

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION  
4:13-CV-261-FL

JAMES K. OVERSTREET, )

Plaintiff, )

v. )

CAROLYN W. COLVIN, )  
Acting Commissioner of Social Security, )

Defendant. )

**ORDER**

This pro se case is before the court on the motion to proceed *in forma pauperis* under 28 U.S.C. § 1915(a)(1) (D.E. 1) by plaintiff and for a frivolity review pursuant to 28 U.S.C. § 1915(e)(2)(B). These matters were referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), respectively. For the reasons stated below, the court will allow plaintiff's motion to proceed *in forma pauperis* but recommend that this case be dismissed for lack of subject matter jurisdiction.

**ORDER ON IN FORMA PAUPERIS MOTION**

Based on the information in the motion to proceed *in forma pauperis*, the court finds that plaintiff has adequately demonstrated his inability to prepay the required court costs. His motion to proceed *in forma pauperis* is therefore ALLOWED.

**MEMORANDUM AND RECOMMENDATION ON FRIVOLITY REVIEW**

**I. Background**

Plaintiff's complaint consists of a four-page form (D.E. 1-1) completed in handwriting in which he asserts that, following a hearing on 23 January 2013, an Administrative Law Judge

(“ALJ”) wrongfully denied him disability benefits. (Compl. 2). He seeks relief in the form of an award of disability benefits, including past due amounts, and legal fees. (*Id.* 3).

## **II. Discussion**

### **A. Legal Standards Applicable to Frivolity Review of Complaint**

After allowing a party to proceed *in forma pauperis*, as here, the court must conduct a frivolity review of the case pursuant to 28 U.S.C. § 1915(e)(2)(B). The court must determine whether the action is frivolous or malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from an immune defendant, and is thereby subject to dismissal. 28 U.S.C. § 1915(e)(2)(B); *see Denton v. Hernandez*, 504 U.S. 25, 27 (1992) (standard for frivolousness). Although in evaluating frivolity a pro se plaintiff’s pleadings are held to “less stringent standards” than those drafted by attorneys, *White v. White*, 886 F.2d 721, 722-23 (4th Cir. 1989), the court is not required to accept a pro se plaintiff’s contentions as true, *Denton*, 504 U.S. at 32. Instead, the court is permitted to “pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.” *Neitzke*, 490 U.S. at 327. Such baseless claims include those that describe “fantastic or delusional scenarios.” *Id.* at 328. Provided that plaintiff’s claims are not clearly baseless, the court must weigh plaintiff’s factual allegations in his favor in its frivolity analysis. *Denton*, 504 U.S. at 32. The court must read the complaint carefully to determine if plaintiff has alleged specific facts sufficient to support his claims. *White*, 886 F.2d at 724.

Under Fed. R. Civ. P. 8, a pleading that states a claim for relief must contain “a short and plain statement of the grounds for the court’s jurisdiction . . . [and] a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(1), (2). Case law explains that the factual allegations in the complaint must create more than a mere possibility of misconduct. *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (citing

*Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Likewise, a complaint is insufficient if it offers merely “labels and conclusions,” “a formulaic recitation of the elements of a cause of action,” or “naked assertion[s]” devoid of “further factual enhancement.” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted)).

A court may consider subject matter jurisdiction as part of the frivolity review. *See Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (holding that “[d]etermining the question of subject matter jurisdiction at the outset of the litigation is often the most efficient procedure”); *Cornelius v. Howell*, No. 3:06-3387-MBS-BM, 2007 WL 397449, at \*2-4 (D.S.C. 8 Jan. 2007) (discussing the lack of diversity jurisdiction during frivolity review as a basis for dismissal). “Federal courts are courts of limited jurisdiction and are empowered to act only in those specific situations authorized by Congress.” *Bowman v. White*, 388 F.2d 756, 760 (4th Cir. 1968). The presumption is that a federal court lacks jurisdiction in a particular case unless it is demonstrated that jurisdiction exists. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U.S. 327, 336 (1895). The burden of establishing subject matter jurisdiction rests on the party invoking jurisdiction, here plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (“The burden of proving subject matter jurisdiction . . . is on the plaintiff, the party asserting jurisdiction.”). The complaint must affirmatively allege the grounds for jurisdiction. *Bowman*, 388 F.2d at 760. If the court determines that it lacks subject matter jurisdiction, it must dismiss the action. Fed. R. Civ. P. 12(h)(3).

## **B. Review of Plaintiff’s Complaint**

Although plaintiff has alleged that his application for disability benefits was denied following a hearing before an ALJ, he has not alleged that he sought administrative review of this denial. This apparent absence of prior administrative action on his claim for disability is

fatal to it. The Social Security Act provides for judicial review only after a final decision by the Commissioner of Social Security:

Any individual, *after any final decision of the Commissioner of Social Security* made after a hearing to which he was a party, irrespective of the amount in controversy, 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) (emphasis added). A claim for benefits brought without exhaustion of administrative remedies is subject to dismissal for lack of subject matter jurisdiction. *See, e.g., Cano v. Cmm'r of Soc. Sec.*, No. 8:10-2400, 2010 WL 4774775, at \*1 (D.S.C. 16 Nov. 2010), *adopting*, 2010 WL 4780056, at \*2-3 (D.S.C. 21 Sept. 2010) (report and recommendation for dismissal of plaintiff's claim for failure to exhaust administrative remedies before the Commissioner of Social Security). This case should accordingly be dismissed.

### **III. Conclusion**

For the foregoing reasons, IT IS RECOMMENDED that this action be DISMISSED.

The Clerk shall send a copy of this Memorandum and Recommendation to plaintiff, who shall have 14 days from service thereof to file written objections. Failure to file timely written objections bars plaintiff from receiving a de novo review by the District Judge on an issue covered in the Memorandum and Recommendation and, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Judge.

SO ORDERED, this 9th day of January 2014.

  
James E. Gates  
United States Magistrate Judge