IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

JEROME M. ENSMINGER, as Personal Representative of the Estate of JANE ENSMINGER, et al., Plaintiffs,	)	**No. 7:22-CV-00131-BO-RJ**
vs.	)	
UNITED STATES OF AMERICA, Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S 12(B)(1) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Plaintiff, Jerome M. Ensminger, files this Response to Defendant, the United States of America's, 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction. In support thereof, Plaintiff would respectfully show the Court as follows.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Defendant seeks dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, arguing that Plaintiff allegedly failed to comply with the administrative exhaustion requirement set forth in section 804(h) of the Camp Lejeune Justice Act (the "Act"). More specifically, Defendant argues that Plaintiff's prior notice of claim filed with the Department of the Navy before the Act's passage does not constitute compliance with section 804(h). Defendant's argument is unavailing, and the Motion should be denied.

Plaintiff hereby submits evidence regarding his previously filed Standard Form 95 notice with the Department of the Navy for the same claims asserted in this action related to Camp Lejeune contaminated water. Likewise, Plaintiff subsequently received

a rejection letter from the Department of the Navy as to those claims. As demonstrated more fully below, this notice and rejection constitute material compliance with section 804(h) of the Camp Lejeune Justice Act and 28 U.S.C. § 2675(a) incorporated therein. Indeed, applying the well-settled rules of statutory construction, nothing in the Camp Lejeune Justice Act requires that the administrative exhaustion requirement set forth in 28 U.S.C. § 2675(a) take place ***only after*** such Act became law. Further, such an interpretation would frustrate the purpose and intent of section 2675(a)—to give the government notice of potential claims. Accordingly, the Court should find that Plaintiff has satisfied section 804(h) of the Camp Lejeune Justice Act and deny Defendant's Motion.

EVIDENCE IN SUPPORT OF BRIEF

Plaintiffs attach true and correct copies of the following evidence:

Exhibit A — Declaration of Jerome M. Ensminger

Exhibit A-1 — Standard Form 95 of Jerome M. Ensminger dated October 30, 2002

Exhibit A-2 — Rejection Letter from the Department of the Navy to Jerome M. Ensminger dated March 19, 2019

ARGUMENT & AUTHORITIES

I. The Camp Lejeune Justice Act's Incorporation of 28 U.S.C. § 2675

As Defendant points out, section 804(h) of the Camp Lejeune Justice Acts states that "[a]n individual may not bring an action under this section before complying with section 2675 of title 28, United States Code." Pub. L. No. 117-168, § 804(h), 136 Stat. 1802 (2022). Section 2675(a) states, in pertinent part, that "[a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death . . . , unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the

agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). The accompanying federal regulations provide that a claim is presented "when a Federal agency receives from a claimant . . . an executed ***Standard Form 95*** or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death. 28 C.F.R. § 14.2(a) (emphasis added). Thus, a "claimant meets his burden [under section 2675] if the notice (1) is sufficient to enable the agency to investigate and (2) places a sum certain value on her claim." *Ahmed v. United States*, 30 F.3d 514, 517 (4th Cir. 1994) (internal quotations omitted).

II. The Evidence Demonstrates Plaintiff's Compliance with 28 U.S.C. § 2675 with Respect to the Claims Asserted in this Action

Plaintiff previously complied with 28 U.S.C. § 2675 as to the claims asserted in this action, and thus has also complied with section 804(h) of the Camp Lejeune Justice Act. First, Plaintiff submitted his Standard Form 95 notice of claims related to Camp Lejeune contaminated water to the Department of the Navy on October 30, 2002. Ex. A-1. Thereafter, he received a final written rejection of his claims from the Department of the Navy on March 19, 2019. Ex. A-2. Plaintiff's Standard Form 95 notice complied with section 2675 because (1) it was sufficient to enable the Department of the Navy to investigate (which it obviously did given the subsequent rejection letter); and (2) placed a sum certain value on the claim. *Ahmed*, 30 F.3d at 517; Exs. A-1.

III. The Plain Language of Section 804(h) Does Not Require that Compliance with 28 U.S.C. 2675 Take Place Only After the Camp Lejeune Justice Act Was Passed

Defendant contends that Plaintiff can comply with section 804(h) only if the requirements of 28 U.S.C. § 2675 are met *after* the Camp Lejeune Justice Act became law. But such an interpretation would violate both the long-standing rules of statutory construction and the purpose of section 2675.

The fundamental canon of statutory construction is that the words of a statute must be read in context and with a view to their place in the overall statutory scheme. *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 320 (2014). As the Fourth Circuit Court of Appeals has explained, "principal among the[] rules [of statutory construction] is that we determine, and adhere to, the intent of the legislature reflected in or by the statute being construed. As an initial and primary proposition, that intent is to be determined by the words in the statute." *Virginia Society for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 272 (4th Cir. 1998). "Any statutory analysis necessarily begins with the plain language of the statute. When the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *United States v. Searcy*, 880 F.3d 116, 126 (4th Cir. 2018). Thus, a court is "not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face." *United States v. Marine*, 155 F.2d 456, 458-59 (4th Cir. 1946). As the Supreme Court has stated, courts "may not narrow a provision's reach by inserting words Congress chose to omit *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725, 207 L. Ed. 2d 132 (2020).

The Camp Lejeune Justice Act of 2022, although it creates a new cause of action, utilizes many other statutes to obtain the legislative intent of providing for individuals injured by contaminated water at Camp Lejeune. For example, the Act uses the definition of "veteran" in 38 U.S.C. 101ma (§ 804(b)); makes use of the Medicare program in 42 U.S.C. 1395 (§804(e)(2)(A)(ii)) and Medicaid program in 42 U.S.C. 1396 (§804(e)(2)(A)(iii)) to define offsets to recovery under the Act; forbids the U.S. from claiming immunity that would be available under 28 U.S.C. 2680(a) (§ 804(f)); and requires compliance with 28 U.S.C. § 2675 before bringing an action under the Act (§804(h)). The mere fact that the Act uses pre-existing procedures for the implementation of this new cause of action does not create a "first things first" requirement for the simple reason that Congress did not

set that requirement in the statute. The only requirement relating to the procedure in 28 U.S.C. § 2675 is "complying with section 2675 of title 28, United States Code" as some time before "bring[ing] an action under this section." Nothing else.

Indeed, there is no requirement in the plain language of section 804(h) that a claimant must comply with 28 U.S.C. § 2675 *only after* the Camp Lejeune Justice Act became law. Such an interpretation would require the Court to add in the words "*after passage of this Act/section*" or "*after this Act/section became law*" to the end of section 804(h). But this would violate the primary rule of statutory construction and effect a purpose which does not appear on the face of the statute. *See Caldwell*, 152 F.3d 272; *Marine*, 155 F.2d at 458-59. If Congress wanted individuals bringing an action under the Act to wait until the Act was passed to file their claims under 28 U.S.C. § 2675, it would have said so. It did not.

Defendant's interpretation of section 804(h) and 28 U.S.C. § 2675 stands this basic rule of statutory construction on its head, requiring the court to insert words into the statute that are not there. Further, Defendant's reliance on a 2010 amendment to the Black Lung Benefits Act to support its tortured interpretation of section 804(h) is misplaced and unavailing. Indeed, the 2010 amendment in question had nothing to do with exhaustion of administrative remedies nor compliance with 28 U.S.C. § 2675. *See* Pub. L. No. 111-148, § 1556(c), 124 Stat. 119, 260 (2010). To the contrary, as the Fourth Circuit has explained, the 2010 amendment only addressed retroactive application of certain recalibrated eligibility requirements. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 381-82 (4th Cir. 2011).

Defendant's appeal to the legislative history of 28 U.S.C. § 2675 is equally erroneous. In the absence of ambiguity or absurdity in the plain language of a statute, reference to legislative history in the interpretation of that statute is inappropriate.

Stiltner v. Beretta U.S.A. Corp., 74 F.3d 1473, 1482 (4th Cir. 1996). Like section 804(h) of the Act, 28 U.S.C. § 2675 could not be more clear or unambiguous. A claimant satisfies the administrative exhaustion requirement before filing suit if he has "first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). As previously explained and shown by the evidence attached to this response, Plaintiff has met these requirements.

Further, Defendant's reliance on *McNeil v. United States*, 508 U.S. 106, 111-13 (1993) is misplaced. Indeed, *McNeil* is factually distinct from the present case because there the plaintiff did not file ***any*** notice of claim with the government pursuant to section 2675(a) prior to filing suit in federal court. *McNeil*, 508 U.S. at 107-08. Instead, the plaintiff filed his notice of claim after filing suit, and upon receiving the government's denial thereafter, argued that he had exhausted his administrative remedies and complied with section 2675(a) because he did so "before substantial progress was made in the litigation." *Id.* The Supreme Court rejected this argument based on the plain language of section 2675(a). *Id.* at 111-113. This Court should likewise reject Defendant's argument here based on the same plain language.

Finally, even if the legislative history of section 2675(a) is considered, Defendant's interpretation would not further the purpose of the statute. As one court has explained "the purpose of 28 U.S.C. § 2675(a) is to provide notice to the relevant federal agency of claims, ***not to put up a barrier of technicalities to defeat their claims.***" *Starr v. United States*, 262 F. Supp.2d 605, 607-08 (D.Md. 2003) (internal citations omitted) (emphasis added). Based on the attached Standard Form 95 and subsequent rejection letter, the Department of the Navy has been on notice of Plaintiff's claims related to Camp Lejeune water contamination for years, if not decades. Exs. A-1, A-2. Forcing Plaintiff to jump

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through that hoop again after passage of the Camp Lejeune Justice Act does nothing to give the United States any new notice of those claims, but instead only "put[s] up a barrier of technicalities." *Starr*, 262 F. Supp.2d at 607-08. As such, the Court should find that Plaintiff has complied with section 804(h) of the Camp Lejeune Justice Act and 28 U.S.C. § 2675(a).

CONCLUSION & PRAYER

WHEREFORE, Plaintiff, Jerome Ensminger, prays that the Court rule that he has complied with section 804(h) of the Camp Lejeune Justice Act and 28 U.S.C. § 2675(a). Plaintiff prays for such other and further relief to which he may be justly entitled.

Dated: October 19, 2022.