

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

MARSHALL G. HILES,
Plaintiff,

Case No. 1:12-cv-673
Black, J.
Litkovitz, M.J.

vs.

ARMY REVIEW BOARD
AGENCY, et al.,
Defendants.

ORDER

This matter is before the Court on the federal defendants' motion for a briefing schedule (Doc. 83), plaintiff's memorandum in partial opposition to defendants' motion (Doc. 84), and defendants' reply memorandum in support of the motion (Doc. 86).¹

I. Background

Plaintiff instituted this action by filing a complaint against a number of federal agencies and departments on September 5, 2012. (Doc. 1). The undersigned issued a Report and Recommendation on March 25, 2013, recommending that defendants' motion to dismiss be granted and this case be terminated. (Doc. 38). Plaintiff subsequently filed a motion to amend the complaint/motion for summary judgment on December 20, 2013. (Doc. 54). The undersigned issued a Report and Recommendation on August 12, 2014, recommending that plaintiff's motion to amend/motion for summary judgment be denied. (Doc. 61).

On September 16, 2014, the district judge issued Orders (1) adopting the undersigned's Report and Recommendation denying plaintiff's motion to amend/motion for summary judgment

¹ Plaintiff has also filed a "sur-response memorandum" in support of his opposing memorandum. (Doc. 87). Plaintiff's supplemental memorandum will not be considered because plaintiff did not obtain leave of Court and has not shown good cause for filing a supplemental memorandum. *See* S.D. Ohio Civ. R. 7.2 (allowing for filing of a motion, memorandum in opposition, and reply memorandum and stating that "[n]o additional memoranda beyond those enumerated are permitted except upon leave of court for good cause shown.").

(Doc. 66), and (2) adopting as modified the undersigned's Report and Recommendation granting defendants' motion to dismiss the complaint (Doc. 67). Pursuant to the terms of the latter Order, plaintiff's second, third, fourth, fifth and sixth claims were dismissed with prejudice; the Report and Recommendation was modified to reflect that the District Court has jurisdiction over plaintiff's first claim seeking review of a decision of the Army Board of Corrections and Military Review (ABCMR); and the case was recommitted to the undersigned for further proceedings. (Doc. 67). The following day, a Calendar Order was issued establishing a discovery deadline of January 16, 2015, and a dispositive motion deadline of March 16, 2015. (Doc. 69).

Thereafter, on October 16, 2014, plaintiff moved for reconsideration of the Orders denying his motion to amend/motion for summary judgment (Doc. 66) and granting defendants' motion to dismiss claims two through six of the complaint (Doc. 67). (Doc. 73). An Order was issued on December 10, 2014, granting in part plaintiff's motion for reconsideration. (Doc. 80). The Court explained that although it had denied plaintiff's motion to amend/motion for summary judgment for lack of subject matter jurisdiction over plaintiff's claims, plaintiff had cited a case in his reply brief filed on November 17, 2014 (Doc. 78), that called the Court's subject matter jurisdiction ruling into question. (Doc. 80 at 6-7, citing *Anestis v. U.S.*, 749 F.3d 520 (6th Cir. 2014)). The Court found that *Anestis* "advised that in certain circumstances, [district courts] do have subject matter jurisdiction over claims against the Veterans Administration and certain tort claims are not precluded by sovereign immunity." (*Id.*). The Court decided that the parties should have an opportunity to brief whether "this advice to the United States District Court applies to plaintiff's claims in this case," following which the Court would make a determination on the issue. (*Id.* at 7-8). The Court granted plaintiff's motion to reconsider the Order dismissing plaintiff's second, third, fourth, fifth and sixth claims with prejudice for lack of

subject matter jurisdiction (Doc. 67), but only as to the second claim²; granted plaintiff's motion to reconsider the Order denying plaintiff's motion to amend/motion for summary judgment (Doc. 66), but only with respect to plaintiff's motion to amend the complaint; and recommitted the matter to the undersigned for further proceedings. (Doc. 80 at 8).

II. The federal defendants' motion for a briefing schedule

The federal defendants request that the Court issue a briefing schedule on the matters set forth in the December 10, 2014 Order. (Doc. 83). Defendants identify these matters as: (1) reconsideration of the Court's decision dismissing the second claim of the complaint; and (2) reconsideration of the Court's Order denying plaintiff's motion to amend/motion for summary judgment. (Doc. 83; Doc. 86 at 3). Defendants propose to file the administrative record in this matter as soon as possible, and they further propose that the additional briefing ordered by the Court be completed by the dispositive motion deadline of March 16, 2015 set forth in the previously established Calendar Order. (*See* Doc. 69).

Plaintiff objects to the timeline proposed by defendants. (Doc. 84). Plaintiff construes the December 10, 2014 Order as: (1) granting plaintiff's motion for reconsideration as to the second claim for relief, and (2) granting plaintiff's motion to amend the complaint. (*Id.* at 3). Plaintiff argues that it is not feasible to complete briefing on the jurisdictional issue, conduct necessary discovery, and submit an amended complaint by the March 16, 2015 dispositive motion deadline as proposed by defendants. (*Id.* at 4). Plaintiff therefore proposes that briefing on the issue of the Court's subject matter jurisdiction be completed by March 31, 2015; a

² In his opposing memorandum, plaintiff describes the second claim for relief as "a constitutional facial attack to certain Department of Veterans Affairs' ("VA") regulations based on the Fifth Amendment to the United States Constitution." (Doc. 84 at 3). As noted in the Report and Recommendation issued on March 25, 2013, the second claim is actually a claim for recovery of benefits which plaintiff alleges are owed his deceased father by the VA and which have not been paid due to the VA's alleged diversionary tactics and other purported misconduct. (Doc. 38 at 3-4).

deadline of May 31, 2015, for amendment of the complaint be established; the discovery deadline be extended to November 30, 2015; and the dispositive motion deadline be extended to February 28, 2016. (*Id.* at 4).

In reply, defendants assert that the only substantive issues remaining in this lawsuit are: (1) the validity of plaintiff's first claim for relief brought under the Administrative Procedure Act (APA) (i.e., whether the failure of the Army Review Board Agency (ARBA) or ABCMR to correct his father's military records was arbitrary and capricious); and (2) whether subject matter jurisdiction exists over plaintiff's second claim for relief. (Doc. 86 at 1-2). Defendants allege that these issues should be addressed concurrently. Defendants contend that discovery should not be necessary in this APA case, and it would be premature to set a deadline for amending the complaint before a determination is made as to whether the District Court has subject matter jurisdiction over plaintiff's claims. (*Id.* at 4-7).

III. Resolution

The Court will grant the federal defendants' motion for a briefing schedule. (Doc. 83).

To clarify, the procedural posture of this case is as follows:

- The first claim for relief is pending before the Court. The Court previously issued an Order finding that there is subject matter jurisdiction over this claim. (Doc. 67).
- The parties are to brief the issue of whether the District Court has subject matter jurisdiction over plaintiff's second claim for relief pursuant to the Court's Order of December 10, 2014. (Doc. 80).
- Plaintiff has not been granted leave to amend the complaint. If subject matter jurisdiction is found to exist after additional briefing has been completed, then reconsideration of the Order denying plaintiff's motion to amend may be appropriate. (*See* Doc. 80).
- Plaintiff's motion for summary judgment is no longer before the Court. Plaintiff's request for reconsideration of the motion was expressly denied in the December 10, 2014 Order. (*Id.* at 8).

Thus, the only issue to be briefed pursuant to the December 10, 2014 Order is whether the District Court has subject matter jurisdiction over plaintiff's second claim for relief. A deadline of March 16, 2015, for the submission of briefs on this issue is reasonable.

It is not necessary to establish a deadline for plaintiff to amend the complaint before a determination is made as to whether the District Court has subject matter jurisdiction over plaintiff's second claim. Further, the Court declines to extend the discovery and dispositive motion deadlines set forth in the Calendar Order by nearly one year as requested by plaintiff.³ (See Doc. 69). Plaintiff's request is inconsistent with the guidelines for timely resolution of civil cases established by the Civil Justice Reform Act of 1990.⁴ Moreover, it appears likely at this juncture that this APA case will be resolved on the administrative record. See *CareToLive. v. von Eschenbach*, No. 2:07-cv-729, 2007 WL 3232454, at *2 (S.D. Ohio Nov. 1, 2007) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (in an APA action, the focus should be on the administrative record already in existence); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.")). Thus, additional time to conduct discovery is not warranted.

³ Plaintiff correctly notes that the Calendar Order includes a discovery deadline of January 16, 2015 (Doc. 69), but plaintiff incorrectly interprets the establishment of a deadline as authorization for the parties to engage in "full discovery." (Doc. 84 at 3). The mere establishment of a discovery deadline is not authorization for the parties to engage in discovery that is not relevant to the parties' dispute.

⁴ The Act provides that civil cases brought in federal court should be tried within three years of the date of filing. 28 U.S.C. § 476(a)(3). Plaintiff filed this lawsuit on September 5, 2012.

IT IS THEREFORE ORDERED THAT:

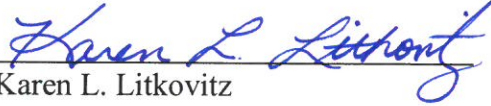
Defendants' motion for a briefing schedule (Doc. 83) is **GRANTED**. The following briefing schedule will apply in this case:

Parties' briefs on subject matter jurisdiction due on or before: March 16, 2015

Parties' opposing briefs due on or before: April 10, 2015

Parties' reply briefs due on or before: April 24, 2015

Date: 1/26/15


Karen L. Litkovitz
United States Magistrate Judge