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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MATTHEW JAMES KENNEDY,
Plaintiff,
v.
JEFFREY HATFIELD, Administrative
Law Judge; BRADFORD D. MYLER,
Attorney; ANDREW M. SAUL,
Commissioner of Social Security,
Defendants.

Case No.: 20cv395-KSC

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS FOR LACK
OF JURISDICTION AND DENYING
DEFENDANTS’ MOTION TO
DISMISS FOR INADEQUATE
SERVICE OF PROCESS**

[Doc. Nos. 9, 11, 13, 15.]

On March 2, 2020, plaintiff Matthew James Kennedy filed a Complaint seeking an order requiring the Social Security Administration to pay \$900 to his former attorney, Bradford D. Myler (“Attorney Myler”), and an award of damages in the amount of \$7,500. [Doc. No. 1, at pp. 1, 3.] Before the Court are two Motions to Dismiss. The first Motion to Dismiss was filed by Attorney Myler [Doc. No. 9], and the second Motion to Dismiss was filed by defendant Jeffrey Hatfield, an Administrative Law Judge (“ALJ Hatfield”), and defendant Commissioner of Social Security (the “Commissioner”) [Doc. No. 11].

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1 Plaintiff did not file an opposition to either of these Motions. Instead, plaintiff first
2 filed a Motion to Continue seeking an order continuing Attorney Myler as a defendant.
3 [Doc. No. 13.] Plaintiff then filed a second Motion to Continue seeking an order
4 continuing Attorney Myler, ALJ Hatfield, and the Commissioner as defendants in this
5 action.¹ [Doc. No. 15.] For the reasons outlined more fully below, the Court finds that
6 defendants' Motions to Dismiss must be GRANTED [Doc. Nos. 9, 11], and the
7 Complaint must be dismissed without leave to amend for lack of subject matter
8 jurisdiction.

9 **Plaintiff's Complaint and the Attached Exhibits**

10 In his Complaint, plaintiff alleges he contacted Attorney Myler in April 2018 to
11 represent him in his social security case. [Doc. No. 1, at p. 2.] However, when it was
12 time for the hearing, Attorney Myler was allegedly unable to represent plaintiff.
13 Therefore, plaintiff claims he notified Attorney Myler that he had been dismissed from
14 the case. Plaintiff then hired another attorney to represent him in his social security case,
15 and a favorable outcome was achieved. [Doc. No. 1, at p. 2.]

16 The Complaint further alleges that the Social Security Administration paid
17 plaintiff's new attorney \$8,127 to cover the legal fees in his case and that ALJ Hatfield
18 ruled plaintiff would also have to pay \$900 to Attorney Myler. [Doc. No. 1, at pp. 2-3.]
19 In support of this allegation, plaintiff attached to this Complaint a copy of a form dated
20 January 5, 2020 and entitled Authorization to Charge and Collect Fees. This form is
21 signed by ALJ Hatfield and is addressed to Attorney Myler. A copy of the form is also
22 addressed to plaintiff. The form states that Attorney Myler is authorized to charge and
23 collect a fee for services from plaintiff in the amount of \$900.00 and includes the
24 following explanation:

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28 ¹ Based on their content, the Court has construed plaintiff's Motions to Continue as
oppositions to defendants' Motions to Dismiss. [Doc. Nos. 13, 15.]

1 Although the claimant objected to your fee petition, your requested
2 fee was not unreasonable in light of the work you achieved on behalf of the
3 claimant. While you did not represent the claimant at the hearing, you
4 reviewed the file and timely requested reconsideration of the initial
5 determination. After receipt of the reconsideration determination, you
6 timely requested a hearing before an Administrative Law Judge. At the
7 hearing level, you submitted medical records from several medical sources.
8 Based on the foregoing, the authorized amount fairly compensates you for
9 the work you performed.

10 [Doc. No. 1-2, at p. 1.]

11 The Authorization form also advises plaintiff he could challenge the fee award
12 “**within 30 days from the date of this notice.**” [Doc. No. 1-2, at p. 1 (emphasis in
13 original).] The Authorization form further advises plaintiff that his reasons for
14 disagreeing with a fee award must be stated in a request for review. [Doc. No. 1-2, at
15 pp. 1.]

16 Next, the Complaint alleges plaintiff learned on February 20, 2020 that the Social
17 Security Administration does not pay fees to an attorney who withdraws prior to the end
18 of the case. [Doc. No. 1, at p. 2.] In this regard, a February 20, 2020 letter addressed to
19 plaintiff from the Social Security Administration is attached to the Complaint. This letter
20 explains as follows: “The law does not permit payment of a fee by [the Social Security
21 Administration] when a representative or claimant withdraws his/her services prior to a
22 favorable decision. Therefore, the Social Security Administration is not involved in
23 paying the fee. This is a matter between you and your representatives.” [Doc. No. 1-2, at
24 p. 3.]

Discussion

I. The Parties’ Motions.

25 Attorney Myler’s Motion to Dismiss argues that the Court should dismiss the
26 Complaint for lack of subject matter jurisdiction and for failure to state a claim.

27 Alternatively, Attorney Myler contends he should be dismissed as a defendant, because
28 the allegations in the Complaint do not arise out of any actions he has taken. Rather, the

1 allegations in the Complaint arise out of actions or inactions by the Social Security
2 Administration. [Doc. No. 9, at pp. 2-3.] The Motion to Dismiss filed by ALJ Hatfield
3 and the Commissioner argues that the Complaint should be dismissed for lack of
4 jurisdiction and for inadequate service of process. [Doc. No. 11, at pp. 3-5.]

5 In his Motions to Continue, which are essentially oppositions to defendants'
6 Motions to Dismiss, plaintiff argues that the Court should not dismiss any of the
7 defendants and should not dismiss the Complaint. According to plaintiff, the fee dispute
8 alleged in the Complaint is within the Court's jurisdiction under 42 U.S.C. § 406, because
9 it is an appeal of a "judgment" issued by ALJ Hatfield and because his Complaint was
10 timely filed in this Court. [Doc. No. 13, at p. 2; Doc. No. 15, at pp. 1-2.] For the reasons
11 outlined below, the Court cannot agree with plaintiff's contention that the Court has
12 jurisdiction under Section 406 to consider the merits of the allegations in his Complaint.

13 **II. Jurisdiction.**

14 **A. Applicable Standards.**

15 Under Federal Rule of Civil Procedure 12(b)(1), a party may challenge a Federal
16 Court's subject matter jurisdiction based on allegations on the face of the complaint.
17 Fed.R.Civ.P. 12(b)(1). "If the court determines at any time that it lacks subject-matter
18 jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). To resolve a
19 facial challenge to subject matter jurisdiction, the Court accepts the plaintiff's allegations
20 as true; draws "all reasonable inferences in the plaintiff's favor;" and then determines
21 whether there are adequate allegations to invoke the Court's jurisdiction. *Leite v. Crane*
22 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

23 "The United States, as a sovereign, is immune from suit unless it has waived its
24 immunity." *Balser v. Dep't of Justice, Office of U.S. Tr.*, 327 F.3d 903, 907 (9th Cir.
25 2003). "A court lacks subject matter jurisdiction over a claim against the United States if
26 it has not consented to be sued on that claim." *Id.* "In sovereign immunity analysis, any
27 lawsuit against an agency of the United States or against an officer of the United States in
28 his or her official capacity is considered an action against the United States." *Id.* "A

1 waiver of sovereign immunity by the United States must be expressed unequivocally.”

2 *Id.*

3 Title 42, United States Code, Section 405(g), limits the Court’s jurisdiction in
4 social security matters to review of “any final decision of the Commissioner of Social
5 Security made after a hearing. . . .” 42 U.S.C. § 405(g). A decision of the Commissioner
6 is only final within the meaning of 42 U.S.C. § 405(g) after a request is made of the
7 Appeals Council to review the decision of an ALJ and the request for review has been
8 heard or refused. 42 U.S.C. § 405(g); 20 C.F.R. § 404.981.

9 Here, plaintiff is not challenging a final decision of the Commissioner within the
10 meaning of Section 405(g). Instead, the allegations in plaintiff’s Complaint involve a
11 dispute with ALJ Hatfield and the Commissioner over attorney’s fees awarded to his
12 former attorney. As outlined more fully below, statutory law and regulations provide a
13 separate procedure for challenging an ALJ’s award of attorney’s fee in matters before the
14 Commissioner, and any such disputes are not subject to review by Federal Courts.

15 Title 42, United States Code, Section 406(a), states in part as follows:
16 “[W]henever the Commissioner of Social Security, in any claim before the Commissioner
17 for benefits . . . , makes a determination favorable to the claimant, the Commissioner
18 shall, if the claimant was represented by an attorney in connection with such claim, fix
19 . . . a reasonable fee to compensate such attorney for the services performed by him in
20 connection with such claim.” 42 U.S.C. § 406(A). Once the amount of the attorney’s fee
21 is fixed, the attorney and the claimant are provided with a written notice that includes “a
22 description of the procedures for review” 42 U.S.C. § 406(a)(2)(A)-(D)(iii); 20
23 C.F.R. § 404.1720(c). In this regard, Section 406(a)(3) sets for the procedures for
24 review: either the attorney or the claimant may submit a written request for the
25 Commissioner to review the amount of the fee award within 30 days of the date of the
26 notice. 42 U.S.C. § 406(a)(3)(A); 20 C.F.R. § 404.1720(d).

27 When a request for review is submitted, the amount of attorney’s fees is then
28 reviewed by an authorized official, and this official can either affirm or modify the award

1 of attorney's fees. 42 U.S.C. § 406(a)(3)(B)(i); 20 C.F.R. § 404.1720(d)(1). An untimely
2 request for review will be considered if there is good cause for not submitting the request
3 on time. 20 C.F.R. § 404.1720(d)(1). ***"The decision of the administrative law judge or***
4 ***other person conducting the review shall not be subject to further review."*** 42 U.S.C. §
5 406(a)(3)(C); 20 C.F.R. § 404.1720(d)(1) (emphasis added).

6 In sum, "Section 406(a) grants the Social Security Administration exclusive
7 jurisdiction to award attorney's fees for representation of a Social Security claimant in
8 proceedings before the Administration." *Clark v. Astrue*, 529 F.3d 1211, 1215 (9th Cir.
9 2008). Accordingly, this Court does not have jurisdiction to review the attorney's fee
10 dispute alleged in the Complaint. For this reason, the Court finds that defendants'
11 Motions to Dismiss for lack of subject matter jurisdiction must be GRANTED.

12 Defendants contend that plaintiff's Complaint should be dismissed without leave to
13 amend, because the jurisdictional defects in the Complaint cannot be cured by
14 amendment. [Doc. No. 11, at p. 5.] "Ordinarily a court should grant leave to amend
15 unless it finds that amendment of the claim would be futile." *Ard v. F.D.I.C.*, 770 F.
16 Supp. 2d 1029, 1041 (C.D. Cal. 2011). "Dismissal without leave to amend is proper if it
17 is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A.,*
18 *Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008). "The party asserting jurisdiction bears the
19 burden of proving that the court has subject matter jurisdiction over his claims." *Conant*
20 *v. Brown*, 248 F. Supp. 3d 1014, 1018 (D. Or. 2017).

21 Here, plaintiff has not requested leave to amend. Nor does it appear possible for
22 plaintiff to amend the allegations in his Complaint to establish subject matter jurisdiction.
23 Although Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend should
24 be granted "freely" and "when justice so requires," statutory law and regulations clearly
25 indicate that disputes over attorney's fees in matters before the Commissioner can only
26 be reviewed by an official authorized by the Commissioner and are not subject to any
27 further review by the Federal Courts. Accordingly, the Court finds it would be futile to
28 grant plaintiff leave to amend his Complaint.

1 **II. Service of Process.**

2 Referring to a proof of service at “Dkt. 1” (*i.e.*, the Complaint), ALJ Hatfield and
3 the Commissioner argue that this action should be dismissed, because plaintiff did not
4 satisfy the requirements for serving a United States agency and agency employees that
5 are set forth in Federal Rule of Civil Procedure 4(i)(2). According to defendants, the
6 proof of service only indicates plaintiff mailed the Summons “to unidentified recipients.”
7 [Doc. No. 11, at p. 5.] However, the Court is unable to locate a copy of the referenced
8 Summons in the record. Under these circumstances, the Court is unable to determine
9 whether plaintiff satisfied the service requirements in Rule 4. Therefore, at this time, the
10 Court finds that defendants’ Motion to Dismiss must be DENIED to the extent it seeks
11 dismissal of the case based on inadequate service.

12 **Conclusion**

13 Based on the foregoing, defendants’ Motions to Dismiss are GRANTED in part
14 and DENIED in part. [Doc. Nos. 9, 11.] The Motions are GRANTED as to all
15 defendants to the extent they seek dismissal of plaintiff’s Complaint for lack of subject
16 matter jurisdiction. The Motion of ALJ Hatfield and the Commissioner is DENIED to
17 the extent it seeks dismissal of the Complaint for inadequate service of process.

18 Plaintiff’s Motions to Continue, which the Court has construed as oppositions to
19 defendants’ Motions to Dismiss, are also DENIED for the reasons outlined above. [Doc.
20 Nos. 13, 15.]

21 Plaintiff’s Complaint is dismissed without leave to amend, and the Court
22 DIRECTS the Clerk of Court to terminate this action as to all defendants.

23 IT IS SO ORDERED.

24 Dated: July 6, 2020



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26 Hon. Karen S. Crawford
27 United States Magistrate Judge
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