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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael A McCoy,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,
13 Acting Commissioner of Social Security,

14 Defendant.
15

No. CV-15-00344-PHX-DGC

ORDER

16 Defendant moves to dismiss this action for lack of subject matter jurisdiction
17 under Fed. R. Civ. P. 12(b)(1). Doc. 21. Plaintiff files a response. Doc. 22. No party
18 requests oral argument. The Court will grant the motion.

19 **I. Background.**

20 On August 17, 2010, Defendant denied Plaintiff's claim for disability insurance
21 benefits. *Id.* at 2. On December 9, 2011, at Plaintiff's reconsideration hearing, an
22 administrative law judge reversed and forwarded Plaintiff's claim for processing. *Id.* On
23 June 16, 2012, Defendant sent Plaintiff a Notice of Award informing him he was entitled
24 to disability insurance benefits. *Id.* Upon Plaintiff's request, Defendant conducted a
25 review of Plaintiff's benefits calculation. *Id.* On July 22, 2012 Plaintiff received notice
26 that upon review, Defendant found the first decision's calculation to be correct.. *Id.* The
27 July 22, 2012 notice also informed Plaintiff that, if he disagreed with the decision, he had
28 the right to request a hearing before an ALJ and he had 60 days from the date he received

1 the letter to make the request. *Id.* No evidence suggests Plaintiff made such a request.
2 *Id.* On February 25, 2015, Plaintiff filed this action. Doc. 1.

3 **II. Analysis.**

4 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*
5 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the
6 challenger asserts that the allegations contained in the complaint are insufficient on their
7 face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger
8 disputes the truth of the allegations that, by themselves, would otherwise invoke federal
9 jurisdiction.” *Id.* Where, as here, Defendant factually challenges the assertion of
10 jurisdiction, the court may consider evidence extrinsic to the complaint. *Robinson v.*
11 *United States*, 586 F.3d 683, 685 (9th Cir. 2009). Plaintiff bears the burden of
12 establishing subject matter jurisdiction by a preponderance of the evidence. *Id.*

13 A federal district court has jurisdiction to review a final decision of Defendant
14 made after a hearing to which the plaintiff was a party. 42 U.S.C. § 405(g); 42 U.S.C. §
15 1383(c)(3). No findings of fact or decision by Defendant may be reviewed except as
16 provided under 42 U.S.C. § 405(g). 42 U.S.C. § 405(h). If the requirements of § 405(g)
17 are not satisfied, a federal district court may have subject jurisdiction only over a
18 “colorable constitutional claim” asserted by the plaintiff. *Califano v. Sanders*, 430 U.S.
19 99, 109 (1977). Plaintiff has made no constitutional claim.

20 Plaintiff has made no assertion and presented no evidence that Defendant has
21 made a reviewable final decision. *See* Docs. 1, 22. Plaintiff has made no assertion and
22 presented no evidence that he requested a hearing to challenge the determination of the
23 amount of his benefits. *Id.* Plaintiff’s one-page response states only that “Rule 103 on
24 evidence in SSA attorney letter dating July 22 2016, which I never received, did not give
25 me the chance to go before a administrative law judge to question the amount of benefit
26 paid to me.” Doc. 22.

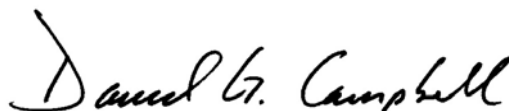
27 Plaintiff has failed to meet his burden of establishing subject matter jurisdiction by
28 a preponderance of the evidence. *Robinson*, 586 F.3d 685. Accordingly, the Court will

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grant Defendant's motion to dismiss.

IT IS ORDERED: Defendant's motion to dismiss for lack of subject matter jurisdiction (Doc. 21) is **granted**. The Clerk is directed to terminate this matter.

Dated this 2nd day of November, 2016.



David G. Campbell
United States District Judge