

SUITS FOR MILITARY PAY AND DISABILITY BENEFITS IN THE COURT OF FEDERAL CLAIMS

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INTRODUCTION

As the Supreme Court has said, “[J]udges are not given the task of running the Army [or any other military service].”¹ Additionally: “The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments”² That said, the Court of Federal Claims and its predecessors have, for many years, considered and decided military pay

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1. Orloff v. Willoughby, 345 U.S. 83, 93 (1953).
2. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

and disability cases.

In the Court of Federal Claims, suits by current and former members of the military services necessarily depend upon the Tucker Act for jurisdiction.³ As a consequence, the actions must focus on monetary relief, even though the claims may have a nonmonetary impetus, such as a contested separation, a failure of promotion, or a challenged court-martial conviction. To some extent, federal district courts share this caseload because purely equitable claims and monetary claims of \$10,000 or less may be brought in district courts.⁴

For well over a century, a steady flow of these cases has reached the

3. In pertinent part, the Tucker Act provides:

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.

28 U.S.C. § 1491(a)(1) (2006).

4. See Little Tucker Act, 28 U.S.C. § 1346(a) (providing that district courts shall have jurisdiction “concurrent with the United States Court of Federal Claims” of civil actions against the United States not exceeding \$10,000 and not sounding in tort). As a result, claims by soldiers and ex-soldiers may be brought in federal district courts via two distinct routes, one of which is comparable to that available in the Court of Federal Claims, and one of which is not. So long as the monetary relief sought in a military pay case does not exceed the threshold of the Little Tucker Act, jurisdiction would be proper in the district court under that statute. Alternatively, if no monetary relief were sought, jurisdiction would be available in district court under the general federal question statute, 28 U.S.C. § 1331 (2006), and the Administrative Procedure Act (APA), 5 U.S.C. § 702, so long as the claim had first been before a corrections board or other relevant military board. In that circumstance, the district court would have available the remedies appropriate for judicial review of administrative action.

Disputes about jurisdiction have arisen where a service member sought only equitable relief in circumstances in which a monetary recovery would be a logical outcome of a grant of that relief. The D.C. Circuit has held that the district court would have jurisdiction over such claims so long as “the sole remedy requested [in the complaint] is declaratory or injunctive relief that is not ‘negligible in comparison’ with the potential monetary recovery.” *Kidwell v. Dep’t of the Army*, 56 F.3d 279, 284 (D.C. Cir. 1995) (citing *Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985)); see also *Tootle v. Sec’y of the Navy*, 446 F.3d 167, 176 (D.C. Cir. 2006) (quoting *Kidwell*, 56 F.3d at 284). In that event, the D.C. Circuit opined that “any monetary benefits that might flow if [the plaintiff] prevails on his nonmonetary claims will not come from the District Court’s exercise of jurisdiction.” *Tootle*, 446 F.3d at 175. Rather, the monetary recovery would flow “from the structure of statutory and regulatory requirements governing compensation when a service member’s files change.” *Id.* (quoting *Kidwell*, 56 F.3d at 285–86).

For cases brought in district courts invoking the APA as a basis for review of action by a corrections board or other military board, exhaustion of administrative remedies has also been a significant issue. For a discussion of the varied precedents of the regional circuits regarding exhaustion, see *infra* note 47.

Court of Federal Claims and its predecessor.⁵ In the past few years, an influx of cases stemming from military service in Iraq or Afghanistan has been evident:

Military Pay & Disability Cases Filed in the Court of Federal Claims⁶

	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>
Back Pay	5	10	9	10	8
Correct Records & Reinstatement	10	12	12	21	17
Retirement, Disability & Other	7	16	19	17	24
Totals	22	38	40	48	49

The role of the court in addressing these cases has changed markedly over a span of decades. Years ago, cases were brought as de novo actions in which the Court of Claims undertook a traditional fact-finding role. In practical terms, that changed when military correction and review boards were instituted in 1946.⁷ The formation of military correction boards was designed primarily “to relieve Congress of the burden of considering private bills to correct” claimed errors in military personnel actions.⁸ Service members had frequently turned to Congress as an alternative to the Court of Federal Claims’s predecessor in seeking redress and relief. Congress’s remedy, however, not only pushed many cases to a military administrative body and then to this court, but also worked a significant change in the court’s posture in the cases. Relatively few cases were filed in court as de novo actions. Most cases came to the court after first being presented to a military board, and the court’s function was largely converted into one of reviewing administrative action by boards. Even then, the court carried over some elements of de novo consideration of

5. *See, e.g.*, *United States v. Kelly*, 82 U.S. (15 Wall.) 34, 36 (1872) (ruling on an appeal by the government from a judgment of the Court of Claims, predecessor to the Court of Federal Claims, in a military pay case).

6. E-mail from Lisa Reyes, Chief Deputy Clerk for Operations, Court of Fed. Claims, to the Hon. Charles Lettow, Court of Fed. Claims (Sept. 10, 2012, 01:15 EDT) (on file with author).

7. *See* *Martinez v. United States*, 333 F.3d 1295, 1306 (Fed. Cir. 2003) (en banc) (citing the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 207, 60 Stat. 812, 837).

8. *Id.* at 1306–07.

evidence, at least in certain circumstances. In recent years, however, changing precedents in the United States Court of Appeals for the Federal Circuit have removed many, if not all, of those elements.

Notwithstanding that procedural evolution, some principles have remained constant. The six-year statute of limitations for cases filed in the court under the Tucker Act⁹ begins to run upon the service member's separation or discharge.¹⁰ The court accords a presumption of regularity to a military service's actions respecting military personnel, and a claimant must overcome that presumption to prevail.¹¹ The most common ground for relief invoked by successful claimants involves a procedural irregularity or failure to comply with applicable regulations by a military authority, if the flaw has operated to the prejudice of the claimant.¹²

9. 28 U.S.C. § 2501.

10. *See Martinez*, 333 F.3d at 1309–10. In district courts, the six-year statute of limitations in 28 U.S.C. § 2401(a) applies to APA-based claims, but the accrual date of the claim depends on whether it relates to an underlying cause or a board determination. The underlying cause accrues at the time of the harm, but claims based on board action may not accrue until final disposition by the board (which may occur as long as fifteen years after a discharge). 10 U.S.C. § 1553(a); *see Smith v. Marsh*, 787 F.2d 510, 511–12 (10th Cir. 1986) (affirming both the district court's dismissal of the plaintiff's claim on the underlying discharge and its finding of timeliness on board action related to that discharge); *Geyen v. Marsh*, 775 F.2d 1303, 1308–10 (5th Cir. 1985) (holding that a discharge eleven years prior to filing of the suit could not be addressed in district court, but that board review of that discharge, which occurred only one year prior, could be); *Dougherty v. U.S. Navy Bd. for Corr. of Naval Records*, 784 F.2d 499, 500–02 (3d Cir. 1986) (holding that the statute of limitations began to run when a board issued its final decision rather than when a former serviceman was discharged); *Bittner v. Sec'y of Def.*, 625 F. Supp. 1022, 1029 (D.D.C. 1985) (dismissing claims of plaintiffs who failed to pursue board review because the underlying discharge occurred more than six years prior, while allowing the claims of similarly situated plaintiffs who had pursued board review fewer than six years prior). This distinction between the underlying cause of action and a board-derived cause of action could potentially lead to a situation where a discharged plaintiff takes the maximum available time to file with the board—fifteen years—and the maximum time to file suit in district court on the board's decision—six years—resulting in an action filed twenty-one years after the discharge actually occurred. Such a scenario is briefly described in *Walters v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983), which notes that a plaintiff who had waited ten years after his discharge to file suit in court could rescue his claim by pursuing a remedy from a board first. If the board decision was unfavorable, the plaintiff in *Walters* could *then* have proceeded to district court with a claim of the board's action, though not on the underlying discharge itself. *Id.*

11. *See Melendez Camilo v. United States*, 642 F.3d 1040, 1045 (Fed. Cir. 2011) (holding the absence of a specific discussion of evidence is inadequate to overcome the presumption that the board considered the evidence).

12. *See Fisher v. United States*, 402 F.3d 1167, 1176–77 (Fed. Cir. 2005).

When the question is one of physical or mental fitness for service in the military, courts are loath to interfere with decisions made by the President and his designated

I. STANDARDS FOR DECISION

In general, “a member of a uniformed service who is on active duty” is “entitled to the basic pay of the pay grade to which assigned.”¹³ When a military pay claim is at issue, and the matter has been before a correctional board, “the scope of . . . review for [a] challenge[] to [a] military correction board decision[] is ‘limited to determining whether [the] decision . . . is arbitrary, capricious, unsupported by substantial evidence, or contrary to applicable statutes and regulations.’”¹⁴ When appropriate, the court may accompany an award of monetary relief with an order “directing restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records.”¹⁵ Nonetheless, the Military Pay Act, with two exceptions, cannot be used to obtain the salary of a higher rank for which the claimant was not selected.¹⁶ Instead, “a service member is entitled only to the salary of the rank to which he [or she] is appointed and in which he [or she] serves.”¹⁷ The two exceptions occur when: (1) the plaintiff “has satisfied all the legal requirements for promotion, but the military has refused to recognize his [or her] status,” or (2) “the decision not to promote the service member leads to the service

agents. . . . This deference to Executive authority does not extend to ignoring basic due process considerations, however. When there is a question of whether reasonable process has been followed, and whether the decision maker has complied with established procedures, courts will intervene, though only to ensure that the decision is made in the proper manner.

Id.

13. 37 U.S.C. § 204(a). This statute has been determined to be “money-mandating” by the Federal Circuit. *Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005). Standing alone, the Tucker Act does not create a substantive right to relief, nor is it, by itself, sufficient to confer jurisdiction on the Court of Federal Claims. *See United States v. Testan*, 424 U.S. 392, 398 (1976); *Martinez*, 333 F.3d at 1303. Rather, “A substantive right must be found in some other source of law” *United States v. Mitchell*, 463 U.S. 206, 216 (1983). Thus, the Tucker Act essentially acts to waive the government’s sovereign immunity with respect to claims deriving from a money-mandating source of law. *See id.* Accordingly, to establish that this court has subject matter jurisdiction under the Tucker Act, the plaintiff must first point to an independent, substantive source of law that may be interpreted as mandating payment from the United States for the injury suffered, and upon successfully doing so, the plaintiff must then present “a nonfrivolous assertion that [he or she] is within the class of plaintiffs entitled to recover under th[at] money-mandating source.” *Jan’s Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1307 (Fed. Cir. 2008).

14. *Melendez Camilo*, 642 F.3d at 1044 (quoting *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983)).

15. 28 U.S.C. § 1491(a)(2).

16. *See Smith v. Sec’y of the Army*, 384 F.3d 1288, 1294 (Fed. Cir. 2004).

17. *Id.* (citing *James v. Caldera*, 159 F.3d 573, 582 (Fed. Cir. 1998); *Dodson v. United States*, 988 F.2d 1199, 1208 (Fed. Cir. 1993); *Skinner v. United States*, 594 F.2d 824, 830 (Ct. Cl. 1979)).

member's compelled discharge."¹⁸

Provisions of Chapter 5 of Title 37 of the United States Code authorizing "special and incentive pays" for members of the uniformed services¹⁹ can pose significant issues of statutory interpretation. A number of those provisions state that an incentive pay or bonus "may" be made to a qualifying soldier.²⁰ Ordinarily, by using the permissive "may," these statutory authorizations are presumptively discretionary, not mandatory.²¹ Discretionary payments are not money-mandating for purposes of the Tucker Act.²² Certain of these statutes have a long history, however, that rebuts this presumption.²³ The Supreme Court drew upon that history in *United States v. Larionoff*,²⁴ a military pay case in which the Court observed that "[f]rom early in our history, Congress has provided by statute for payment of a re-enlistment bonus to members of the Armed Services who re-enlisted upon expiration of their term of service, or who agreed to extend their period of service before its expiration."²⁵ Accordingly, the Court assumed that a statute providing for payment of a re-enlistment bonus was money-mandating and that eligible service members who met the statutory requirements for payment of the bonus were entitled to receive it. In short, some military pay statutes that use the permissive word "may" nonetheless qualify as money-mandating provisions for purposes of the Tucker Act, by virtue of long-standing usage and history.

Disability claims rest on a somewhat different footing than pay claims. To receive compensation or retirement benefits for military disability, a service member must suffer a permanent disability manifesting itself during

18. Smith, 384 F.3d at 1294–95 (citing *Dysart v. United States*, 369 F.3d 1303, 1315–16 (Fed. Cir. 2004); *Law v. United States*, 11 F.3d 1061, 1065 (Fed. Cir. 1993)).

19. 37 U.S.C. ch. 5 (quoting title).

20. See, e.g., 37 U.S.C. § 308i(a) (providing that a prior-service enlistment bonus "may be paid" to a former enlisted member of an armed force who enlists in the Selected Reserve of the Ready Reserve).

21. See *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) ("There is a presumption that the use of the word 'may' in a statute creates discretion.").

22. See *Deggins v. United States*, 39 Fed. Cl. 617, 620 (1997) ("[T]he [plaintiff's] claim for military pay and allowances based on a statute that provides only for a discretionary payment of money is fatally flawed."), *aff'd*, 178 F.3d 1308 (Fed. Cir. 1998); *Adair v. United States*, 648 F.2d 1318, 1322–23 (Ct. Cl. 1981) (holding that 37 U.S.C. § 313, providing that physicians in the Public Health Service "may" receive a variable incentive amount of special pay for each year of an active duty agreement, is only discretionary and not money-mandating).

23. Most of these statutes are found in Chapter 5 of Title 37, entitled "Special and Incentive Pays." 37 U.S.C. §§ 301–330.

24. 431 U.S. 864 (1977).

25. *Id.* at 865.

active service.²⁶ A service member has a physical examination prior to separation or discharge, but that may not be a sufficient basis for a decision regarding a disability determination. A Physical Evaluation Board (PEB), formerly known as a Retiring Board, “determines a service member’s fitness for duty and entitlement to disability retirement [or a medical separation payment] once a Medical Evaluation Board . . . finds the soldier does not meet the [applicable] standards for retention.”²⁷ Often the dispute in military disability claims filed in court concerns whether the service member’s medical profile upon separation or discharge should have triggered an evaluation by a Medical Evaluation Board and a PEB.²⁸ Where the service member has not proceeded via a PEB, his or her claim does not accrue until final action by a correction board, which has authority to act in the place of a PEB as the proper tribunal to determine eligibility for a disability separation payment or retirement.²⁹ Although a correction board is empowered to act as a PEB and make a fitness determination in the first instance,³⁰ a correction board can alternatively refer a post-separation or post-discharge claim to a PEB for action.³¹ If a service member’s condition is not “of a permanent nature and stable,”³² a uniformed service may put the member on a temporary disability retired list, pending a further determination of permanency and stability.³³ A disability of less than 30% under the standard schedule of rating disabilities entitles the service member to a separation payment rather than a disability

26. See 10 U.S.C. § 1201(a)–(b)(2).

27. *Chambers v. United States*, 417 F.3d 1218, 1225 n.2 (Fed. Cir. 2005); see also *McHenry v. United States*, 367 F.3d 1370, 1373 (Fed. Cir. 2004) (“In order to determine the existence and extent of disability, the Secretary established a [Physical Evaluation Board] in 1990 ‘to act on behalf of the Secretary of the Navy . . . in making determinations of fitness for duty, entitlement to benefits, and disposition of service members referred to the Board.’” (quoting SEC’Y OF THE NAVY, SECNAV INSTRUCTION 1850.4C, DEPARTMENT OF THE NAVY DISABILITY EVALUATION MANUAL ¶ 6A (1990), *superseded by* SEC’Y OF THE NAVY, SECNAV INSTRUCTION 1850.4E, DEPARTMENT OF THE NAVY DISABILITY EVALUATION MANUAL ENCLOSURE (1), at 1–6 (2002)).

28. See, e.g., *Colon v. United States*, 71 Fed. Cl. 473, 482 (2006), *aff’d sub nom. Acevedo v. United States*, 216 F. App’x 977 (Fed. Cir. 2007).

29. See 10 U.S.C. § 1201 (allowing the Secretary to make a determination of disability).

30. See *Barnick v. United States*, 591 F.3d 1372, 1380 (Fed. Cir. 2010) (stating that the board is capable of making retroactive disability determinations).

31. See *Sawyer v. United States*, 930 F.2d 1577, 1582 (Fed. Cir. 1991) (“There is sufficient flexibility in the system to permit the boards to complement or supplement one another in the interest of reaching a just result.”); *Peoples v. United States*, 101 Fed. Cl. 245, 263 (2011) (gauging an appeal from the Board for Correction of Naval Records on the sufficiency of the administrative record).

32. 10 U.S.C. § 1201(b)(1).

33. *Id.* § 1202.

retirement benefit.³⁴

A number of recent cases have involved claims of improper separation or discharge of service members alleged to have suffered post-traumatic stress disorder (PTSD). These cases have focused on provisions of the National Defense Authorization Act for Fiscal Year 2008.³⁵ Those provisions specify that “[i]n making a determination of disability of a member of the armed forces for purposes of this chapter, the Secretary concerned . . . shall, to the extent feasible, utilize the schedule for rating disabilities in use by the Department of Veterans Affairs [(VA)].”³⁶ In effect, the statutory revision extends prior provisions that required the uniformed services to apply the Veterans Affairs Schedule for Rating Disabilities (VASRD) when assessing disability ratings.³⁷

Consequently, for some time, the uniformed services have applied the same rating system as that developed by the VA. The equivalence does not mean, however, that the results obtained will be the same. “The military uses the VASRD, ‘to determine fitness for performing the duties of office, grade, and rank, whereas . . . the VA uses the VASRD [after discharge] to determine the disability ratings based on an evaluation of the individual’s capacity to function and perform tasks in the civilian world.”³⁸

II. PROCEDURES

A. Discharge and Separation Back-Pay Claims

In military board cases, the court has consistently employed a “substantial evidence” standard of review that “does not require a reweighing of the evidence, but a determination whether *the conclusion being reviewed* is supported by substantial evidence.”³⁹ Under this standard, the court may not “substitute [its] judgment for that of the military

34. See *id.* § 1203(b)(4) (describing that a service member may be separated from the member’s uniformed service and entitled to severance pay).

35. Wounded Warrior Act, Pub. L. No. 110-181, § 1642, 122 Stat. 430, 465 (codified at 10 U.S.C. § 1216a(a)(1) (Supp. IV 2011)).

36. *Id.*

37. See, e.g., SEC’Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3212, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, AND SEPARATION § 1.7 (2006); SEC’Y OF THE ARMY, ARMY REGULATION 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION § 3-5(a) (2006); SEC’Y OF THE NAVY, SECNAV INSTRUCTION 1850.4E, DEPARTMENT OF THE NAVY DISABILITY EVALUATION MANUAL ENCLOSURE (3) § 3801(b) (2002). These regulations state that the Air Force, Army, and Navy will all use Veterans Affairs Schedule for Rating Disabilities ratings.

38. *Sabree v. United States*, 90 Fed. Cl. 683, 695–96 (2009) (quoting *Haskins v. United States*, 51 Fed. Cl. 818, 826 (2002)).

39. *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983).

departments when reasonable minds could reach differing conclusions on the same evidence.”⁴⁰

In the years immediately following the establishment of military correction boards, the court clung to rudiments of its earlier de novo consideration of military pay and benefits claims. Specifically, the court often accepted and considered de novo evidence to supplement its review of the boards’ decisions, allowing it latitude to reach a conclusion contrary to that of the military board.⁴¹ As the court explained in *Brown v. United States*, the boards served as nonadversarial, investigatory bodies—not as “tribunals adjudicating disputes between adverse parties.”⁴² The court reasoned:

[T]he administrative system, as a whole, is not designed to collect and evaluate for itself all the evidence . . . , nor is it geared to produce records comparable to those of the regulatory agencies. There is, in short, less need and less warrant for deferring to the administrative fact-finding process, as all-inclusive, self contained, and final.⁴³

Thus, while the court exercised a limited power of review in military board cases, it had the freedom to accept de novo evidence and use a supplemented record when addressing a military board’s conclusions.

This procedure was altered after the Supreme Court explicitly stated in *Florida Power & Light Co. v. Lorion* that a lower court reviewing an agency action should generally remand the case to the agency to consider new evidence if the record before the court is incomplete.⁴⁴ In light of *Florida Power*, the Federal Circuit modified its stance to require the court to remand a case to a board to consider relevant evidence that was omitted in the first instance, rather than continuing to allow the court to consider new evidence put forth in a supplemented record.⁴⁵ Under this procedural regimen, the court’s review is limited to the administrative record, and if

40. *Id.* at 1156.

41. *See id.* at 1157 (“[A]ll of the competent evidence must be considered, whether original or supplemental, and whether or not it supports the challenged conclusion [of the military board].” (citing *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 483, 490 (1951)); *see also* *Brown v. United States*, 396 F.2d 989, 991–94, 996 (Ct. Cl. 1968) (detailing the court’s “established practice of accepting *de novo* evidence in [the military correction] area”).

42. 396 F.2d at 995.

43. *Id.* at 996.

44. 470 U.S. 729, 744 (1985) (“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 on 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.”).

45. *See* *Walls v. United States*, 582 F.3d 1358, 1367–68 (Fed. Cir. 2009) (holding that except for rare cases a court must remand a case to an agency if its record is inadequate).

the court finds that a particular claim was not adequately addressed, it should order a remand to the military board.⁴⁶

Notably, any involvement of a military board may significantly limit a plaintiff's ability to raise new claims and arguments before the court. In *Metz v. United States*, the Federal Circuit held that a plaintiff who brings a claim in court after a decision by a military board waives the claims or arguments he or she does not raise in initial or reconsideration petitions before the board.⁴⁷

46. See *Riser v. United States*, 93 Fed. Cl. 212, 217–18 (2010) (remanding a suit for back pay to the Army Correction Board so it could consider relevant resignation correspondence that had not been considered by the Board); see also *Hale v. United States*, No. 10-822C, 2011 WL 2268961, at *2 (Fed. Cl. June 9, 2011) (remanding claims for back pay and medical disability payments to a military board because plaintiff raised procedural issues that had not been considered by a board).

47. 466 F.3d 991, 999 (Fed. Cir. 2006). *Metz* effectively imposes a categorical exhaustion requirement on a military pay claimant who first seeks relief from a corrections board. The institution of such a requirement constitutes a significant departure from the earlier decisions of the Court of Claims in *Brown* and the Federal Circuit in *Heisig*, allowing submission of de novo evidence and supplementary materials in an action filed in court. See *supra* notes 4, 41–42.

Suits brought under the APA in district courts necessarily are predicated upon review of action by a military board or official. Some circuits have adopted an approach similar to that in *Metz*, requiring plaintiffs to exhaust their claims at the administrative level. See *Coburn v. McHugh*, 679 F.3d 924, 930 (D.C. Cir. 2012) (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009), which held that a district court could not review an administrative determination based upon claims which were not presented to the administrative body); *Schwalier v. Panetta*, 839 F. Supp. 2d 75, 80 (D.D.C. 2012) (conditioning jurisdiction over APA-based claims on whether those claims had first been raised before and ruled on by an agency); *Bittner v. Sec'y of Def.*, 625 F. Supp. 1022, 1026 (D.D.C. 1985) (noting the D.C. Circuit's "strong preference for presuit exhaustion of intramilitary administrative remedies" because of the agency expertise such proceedings provide to courts); see also *Duffy v. United States*, 966 F.2d 307, 311 (7th Cir. 1992) (holding that a service member's failure to file a claim with a correction board constituted a failure to exhaust intramilitary administrative remedies such that the related claim had to be dismissed pending exhaustion of available administrative remedies).

Other circuits have not been so categorical in requiring complete exhaustion of remedies in APA cases brought through actions in district court. For example, the Ninth Circuit has held,

[T]here are four circumstances in which exhaustion is not required: (1) if the intraservice remedies do not provide an opportunity for adequate relief; (2) if the petitioner will suffer irreparable harm if compelled to seek administrative relief; (3) if administrative appeal would be futile; or (4) if substantial constitutional questions are raised.

Wenger v. Monroe, 282 F.3d 1068, 1073 (9th Cir. 2002) (citing *Muhammad v. Sec'y of the Army*, 770 F.2d 1494, 1495 (9th Cir. 1985)). In essence, the Ninth Circuit treats "[e]xhaustion of administrative remedies, when not made mandatory by statute . . . [as] a prudential doctrine," not a limitation on subject matter jurisdiction. *Santiago v. Rumsfeld*,

Former service members have another valid procedural option that they may pursue to allow the court to undertake a full evidentiary review. Since their inception, military boards have been regarded as a “permissive administrative remedy . . . [,] not a mandatory prerequisite to filing a Tucker Act suit challenging the discharge.”⁴⁸ Therefore, a plaintiff may opt to file suit directly in the Court of Federal Claims instead of seeking relief first before a military correction board.⁴⁹ According to *Martinez v. United States*, this flexibility provides benefits to both parties:

[R]equiring resort to a correction board would necessarily extend the period within which a discharge claim for back pay could be brought. Such an extension would naturally increase the risk that discharge claims would be stale, along with the risk of lost evidence, unavailable witnesses, and faded memories. In addition, the passage of time would increase the potential liability of the United States for back pay and would make the availability of corrective action more difficult to effect. . . .

Second, it is by no means clear that an exhaustion requirement would be favorable to service members generally. . . . [M]any service members might prefer to have the option of seeking an immediate judicial remedy rather than having to go through a correction board before having access to a court. A mandatory exhaustion requirement would make that course of action unavailable.⁵⁰

A service member may preserve access to “both the judicial remedy and the right to a reviewable decision by the correction board [by filing suit]

425 F.3d 549, 554 (9th Cir. 2005) (citing *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 541 (9th Cir. 2004)); *see also* *Aikens v. Ingram*, 652 F.3d 496, 508 (4th Cir. 2011) (King, J., dissenting) (requiring exhaustion except where resort to a board would be futile); *Winck v. England*, 327 F.3d 1296, 1304 (11th Cir. 2003) (quoting *Linfors v. United States*, 673 F.2d 332, 334 (11th Cir. 1982) (per curiam), (requiring exhaustion except “where no genuine opportunity for adequate relief exists, irreparable injury will result if the complaining party is compelled to pursue administrative remedies, or an administrative appeal would be futile” (citations omitted)); *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir. 1980) (same). Courts of appeals that take a similar approach have held that district courts could take jurisdiction of cases absent exhaustion, but stay judicial proceedings until a correction board considered the service member’s claims. *See* *Montgomery v. Rumsfeld*, 572 F.2d 250, 252–55 (9th Cir. 1978); *Nelson v. Miller*, 373 F.2d 474 (3d Cir. 1967).

In actions jurisdictionally predicated on the Little Tucker Act, district courts presumably would be governed by the precedents of the Federal Circuit because appeals in those cases would be to the Federal Circuit, not the pertinent regional circuit. The exhaustion rule of *Metz* would accordingly apply to such actions in district courts.

48. *Martinez v. United States*, 333 F.3d 1295, 1303–04 (Fed. Cir. 2003) (citing *Richey v. United States*, 322 F.3d 1317, 1325 (Fed. Cir. 2003); *Heisig v. United States*, 719 F.2d 1153, 1155 (Fed. Cir. 1983)).

49. *Id.*

50. *Id.* at 1309 (citation omitted).

within six years of the date of discharge and request[ing] that the court action be stayed until the correction board proceeding is completed.”⁵¹ *Metz*, in effect, would require that a service member file suit in the Court of Federal Claims before filing claims with a military board if he or she wished to raise issues before the court rather than before a military board.⁵²

Additionally, because correction boards do not employ adversarial procedures, they are not well suited to handle certain types of claims. A personal appearance or argument may or may not be allowed by the board, at its discretion. As a result, fact-finding may be problematic in some circumstances. The classic example is a claim by a service member of ineffective assistance of counsel in an administrative discharge hearing or court martial. In *Helferty v. United States*,⁵³ the service member raised his claim of ineffective assistance of counsel before a correction board, which eventually requested that military counsel and officials provide a series of advisory opinions to assist in its review. Included in those opinions was a statement by the prior counsel who had been alleged to have been ineffective. Notwithstanding the bar on ex parte communications to the board,⁵⁴ the prior counsel’s statement was withheld from the claimant and his counsel on privacy grounds.⁵⁵ In court, the government sought a remand to the board, attaching the prior counsel’s statement that previously had been provided to the board on an ex parte basis, and that motion was granted.⁵⁶ As the case has developed on remand, the board reportedly is struggling with competing affidavits, filed *seriatim*, one after the other, responsively describing and contesting prior counsel’s investigatory activities and actions at the administrative discharge hearing. Consequently, the board is faced with finding facts on a convoluted paper record, unaided by direct testimony, cross-examination, or an opportunity to assess credibility. In short, the correction board as structured cannot find facts in a typical trial-type setting, and the adequacy of its proceedings might well be questioned in certain situations.

B. Disability Retirement Pay Claims

In disability retirement pay cases, claims of entitlement to benefits “do

51. *Id.*

52. Otherwise, a claimant would lose the ability to submit some claims directly to the court or to adduce some evidence directly to the court.

53. 101 Fed. Cl. 224 (2011).

54. See 10 U.S.C. § 1556 (2006) (prohibiting ex parte communications to boards, subject to exceptions that include “[c]lassified information” and “[i]nformation the release of which is otherwise prohibited by law”).

55. *Helferty*, 101 Fed. Cl. at 226.

56. *Id.* at 229.

not accrue until the appropriate [military] board either finally denies such a claim or refuses to hear it.”⁵⁷ As a result, the board proceeding “becomes a *mandatory* remedy.”⁵⁸ Among other things, the six-year statute of limitations for the Court of Federal Claims’s cases under the Tucker Act does not automatically begin to run upon the service member’s discharge: “The decision by the first statutorily authorized board which hears or refuses to hear the claim is the triggering event.”⁵⁹ A limited exception to this rule exists: if a “service member has sufficient actual or constructive notice of his disability, and hence, of his entitlement to disability retirement pay, at the time of discharge,” then “the service member’s failure to request a hearing board prior to discharge has . . . the same effect as a refusal by the service to provide board review,” thus triggering the start of the six-year statute of limitations.⁶⁰ In such a case, the court must look to “[w]hether the veteran’s knowledge of the existence and extent of his condition at the time of his discharge was sufficient to justify concluding that he waived the right to board review of the service’s finding of fitness.”⁶¹ The court determines the service member’s knowledge by reference to the statutory requirements for disability retirement benefits, contained in 10 U.S.C. § 1201.⁶²

Correction boards have had difficulty addressing disability claims raised considerably after discharge or separation, where no PEB was convened prior to discharge and the medical information gathered before discharge was not comprehensive.⁶³

III. CLASS ACTIONS

In a few circumstances, prior service members have presented military pay or disability claims in suits that were certified as class actions under Rule 23 of the Rules of the Court of Federal Claims. The most recent such case was *Sabo v. United States*, involving disabled veterans who had served in the wars in Iraq and Afghanistan and who suffered PTSD.⁶⁴ Another

57. *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990) (citing *Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962)).

58. *Chambers v. United States*, 417 F.3d 1218, 1225 (Fed. Cir. 2005) (internal quotation marks omitted).

59. *Real*, 906 F.2d at 1560.

60. *Chambers*, 417 F.3d at 1226 (citing *Real*, 906 F.2d at 1560, 1562).

61. *Real*, 906 F.2d at 1562.

62. *Id.* at 1562–63; *see also Chambers*, 417 F.3d at 1226.

63. *See, e.g., Peoples v. United States*, 101 Fed. Cl. 245, 263–65 (2011) (approving a board’s denial of a disability retirement claim because the Physical Evaluation Board did not have all of the information it needed to determine the claimant’s fitness for duty at the time of discharge).

64. 102 Fed. Cl. 619, 621 (2011).

notable set of examples occurred roughly a decade earlier, when military officers who were involuntarily separated or retired for failure of promotion successfully brought reverse-discrimination suits in this court that were also certified as class actions.⁶⁵ The facts and procedural circumstances of the two types of cases are instructive for other situations in which a number of veterans may have similar claims arising out of their military service.

A. *The PTSD Class Action*

In *Sabo*, seven veterans filed suit, averring that they suffered from PTSD incurred as a result of their service in Iraq and Afghanistan and contending that their respective service branches had not assigned sufficient disability ratings.⁶⁶ The court granted the plaintiffs' motion to proceed as a class action, certified the class, delineated the claims to be decided, appointed class counsel, and approved a notice to be supplied to all potential class members.⁶⁷ As in any class action, great care was taken to ensure that adequate notice be given to potential class members. Counsel sent notices directly to approximately 4,300 potential members and established a website to expand the reach of information about the suit.⁶⁸ Given the issuance of new and more lenient criteria in 2008 for rating a disability based upon PTSD,⁶⁹ the government enabled plaintiffs who opted in to apply for priority review of their PTSD disability rating by a Physical Disability Board of Review or a correction board.⁷⁰ When that process proved to be slow and cumbersome, the parties undertook settlement discussions. Ultimately, 2,176 individuals opted into the suit, and the parties reached a proposed settlement on conceptual terms for nine discrete categories of claimants, separated according to those who had or had not received a military board decision, had received severance pay or disability retirement or were placed on the Temporary Disability Retirement List (TDRL), or had received a disability rating from the VA.⁷¹ The proposed settlement agreement provided that each class member would at least be

65. See *Christian v. United States*, 337 F.3d 1338, 1339 (Fed. Cir. 2003); *Berkley v. United States*, 287 F.3d 1076, 1081 (Fed. Cir. 2002); *Christensen v. United States*, 60 Fed. Cl. 19 (2004).

66. *Sabo*, 102 Fed. Cl. at 621–23.

67. *Id.* at 623. The court allows only opt-in class actions; opt-out class actions are not permitted. See U.S. Ct. Fed. Claims R. 23 rules committee notes, available at http://www.usfc.uscourts.gov/sites/default/files/court_info/20120702_rules/12.07.02%20FINAL%20VERSION%20OF%20RULES.pdf.

68. *Sabo*, 102 Fed. Cl. at 623.

69. See *supra* notes 35–37 and accompanying text.

70. See *Sabo*, 102 Fed. Cl. at 622–24.

71. *Id.* at 624–25.

placed on the TDRL at a 50% disability rating for the first six months after separation or retirement and be granted additional relief, dependent upon individual circumstances.⁷²

The court approved the settlement after giving each class member the opportunity to respond.⁷³ Fourteen class members indicated disapproval, while seven responding members neither approved nor disapproved.⁷⁴ Attorneys' fees for class counsel were deferred, although the parties agreed that attorneys' fees would not be paid out of settlement proceeds to claimants.⁷⁵

B. *The Reverse-Discrimination Class Actions*

Christian v. United States involved male, nonminority former lieutenant colonels in the Army whom a board had selectively retired early using race- and gender-based retention goals.⁷⁶ *Berkley v. United States* concerned a certified class comprised of Air Force officers whom a board had involuntarily separated based partly on race- and gender-based criteria.⁷⁷ In *Christensen v. United States*, the class plaintiffs were colonels in the Air Force whom a board had selected for involuntary retirement on the basis of unconstitutional race and gender preferences.⁷⁸

In these three sets of reverse-discrimination cases, the disputes ultimately centered on remedy. The government urged the court to remand the cases to the pertinent service secretaries for a "harmless error" analysis, calling for reconsideration by reconstituted service boards to make new separation and early retirement decisions using criteria that had no discriminatory elements. The Federal Circuit adopted this remedial approach in *Christian v. United States*.⁷⁹

Subsequently, however, the parties reached settlement agreements that provided payments of standard lump-sum amounts to each class member and did not entail sets of "harmless error" determinations.⁸⁰ Class counsel would be paid fees out of the total award but at rates that amounted to less than 10% of the award.⁸¹ In *Berkley*, some class plaintiffs elected to be considered by a special board, and some were granted retention with

72. *Id.* at 625.

73. *Id.* at 629–30.

74. *Id.* at 629.

75. *Id.* at 630.

76. 46 Fed. Cl. 793, 816–17 (2000).

77. 45 Fed. Cl. 224, 225–26, 235 (1999).

78. 60 Fed. Cl. 19, 20 (2004).

79. 337 F.3d 1338, 1349 (Fed. Cir. 2003).

80. *See, e.g.*, *Christensen v. United States*, 65 Fed. Cl. 625, 627–28 (2005).

81. *Id.* at 628.

back-pay and allowances.⁸²

C. Remedial Issues

As *Sabo* and the reverse-discrimination cases illustrate, class actions can and should be certified in military pay and disability cases where liability issues apply broadly to all members of the class. Nonetheless, where liability is established in class actions, the remedial stage can be troublesome. Pay and declaratory relief in the form of correction of military records is heavily dependent upon the individual circumstances of class members. Despite that inherent difficulty, counsel achieved settlements in these exemplars, using a template that was either applicable to all class members or to members on a category-by-category basis, with individual adjustments as appropriate. Creative remedial solutions can ensure fairness for all class members.

CONCLUSION

The Court of Federal Claims continues to provide a viable forum for suits seeking military pay and benefits brought by current and former members of military services. Indeed, it is the only judicial avenue available to claimants seeking direct monetary relief in amounts greater than \$10,000. The procedure applied by the Court of Federal Claims to these suits should be readily comprehensible to anyone familiar with federal trial practice generally. Nonetheless, some quirks exist, a few of which are attributable to the accumulated precedents derived from the court's consideration of those cases over a century and one-half. Others, however, are derived from changes in the law reflected in decisions by the Federal Circuit during the past decade, as that court has moved away from certain earlier decisions that allowed flexibility in presentation of claims toward a more formulaistic adherence to doctrines developed for judicial review of agency actions under the Administrative Procedure Act.

82. 45 Fed. Cl. 224.