

**MEMORANDUM OPINION GRANTING MOTION TO DISMISS DUE TO LACK OF  
SUBJECT-MATTER JURISDICTION**

Presently before the Court is a motion to dismiss [9] filed by Defendant, United States of America (the “Government”), pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Upon due consideration, the Court finds the motion should be granted on Rule 12(b)(1) grounds, because the Court lacks subject-matter jurisdiction over the case.

*A. Factual and Procedural Background*

In the case *sub judice*, Plaintiff Norris JM Banks (“Plaintiff”) alleges that he injured his back while working at the North Chicago VA Medical Center on or around November 13, 2002, and thereafter filed a claim for compensation and medical benefits with the Department of Labor (“DOL”), Office of Workers’ Compensation Programs (“OWCP”), due to lumbar back strain, aggravation of lumbar stenosis, and aggravation of neurogenic claudication.<sup>1</sup> Plaintiff began receiving temporary total disability benefits pursuant to the Federal Employees’ Compensation Act (“FECA”) effective January 2, 2003.<sup>2</sup> Plaintiff avers that on or around April 3, 2007, Dr. Paul

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<sup>1</sup> See Pl.’s Compl. [1] ¶ 4; Def.’s Mot. Dismiss [9] at 4; Tritz Decl. [9-1] ¶ 4; DOL Employees’ Comp. Appeals Bd. Decision & Order [9-2] at 1–2; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 2.

<sup>2</sup> See Pl.’s Compl. [1] ¶ 4; Def.’s Mot. Dismiss [9] at 4; Tritz Decl. [9-1] ¶ 5; Payment History Inquiry R. [9-3] at 1; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 2.

Plaintiff alleges that “[a]fter [he] suffered more than a three-year loss of benefits and compensation,” the attorney who represented Plaintiff in the OWCP case filed a motion for reconsideration of that decision, because he discovered Dr. Barkhaus was employed by the Milwaukee Veterans Administration Medical Center, and “[u]nder OWCP rules, physicians who are employed by or who are associated with federal agencies are prohibited from serving as referee medical examiners.”<sup>5</sup> Plaintiff further maintains that “[u]pon consideration of said motion for reconsideration, OWCP determined that there was clear evidence on the part of OWCP in terminating [Plaintiff’s] benefits due to Dr. Barkhaus’ employment by the Veterans Administration Medical Center” and “affiliation with the Milwaukee Veterans Administration Medical Center” during “the time of [Dr. Barkhaus’] referee medical report to OWCP.”<sup>6</sup> It is undisputed that OWCP committed an error of its own procedures in relying on Dr. Barkhaus’ report

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<sup>3</sup> See Pl.’s Compl. [1] ¶ 5; Def.’s Mot. Dismiss [9] at 4; Tritz Decl. [9-1] ¶¶ 9–10; DOL Employees’ Comp. Appeals Bd. Decision & Order [9-2] at 3; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 3, 5.

<sup>4</sup> See Pl.’s Compl. [1] ¶ 6; Def.’s Mot. Dismiss [9] at 4; Tritz Decl. [9-1] ¶¶ 9–10; DOL Employees’ Comp. Appeals Bd. Decision & Order [9-2] at 3; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 6, 5.

<sup>5</sup> See Pl.’s Compl. [1] ¶ 7; Def.’s Mot. Dismiss [9] at 4–5; Tritz Decl. [9-1] ¶ 12; Pl.’s Request for Recons. to DOL/OWCP [9-4] at 1; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 7.

<sup>6</sup> See Pl.’s Compl. [1] ¶¶ 7–8; Def.’s Mot. Dismiss [9] at 5; Pl.’s Request for Recons. to DOL/OWCP [9-4] at 2; DOL/Office of Workers’ Comp. Programs Letter to Pl. [9-5] at 2; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 8, 5.

process of seeking reinstatement of his benefits, [he] accumulated legal expense[s] of \$32,551.05 and \$1,200.00 in out-of-pocket medications and medical expenses,” necessitating the taking out of a loan and an interest expense of approximately \$15,000.00.<sup>10</sup> Plaintiff also maintains that he “suffered other financial adversities resulting from the suspension of [his] benefits,” including his inability to afford health insurance, “the monthly cost of which rose from \$270.00 to \$800.00 during the suspension of [his] benefits,” as well as his inability to afford regular medication for his pain and suffering.<sup>11</sup>

Plaintiff maintains that he submitted a claim to DOL’s Employees’ Compensation Appeals Board (“ECAB”)/OWCP, Senior Claims Examiner, pursuant to 28 U.S.C. § 2675(a), for the alleged damages he sustained while pursuing the reinstatement of his benefits; the claim was sent

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<sup>7</sup> See Pl.’s Compl. [1] ¶ 8; Pl.’s Request for Recons. to DOL/OWCP [9-4] at 2; DOL/Office of Workers’ Comp. Programs Letter to Pl. [9-5] at 2; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 8, 5; Def.’s Reply Supp. Mot. Dismiss [18] at 3.

<sup>8</sup> See Pl.’s Compl. [1] ¶ 9; Def.’s Mot. Dismiss [9] at 5; Tritz Decl. [9-1] ¶ 13; DOL/Office of Workers’ Comp. Programs Letter to Pl. [9-5] at 2, 5; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 9, 5.

<sup>9</sup> The Government states that Plaintiff’s first payment was issued on October 8, 2010 for the period January 1, 2010 to September 25, 2010 in the amount of \$31,964.40; that payments were issued on October 23, 2010 for the period September 26, 2010 to October 23, 2010 in the amount of \$3,364.00; and that his last payment, as of the filing of the Government’s motion to dismiss, was issued for the period August 23, 2015 to September 19, 2015. The Government further states that as of September 19, 2015, Plaintiff has received a total of \$532,918.87 in temporary total disability compensation and \$23,631.95 in medical benefits, and that payments for the retroactive compensation for the period July 18, 2007 to December 31, 2009 were processed on December 13, 2010. See Def.’s Mot. Dismiss [9] at 5.

<sup>10</sup> See Pl.’s Compl. [1] ¶ 9; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 9.

<sup>11</sup> See Pl.’s Compl. [1] ¶ 10; Pl.’s Resp. Aff. & Br. Opp’n to Def.’s Mot. Dismiss [13] ¶ 10.

that the Government took no action on Plaintiff's submission. Plaintiff asserts that DOL's failure to make a final disposition of the claim for more than six months constitutes the agency's denial of his claim<sup>14</sup> (though he acknowledges the claim "never has been formally rejected"); subsequently, on May 15, 2015, Plaintiff filed this suit against the Government pursuant to 28 U.S.C. § 1346(b) of the Federal Tort Claims Act (the "FTCA").<sup>15</sup> Plaintiff seeks a judgment against the Government in the amount of \$200,000.00 for the legal and medical expenses allegedly incurred while Plaintiff sought the reinstatement of his benefits from July 18, 2007 (the date his benefits were terminated) until September 1, 2010 (the date his benefits were fully restored).<sup>16</sup>

In lieu of an answer, the Government has filed the present motion to dismiss [9] pursuant to Rule 12(b)(1) and Rule 12(b)(6). Plaintiff has filed a response, and the Government has filed a reply. The matter is now ripe for review. Because the Court finds that dismissal is proper on the Government's first argument for dismissal, that the Court lacks subject-matter jurisdiction to

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<sup>12</sup> See Pl.'s Compl. [1] ¶ 4; Pl.'s Resp. Aff. & Br. Opp'n to Def.'s Mot. Dismiss [13] at 6; Standard Form 95, Claim for Damage, Injury, or Death, to DOL ESA/OWCP [13-1] at 1-2.

<sup>13</sup> See Def.'s Mot. Dismiss [9] at 6. The Court notes that the Government incorrectly cites 29 C.F.R. § 15.4 in support of this statement; the correct supporting citation is 29 C.F.R. § 15.104.

<sup>14</sup> See Pl.'s Compl. [1] ¶ 4; Pl.'s Resp. Aff. & Br. Opp'n to Def.'s Mot. Dismiss [13] at 6.

<sup>15</sup> See Pl.'s Compl. [1] ¶¶ 1, 4.

<sup>16</sup> See *id.* ¶¶ 9-11.

jurisdiction by motion. Fed. R. Civ. P. 12(b)(1). A court must address a Rule 12(b)(1) jurisdictional challenge before addressing a challenge on the merits under Rule 12(b)(6). *Braatz, L.L.C. v. Red Mango FC, L.L.C.*, No. 15-10498, 2016 WL 1253679, at \*2 (5th Cir. Mar. 30, 2016) (per curiam) (citing *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)). Addressing Rule 12(b)(1) arguments first “prevents a court without jurisdiction from prematurely dismissing a case with prejudice.” *Ramming*, 281 F.3d at 161.

“Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims.” *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012) (citing *Kokkonen v. Guar. Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); *Stockman v. Fed. Election Comm’n*, 138 F.3d 144, 151 (5th Cir. 1998)). “Subject-matter jurisdiction. . . refers to a tribunal’s power to hear a case. It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.” *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 254, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) (internal quotation marks and citations omitted). “ ‘It is to be presumed that a cause lies outside [a federal court’s] limited jurisdiction, and the burden of establishing the

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<sup>17</sup> The Government’s other arguments not addressed by the Court in this opinion include the following: (1) pursuant to Rule 12(b)(1), this Court has no subject-matter jurisdiction over the claim for damages against the United States under the FTCA because FECA is Plaintiff’s exclusive remedy for an injury that occurred on the job under 5 U.S.C. § 8116(c); (2) pursuant to Rule 12(b)(1), this Court has no subject-matter jurisdiction to review this case because Plaintiff’s FTCA action is not based on a state law cause of action as required by 28 U.S.C. § 1346(b)(1); and (3) pursuant to Rule 12(b)(6), Plaintiff has failed to state a claim for relief because his FTCA administrative claim was filed outside of the FTCA’s statute of limitations set forth in 28 U.S.C. § 2401(b).

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