

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6248

FREDERICK SELLERS,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. John Preston Bailey, District Judge. (2:15-cv-00079-JPB-RWT)

Submitted: June 20, 2017

Decided: June 23, 2017

Before SHEDD, WYNN, and DIAZ, Circuit Judges.

Affirmed in part, vacated in part, and remanded with instructions by unpublished per curiam opinion.

Frederick Sellers, Appellant Pro Se. Erin Carter Tison, Assistant United States Attorney, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Frederick Sellers appeals the district court's order dismissing his complaint. We have reviewed the record and find no reversible error. Accordingly, we deny Sellers' motion to appoint counsel and affirm for the reasons stated by the district court. *Sellers v. United States*, No. 2:15-cv-00079-JPB-RWT (N.D. W. Va., Feb. 16, 2017). However, because the district court, which lacked subject-matter jurisdiction over Sellers' complaint, dismissed Sellers' unnecessary surgery claim with prejudice, we vacate this portion of the judgment and remand the case with instructions to dismiss the claim without prejudice. *See S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013) (explaining that dismissal for lack of subject-matter jurisdiction must be without prejudice); *see also Robb v. United States*, 80 F.3d 884, 887 n.2 (4th Cir. 1996) (finding dismissal under independent contractor exception is dismissal for want of subject-matter jurisdiction).

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED WITH INSTRUCTIONS*