IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5741

Summary Calendar

JOE E. PERRYMAN,

Plaintiff-Appellant,

versus

DEPARTMENT OF LABOR,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(SA-90-CV-343)
(January 19, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Joe E. Perryman, a former employee of the United States Postal Service ("Postal Service"), brought this action to challenge the decision of the Office of Workers' Compensation Programs (OWCP) to terminate his disability benefits in May 1981. Finding that Perryman's action is in part time-barred and in part barred by the doctrine of res judicata, the district court

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

granted defendants' motion to dismiss. Perryman now appeals from that dismissal, and, finding no error, we affirm.

I

Perryman was employed as a mail handler by the Postal Service from June 1957 though March 1976, when he retired because of a medical disability. Because the OWCP determined that Perryman's disability was caused by his Postal Service employment, he began receiving benefits under the Federal Employee's Compensation Act (FECA). Moreover, Perryman chose to receive his retirement benefits earned under the Civil Service Retirement Act (CSRA) in one sum, and he was paid accordingly.

In April 1981, at the request of the OWCP, Dr. Eades examined Perryman to determine whether he was still entitled to benefits under FECA. Dr. Eades determined that, although Perryman is totally disabled, his disability is not related to his federal employment. Accordingly, the OWCP terminated Perryman's benefits as of May 21, 1981, and that termination was affirmed by the Employees' Compensation Appeals Board (ECAB).

In June 1983, Perryman filed suit against the United States Department of Labor and the Office of Personnel Management seeking to have his FECA benefits restored, or, alternatively, to have his annuity rights restored under the CSRA. Judge Prado, United States District Judge for the Western District of Texas, granted defendants' motion to dismiss in July 1984.

In 1987, Perryman, proceeding pro se, filed an application requesting a review of the May 1981 order that terminated his

FECA benefits. The OWCP denied that application on the grounds that the evidence submitted to support it was immaterial, and the ECAB affirmed this decision.

In April 1987, Perryman filed a second lawsuit against the United States Department of Labor and the Office of Personnel Management. In this second lawsuit, he also named individuals in their federal official capacities (collectively "the federal defendants")[1] and Dr. Eades as defendants. As in his June 1983 lawsuit, Perryman's objective was to obtain reinstatement of his FECA benefits, although he also included state law medical malpractice claims against Dr. Eades. Defendants moved to dismiss, or, in the alternative, for summary judgment. Judge Prado, again presiding, found that Perryman's claims were the subject of his prior lawsuit and, therefore, that they are barred by the doctrine of res judicata. Judge Prado also determined that, because Dr. Eades had not examined Perryman since April 1981--almost nine years before Perryman filed his second lawsuit, Perryman's claims against Dr. Eades are time-barred. Accordingly, the district court dismissed Perryman's lawsuit, and Perryman now appeals from that dismissal.

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[1] As listed in Perryman's complaint, these defendants are: Larry W. Anglin, M.D., United States Department of Labor; Richard L. Poffenberger, Deputy Commissioner; David Essley, Claims Supervisor; Raymond Sherley, Claims Supervisor; Bobbie Samison, Claims Examiner; Eddie Jordan, Jr., Chief, Branch of Claims; Deborah Preis, Claims Examiner; Ronald Ederer, United States Attorney; and Richard L. Thornburgh, Attorney General of the United States. Although Perryman did not specify the capacity in which he was suing, the district court held that Perryman's claims against these individuals are limited to their official capacities. Perryman has not challenged this holding on appeal.

II

Perryman raises the following issues on appeal:[2]

A. Did the district court properly determine that Perryman's claims against the federal defendants are barred by res judicata?;

B. Did the district court properly determine that Perryman's claims against Dr. Eades are barred by the statute of limitations?; and

C. Was Perryman denied due process because Judge Prado presided over his case?

A

Perryman's first challenge is to the district court's dismissal of his claims against the federal defendants as being barred by the doctrine of res judicata. This court has held that res judicata bars subsequent actions where a previous action:

> (1) resulted in a final judgment on the merits;
> (2) was rendered by a court of competent jurisdiction;
> (3) involved the same cause of action; and
> (4) involved the same parties.

Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990) (emphasis added and citations omitted). We have also, under the doctrine of issue preclusion, prevented parties from relitigating issues where:

> (1) the issues in the present action are identical to those involved in a prior action;

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[2] Perryman's brief is difficult to follow, especially because he has presented his contentions in a group fashion. Although--mindful of the fact that he is proceeding pro se--we have attempted to apply a liberal construction to Perryman's brief, we note that it is the rule of this court that "[i]ssues not briefed, or set forth in the list of issues presented, are waived." Atwood v. Union Carbide Corp., 847 F.2d 278, 280 (5th Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1079, 109 S. Ct. 1531 (1989).

(2) these issues were actually litigated in the prior action; and
(3) the determination of the issue in the prior action was a critical and necessary part of the resulting judgment.

Terrel v. DeConna, 877 F.2d 1267, 1270 (5th Cir. 1989). To apply the doctrine of issue preclusion, "[c]omplete identity of parties in the two suits is not required." Id.

Judgment in Perryman's 1983 action was rendered by a court of competent jurisdiction, and that judgment--an order granting defendants' motion to dismiss--constitutes a final judgment on the merits. As for the same parties and same cause of action requirements of res judicata, in his 1983 cause of action, Perryman brought suit against the United States Department of Labor and Office of Personnel Management seeking to have his FECA benefits reinstated or his annuity rights restored under the CSRA. That suit was dismissed because (1) Perryman chose to withdraw his benefits under the CSRA[3] and (2) termination of FECA

[3] The irrevocability of such withdrawals is expressly established under 5 U.S.C. §§ 8342(a), 8334(d).

benefits is not subject to judicial review.[4] Perryman never appealed from that dismissal.

In Perryman's present action, he again seeks reinstatement of his FECA benefits, and he has again brought suit against the United States Department of Labor and the Office of Personnel Management. The only difference is that, in this second action, he has also named individuals in their official capacities as defendants,[5] and he has added what may be perceived as additional claims.

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[4] Claims against the Department of Labor must be brought under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101, et. seq., which provides for the payment of compensation to employees of the United States who, subject to certain exceptions, are disabled in the performance of duty. See 5 U.S.C. § 8102. This Act, which is administered by the Secretary of Labor through the OWCP, constitutes the exclusive remedy against the United States for such employment-related injuries. See 5 U.S.C. § 8116(c) ("The liability of the United States or an instrumentality thereof . . . under this subchapter . . . is exclusive and instead of all other liability of the United States or the instrumentality . . . .). In fact, section 8128(b) explicitly provides that:

> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is--
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> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and,
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> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b) (emphasis added); see Owens v. Brock, 860 F.2d 1363, 1367 (6th Cir. 1988) ("Except for cases alleging that the Secretary violated a claimant's constitutional rights or exceeded the scope of his congressional mandate, courts have unanimously held that section 8128(b) prohibits judicial review of FECA benefit determinations."). We note that Perryman exercised his right to appeal the OWCP termination of his benefits to the ECAB, and that the ECAB affirmed the OWCP's determination.

[5] See supra note 1.

In short, although it is somewhat bulkier and messier the second time around, Perryman has brought the same cause of action--an action that is still based upon a determination not subject to judicial review.[6] To the extent that Perryman has attempted to raise additional causes of action, we find that they are claims that "`could have been' advanced in support of the cause of action on the occasion of its former adjudication[,]"[7] and, as such, they are barred by the doctrine of res judicata. Finally, Perryman has not circumvented the doctrine of res judicata by alleging a violation of due process. As we stated in Equitable Trust Co. v. Commodity Futures Trading Co., 669 F.2d 269, 273 (5th Cir. 1982) (internal quotation omitted), when comparing a prior complaint with another that was before us,

> the constitutional allegations here are mere verbiage, made solely for the purpose of obtaining jurisdiction. . . . [Perryman's due process claim] is no more than a claim of a constitutional entitlement to a judicial review of agency action. Indeed the allegations of harm in the two complaints are virtually identical.

Moreover, in a case similar to Perryman's, we held that:

> The primary right, duty, and wrong in the constitutional claims are the same as those in the previous action seeking judicial review of the Secretary's denial of benefits. Also, the Secretary's improprieties giving rise to Thibodeaux's

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[6] See supra note 4.

[7] See Uithoven v. United States Army Corp. of Engineers, 884 F.2d 844, 847 (5th Cir. 1989), citing Nilsen v. Moss Point, 701 F.2d 556, 560 (5th Cir. 1983) (en banc); see also Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir.), cert. denied, 423 U.S. 908, 96 S. Ct. 210 (1975) ("Looking beyond the pleadings to what could have been pleaded is precisely what is required by the federal law of res judicata.").

> constitutional claims existed in 1968, thirteen years before Mrs. Thibodeaux filed her first action against the Secretary in federal court, and thus could have been asserted in the earlier litigation.

Thibodeaux v. Bowen, 819 F.2d 76, 80-81 (5th Cir. 1987) (internal citation omitted and emphasis added). Today, we again hold that the allegedly novel claims before us could have been brought in Perryman's previous action and, therefore, they are barred.

With the exception of his claims against Dr. Eades, which we address separately in Part II.B, we also find that, in comparing his two actions, Perryman has brought this action against the same entities--the United States Department of Labor and the Office of Personnel Management, both directly and through individuals acting in their official capacities as agents of these entities.[8] Even though we conclude that Perryman has not

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[8] As we held in Howell, 897 F.2d at 188:

> The identity of parties test is met not only as to parties to the earlier litigation, however, but also to those in privity with them. A non-party is in privity with a party for res judicata purposes . . . if the party adequately represented his interests in the prior proceeding.

Although in Howell we determined that the doctrine of res judicata did not bar the plaintiff's claims, we distinguished another case decided by this court which more closely resembles the case at issue:

> In Lubrizol v. Exxon, 871 F.2d 1279 (5th Cir. 1989), three Exxon employees asserted res judicata as a defense to claims in a subsequent suit that were the same as claims settled in an earlier suit to which Exxon was a party. This court found the claims against the employees barred because they could have been raised in the earlier proceeding, and because the entire basis for Exxon's alleged liability in the earlier suit was vicarious liability for the actions of the employees acting within the scope of their employment. Id. at 1288-89. The theory of liability and the relief sought were the same in both suits.

Howell, 897 F.2d at 183, 189 n.1.

succeeded in circumventing the doctrine of res judicata simply by adding a list of individual federal officials to his claims against the United States Department of Labor and the Office of Personnel Management, we also acknowledge that these individual-specific claims are for the most part barred by the doctrine of issue preclusion.

In sum, we find that Perryman's claims against the United States Department of Labor and the Office of Personnel Management involve the (1) same cause of action and (2) same parties which were the subject of his previous suit--a suit which the (3) district, a court of competent jurisdiction, (4) dismissed on the grounds that Perryman was appealing from a FECA determination not subject to judicial review. In short, all of the requirements of res judicata have been satisfied, and Perryman's action is barred by that doctrine. See Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990).

B

Dr. Eades examined Perryman for the OWCP in April 1981, and this was his only contact with Perryman; Dr. Eades never treated Perryman. To the extent that Perryman raises state law medical malpractice claims--the liberal construction given to Perryman's claims by the district court--against Dr. Eades, the applicable limitations period for such claims is two years. See TEX. REV. CIV. STAT. ANN. art. 4590i § 10.01 (Vernon 1992). Perryman did not bring these claims against Dr Eades until April 1990--nearly

nine years after Dr. Eades performed Perryman's examination.[9] Accordingly, we conclude that Perryman's claims against Dr. Eades are time-barred.

C

Perryman's final contention is that he was denied due process because of a conflict of interest on the part of Judge Prado. Specifically, Perryman contends that conflicts of interest resulted from the facts that (1) Judge Prado presided over Perryman's two lawsuits after serving as the United States Attorney for the Western District of Texas when Perryman initiated his original action, and that (2) Judge Prado presided over the present action after dismissing Perryman's original action.

A judge is required to disqualify him- or herself from a case if, as a government employee, he or she participated in the case as "counsel, adviser or material witness," or "expressed an opinion concerning the merits" of the case. 28 U.S.C. § 455(b)(3). Although a section 455(b) conflict generally cannot be waived, see 28 U.S.C. § 455(e),[10] this court has found that

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[9] We note that, although Perryman contends that the limitations period should not have started to run until the last time the OWCP denied his appeal on July 14, 1988, it is indisputable that Perryman was aware that his examination by Dr. Eades caused the termination of his disability benefits in May of 1981.

[10] The exception to this rule is that "[s]ection 455(a), which addresses appearances of impropriety, may be waived by the litigants if the judge fully and fairly apprises the parties of the reasons for the appearance of impropriety." United States v. York, 888 F.2d 1050, 1053 (5th Cir. 1989).

the policy undergirding section 455(b) supports a timeliness requirement. See York, 888 F.2d at 1053-55 ("Hence, we conclude that it is more consistent with the legislative purposes underlying the entirety of section 455 for us to construe both subsections (a) and (b) as requiring timeliness."); see also Stephenson v. Paine Webber Jackson & Curtis, Inc., 839 F.2d 1095, 1096 n.3 (5th Cir.) (under circumstances similar to those in the case before us, finding a section 455(b) issue waived where it was raised for the first time on appeal), cert. denied, 488 U.S. 926, 109 S. Ct. 310 (1988).

Perryman did not raise this section 455(b) issue in his first action even though he was represented by counsel and aware of Judge Prado's service as United States Attorney. Moreover, in the present action, he has raised it for the first time on appeal. In reviewing such a belated section 455 motion, we need not determine whether Perryman has waived this issue or whether we review his motion for plain error. See York, 888 F.2d at 1056.[11] Perryman's section 455 motion is untimely,[12] and

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[11] Although this court previously considered this very issue in York, we decided that case without employing a per se rule. See 888 F.2d at 1056. Specifically, we "acknowledge[d] that some courts will review a motion for disqualification for the first time on appeal under a plain-error rule, even if the parties did not raise the matter in the district court[,]" and acknowledged our suggestion in Stephenson, 839 F.2d at 1096 n.3, "that we will not entertain such a question raised for the first time on appeal." York, 888 F.2d at 1056. We then held that the motion for disqualification in that case was untimely and that York had failed to establish plain error.

[12] We note that Perryman also failed to object when Judge Prado presided over the hearing on Defendants' Motion to Dismiss or Grant Summary Judgment.

Perryman has failed to establish plain error. See id. In short, we find that Perryman's original lawsuit was properly dismissed because the termination of FECA benefits is not subject to judicial review, and there is no evidence in the record to support Perryman's contention that Judge Prado was in any way biased against him in either of his lawsuits.

III

For the foregoing reasons, we AFFIRM the district court's dismissal of Perryman's action.