

United States District Court
Southern District of Texas

ENTERED

July 09, 2021

Nathan Ochsner, Clerk

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JON STEPHENS,
Plaintiff,

v.

THE UNITED STATES
Defendants.

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CIVIL ACTION NO. 4:18-cv-1878

**ORDER ADOPTING MAGISTRATE JUDGE'S
MEMORANDUM AND RECOMMENDATION**

On June 9, 2021 the Magistrate Judge issued a Memorandum and Recommendation (ECF No. 63). Plaintiff filed timely objections to the Memorandum and Recommendation (ECF No. 64). Plaintiff concedes in his objections that any challenge to the VA's failure to perform a cosmetic procedure during his surgery is barred by the Veterans Judicial Review Act. As part of his objection to the Magistrate Judge's Memorandum and Recommendation, Plaintiff seeks leave to file a Proposed Second Amended Complaint. Plaintiff's Proposed Second Amended Complaint states that Plaintiff does not contend he was entitled to cosmetic surgery, but rather that his consent to the surgeries performed at the VA hospital was based on false representations made by VA staff (ECF No. 65 at 5). However, the proposed Second Amended Complaint continues to include multiple allegations regarding the VA's failure to provide cosmetic surgery. The United States filed a response to Plaintiff's objections and opposes the Plaintiff's request for leave to file a Second Amended Complaint (ECF No. 66).

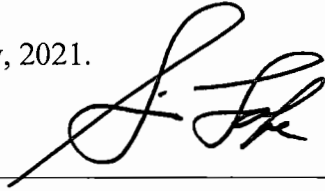
Having reviewed Plaintiff's objections and Defendant's response, the Court is of the opinion that the Magistrate Judge's Memorandum and Recommendation should be adopted by this Court. It is therefore **ORDERED** that the Magistrate Judge's Memorandum and Recommendation is hereby **ADOPTED** and Plaintiff's current claims are dismissed for lack of subject matter jurisdiction.

It is further **ORDERED** that Plaintiff's request for leave to file the Proposed Second Amended Complaint attached to his objections is **DENIED**.

It is further **ORDERED** that Plaintiff is **GRANTED** leave to file a second amended complaint which is consistent with this Court's order dismissing all claims involving questions of

law or fact related to a benefits decision such as the surgical procedures provided to Plaintiff. Plaintiff may file a second amended complaint based only on his allegation that the process for obtaining his consent to the surgeries violated the standard of care. The second amended complaint shall not contain any allegation of negligence or seek to recover for the failure to provide a particular surgical procedure because all such claims involve questions of law or fact related to a benefit decision, are barred by the Veterans Judicial Review Act, and have been dismissed for lack of subject matter jurisdiction. Plaintiff shall file the second amended complaint on or before July 23, 2021.

SIGNED at Houston, Texas this 9th day of July, 2021.

A handwritten signature in black ink, appearing to read 'S. Lake', written over a horizontal line.

SIM LAKE
SENIOR UNITED STATES DISTRICT JUDGE