a] jurisdictional requirement and set a different rule for *pro se* litigants only." *Kelley v. Sec'y of Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987). In short, "even *pro se* plaintiffs must persuade the court that jurisdictional requirements have been met." *Hale v. United States*, 143 Fed. Cl. 180, 184 (2019). In the absence of subject-matter jurisdiction, the Court must dismiss the claim. *Kissi v. United States*, 493 F. App'x 57, 58 (Fed. Cir. 2012).

Generally, "[t]he jurisdiction of the Court of Federal Claims is defined by the Tucker Act, which gives the court authority to render judgment on certain monetary claims against the United States." *RadioShack Corp. v. United States*, 566 F.3d 1358, 1360 (Fed. Cir. 2009). The Tucker Act, 28 U.S.C. § 1491(a)(1), provides this Court with jurisdiction to decide "actions pursuant to contracts with the United States, actions to recover illegal exactions of money by the United States, and actions brought pursuant to money-mandating statutes, regulations, executive orders, or constitutional provisions." *Roth v. United States*,

378 F.3d 1371, 1384 (Fed. Cir. 2004). The Tucker Act, however, “does not create a substantive cause of action.” *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc). Moreover, “[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act.” *United States v. Mitchell*, 463 U.S. 206, 216 (1983). With respect to “money-mandating” claims, the plaintiff must identify a law that “can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.” *Id.* at 217 (internal citations omitted). For the reasons explained below, Mr. McGhee’s four claims are not within this Court’s subject-matter jurisdiction.

*First*, in making his primary incapacitation pay claim, Mr. McGhee relies upon two subsections of the Military Pay Act – neither of which are money-mandating. The first subsection on which Mr. McGhee relies, 37 U.S.C. § 204(g)(1)(A), provides the following:

A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service whenever such member is

16a

physically disabled as the result of an injury, illness, or disease incurred or aggravated . . . in line of duty while performing active duty[.]

The second subsection on which Mr. McGhee relies, 37 U.S.C. § 204(h)(1)(A), provides:

A member of a reserve component of a uniformed service who is physically able to perform his military duties, is entitled, upon request, to a portion of the monthly pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service for each month for which the member demonstrates a loss of earned income from nonmilitary employment or self-employment as a result of an injury, illness, or disease incurred or aggravated . . . in line of duty while performing active duty[.]

Notably, section 204(i)(2) provides the Secretary with discretion regarding any pay award for more than six months made pursuant to sections (g) or (h). 37 U.S.C. § 204(i)(2) (“Pay and allowances may



not be paid under subsection (g) or (h) for a period of more than six months. The Secretary concerned may extend such period in any case if the Secretary determines that it is in the interests of fairness and equity to do so.”).

While Mr. McGhee claims that, based on the Military Pay Act, he is entitled to additional incapacitation pay beyond the 14 months and 11 days that ABCMR awarded him, *see* ECF No. 22, the Federal Circuit has expressly held that a statute governing incapacitation pay is not money-mandating because it provides the government with plenary discretion to determine an individual’s eligibility for more than six months of incapacitation pay. *Barnick v. United States*, 591 F.3d 1372, 1378 (Fed. Cir. 2010) (“Any additional incapacitation pay under 37 U.S.C. § 204(g) is wholly at the discretion of the Air Force, and courts lack jurisdiction over such a claim[.]”). Because Mr. McGhee seeks incapacitation pay for a period greater than six months, his Military Pay Act claim, based, as it is, upon 37 U.S.C. § 204 (g)-(h), is not a money mandating claim and, thus, is not within this Court’s jurisdiction.<sup>6</sup>

---

<sup>6</sup> In Mr. McGhee’s response to the government’s motion to dismiss, but not in his complaint, he alleges that on September 24, 2016, the MOANG Equal Opportunity Officer purportedly told him

---

that MOANG would submit a correct incapacitation pay packet for the full twenty-one months of incapacitation pay but that MOANG never filed a request for more than the original six months of incapacitation pay. ECF No. 22 at 10-11. To the extent that Mr. McGhee's assertions, generously characterized, may be viewed as an equitable estoppel claim, it must fail. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990). Indeed, as the Federal Circuit has held, "[w]hat the *Richmond* Court left for another day is whether estoppel can lie against the Government in a case not involving payment from the Treasury, *i.e.*, claims for other than monetary relief." *Perez v. United States*, 156 F.3d 1366, 1373 (Fed. Cir. 1998). Whatever opening the Federal Circuit may have left for such claims, equitable estoppel cannot be used to create a money mandating claim where none exists. Moreover, even "[a]ssuming for the sake of argument that . . . *Richmond* . . . leaves open a 'crack in the door' through which an estoppel argument might pass, . . . [plaintiff] has failed to make the threshold showing of reasonable reliance as required by *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384–85, 68 S.Ct. 1, 3– 4, 92 L.Ed. 10 (1947)." *Belanger v. Office of Pers. Mgmt.*, 1 F.3d 1223, 1228 (Fed. Cir. 1993) (quoting *Brush v. Office of Pers. Mgmt.*, 982 F.2d 1554, 1558 n. 11 (Fed. Cir. 1992)); see also *Brenes v. United States*, 152 Fed. Cl. 365, 372 n.7 (2021) ("[T]he Court is unaware of a case in which a plaintiff successfully has relied upon an estoppel theory to recover money.").

Mr. McGhee fails to distinguish the instant case from *Barnick*, 591 F.3d at 1377, which is binding on this Court. In an attempt to demonstrate that 37 U.S.C. § 204 is a money-mandating statute, Mr. McGhee cites to *Chambers v. United States*, 417 F.3d 1218 (Fed. Cir. 2005). ECF No. 22 at 6 n.7. While Mr. McGhee is correct that the Federal Circuit in *Chambers* refers to 37 U.S.C. § 204 as a money-mandating statute, that decision does not separately analyze the different subsections of the statute. *Chambers*, 417 F.3d at 1224. The *Barnick* decision, in contrast, specifically addresses how and why 37 U.S.C. § 204(i)(2) renders 37 U.S.C. § 204(g)(1)(A) and 37 U.S.C. § 204(h)(1)(A) not money-mandating. *Barnick*, 591 F.3d at 1378. For instance, the court in *Barnick* explained:

However, “[a] statute is not money-mandating when it rives the government complete discretion over the decision whether or not to pay an individual or group.” Here, because § 204 incapacitation pay beyond the initial six-month period is wholly within the Secretary’s discretion under § 204(i)(2), the Court of Federal Claims and this court lack subject matter jurisdiction over [the]

claim for additional incapacitation pay.

*Id.* (internal citation omitted) (quoting *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006)). Mr. McGhee fails to distinguish – or even address – *Barnick’s* holding.

*Second*, Mr. McGhee’s discrimination claim under USERRA is outside of this Court’s jurisdiction. Pursuant to USERRA, if the veteran’s employer is a federal agency, jurisdiction lies exclusively with the United States Merit Systems Protection Board, 38 U.S.C. § 4324(c)(1), whereas claims against a state employer “may be brought in a State court of competent jurisdiction in accordance with the laws of the State.” 38 U.S.C. § 4323(b)(2); *see Dziekonski v. United States*, 120 Fed. Cl. 806, 810 (2015) (holding that “plaintiff’s citation to the USERRA fails to establish jurisdiction in this Court”). Moreover, USERRA specifically provides that “[i]n the case of a National Guard technician employed under section 709 of title 32, the term ‘employer’ means the adjutant general of the State in which the technician is employed.” 38 U.S.C. § 4303(4)(B); *see* 20 C.F.R. § 1002.306 (providing that “[a] National

Guard civilian technician is considered a State employee for USERRA purposes, although he or she is considered a Federal employee for most other purposes”); *see also Stoglin v. Merit Sys. Prot. Bd.*, 640 F. App’x 864, 867-68 (Fed. Cir. 2016) (holding that National Guard technician must seek relief of USERRA claim in state court). Because Mr. McGhee is a dual status technician with MOANG pursuant to 32 U.S.C. § 709, the correct forum for his USERRA claim is in Missouri state court, not this Court. In any event, this Court lacks jurisdiction over a USERRA claim.

*Third*, this Court has no jurisdiction over Mr. McGhee’s FERS claim because “[b]y statute, the authority to decide a FERS application in the first instance and adjudicate all claims arising under that retirement system rests with [the Office of Personnel Management].” *Stekelman v. United States*, 752 F. App’x 1008, 1010 (Fed. Cir. 2018) (citing 5 U.S.C. § 8461(c)). Moreover, the “jurisdiction to review any potential miscalculation by OPM lies with the MSPB, and not the Court of Federal Claims.” *See id.* at 1011 (citing 5 U.S.C. § 8461(e)(1) and *Miller v. Office of Pers. Mgmt.*, 449 F.3d 1374, 1377 (Fed. Cir. 2006)).

*Fourth*, Mr. McGhee’s whistleblower claim, whether pursuant to the Whistleblower Protection

Act, 5 U.S.C. § 2302,<sup>7</sup> or the Military Whistleblower Protection Act, 10 U.S.C. § 1034, is outside of the subject-matter jurisdiction of this Court. The Whistleblower Protection Act “is a statute designed to forbid agencies from engaging in certain prohibited personnel practices, ‘including unlawful discrimination, coercion of political activity, nepotism, and reprisal against so-called whistleblowers.’” *Burch v. United States*, 99 Fed. Cl. 377, 382 (2011) (quoting *United States v. Fausto*, 484 U.S. 439, 446 (1988)). But this statute is not money mandating as it “in *Black v. United States*, 56 Fed. Cl. 19, 23 (2003). the Military Whistleblower Protection Act only “provides for a comprehensive administrative review scheme over claims of retaliation—specifically, the correction of military records and disciplinary actions as remedies for prohibited actions—*but no private right of action for*

---

<sup>7</sup> The Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16, has been codified in various sections of Title 5 of the United States Code. See *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1344 (Fed. Cir. 2001) (citing the Whistleblower Protection Act as “Pub. L. No. 101–12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.)”).

*money damages, which could be enforced in the Court of Federal Claims.” Bias v. United States, 722 F. App’x 1009, 1014 (Fed. Cir. 2018) (emphasis added); see also Rana v. United States, 664 F. App’x 943, 948 (Fed. Cir. 2016) (same).*

In sum, while Mr. McGhee received substantial relief from the ABCMR, this Court lacks subject-matter jurisdiction over all four of Mr. McGhee’s remaining claims.

### **CONCLUSION**

The government’s motion to dismiss pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction is **GRANTED**. The government’s motion for judgment on the administrative record are **DENIED** as **MOOT**. The Clerk shall **dismiss** Mr. McGhee’s complaint.

**IT IS SO ORDERED.**

s/Matthew H. Solomson  
Mathew H. Solomson  
Judge