IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GERALD A. LECHLITER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 03-098-KAJ
DONALD H. RUMSFELD, Honorable Secretary of Defense, DEPARTMENT OF DEFENSE, and THOMAS E. WHITE, Honorable Secretary of the Army,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Gerald A. Lechliter, 44 Harborview Road, Lewes, Delaware 19958, *Pro Se* Plaintiff.

Colm F. Connolly, Esquire, United States Attorney; Paulette K. Nash, Esquire, Assistant United States Attorney, United States Attorney's Office, 1007 N. Orange Street - Ste. 700, Wilmington, Delaware 19801; Counsel for Defendants.

Of Counsel: Lt. Col. Tara A. Osborn; Mjr. Gary P. Corn, U.S. Army Litigation Division, 901 N. Stuart Street - #400, Arlington, Virginia 22203

August 25, 2004
Wilmington, Delaware

JORDAN, District Judge

I. Introduction

Presently before me is a motion filed by The Honorable Donald H. Rumsfeld, Secretary of the Defense, the Department of Defense, and The Honorable Thomas E. White, Secretary of the Army (collectively the "Defendants") to dismiss the complaint for lack of subject matter jurisdiction, or, in the alternative, for summary judgment. (Docket Item ["D.I."] 12; "Defendants' Motion.") Also before me is *pro se* plaintiff Gerald A. Lechliter's ("Plaintiff") cross-motion for summary judgment (D.I. 14; "Plaintiff's Motion") and motion for reconsideration (D.I. 32) of the September 29, 2003 Memorandum Order denying Plaintiff's motion for continuance and limited discovery (D.I. 31). For the reasons that follow, Defendants' Motion will be granted, Plaintiff's Motion will be denied, and Plaintiff's motion for reconsideration will be denied as moot.

II. Background

On June 1, 1999, Plaintiff retired from the United States Army with more than twenty six years of active service. (D.I. 13 at Ex. 1.) On September 25, 2002, the Department of Veterans Affairs ("DVA") increased plaintiff's combined service-connected disability rating from 80 percent to 100 percent, with an effective date of May 1, 2001. (D.I. 5 at ¶ 2, Ex. A.) This change entitled Plaintiff to an increase in compensation under 10 U.S.C. § 1413 ("§ 1413")[1] from $100 to $300 per month. (*Id*. at Ex. H.) The Defense Finance and Accounting Service ("DFAS") initiated Plaintiff's §

[1]Effective January 1, 2004, § 1413 was repealed.

1413 pay of $300 per month on June 1, 2001.[2] (*Id*. at ¶ 8, Ex. B, Ex. H.) Plaintiff has been paid $300 a month from June 1, 2001 through the present. (*Id*. at Ex. H.)

On October 16, 2002, in an effort to recover § 1413 compensation for the month of May 2001,[3] plaintiff wrote DFAS a letter, pointing out that § 1413 states that a retiree is entitled to payment of § 1413 pay "for any month for which the retiree has a qualifying service-connected disability," and that Plaintiff had a "qualifying service-connected disability for the entire month of May 1, 2001." (*Id*. at ¶ 10.) On October 17, 2002, DFAS told Plaintiff that the effective date of the rating letter, May 2001, could not be used until the June 1, 2001 date was changed in the DVA Compensation and Pension Master Record Award Data M12 Sheet ("M12").[4] (*Id*. at ¶ 11, Ex. D.) Plaintiff sent DFAS a request for a legal opinion on October 18, 2002. (*Id*. at ¶ 12, Ex. E.)

---

[2]The Defendants assert that Plaintiff "was not entitled to, and has never received, a disability payment for the month of May, 2001." (D.I. 13 at ¶¶ 5, 7.) 38 U.S.C. §§ 3.31, states that "[r]egardless of VA regulations concerning effective dates or awards ..., payment of monetary benefits based on original, reopened, or increased awards of compensation, pension, dependency and indemnity compensation ..., may not be made for any period prior to the first day of the calendar month following the month for which the award became effective. However, beneficiaries will be deemed to be in receipt of monetary benefits during the period between the effective date of the award and the date payment commences for the purpose of all laws administered by the Department of Veterans Affairs except that nothing in this section will be construed as preventing the receipt of retired or retirement pay prior to the effective date of waiver of such pay in accordance with 38 U.S.C. 5305."

[3]In a letter to the National Veterans Legal Services Program dated November 5, 2002, Plaintiff argues that he's entitled to $200. (D.I. 2 at Ex. H.) Plaintiff states that he was already receiving disability pay of $100 a month, and the increased disability rating from 80 to 100 percent increased his § 1413 pay from $100 to $300, for a difference of $200. (*Id*.) Despite Plaintiff's statement in the November 5, 2002 letter that he's owed $200, Plaintiff seeks $300 in this action. (*Id*. at ¶ 16.)

[4](D.I. 2 at Ex. B.)

In a letter dated October 30, 2002, the Associate General Counsel of the Office of the General Counsel of the DFAS replied to Plaintiff and stated that, pursuant to the special compensation program administered by the Department of Defense ("DoD"),[5] "to be eligible for special compensation (or any increase thereto) for a given month, a retiree must be entitled to, and in receipt of DVA disability for that month based upon a rating at a qualifying level of disability." (*Id*. at Ex. F.) Accordingly, the Associate General Counsel stated that Plaintiff's "entitlement to an increase in the special compensation was effective June 2001, which was the first month that [he] was both entitled to and in receipt of, the increased DVA disability award." On November 5, 2002, Plaintiff sent a letter to the National Veterans Legal Services Program, addressing Chapter 62.[6] (*Id*. at ¶ 15, Ex. H.)

On January 21, 2003, Plaintiff filed a complaint (D.I. 1) pursuant to the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and the Administrative Procedures Act ("APA"), 5 U.S.C. 701 *et. seq*., seeking review of the final agency action denying him § 1413 pay. Plaintiff seeks $300 for the month of May 2001, a declaratory judgment that the Chapter 62 requirements for receipt of special compensation pay are contrary to § 1413 and that an otherwise qualified uniformed service retiree is entitled to § 1413 compensation from

---

[5]At the time DFAS initiated Plaintiff's § 1413 compensation, it was operating under interim program guidance because Department of Defense Financial Management Regulation ("DoDFMR") did not yet contain provisions addressing § 1413 payments. On October 15, 2002, DFAS published an Interim Change to the DoDFMR incorporating the interim program guidance and establishing § 1413 pay policy and procedures ("Chapter 62"). (D.I. 5 at Ex. G.)

[6]Plaintiff does not state whether the National Veterans Legal Services Program responded, or how the matter was concluded.

the effective date of the rating decision by the Secretary of Veterans Affairs, and costs. (*Id*. at 2.)

The Defendants argue that Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), or, in the alternative, that they are entitled to summary judgment in their favor. (D.I. 13 at 5.)

III. Standard of Review

Lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), may be raised at any time, it cannot be waived and the court is obliged to address the issue on its own motion, if the parties do not raise it. *Dow Chem. Co. v. Exxon Corp.,* 30 F. Supp. 2d 673, 689-690 (D. Del. 1988) (citing *Moodie v. Federal Reserve Bank of New York,* 58 F.3d 879, 882 (2d Cir. 1995)). Once jurisdiction is challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. *Id.* (citing *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 507 (2d Cir. 1994)). Under Rule 12(b)(1), the court's jurisdiction may be challenged either facially (the legal sufficiency of the claim) or factually (sufficiency of jurisdictional fact). Under a facial challenge to jurisdiction, the court must accept as true the allegations contained in the complaint. *See id.* Dismissal for a facial challenge to jurisdiction is "proper only when the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or ... is wholly insubstantial and frivolous.'" *Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, 1408- 1409 (3d Cir. 1991). Under a factual attack, however, the court is not "confine[d] to allegations in the [] complaint, but [can] consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction." *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997).

Pursuant to Federal Rule of Civil Procedure 56(c), a party is entitled to summary judgment if a court determines from its examination of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976). However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

To defeat a motion for summary judgment, Rule 56(c) requires the non-moving party to:

> do more than simply show that there is some metaphysical doubt as to the material facts ... In the language of the Rule, the non-moving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’ ... Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is ‘no genuine issue for trial.’

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Accordingly, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to deny summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

IV. Discussion

A. Jurisdiction

As discussed, Plaintiff claims that I have jurisdiction over this matter under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and the Administrative Procedures Act ("APA"), 5 U.S.C. 701 *et. seq*. Both the Little Tucker Act and the APA have been construed as waivers by the United States of sovereign immunity. *See Randall v. United States*, 95 F. 3d 339, 345 (4th Cir. 1996) (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *Bowen v. Massachusetts*, 487 U.S. 879, 891-892 (1988)).

The Defendant's assert that judicial review under the APA is "inappropriate where there exists some 'other adequate remedy in a court,'" namely the Tucker Act. (D.I. 13 at 7.) As the Fourth Circuit noted, "[t]he interplay between the Tucker Act and the APA is somewhat complicated and raises some significant issues of federal court jurisdiction. ... [T]he proper statutory framework for the district court's jurisdiction ... affects the appellate jurisdiction [of the Court of Appeals]."[7] *Randall*, 95 F.3d at 346.

The APA provides that a person who claims to have suffered a legal wrong because of agency action is entitled to judicial review of that action. 5 U.S.C. § 702. The waiver of sovereign immunity in the APA is limited to suits seeking relief "other than money damages." In addition, review under the APA is available only for "final agency action for which there is no other adequate remedy in a court."[8] 5 U.S.C. 704. "This

---

[7]"The United States Court of Appeals for the Federal Circuit, not the regional courts of appeals, has exclusive jurisdiction over appeals based 'in whole or in part' on the Tucker Act." *Randall*, 95 F. 3d 346.

[8]Plaintiff claims that he has "exhausted administrative remedies within the agency." (D.I. 5 at ¶ 5.) Given that Plaintiff has alleged nothing more than writing letters to the Office of the General Counsel of DFAS and the National Veterans Legal Services Program, I find this statement questionable. However, the Defendants do not raise the issue of final agency action.

limitation has been interpreted to preclude review under the APA when a plaintiff has an adequate remedy by suit under the Tucker Act." *Randall*, 95 F.3d at 346 (citing *Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1230 (5th Cir. 1976); *Bowen*, 487 U.S. at 901 n. 31 (1988)). "Therefore, to determine whether Plaintiff's suit is cognizable under the APA, the court must first examine whether he has an available remedy under the Tucker Act." *Id*. The Tucker Act consists of two parts: 28 U.S.C. § 1491, and 28 U.S.C. §1346(a)(2), the latter of which is known as the Little Tucker Act. *Randall*, 95 F. 3d at 346.

The Little Tucker Act provides that the district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims for:

> civil action[s] or claim[s] against the United States, not exceeding $10,000 in amount, 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. §1346(a)(2). "Although the actual language of the Tucker Act does not specifically prohibit the Court of Federal Claims from issuing injunctive relief, the United States Supreme Court has recognized, as a general rule, that "the Court of [Federal] Claims has no power to grant equitable relief." *Randall*, 95 F.3d at 347 (quoting *Richardson v. Morris*, 409 U.S. 464, 465 (1973)).[9]

---

[9]The Fourth Circuit also explained that the Tucker Act, under 28 U.S.C. § 1491(a)(2), authorizes courts to award injunctive relief in limited circumstances, when such relief is necessary to provide an entire remedy and when the injunction is "an incident of and collateral to" an award of monetary relief. *Randall*, 95 F.3d at 347. However, the Fourth Circuit also noted that this language does not appear in the Little Tucker Act. *Id.* at 347 n.9.

Plaintiff argues that his request for $300 is not damages, but rather money which he is entitled by statute. (D.I. 15 at 11.) Plaintiff further states that "[t]he sum itself is negligible in comparison with the declaratory, injunctive relief in his prayer for relief." (*Id*.) Therefore, according to Plaintiff, because his claim is equitable, it falls under the APA, not the Little Tucker Act." (*Id*. at 13-14) (citing *Zellous v. Broadhead Assocs.*, 906 F.2d 94, 99 (3d Cir. 1990)). I agree.

In *Zellous*, the plaintiffs, who were former, present, and prospective Department of Housing and Urban Development ("HUD") tenants brought suit contending that they were forced to pay a higher share of their income as rent because of HUD's failure to make timely adjustment in their utilities allowances. *Id*. at 95. The plaintiff's requested declaratory, injunctive, and monetary relief, and, in the alternative, restitution. *Id*. The Third Circuit held that jurisdiction under § 702 of the APA was proper because the relief sought was not for money damages. *Id*. at 96-97 (stating that "[w]e believe our holding is mandated by *Bowen v. Massachusetts*, 487 U.S. 879 (1988)"). The Third Circuit "conclude[d] that [plaintiff's] seek only that to which they were entitled ... and thus the relief requested is 'other than monetary damages.'" *Zellous*, 906 F.2d at 99 (citing 5 U.S.C. § 702).

In *Bowen*, the Supreme Court distinguished actions at law for damages, which are intended to compensate the plaintiff for injury to person, property, or reputation, from equitable actions for specific relief, which include the recovery of specific monies. *Id*. at 893. The Supreme Court concluded that the plaintiff in that case did not seek money in compensation for the damages it had sustained, but only "to enforce the statutory mandate itself, which happens to be one for the payment of money. The fact

that the mandate is one for the payment of money must not be confused with the question whether ... [it] is a payment of money as damages or as specific relief." *Id.* at 900-901.

Following the direction of the Third Circuit in *Zellous*, as well as the direction of the Supreme Court in *Bowen*, I find that Plaintiff's claim for $300 and declaratory judgment is to enforce the statutory mandate of § 1413, which was in effect at the time Plaintiff filed suit. Because Plaintiff seeks specific relief for which he believes he was entitled, in other words, equitable relief, I find that the Tucker Act does not apply and hold that I have jurisdiction in this case pursuant to the APA, 5 U.S.C. 701 *et. seq*.

B. Summary Judgment

The district court's review of a final agency action under the APA is limited. *See Randall*, 95 F.3d at 348. The court may set aside the agency's action only if it finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Dougherty v. U.S. Navy Bd. For Correction of Naval Records*, 784 F.2d 499, 500 (3d Cir. 1986). The district court must also determine whether the agency's decision was supported by substantial evidence and whether the agency considered all of the proffered evidence. *Jarrett v. White,* No. 01-800-GMS, 2002 WL 1348304 at *6 (D. Del. June 17, 2002); *Mozur v. Orr,* 600 F. Supp. 772, 776 (E.D. Pa. 1985); *Smith v. Dalton,* 927 F. Supp. 1, 5 (D.D.C. 1996). The plaintiff has the burden of proving arbitrary and capricious behavior by providing "'cogent and clearly convincing evidence' and must 'overcome the presumption that military administrators discharge their duties correctly, lawfully, and in good faith.'" *Jarret*, 2002 WL 1348304 at *6 (citations omitted).

After carefully reviewing Plaintiff's allegations and the record, I find that the facts, taken in a light most favorable to the Plaintiff, cannot support a finding that the DoD, through the DFAS, acted arbitrarily or capriciously, or without substantial evidentiary support in denying Plaintiffs claim for $300 for the month of May 2001. DoD reasonably and properly interpreted the interim guidance that was in effect at the time regarding § 1413 compensation, now incorporated as Chapter 62, to apply only to those who are in actual receipt of DVA disability compensation. As documented on Plaintiff's M12, Plaintiff was in receipt of § 1413 pay in June 2001, and, in correspondence with that date, his § 1413 pay was commenced.

Additionally, because § 1413 has been repealed, Plaintiff's request for declaratory judgment is moot. *See Nextel Partners, Inc., v. Kingston Township*, 286 F.3d 687, 693 (3d Cir. 2002) ("a request for a declaratory judgment that a statutory provision is invalid is moot if the provision has been substantially amended or repealed"). Therefore, the Defendants' Motion will be granted and Plaintiff's Motion will be denied.

C. Motion for Reconsideration

Because the Defendants' Motion will be granted, Plaintiff's motion for reconsideration will be denied as moot.

V. Conclusion

Accordingly, for the reasons set forth herein, the Defendant's Motion (D.I. 13) will be granted, Plaintiff's Motion (D.I. 14) will be denied, and Plaintiff's Motion for reconsideration (D.I. 32) will be denied as moot. An appropriate order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GERALD A. LECHLITER, Plaintiff, v. DONALD H. RUMSFELD, Honorable Secretary of Defense, DEPARTMENT OF DEFENSE, and THOMAS E. WHITE, Honorable Secretary of the Army, Defendants.	)	Civil Action No. 03-098-KAJ

ORDER

For the reasons set forth in the Memorandum Opinion issued on this date,

IT IS HEREBY ORDERED that the Defendant's Motion for Summary Judgment (D.I. 12) is GRANTED, the Plaintiff's Cross-Motion for Summary Judgment (D.I. 14) is DENIED, and the Plaintiff's Motion for Reconsideration (D.I. 32) of the September 29, 2003 Memorandum Opinion (D.I. 31) is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

August 25, 2004
Wilmington, Delaware