UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIE JAMES BUSH, JR.,
Plaintiff,

vs.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Case No. 1:13-cv-406

Barrett, J.
Litkovitz, M.J.

ORDER AND REPORT AND RECOMMENDATION

I. Background

Plaintiff Willie James Bush, Jr., proceeding pro se, brings this action against the United States of America[1] (the Government) under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq., seeking $100 million and reversal of his "retirement back to Federal Workers' Comp. . . ." (Doc. 4 at 5). Plaintiff alleges, *inter alia*, he was coerced into electing retirement benefits instead of workers' compensation benefits under the U.S. Department of Labor's Office of Workers' Compensation Program (OWCP), which resulted in the reduction of his monthly income. (*Id.* at 3-4).

This matter is before the Court on the Government's Motion to Dismiss plaintiff's complaint (Doc. 13), plaintiff's responsive filing (Doc. 17),[2] and the Government's reply memorandum (Doc. 18). Also pending before the Court are plaintiff's: (1) Motion to Expedite (Doc. 11); (2) Motion to Expedite: OPM Suspend Retirement (Doc. 12); (3) Motion to Proceed

[1] Plaintiff also names Ms. Patricia Smith, Catherine P. Carter, Mary Szymzyk, and the United States Attorney General as defendants. *See* Doc. 4 at 1. Because these defendants are employees of the United States Government, *see* Doc. 4 at 2, they are improperly named. As plaintiff brings his lawsuit under the FTCA, the only properly named defendant is the United States. *See Mars v. Hanberry*, 752 F.2d 254, 255-56 (6th Cir. 1985).

[2] On September 23, 2013, plaintiff filed a "Motion to Proceed" wherein he appears to argue that he is entitled to an award of $150 million due to the Government's alleged failure to properly compensate his injuries. (Doc. 17). The Court construes plaintiff's filing as a response to the Government's Motion to Dismiss.

with Lawsuit (Doc. 20); (4) Motion to Paid Plaintiff OWCP/Workers' Comp Payment (Doc. 21); (5) Motion to Impose Disciplinary Actions (Doc. 24); and (6) Motions to Discipline/Investigation and Grant Relief. (Docs. 26, 27). Additionally, the Government has moved to strike plaintiff's Motion to Paid Plaintiff OWCP/Workers' Comp Payment (Doc. 21). *See* Doc. 22.

II. Plaintiff's Complaint

Plaintiff's complaint and attachments thereto are somewhat difficult to decipher. Plaintiff seems to allege that he was coerced into electing to receive retirement benefits, rather than workers' compensation benefits under the Office of Workers' Compensation Program (OWCP):

> IN THE MONTH OF MAY, 2012 I WAS TOLD BY OWCP CLAIM EXAMINER, MARY SZYMZYK, THAT IF I DON'T GO BACK TO WORK FOR THE U.S. POSTAL SERVICE, SHE WOULD TERMINATE MY MONEY FROM FEDERAL WORKERS' COMP (OWCP)! THIS COERSION [sic] FORCE ME TO SWITCH OVER TO OPM FOR RETIREMENT AND AFTER SWITCHING OVER CUT MY ANNUITIES, FORTEEN [sic] HUNDRED DOLLARS A MONTH IN PAY!

(Doc. 4 at 3). Plaintiff further alleges that an OWCP doctor failed to accurately and fully diagnose his medical problems, which he asserts is recoverable as a "diagnostic failure" under the FTCA:

> I WAS SENT BY INDEPENDENT DOCTOR, UNDER CONTRACT WITH OWCP . . . FOR AN EXAMINATION AND DOCTOR DID NOT TAKE BLOOD OR ASK ME IF I HAD ANY OTHER MEDICAL PROBLEMS AND ASSUME EVERYTHING WAS OK WITH ME, EXCEPT MY LOWER BACK! BUT THAT WAS NOT THE CASE, I HAVE SERIOUS ISSUES WITH CLUSTER HEADACHES . . . WITH THESE MEDICAL ISSUES AT HAND, I CAN NOT MAINTAIN A REGULAR WORK SCHEDULE, THAT OWCP WANT TO ME DO!

(Doc. 4 at 3). Lastly, plaintiff alleges that the decrease in his income has caused him financial hardship and exacerbated previously undiagnosed medical issues:

> MEDICAL ISSUES ARE RT FOOT REQUIRING SURGERY DUE TO DEPT OF VA AND U.S. AIR FORCE NEVER CHECK OUT MY WHOLE LEG, NOR MRI THE RIGHT LEG FOR INJURIES AFTER SUFFERING A SERIOUS MOTORCYCLE ACCIDENT, THIRTY-THREE YEARS AGO! PLUS HEARING LOST FROM WORKING ON FLIGHT LINE IN U.S. AIR FORCE AND EXCESSIVE NOISE AROUND POSTAL EQUIPMENT!

(Doc. 4 at 3).

III. The Government's Motion to Dismiss

The Government moves for dismissal of the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting that this Court lacks subject matter jurisdiction and plaintiff's complaint fails to state a claim upon which relief may be granted. (Doc. 13 at 1-2). The Government asserts that plaintiff's claims under the FTCA are an improper attempt to obtain judicial review of the decisions of the OWCP. The Government maintains that OWCP claims and awards of benefits are governed by the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*, which provides the exclusive remedy for federal employment related injuries or death and precludes judicial review of plaintiff's claims in this case. (Doc. 13). The Government also contends that to the extent plaintiff seeks to raise a medical malpractice claim, his failure to comply with Rule 10(D)(2) of the Ohio Rules of Civil Procedure, requiring that complaints containing medical claims be accompanied by an affidavit of merit, mandates dismissal of plaintiff's lawsuit. (*Id.* at 11-13).

IV. Standard for Ruling on Motion to Dismiss

Rule 12(b)(1) allows dismissal of complaints where the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss pursuant to Rule 12, the Court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). *See also Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

Plaintiff bears the burden of proving jurisdiction in order to survive a motion to dismiss on grounds of lack of subject matter jurisdiction. *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003); *Michigan Southern R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n, Inc.*, 287 F.3d 568, 573 (6th Cir. 2002); *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 269 (6th Cir. 1990). "In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits." *Nichols*, 318 F.3d at 677 (citing *Rogers v. Stratton Industries*, 798 F.2d 913, 916 (6th Cir. 1986)).

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). To avoid dismissal under Rule 12(b)(6) for failure to state a claim, plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). While the Court must accept all well-pleaded factual allegations as true, it need not "accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The complaint need not contain "detailed factual allegations," yet must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at

555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

Although plaintiff need not plead specific facts, his statement must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 551 U.S. at 93 (citations omitted). Plaintiff's factual allegations must be enough to raise the claimed right to relief above the speculative level and to create a reasonable expectation that discovery will reveal evidence to support the claim. *Twombly*, 550 U.S. at 556. This inquiry as to plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

It is well-settled that a document filed pro se is "to be liberally construed" and that a pro se complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. . . ." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). However, the Sixth Circuit has recognized the Supreme Court's "liberal construction" case law has not had the effect of "abrogat[ing] basic pleading essentials" in pro se suits. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989). Courts are not required to devote time to a case when the nature of a pro se plaintiff's claim "defies comprehension." *Roper v. Ford Motor Co.*, No. 1:09cv427, 2010 WL 2670827, at *3 (S.D. Ohio April 6, 2010) (Report & Recommendation), *adopted*, 2010 WL 2670697 (S.D. Ohio July 1, 2010) (citing *Jones v. Ravitz*, No. 07-10128, 2007 WL 2004755, at *2 (E.D. Mich. July 6, 2007)). With these principles in mind, the Court reviews plaintiff's complaint.

V. Resolution

A. <u>This Court lacks subject matter jurisdiction over plaintiff's claims.</u>

As best the Court can discern, plaintiff's complaint alleges that the OWCP coerced him into electing to receive retirement benefits rather than workers' compensation benefits, which resulted in a reduction of his monthly benefits. *See* Doc. 4 at 3. This alleged coercion was somehow related to the examination plaintiff received by the OWCP doctor to whom plaintiff was sent for an examination in connection with his OWCP benefits. Plaintiff alleges this doctor failed to accurately and fully diagnose his medical problems and this "diagnostic failure" violates the FTCA. (Doc. 4 at 3) (citing 28 U.S.C. § 2674)[3].

Plaintiff's complaint should be dismissed because the Court lacks subject matter jurisdiction over plaintiff's FTCA claims. Plaintiff's tort claims are predicated on the threatened termination of his OWCP benefits for which FECA provides the sole remedy.

FECA provides a comprehensive statutory scheme under which federal employees may seek coverage for work-related injuries. *See* 5 U.S.C. § 8101 *et seq*. Under FECA, "an employee with a job-related injury is entitled to compensation regardless of her or his ability to work. . . ." *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1222 (6th Cir. 1996). The Secretary of Labor and his authorized agents have plenary authority to "administer, and decide questions arising under [FECA]." 5 U.S.C. § 8145. *See also Copeland v. Donahue*, No. 5:12-cv-541, 2012 WL 6738699, at *5 (N.D. Ohio Dec. 29, 2012) (citing *Staacke v. U.S. Sec'y of Labor*, 841 F.2d 278, 282 (9th Cir. 1988)). The discretion of the Secretary in determining whether to award or refuse to award compensation or to "end, decrease, or increase the compensation previously

[3] Section 2674 of the FTCA provides, "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

awarded[,]" 5 U.S.C. § 8128(a)(1), is "virtually limitless." *Staacke*, 841 F.2d at 282 (citing *Rodriguez v. Donovan*, 769 F.2d 1344, 1348 (9th Cir. 1985)). Most importantly, decisions made by the Secretary and his agents under FECA are "not subject to review by another office of the United States or by a court by mandamus or otherwise." 5 U.S.C. 8128(b)(2).

The Supreme Court has explained FECA's prohibition on judicial review of compensation determinations as follows:

> It was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign immunity. In enacting this provision, Congress adopted the principal compromise -- the "quid pro quo" -- commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government.

Lockheed Aircraft Corp. v. U.S., 460 U.S. 190, 194 (1983). *See also Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 90 (1991) ("FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary of Labor's determination of FECA coverage.") (quoting *Lindahl v. Office of Pers. Mgmt*, 470 U.S. 768, 780 and n.13 (1985)). The Sixth Circuit recognizes FECA's preclusion of judicial review: "[O]nce an injury falls within the coverage of FECA, its remedies are exclusive and no other claims can be entertained by the court." *Saltsman v. U.S.*, 104 F.3d 787, 789 (6th Cir. 1997) (citing *Jones v. Tenn. Valley Auth.*, 948 F.2d 258, 265 (6th Cir. 1991)). *See also Owens v. Brock*, 860 F.2d 1363, 1367 (6th Cir. 1988) ("FECA determinations by the OWCP . . . are simply not subject to judicial review.").

Courts have recognized an exception to FECA's bar on judicial review of OWCP determinations where constitutional challenges are raised. *See Rodrigues v. Donovan*, 769 F.2d 1344, 1347 (9th Cir. 1985). However, the use of this exception is strictly defined and "a mere allegation of a constitutional violation would not be sufficient to avoid the effect of a statutory finality provision." *Id.* at 1348. *See also Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1439

(7th Cir. 1996) ("Courts do not acquire jurisdiction to hear challenges to benefits determinations merely because those challenges are cloaked in constitutional terms. 'A rhetorical cover, will not open the door.'") (quoting *Sugrue v. Derwinski,* 26 F.3d 8, 11 (2d Cir. 1994)). The Sixth Circuit recognizes the limited nature of this exception: "Except for cases alleging that the Secretary violated a claimant's constitutional rights . . . courts have unanimously held that section 8128(b) prohibits judicial review of FECA benefit determinations." *Owens*, 860 F.2d at 1367.

Here, plaintiff seeks review by this Court of the determinations made by the OWCP regarding his election to receive retirement benefits rather than workers' compensation benefits under FECA. Plaintiff appears to allege the tortious conduct of the OWCP doctor somehow coerced plaintiff into electing retirement benefits in place of his OWCP benefits and that the doctor's "diagnostic failure" gives rise to a cause of action under the FTCA. However, plaintiff's eligibility for OWCP benefits is based on injuries he sustained as a federal employee and therefore his claim is covered by FECA. Because plaintiff's claim is covered by FECA, his exclusive remedy is through the administrative processes provided by FECA and this Court is precluded from reviewing his claims. *Saltsman*, 104 F.3d at 789. Plaintiff does not allege that the OWCP determinations are unconstitutional or that the Secretary of Labor's determinations are outside the scope of his plenary authority. Consequently, this matter does not fall within the limited exception to the bar on judicial review of FECA determinations. This Court is therefore barred from reviewing plaintiff's tort claims challenging the OWCP's actions relating to his FECA workers' compensation benefits. Accordingly, the Government's Rule 12(b)(1) motion to dismiss should be granted for lack of subject matter jurisdiction. Given the Court's lack of subject matter jurisdiction, the Government's arguments raised under Federal Rule of Civil

Procedure 12(b)(6) in support of its motion to dismiss are moot. *See Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 272 (6th Cir. 1990).

B. Plaintiff's malpractice claims should be dismissed.

Construing plaintiff's complaint liberally, it further appears that plaintiff alleges medical malpractice claims against the government for the alleged failure of a doctor contracted by the OWCP to provide him appropriate medical diagnosis or treatment. *See* Doc. 4 at 3. Dismissal of this portion of plaintiff's complaint is appropriate because plaintiff has failed to comply with Ohio state law procedural requirements. Ohio law requires that medical malpractice claims must be accompanied by an affidavit of merit from an expert witness. Ohio R. Civ. P. 10(D)(2)(a). The requisite affidavit must contain:

> (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
>
> (ii) A statement that the affiant is familiar with the applicable standard of care;
>
> (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

Id.

Federal courts are to apply state substantive law and federal procedural law when determining issues of state law. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). State laws giving rise to "'state-created rights and obligations' or [are] otherwise 'bound up with these rights and obligations in such a way that its application to federal court is required[,]'" are considered substantive laws. *Shropshire v. Laidlaw Transit, Inc.*, 550 F.3d 570, 574 (6th Cir. 2008) (quoting *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 535 (1958)). Courts within the Sixth Circuit have reached different conclusions on whether Ohio Civil Rule 10(D) is substantive or procedural. *Compare Bennafield v. U.S.*, No. 4:23-cv-3010, 2013 WL 5173221, at

*2 (N.D. Ohio Sept. 12, 2013) (joining majority opinion and finding that Rule 10(D) applies to FTCA claims) (citing cases), with *Thompson v. U.S.*, No. 1:13-cv-550, 2013 WL 3480347, at *3-5 (N.D. Ohio July 10, 2013) (finding that "Ohio Rule 10(D) creates additional burdens not required by the applicable federal rules" and thus declining to dismiss complaint for failure to include affidavit of merit). In *Daniel v. U.S.*, 716 F. Supp.2d 694, 698 (N.D. Ohio 2010), the court determined that Ohio Civil Rule 10(D) is substantive and applies to FTCA claims filed in federal court:

> Although the Sixth Circuit has not yet addressed this issue, several Courts of Appeal agree that similar state rules of procedure operate as substantive law under the FTCA. *See Cestnik v. Fed. Bureau of Prisons,* 84 F. App'x. 51, 53-54 (10th Cir. 2003) ("When a plaintiff brings suit against the United States under the FTCA, state substantive law applies. We have held Colorado's requirement of this certificate [of merit] to be a substantive, rather than procedural, rule of law. As such, it is applicable to Mr. Cestnik's FTCA claims, even though he is proceeding pro se." (internal citations omitted)); *Bramson v. Sulayman*, 251 F. App'x. 84, 87 n.2 (3d Cir. 2007) ("The affidavit of merit requirement applies to malpractice claims under New Jersey law in federal court. *See Chamberlain v. Giampapa,* 210 F.3d 154, 161 (3d Cir. 2002). *Chamberlain* was a diversity jurisdiction case, but the FTCA, under which the District Court had jurisdiction here, also requires the application of state law."). *See also Mathison v. U.S.*, 44 F. App'x 27, 29 (8th Cir. 2002) (applying a similar Minnesota statute to claims under the FTCA).
>
> A number of other district courts have also examined the application of similar statutes to the FTCA and have come to the same conclusion. *See, e.g., Luckett v. United States,* No. 08–CV–13775, 2009 WL 1856417, at *5 (E.D. Mich. June 29, 2009) ("Under the FTCA, the law of the place where the alleged act or omission occurred is to be applied; therefore, Michigan law applies in the instant case. Under Michigan law, initiation of a medical malpractice action requires that the plaintiff file a complaint and an affidavit of merit." (internal citations omitted)); *Lopez v. Brady*, No. 4:CV–07–1126, 2008 WL 4415585 (M.D. Pa. Sept. 25, 2008) ("Courts within this circuit have recognized that Rule 1042.3 [which requires an affidavit of merit] is substantive law and should be applied by federal courts sitting in diversity. It has also been held that a Plaintiff pursuing an FTCA claim must comply with Pennsylvania substantive law." (internal citations omitted)); *Stanley v. U.S.*, 321 F. Supp.2d 805, 807 (N.D. W.Va. 2004) (holding that statute requiring a screening certificate of merit as a prerequisite to medical malpractice actions is substantive and applies to claims under the FTCA).

Daniel, 716 F. Supp.2d at 698-99.

The undersigned is persuaded by the above analysis and finds that Ohio Civil Rule 10(D) is a substantive rule and applies to plaintiff's instant medical malpractice claims. As plaintiff does not dispute that he did not file an affidavit of merit, defendant's motion to dismiss should be granted.

For the above reasons, the undersigned recommends that defendant's motion to dismiss plaintiff's complaint be granted.

VI. Conclusion

For the reasons stated herein, **IT IS RECOMMENDED THAT** defendant's motion to dismiss (Doc. 13) be **GRANTED,** that plaintiff's claims against defendant be **DISMISSED** with prejudice, and this matter be closed on the docket of the Court.

In light of this recommendation, the following motions are **DENIED** as moot:

(1) Plaintiff's Motion to Expedite (Doc. 11);

(2) Plaintiff's Motion to Expedite: OPM Suspend Retirement (Doc. 12);

(3) Plaintiff's Motion to Proceed with Lawsuit (Doc. 20);

(4) Plaintiff's Motion to Paid Plaintiff OWCP/Workers' Comp Payment (Doc. 21);

(5) Plaintiff's Motion to Impose Disciplinary Actions (Doc. 24);

(6) Plaintiff's Motions to Discipline/Investigation and Grant Relief (Docs. 26, 27); and

(7) the Government's motion to strike. (Doc. 22).

Date 2/19/14

Karen L. Litkovitz
United States Magistrate Judge

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NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

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