

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

PAVEL GOBERMAN,

Plaintiff,

v.

VIRGINIA WERTZ,

Defendant.

Case No. 3:14-322-SI

OPINION AND ORDER

Michael H. Simon, District Judge.

Plaintiff Pavel Goberman (“Goberman”), proceeding pro se, brings this action challenging the December 2013 decision by the Commissioner of Social Security (“Commissioner”) that as of December 1, 2013, Goberman had resources in excess of the statutory maximum and that, accordingly, the Social Security Administration (“SSA”) overpaid Goberman his entire monthly benefit of \$157. Defendant filed a motion to dismiss (Dkt. 12), arguing that the Court does not have jurisdiction because: (1) Goberman has not exhausted his administrative remedies; and (2) on May 19, 2014, Goberman received a favorable decision from an Administrative Law Judge (“ALJ”), finding that Goberman did not have excess resources as of December 1, 2013, and that Goberman was not overpaid \$157 in December 2013. Defendant’s motion to dismiss is GRANTED.

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“Federal courts are courts of limited jurisdiction” and there is a presumption “that a cause [of action] lies outside this limited jurisdiction[.]” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court may sua sponte dismiss a complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Fed. R. Civ. P. 12(h)(3); see *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011). “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004), cert. denied, 544 U.S. 1018 (2005); see *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 n.2 (9th Cir. 2003), cert. denied, 541 U.S. 1009 (2004). “In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone*, 373 F.3d at 1039.

A court must liberally construe the filings of a pro se plaintiff and afford the plaintiff the benefit of any reasonable doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). “Defective allegations of jurisdiction may be amended, upon terms, in trial or appellate courts.” 28 U.S.C. § 1653. “A pro se litigant must be given leave to amend his or her complaint unless it is ‘absolutely clear that the deficiencies of the complaint could not be cured by amendment.’” *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988) (quoting *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987), superseded on other grounds by statute as recognized in *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000)). Under Federal Rule of Civil Procedure 8(a)(2), however, every complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” This standard “does not require ‘detailed factual allegations,’” but does demand “more than an unadorned, the defendant-unlawfully-harmed-me accusation.”

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Id. (quoting Twombly, 550 U.S. at 555).

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be either “facial” or “factual.” See *Safe Air for Everyone*, 373 F.3d at 1039. A facial attack on subject matter jurisdiction is based on the assertion that the allegations contained in the complaint are insufficient to invoke federal jurisdiction. Id. “A jurisdictional challenge is factual where ‘the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.’” *Pride v. Correa*, 719 F.3d 1130, 1133 n.6 (9th Cir. 2013) (quoting *Safe Air for Everyone*, 373 F.3d at 1039)). When a defendant factually challenges the plaintiff’s assertion of jurisdiction, a court does not presume the truthfulness of the plaintiff’s allegations and may consider evidence extrinsic to the complaint. See *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012); *Robinson*, 586 F.3d at 685; *Safe Air for Everyone*, 373 F.3d at 1039. A factual challenge “can attack the substance of a complaint’s jurisdictional allegations despite their formal sufficiency.” *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996) (citation and quotation marks omitted).

Here, Defendant factually challenges Goberman’s assertion of jurisdiction and attaches documents demonstrating that Goberman both received a fully favorable decision from the ALJ and has not exhausted his administrative procedures before the SSA, rendering this Court without subject matter jurisdiction. Congress may prescribe the procedures and conditions under which the federal courts may review administrative decisions. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Further, “[u]nder settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the

terms of its consent to be sued in any court define that court's jurisdiction to entertain suit.” *United States v. Dalm*, 494 U.S. 596, 608 (1990) (second alteration in original) (citations and quotation marks omitted); *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996). “Where sovereign immunity is waived, any suit must comply with the terms of the statutory waiver of immunity.” *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

Congress has expressly provided the limited circumstances under which an individual may bring suit against the SSA, as follows:

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g). This provision is the sole jurisdictional basis for judicial review of any claim arising under the Social Security Act. 42 U.S.C. § 405(h).

Section 405(g) “clearly limits judicial review to a particular type of agency action, a ‘final decision of the [Commissioner] made after a hearing.’” *Califano v. Sanders*, 430 U.S. 99, 108 (1977); see *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th Cir. 2003). A final judgment consists of two elements: (1) “presentment of the claim to the Commissioner”; and (2) “complete exhaustion of administrative remedies.” *Kildare*, 325 F.3d at 1082; see *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1992).

Under the SSA's regulations, an individual who is dissatisfied with the SSA's initial determination must seek administrative reconsideration within 60 days, absent “good cause” for late filing. 20 C.F.R. § 416.1409. An individual dissatisfied with a reconsidered determination similarly must seek an administrative hearing within 60 days, absent “good cause” for late filing.

20 C.F.R. §§ 416.1430, 416.1433. An individual who remains dissatisfied after an administrative hearing decision must file a timely request for Appeals Council review of the decision. 20 C.F.R. §§ 416.1467-68. If such review is sought, the Appeals Council “will make a decision or remand the case to an administrative law judge” for further administrative proceedings. 20 C.F.R. § 416.1479; see also 20 C.F.R. § 416.1477(a) (“The Appeals Council may remand a case to an administrative law judge so that he or she may hold a hearing and issue a decision or a recommended decision. The Appeals Council may also remand a case in which additional evidence is needed or additional action by the administrative law judge is required.”). If the Appeals Council denies review of the hearing decision, or grants review and issues its own decision, the administrative review process is complete, and the claimant then may seek judicial review of an adverse decision. 20 C.F.R. § 416.1481.

Goberman’s Complaint is factually deficient for two reasons. First, after he received an unfavorable decision from the Commissioner, Goberman filed this action before he had appealed the unfavorable decision to the SSA. Concurrent with the litigation of this lawsuit, Goberman pursued his administrative appeal with the SSA and on May 19, 2014, Goberman obtained a fully favorable decision by the ALJ. Thus, Goberman successfully appealed to the Commissioner the unfavorable decision that he challenges in this lawsuit and there is no more case or controversy regarding the unfavorable December 2013 decision by the SSA.

Second, to the extent Goberman believes that there remains a disputed issue after the fully favorable May 19, 2014 decision by the ALJ, Goberman has not presented evidence that he appealed the May 19, 2014 decision to the Appeals Council and, thus, exhausted his administrative remedies. This Court does not have jurisdiction until Goberman has fully

exhausted his administrative remedies and there is a final decision by the Commissioner. See 20 C.F.R. § 416.1481; Kildare, 325 F.3d at 1082.

Defendant's motion to dismiss (Dkt. 12) is GRANTED. Because Goberman succeeded on his appeal to the SSA and does not have an unfavorable opinion to challenge, the Court finds that no amendment can cure the deficiencies in Goberman's Complaint and dismisses the Complaint with prejudice.

IT IS SO ORDERED.

DATED this 8th day of July, 2014.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge