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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KARL WICHELMAN,  
  
  Plaintiff,  
  
  v.  
  
NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,  
  
  Defendant.

No. 2:16-cv-1123 KJM-EFB PS

FINDINGS AND RECOMMENDATIONS

Plaintiff, proceeding pro se, seeks review of decisions of the Commissioner of Social Security’s (“Commissioner”) denying his application for Childhood Disability Benefits (“CDB”) and finding overpayment of disability benefits.<sup>1</sup> The Commissioner moves to dismiss the complaint for lack of subject matter jurisdiction, arguing that plaintiff failed to exhaust his administrative remedies. ECF No. 21. For the following reasons, it is recommended that the motion be granted and the action dismissed for lack of jurisdiction.<sup>2</sup>

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<sup>1</sup> This action was referred to the undersigned pursuant to Local Rule 302(c)(15). See 28 U.S.C. § 636(c).

<sup>2</sup> Plaintiff filed a request, styled as a “Motion in Limei” [sic], to enjoin the Social Security Agency from contacting him. ECF No. 7 at 2. As discussed herein, the court lacks jurisdiction over plaintiff’s claim(s). Accordingly, the motion should be denied as moot.

1 I. Background

2 The Commissioner previously found that plaintiff was disabled under Title XVI of the  
3 Social Security Act (the “Act”) as of July 1, 1991, and plaintiff started receiving Supplemental  
4 Security Income (“SSI”) that same month. Declaration of Mai Huynh (“Huynh”), ECF No. 21-1,  
5 ¶ a. In 2008, the Social Security Administration (the “agency”) reviewed plaintiff’s file and  
6 discovered he was eligible for Disability Insurance Benefits (“DIB”) under Title II of the Act. *Id.*  
7 ¶ b. The agency contacted plaintiff and scheduled a meeting to obtain information needed to  
8 complete a medical determination. *Id.* ¶ d. The appointment was scheduled for August 29, 2008,  
9 but plaintiff failed to appear for the appointment. *Id.* ¶ e.

10 In October 2008, plaintiff went to an agency field office and completed his DIB  
11 application. *Id.* ¶ h. The application was granted and the Commissioner determined that plaintiff  
12 was entitled to DIB effective June 1993.<sup>3</sup> *Id.* ¶ i. After offsetting the amount for the SSI benefits  
13 plaintiff had received over the prior 16 years, the Commission paid plaintiff \$3,000 in back  
14 payments for his DIB, and in March 2009 plaintiff began receiving both SSI and DIB payments.  
15 *Id.* ¶ l. Also in October 2008, plaintiff filed an application for Childhood Disability Benefits  
16 (“CDB”). *Id.* ¶ y. That application was denied because plaintiff failed to show that he was  
17 disabled prior to age 22. *Id.* ¶ z.

18 In June 2015, the agency suspended plaintiff’s SSI payments because he had failed to  
19 provide necessary information to the agency. *Id.* ¶ o; *See* 20 C.F.R. § 416.714 (providing that the  
20 agency may “request a report from you if [it] need[s] information to determine continuing  
21 eligibility,” and that benefits will be suspended should the information not be provided). Plaintiff  
22 subsequently appeared at an agency field office, but he declined to provide information regarding  
23 his living arrangement, income, and resources. *Id.* ¶ p. Consequently, the agency did not have  
24 the information needed to reinstate his SSI payments. *Id.* A field office technician advised

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27 <sup>3</sup> The decision granting plaintiff’s DIB application found that plaintiff’s disability onset  
28 date was January 1, 1993, which is later than the onset date for his SSI. The apparent discrepancy  
resulted from plaintiff performing substantial gainful activity after his SSI onset date of July 1,  
1991. *Id.* ¶ h.

1 plaintiff that a representative payee could help him with his reporting responsibilities, but plaintiff  
2 was not assigned a representative payee. *Id.* ¶ r.

3 Plaintiff never provided the information sought by the agency, and his SSI benefits  
4 remained suspended until July 20, 2016, at which time they were terminated. *Id.* ¶ s; *see* 20  
5 C.F.R. § 416.1335 (providing that eligibility for SSI benefits will be terminated “following 12  
6 consecutive months of benefit suspension for any reason . . .”). To make matters worse for  
7 plaintiff, the State of California ceased subsidizing his Medicare premiums in November 2015.  
8 The agency, however, did not immediately begin deducting the Medicare premiums, which were  
9 \$104.90 a month, from his DIB payments, resulting in overpayment of \$104.90 in each  
10 subsequent month. *Id.* ¶ v. To recoup the overpayments—as well as to recover SSI  
11 overpayments caused by plaintiff’s failure to provide information regarding his living  
12 arrangement, income, and resources—plaintiff’s DIB account was placed in deferred status. *Id.*  
13 ¶ w.

14 Plaintiff never appealed the Commissioner’s decision finding an overpayment, *id.* ¶ x, nor  
15 did he appeal the 2008 denial of his application for Childhood Disability Benefits, *id.* ¶ bb.

## 16 II. Discussion

17 Defendant argues that plaintiff’s complaint must be dismissed because he failed to exhaust  
18 his administrative remedies prior to filing this action. ECF No. 15 at 2-3.

19 As a sovereign, the United States is immune from suit except according to its consent to  
20 be sued. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). It necessarily follows where Congress  
21 waives the immunity of the United States any terms and conditions that it places on the waiver are  
22 jurisdictional and must be strictly construed. *See Block v. North Dakota ex rel. Board of Univ.*  
23 *and School Lands*, 461 U.S. 273, 287 (1983); *Jerves v. United States*, 966 F.2d 517, 521 (9th Cir.  
24 1992).

25 42 U.S.C. § 405(g) provides a limited waiver of sovereign immunity by permitting district  
26 courts to review a “final decision” of the Commissioner of Social Security.<sup>4</sup> A claimant may

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27 <sup>4</sup> 42 U.S.C. § 405(g) provides in pertinent part: “Any individual, after any final decision  
28 of the Commissioner of Social Security made after a hearing to which he was a party, irrespective

1 obtain a final decision from the Commissioner only by proceeding through all stages of the  
2 administrative appeals process. *Bowen v. City of New York*, 476 U.S. 467, 482 (1986). The  
3 stages of the appeals process consists of: 1) initial determination; 2) reconsideration; 3) hearing  
4 before an ALJ; and 4) Appeals Council review. Only upon the Appeals Council issuing a  
5 decision or declining review may a claimant seek review in a federal district court. 20 C.F.R.  
6 § 404.981.

7 The exhaustion requirement, however, may be waived where the claim is “(1) collateral to  
8 a substantive claim of entitlement (collaterality), (2) colorable in its showing that denial of relief  
9 will cause irreparable harm (irreparability), and (3) one whose resolution would not serve the  
10 purposes of exhaustion (futility).” *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th Cir. 2003). All  
11 three factors must be established to waive the exhaustion requirement. *Kaiser v. Blue Cross of*  
12 *California*, 347 F.3d 1107, 1115 (9th Cir. 2003).

13 The evidence submitted by the Commissioner demonstrates that plaintiff did not seek  
14 administrative review of the agency’s initial decisions denying his application for CDB and  
15 finding an overpayment of disability benefits.<sup>5</sup> Plaintiff does not dispute that he failed to obtain  
16 administrative review. Instead, he appears to contend that any attempt to exhaust his  
17 administrative remedies would have been futile. ECF No. 34 at 2 (arguing that exhaustion is not  
18 “required when the administrative remedy [is] shown to be inadequate or would be futile.”).

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21 of the amount in controversy, may obtain a review of such decision by a civil action commenced  
22 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.”

23 <sup>5</sup> In his opposition, plaintiff objects to the declaration of Mai Huynh, noting that it does  
24 not identify, among other things, how long she has been employed with the agency, where she  
25 previously worked, the primary location of her employment, and what degrees and professional  
26 licenses she has obtained. ECF No. 34 at 2. Such information is not needed to establish a proper  
27 foundation for Ms. Huynh’s declaration. Ms. Huynh declares, under penalty of perjury, that she  
28 is a Program Expert for the Social Security Administration at the San Francisco Regional Office.  
ECF No. 21-1 at 1. It further provides that plaintiff’s official file, which is maintained by the  
Office of Disability Adjudication and Review, is within her legal custody and has been examined.  
*Id.* Thus, there is a sufficient foundation for her statements concerning plaintiff’s administrative  
file.

1 Plaintiff's belief that seeking administrative review would have resulted in an adverse decision  
2 does not excuse him from § 405(g)'s exhaustion requirement. *See Haro v. Sebelius*, 747 F.3d  
3 1099, 1112 (9th Cir. 2014) ("Exhaustion [requirement] is waivable, presentment is not.").

4 As plaintiff did not exhaust his administrative remedies, the court lacks jurisdiction over  
5 plaintiff's claim(s) and the instant action must be dismissed.

6 IV. Conclusion

7 Based on the foregoing, it is hereby RECOMMENDED that:

- 8 1. Defendant's motion to dismiss (ECF No. 21) be granted.
- 9 2. Plaintiff's complaint be dismissed without leave to amend;
- 10 3. All pending motions be denied as moot; and
- 11 4. The Clerk be directed to close this case.

12 These findings and recommendations are submitted to the United States District Judge  
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
14 after being served with these findings and recommendations, any party may file written  
15 objections with the court and serve a copy on all parties. Such a document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
17 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
18 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: August 31, 2017.

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21 EDMUND F. BRENNAN  
22 UNITED STATES MAGISTRATE JUDGE  
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