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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION REGARDING APA MEDICAL CARE CLAIM

Complaint filed January 7, 2009

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT, pursuant to Civil Local Rule 7-9(a), Plaintiffs respectfully move for leave to file the attached Motion for Reconsideration of this Court's July 24, 2013 Order Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Defendants' Motion for Summary Judgment. (Docket No. 537.)

This motion is based on this notice and motion, as well as the memorandum of points and authorities that follows. A proposed order and proposed motion for reconsideration regarding Plaintiffs' medical care claim pursuant to the Administrative Procedures Act is filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs respectfully request that the Court grant them leave to file the enclosed motion for reconsideration, asking the Court to reconsider its Order concerning Defendants' motion for summary judgment as to Plaintiffs' medical care claim under the Administrative Procedures Act ("APA"). (Docket No. 537 ("Order") at 47-52.) Pursuant to Civil Local Rule 7-9(b), Plaintiffs respectfully submit that the ground for this motion is the Court's manifest legal errors with respect to its findings that (1) "sovereign immunity has not been waived" as to Plaintiffs' claim for medical care from the Army, pursuant to the APA, and that (2) Plaintiffs have an "adequate alternative remedy" through the DVA. (Order at 47-52.)

As explained in greater detail in the proposed motion for reconsideration, the Court's rulings directly conflict with the language of 5 U.S.C. § 702 (the APA sovereign immunity waiver statute), the Supreme Court's ruling in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), and the Court's January 19, 2010 Order. Section 704 of the APA, upon which the Court basis its finding of no waiver of sovereign immunity, does not restrict section 702's waiver of sovereign immunity. *See, e.g., Trudeau v. FTC*, 456 F.3d 178, 186-87 (D.C. Cir. 2006). Section 704 simply codifies the requirement that a plaintiff must exhaust *internal* agency remedies before the agency action can be challenged through an APA cause of action.

In addition, the "adequate remedy" the Court points to, namely that "the class members can seek medical care [from] DVA and challenge any denial of care through the statutory scheme prescribed by Congress" (Order at 52), is not a remedy that can redress Plaintiffs' injury — that the Army is failing to follow its regulation. *See Sackett v. Envtl. Prot. Agency*, __ U.S. __, 132 S.Ct. 1367, 1372 (2012). The fact that the DVA — an altogether different agency — has its own internal procedures by which veterans can seek review of DVA compensation decisions is not relevant to the question of whether the Army's failures are properly subject to judicial review. The Court's Order incorrectly raises Plaintiffs' burden under the APA by requiring Plaintiffs to prove there is no other source available from which a plaintiff might obtain what the defendant agency was legally obligated to provide.

CONCLUSION

For the foregoing reasons, and as explained in greater detail in the proposed motion for reconsideration, Plaintiffs respectfully ask the Court to grant their motion for leave to file a motion for reconsideration.

Dated: August 5, 2013

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*, Plaintiffs, v. CENTRAL INTELLIGENCE AGENCY, *et al.*, Defendants.	Case No. CV 09-0037-CW **PLAINTIFFS' MOTION FOR RECONSIDERATION REGARDING APA MEDICAL CARE CLAIM** Complaint filed January 7, 2009

Pursuant to Civil Local Rule 7-9(a), Plaintiffs respectfully seek reconsideration of the Court's July 24, 2013 Order Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Defendants' Motion for Summary Judgment. (Docket No. 537 ("Order").) In particular, Plaintiffs ask the Court to reconsider its Order concerning Plaintiffs' medical care claim pursuant to the Administrative Procedures Act ("APA"). (Order at 47-52.)

The Court ruled that Plaintiffs cannot sue the Department of Defense ("DOD") and Army for the medical care promised under AR 70-25 because "sovereign immunity has not been waived." (Order at 52.) Relying on Section 704 of the APA, 5 U.S.C. § 704, the Court concluded there was no waiver because Plaintiffs may challenge only agency action "for which there is no other adequate remedy in a court." (*Id.* at 47.) According to the Court, there is such an "adequate remedy," namely that "the class members can seek medical care [from] DVA and challenge any denial of care through the statutory scheme prescribed by Congress." (*Id.* at 52.) As explained below, Plaintiffs respectfully submit that the Court's rulings — that sovereign immunity has not been waived and that Plaintiffs have some "other adequate remedy" to enforce the Army's legal obligations — are manifest legal errors.

I. ARGUMENT

The Court's Order is in direct conflict with the language of 5 U.S.C. § 702 (the APA sovereign immunity waiver statute), the Supreme Court's ruling in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), and the Court's January 19, 2010 Order. Section 704 of the APA is a separate statute requiring the exhaustion of internal agency remedies, and it does not restrict section 702's waiver of sovereign immunity. *See, e.g.*, *Trudeau v. FTC*, 456 F.3d 178, 186-87 (D.C. Cir. 2006).

A. APA Sovereign Immunity Waiver Requires Only that Plaintiffs Seek "Relief Other than Money Damages."

The plain language of the APA provides that sovereign immunity is waived in a case such as this. Section 702 is the APA's sovereign immunity waiver provision. It states, in pertinent part, that an action "seeking relief *other than money damages . . . shall not be dismissed nor relief*

therein be denied on the ground that it is against the United States . . . ." 5 U.S.C. § 702 (emphasis added). The purpose of this provision, as amended in 1976, was "to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases" that seek specific relief rather than monetary damages. *Bowen*, 487 U.S. at 891-92; *see also Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 524 (9th Cir. 1989) ("clear objective of the 1976 amendment was to waive sovereign immunity as a defense in actions seeking relief other than money damages").

Based on the language of section 702, then, the only relevant question concerning sovereign immunity is whether the relief sought is for "other than money damages." 5 U.S.C. § 702. Indeed, the D.C. Circuit has found that, "[e]ven construing § 702 'strictly,' . . . there is no doubt Congress lifted the bar of sovereign immunity in actions not seeking money damages." *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (*en banc*) (citations omitted). The Supreme Court in *Bowen*, adopting Judge Bork's analysis of APA legislative history, explained: "'both [House and Senate] Reports go on to say that the time [has] now come to eliminate the sovereign immunity defense in *all equitable actions for specific relief* against a Federal agency. . . .'" *Bowen*, 487 U.S. at 899 (quoting *Md. Dep't of Human Resources v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1447 (D.C. Cir. 1985) (internal quotations omitted; emphasis and second brackets in original)); *see also* H.R. Rep. No. 94-1656, at 6124 (1976) ("[The amendment to section 702] would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus.").

The Court explained this well in its January 19, 2010 Order: "Under 5 U.S.C. § 702, . . . sovereign immunity is waived 'in all actions seeking relief from official misconduct except for money damages.' The Presbyterian Church v. United States, 870 F.2d 518, 525 (9th Cir. 1989); see also Rosemere Neighborhood Ass'n v. U.S. EPA, 581 F.3d 1169, 1172 n.2 (9th Cir. 2009) ('Section 702 waives the government's sovereign immunity for actions, such as this one, that seek injunctive relief.')." (Docket No. 59 at 6-7.) A plaintiff can rely on the APA's waiver of sovereign immunity even for non-APA causes of action, regardless of whether the remaining

elements of the APA are satisfied. *See, e.g.*, *Presbyterian Church*, 870 F.2d at 524 (waiver of sovereign immunity in section 702 is not constrained by the substantive elements of an APA claim); *Trudeau*, 456 F.3d at 185-87 (collecting cases and finding that the APA's section 702 waiver of sovereign immunity applied *regardless* of the review standards of section 704).

Plaintiffs seek specific relief, not money damages or substitute relief. This Court has held as much on three occasions, including in this same Order: Plaintiffs' medical care claim is for specific equitable relief, not one for money damages. (*See* Order at 44-47; *see also* Docket No. 485 (Class Cert. Order) at 27 ("Plaintiffs' injury could not be fully remedied by money damages").) The Court need not go any further. There is a waiver of sovereign immunity pursuant to section 702 because Plaintiffs' claim against the Army for medical care is "[a]n action in a court of the United States seeking relief other than money damages."[1] 5 U.S.C. § 702; *see, e.g.*, *Doe v. Hagee*, 473 F.Supp.2d 989, 999 (N.D. Cal. 2007) (The APA's "waiver of sovereign immunity applies in 'all actions seeking relief from official misconduct except for money damages'" (quoting *Presbyterian Church*, 870 F.2d at 525)). To the extent the Court relies on section 704 of the APA to reinstate the sovereign immunity that section 702 expressly waives for this type of case, that reliance was manifest error.

B. Section 704 Merely Codifies the Requirement that Plaintiffs Exhaust Internal Remedies at the Specific Agency Whose Action Is Being Challenged.

As the Supreme Court has found, "the primary thrust of § 704 was to codify the exhaustion requirement."[2] *Bowen*, 487 U.S. at 903; *see also Glisson v. United States Forest*

[1] The Court cited *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641 (9th Cir. 1998). (Order at 47.) But *Tucson Airport* turned on section 702 not being satisfied to establish waiver of sovereign immunity, not on an analysis of section 704. *See* 136 F.3d at 646-47 (holding "that the APA does not waive sovereign immunity" because the plaintiff's claim based in contract was impliedly forbidden). The panel also discussed two distinct concepts: "the presence or absence of an adequate remedy within the meaning of § 704, and the requirement that a cause of action not be 'impliedly forbidden' under § 702." *Id.* at 646 (determining that the plaintiff did "not have an adequate remedy elsewhere"). The panel in *Tucson Airport* did not address or cite *Presbyterian Church*.

[2] The full text of section 704 is as follows: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise

(Footnote continues on next page.)

Serv., 55 F.3d 1325, 1326 (7th Cir. 1995) (Posner, J.) ("Exhaustion of administrative remedies is a doctrine . . . now codified in cases governed by the Administrative Procedure Act . . . , 5 U.S.C. § 704-under which a court asked to invalidate an administrative order will stay its hand until the plaintiff has exhausted whatever *internal remedies* the agency provides." (internal citations omitted; emphasis added)).

The Ninth Circuit has previously rejected the government's argument that section 702's sovereign immunity waiver is limited by the exhaustion requirement. In *Presbyterian Church*, it reversed the district court's decision that sovereign immunity barred the church's suit for declaratory and injunctive relief. 870 F.2d at 524-26. The Court drew the sharp distinction between exhaustion and sovereign immunity in explaining that the suit could go forward under section 702. *Id.* at 526. It explained Congress's conclusion embodied in the APA that "[t]he need to channel and restrict judicial control over administrative agencies . . . could be better achieved through doctrines such as . . . exhaustion . . . rather than through 'the confusing doctrine of sovereign immunity.'" *Id.* at 524 (citation omitted).[3]

There is no issue of exhaustion here because there is nothing for Plaintiffs to exhaust. As Plaintiffs have argued, and Defendants have never disputed, there is no internal Army procedure available by which Plaintiffs can challenge the Army's failure to provide medical care pursuant to AR 70-25. (*See* Order at 53; Docket No. 495 at 43.) Because there is no internal remedy

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(Footnote continued from previous page.)

expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704.

[3] In *Gallo Cattle Co. v. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998), the Ninth Circuit considered a challenge to an agency order denying plaintiffs preliminary relief while they adjudicated the merits of their petition before an administrative board. The panel stated that section 702's sovereign immunity waiver has "limitations," and suggested section 704 is one of them. But the panel ultimately determined plaintiff's action was not subject to *judicial review* because the agency's denial of interim relief did not constitute "final agency action" under section 704. *Id.* at 1200. The decision was based on lack of subject matter jurisdiction, *not* sovereign immunity. And the panel did not purport to reject the distinction drawn by the Court earlier in *Presbyterian Church*.

available at the Army — either created by Congress or otherwise — to challenge the Army's failure to act, there is no remedy that Plaintiffs must exhaust before an action can be brought under the APA. *See Bowen*, 487 U.S. at 902 (noting that administrative law scholar Professor Davis concluded "§ 704's bar to judicial review of agency action when there is an 'adequate remedy' elsewhere [is] merely a restatement of the proposition that '[o]ne need not exhaust administrative remedies that are inadequate'" (quoting K. Davis, Administrative Law, § 26:12, p. 468 (2d ed. 1983))); *cf. Cohen*, 650 F.3d at 733 ("it is 'improper to impose an exhaustion requirement' when the allegation is that the 'administrative remedy furnishes no effective remedy at all'" (quoting *McCarthy v. Madigan*, 503 U.S. 140, 156 (1992) (Rehnquist, J., concurring))).

The fact that the DVA — an altogether different agency — has its own internal procedures by which veterans can seek review of DVA compensation decisions is not relevant to the question of whether the Army's failures are properly subject to judicial review. Certainly, Defendants have never contended that DVA internal procedures have to be exhausted before the Army's failure could be subject to judicial review. And section 704 does not so require.

Indeed, when Congress enacted section 704, "it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to *specific agencies*." *Bowen*, 487 U.S. at 903 (emphasis added). In fact, section 704 "'does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.'" *Id.* (quoting Attorney General's Manual on the Administrative Procedure Act 101 (1947)). The text of section 704 makes clear that it is the specific agency's own internal remedies that must be exhausted, or upon which the Court must weigh their adequacy if not exhausted, that is relevant. It does not follow that a plaintiff must exhaust administrative remedies against one agency by proceeding against another, as this Court's Order requires. The "other adequate remedy" under section 704 must be against the wrongdoing agency that issued the "agency action" being challenged.

Accordingly, the only remedy available in a court to redress *the Army's* failure to follow AR 70-25 is through an action in district court. There is no specific review procedure available within the Army for the Court to even consider as adequate or not. The Army's failure to act is

considered final agency action under the APA, *see* 5 U.S.C. § 551(13), and therefore, is reviewable pursuant to section 704.[4]

C. The Potential Availability of Medical Care from DVA Is Not a "Remedy" to Plaintiffs' Injury Caused by the Army's Failure to Follow AR 70-25.

The injury Plaintiffs seek to remedy is the Army's failure to abide by its own regulations' requirement that it provide medical care. That injury can be remedied only by requiring the Army to follow its own regulation. That DVA — if a class member is honorably discharged, can establish a service-connection for a particular condition, and then is placed in an appropriate priority level — may be obligated to provide that class member with medical care that would obviate the need for Army medical care required by AR 70-25 is irrelevant to the injury that class members here seek to remedy. As the Supreme Court has recently reasoned, "[t]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency. The Government, to its credit, does not seriously contend that other available remedies alone foreclose review under § 704." *Sackett v. Envtl. Prot. Agency*, __ U.S. __, 132 S.Ct. 1367, 1372 (2012).

The reasoning of the D.C. Circuit in *Coker v. Sullivan*, cited in this Court's Order, also supports the same conclusion. In *Coker*, the plaintiffs sued the Department of Health and Human Services ("HHS") as a way to indirectly "cure their state-created injuries." *Coker v. Sullivan*, 902 F.2d 84, 90 (D.C. Cir. 1990). The court reasoned that "[a]ctions directly against the states are not merely adequate; they are also more suitable avenues for plaintiffs to pursue the relief they seek. The states are the immediate cause of the injuries . . . ; these plaintiffs ask HHS not to refrain from harming them but rather to cure their state-created injuries." *Id.* Similarly, the injury Plaintiffs seek to remedy concerning medical care is being caused *by the Army*, not by DVA or any other agency. It is the Army's failure to follow its own regulation that is causing Plaintiffs'

[4] There is no dispute that the Army's failure to act to provide medical care pursuant to AR 70-25 qualifies as final agency action. The Army has made clear that it does not believe it has a duty under AR 70-25 to provide medical care to class members, admitted that it has not provided such medical care, and has no intention of doing so. (*See* Docket No. 495 at 36-39.)

injury. DVA's separate system to provide compensation and medical care for service-connected injuries is irrelevant.[5] Moreover, to the extent the Court is requiring Plaintiffs to look beyond the agency that has failed to fulfill its legal obligation — and prove there is no other available source from which they might obtain what the defendant agency was legally obligated to provide (*see* Order at 49-52) — the Court has erroneously raised the burden for plaintiffs to satisfy the section 704 finality requirement.

D. The Court's Order Is Contrary to the Purpose of the APA.

The Court's Order runs contrary to the purpose of the APA. As its legislative history reflects, the APA judicial review provision was designed to allow "[a]ny person suffering legal wrong because of any agency action . . . [to be] entitled to judicial review." S. Rep. No. 752, at 212 (1945) (italics omitted); *see also* H.R. Rep. No. 1980, at 1205 (1946) (The APA "sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong (sec. 10)."). The Supreme Court in *Bowen* warned that section 704, which "was intended to avoid such duplication [of procedures,] should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." 487 U.S. at 903. The Court emphasized that a "restrictive interpretation of § 704 would unquestionably . . . 'run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes . . . ." *Id.* at 904 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)); *accord Cohen*, 650 F.3d at 734 (quoting same: "allowing judicial review of Appellants' APA suit is consistent with the APA's underlying purpose — 'remov[ing] obstacles to judicial review of agency action'" (brackets in original)).

Despite holding that AR 70-25 has the force of law and is enforceable against the Army (Order at 26-27), this part of the Court's Order has the effect of rendering the medical care provision of the Army's regulation a nullity and making Plaintiffs' injury caused by the Army

[5] By contrast to the Army's obligation imposed by AR 70-25, the rationed system for DVA to provide medical care is constrained by its own specific statutory scheme and priority level system. (*See* Docket No. 519.) And, as a practical matter, the Plaintiff class representatives are not receiving DVA medical care for conditions caused by testing; it appears many absent class members are not as well. (*Id.*)

unredressable. The Court should follow the Supreme Court's decisions in *Bowen* and *Sackett*, as well as the D.C. Circuit's *en banc* decision in *Cohen*, to conclude that Plaintiffs may seek to remedy their injury and compel the Army to follow its own regulation. The possibility of obtaining that which one agency is legally obligated to provide from another agency has no effect on whether the wrongdoing agency's failure to fulfill *its own* legal obligations is subject to judicial review.

The Supreme Court has noted the strong APA "presumption of reviewability for all final agency action." *Sackett*, 132 S.Ct. at 1373. Indeed, the APA's "'generous review provisions' must be given a 'hospitable interpretation.'" *Bowen*, 487 U.S. at 904 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967)). Without this action through the APA, Plaintiffs have no other recourse to challenge the Army's failure to follow AR 70-25's medical care requirement. There is no other alternative remedy in a court for Plaintiffs to exhaust and no other way to redress the injury.

II. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to reconsider its decisions that sovereign immunity has not been waived and that Plaintiffs have an "adequate alternative remedy," and accordingly, to deny Defendants' motion for summary judgment with respect to Plaintiffs' APA medical care claim.

Dated: August 5, 2013

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By: /s/ Eugene Illovsky
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

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CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

[PROPOSED] ORDER GRANTING PLAINTIFFS LEAVE TO FILE MOTION FOR RECONSIDERATION REGARDING APA MEDICAL CARE CLAIM

Complaint filed January 7, 2009

Plaintiffs moved for leave to file a motion for reconsideration, asking the Court to reconsider its Order concerning Defendants' motion for summary judgment as to Plaintiffs' medical care claim under the Administrative Procedures Act ("APA"). (Docket No. 537 ("Order") at 47-52.)

The Court, having read and considered Plaintiffs' Motion for Leave, and finding good cause therefor, hereby GRANTS the Motion.

IT IS HEREBY ORDERED that Plaintiffs file their Motion for Reconsideration on or before _____, 2013.

IT IS SO ORDERED.

Dated: _____

_____
The Honorable Claudia Wilken
Chief District Judge, United States District Court
for the Northern District of California