

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41303

Summary Calendar

JAMES TUCKER,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF ARMY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(94-CV-409)

(May 16, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

James Tucker, proceeding *pro se* and *in forma pauperis*, filed suit against the United States Department of Army alleging deprivation of due process arising from his dismissal from Warrant Officer Candidate School. The district court dismissed Tucker's suit pursuant to Rule 12(b)(1) of the Federal Rules of

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Civil Procedure due to Tucker's failure to exhaust available administrative remedies. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 1990, Tucker enrolled in Warrant Officer Candidate School (WOCS) of the United States Army Reserves, in Fort McCoy, Wisconsin. Tucker was disenrolled from the course when he failed two Army Physical Fitness Tests (APFTs). The Army recommended that Tucker be given another opportunity to re-enroll in WOCS when he could achieve the scores necessary to pass the APFT.

Tucker re-enrolled in WOCS in April 1992. Unfortunately, however, Tucker injured his right leg when he stepped in a pothole while running. The injury to his leg caused Tucker to be disenrolled from WOCS once again.

On October 5, 1992, Tucker applied for incapacitation pay based upon the leg injury he received while at WOCS. The Army Finance and Accounting Office in Fort Riley, Kansas, recommended that Tucker's claim be denied because Tucker had failed to establish that the injury had caused lost wages from his civilian job as a carpenter. Tucker appealed this decision; his appeal was denied at several levels.

Tucker was next informed that he could seek relief from to the Army Board for Correction of Military Records (ABCMR), a civilian board appointed by the Secretary of the Army, which has statutory authority to "correct any [Army] record" if necessary

to "remove error or injustice." 10 U.S.C. § 1552(a). Rather than seeking relief from the ABCMR, however, Tucker instead instituted this civil suit against the Army, claiming that the Army's actions violated due process and seeking compensatory damages of \$150,000, punitive damages of \$150,000, promotion to the rank of Chief Warrant Officer (CW2) upon completion of WOCS, and incapacitation pay of \$17,000. On June 2, 1994, Tucker moved for a default judgment, alleging that the defendant had failed to file a timely answer. The district court denied the motion on grounds that the court had explicitly granted the defendant an extension of time to answer until July 5, 1994.

On June 28, 1994, Tucker filed an appeal to this court, alleging error in the district court's refusal to grant his motion for a default judgment. On August 31, 1994, we dismissed Tucker's appeal as interlocutory. The Army then filed a motion in the district court to dismiss Tucker's complaint for lack of subject matter jurisdiction, FED. R. CIV. P. 12(b)(1), or for failure to state a claim upon which relief could be granted, FED. R. CIV. P. 12(b)(6), or in the alternative, for summary judgment. FED. R. CIV. P. 56(c). The district court granted the motion to dismiss, without prejudice, on grounds that Tucker had failed to establish subject matter jurisdiction because he had failed to exhaust available administrative remedies. Tucker filed a timely appeal to this court. We affirm.

II. ANALYSIS

A. *Briefed Arguments.*

Although he expresses it in many different ways, Tucker's brief raises only one point of error-- namely, that the district court erred in denying his motion for default judgment. Tucker bases this argument on his belief that the magistrate judge exceeded his authority by granting the defendants an extension of time in which to answer. Since the magistrate judge did not have power to grant the defendants an extension of time in which to answer, Tucker argues, the district court should have granted his motion for a default judgment. We disagree.

Tucker's basis for contending that the magistrate judge exceeded his authority is Rule 72(b) of the Federal Rules of Civil Procedure. Rule 72(b) states that

[a] magistrate judge assigned *without consent of the parties* to hear a pretrial matter dispositive of a claim or defense of a party . . . shall promptly conduct such proceedings as are required. . . . Within 10 days after being served with a copy of the [magistrate judge's] recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. . . . The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

In the case at bar, the docket sheet reveals that on May 3, 1994, district court judge Donald E. Walter referred the defendant's motion for an extension of time in which to file an

answer to magistrate judge Roy S. Payne. On May 5, 1994, magistrate judge Payne granted the defendant's motion. On May 10, 1994, Tucker filed a untimely memorandum in opposition to the motion. Tucker never filed an objection to the magistrate judge's decision with the district court.

The district court has statutory authority to "designate a magistrate judge to hear and determine any pretrial matter pending before the court" 28 U.S.C. § 636(b)(1)(A). Furthermore, under the plain language of both 28 U.S.C. § 636(b)(1)(A) and Rule 72(a) of the Federal Rules of Civil Procedure,¹ the magistrate judge had authority to grant the defendant's motion to extend time (which is a nondispositive motion) without the necessity of obtaining either Tucker's or the defendant's consent. Accordingly, it was not error for the district court to refer the defendant's motion for an extension of time to the magistrate judge without Tucker's prior approval and it was not beyond the power of the magistrate judge to grant the motion. A fortiori, it was not error for the district court to deny Tucker's motion for a default judgment.

B. Motions.

Tucker attached four motions to his brief: (1) "Motion for Medical Treatment and Incapacitation Pay"; (2) "Motion for Appeal to be Heard by Three-Judge Panel"; (3) "Motion for Appeal to be

¹ Rule 72(a) of the Federal Rules of Civil Procedure governs nondispositive matters assigned to magistrate judges. Rule 72(b), by contrast, governs dispositive motions.

Heard on the Original Record"; and (4) "Motion for Hearing of Appeal on the Original Record Without the Necessity of an Appendix." We proceed to address each of these motions in turn.

A. *"Motion for Medical Treatment and Incapacitation Pay."*

Construing Tucker's *pro se* brief liberally, his first motion for medical treatment and incapacitation pay is tantamount to a challenge of the district court's dismissal based upon Tucker's failure to exhaust available administrative remedies. The district court determined that because Tucker had not filed a claim with the ABCMR and because an uncontroverted affidavit submitted by the Executive Secretary of the ABCMR indicated that the ABCMR has the power to grant the relief sought, Tucker had failed to exhaust available administrative remedies. Schlesinger v. Councilman, 420 U.S. 738, 756 (1974).

It is well-settled that a court should not review internal military affairs unless the plaintiff has both: (1) alleged a deprivation of a constitutional right or federal law by military personnel; and (2) exhausted all available intraservice corrective measures. Woodrick v. Hungerford, 800 F.2d 1413, 1416 (5th Cir. 1986), cert. denied, 481 U.S. 1036 (1987); Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971). Where an Army plaintiff has a right to review from the ABCMR, he must avail himself of the ABCMR's review before federal courts may exercise jurisdiction, unless the plaintiff can prove that one of the recognized exceptions to the exhaustion doctrine applies. See Von Hoffburg v. Alexander, 615 F.2d 633, 638 (5th Cir. 1980)

(noting that ABCMR is may provide administrative remedy in Army discharge action and cataloguing exceptions to the exhaustion doctrine); cf. Holdiness v. Stroud, 808 F.2d 417, 426 (5th Cir. 1987) (noting that, in a Bivens discharge case, plaintiff had not availed himself of ABCMR review and therefore court should not permit private action remedy).

In the case at hand, Tucker has not yet attempted to obtain relief from the ABCMR, nor has he attempted to establish that his case falls within one of the exceptions to the exhaustion doctrine. Accordingly, he has failed to exhaust his administrative remedies and the district court did not err in dismissing Tucker's claim for incapacitation pay for a lack of subject matter jurisdiction.

B. Motions for "Appeal to be Heard by Three-Judge Panel," for "Appeal to be Heard on the Original Record," and for "Hearing of Appeal on the Original Record Without the Necessity of an Appendix."

Tucker filed a motion, attached to his brief, asking this court to hear his appeal as a three-judge panel pursuant to 28 U.S.C. § 46(b). The hearing of cases in the Court of Appeals is normally conducted in three-judge panels, as is this case. Because we are deciding this case in the usual three-judge panel format, Tucker's motion in this regard is denied as moot.

Tucker also asks this court to hear his appeal on the original record without the necessity of reproducing any parts thereof pursuant to Rule 24(c) of the Federal Rules of Appellate Procedure. Again, as this court has already granted Tucker the

right to proceed *in forma pauperis*, and has heard his appeal without the necessity of reproducing any parts of the record, Tucker's motion in this regard is likewise denied as moot.

Tucker's final motion asks this court to permit his appeal on the original record without the necessity of an appendix. Pursuant to Local Rule 30.1, this court does not require the filing of an appendix, but instead permits the filing of record excerpts in lieu of the appendix prescribed in Rule 30 of the Federal Rules of Appellate Procedure. As Tucker has provided this court with record excerpts, this motion is denied as moot.

III. CONCLUSION

For the foregoing reasons and treating Tucker's motion for incapacitation pay as a challenge to the merits of the district court's judgment regarding his failure to exhaustion available administrative remedies, the judgment of the district court is **AFFIRMED**. Tucker's remaining motions are **DENIED** as **MOOT**.