UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID BOURKE,	)	
	)	
Plaintiff,	)	
	)	No. 20 C 4427
v.	)	
	)	Judge Alonso
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS

Introduction

Plaintiff David Bourke is a federal employee who brings claims against the United States arising from care he received for treatment of his workplace injuries. Bourke alleges that the care he received from the VA was negligent, and that as a result he suffers from various physical ailments. But because Bourke's claims arise from workplace injuries that occurred during the course of his federal employment, they are subject to the Federal Employees Compensation Act (FECA), and the Department of Labor has exclusive jurisdiction over this case. Indeed, Bourke has already litigated his workplace injury claims before the Department of Labor, including through a hearing and appeal. Because FECA prohibits judicial review of the Department of Labor's decisions, Bourke's complaint should be dismissed with prejudice for lack of subject matter jurisdiction. Furthermore, Bourke's allegations make clear that he failed to file his complaint within Illinois's four year statute of repose for medical malpractice actions. Therefore, in the alternative, Bourke's complaint should be dismissed with prejudice for failure to state a claim.

Facts

I. Bourke's District Court Complaint

Bourke alleges that medical care providers at the Hines VA Medical Center provided negligent care while they were treating him for workplace injuries that occurred during the course of his employment at Hines. Compl. ¶¶ 3-4. Bourke alleges that he received this treatment at Hines in 2015 and that his providers "misdiagnosed the nature of plaintiff's medical condition," failed to advise him of the risks associated with taking steroids, prescribed "inappropriate medication," and failed to properly monitor his medication. *Id.* ¶¶ 9-10. Bourke claims that he now suffers from steroid-associated osteoporosis, a fractured thoracic vertebrae, and compression back fractures. *Id.* ¶ 11.

Bourke alleges that prior to filing suit he presented a workplace injury claim pursuant to FECA, which was denied by the Department of Labor on January 27, 2020. *Id.* ¶¶ 5-6. Bourke also presented a Form SF-95 administrative tort claim to the VA pursuant to the Federal Tort Claims Act (FTCA), which the VA denied on January 31, 2020. *Id.* ¶¶ 5, 7. Bourke filed his federal court complaint on July 28, 2020. Dkt. 1.

II. Bourke's FECA Claim

In July of 2017, Bourke filed an occupational disease claim with the Department of Labor and alleged that he had multiple medical conditions as a result of being exposed to chemical fumes during the course of his federal employment. Ex. 1, Hearing Representative Decision at 1. Bourke, who was employed as a reproduction equipment operator at Hines, claimed that he was exposed to hazardous chemicals that were used by a roofing repair contractor and traveled through Hines's HVAC system. *Id.* He asserted that, due to the chemical exposure and subsequent medical treatment, he had developed degenerative disc disease, steroid induced osteoporosis with facture, and other health issues. *Id.*

The Department of Labor accepted Bourke's claim for investigation and then denied it on the merits on January 11, 2018, on the basis that the medical evidence did not establish that Bourke's medical conditions were causally related to his workplace exposure. *Id.* Bourke, who at this point had retained counsel, was granted a telephonic hearing and given leave to submit additional medical records. *Id.* at 2. The Department of Labor considered this supplemental information and affirmed its initial decision on August 30, 2018. *Id.* at 1, 4.

Bourke appealed and, in an appeal brief, argued that he had suffered serious harm from the negligent medical treatment he received at Hines. Ex. 2, Bourke FECA Appeal Br. at 1 ("The nexus of the multiple injuries in the claim stem from the medical treatment Mr. Bourke had after his work exposures."). Burke described how the doctors at Hines diagnosed him as having sarcoidosis and, in March of 2015, prescribed the steroid prednisone. *Id.* at 3-4. Bourke stated that he took prednisone for five months, notwithstanding subsequent hospitalizations at Hines and alleged contraindications for the medication. *Id.* at 3-4. Bourke asserted that he eventually sought a second opinion at the Mayo Clinic and "was informed that he did not actually have sarcoidosis and thus the prednisone usage was, and had been all along, unnecessary." *Id.* at 4. Bourke sought compensation for all of the injuries he allegedly suffered as a result of his "misdiagnosed" sarcoidosis and prednisone-related complications and various other "errors" by the healthcare providers at Hines. *Id.* at 8.

The Department of Labor denied Bourke's appeal on January 27, 2020, on the ground that Bourke had not submitted any narrative medical opinion that might establish the cause of his numerous diagnosed conditions. Ex. 3, Appeals Board Decision at 5. The Department of Labor concluded that Bourke therefore had not met his burden of proving that his conditions were causally related to his federal employment at Hines. *Id.*

III. Bourke's FTCA Claim

Bourke also presented an administrative claim for $10 million to the VA in September of 2016. Ex. 4, Bourke SF-95. Bourke stated that the basis for his administrative claim was: "Exposure to hazardous chemical and toxic fumes through HVAC system from VA hired roofing contractor while in print shop." *Id.* at 3. Bourke asserted: "This is a federal workman's compensation claim." *Id.* The VA denied Bourke's claim, on January 30, 2017, on the ground that FECA precludes an FTCA action by a federal employee for damages resulting from medical malpractice by a government doctor treating an on-the-job injury. Ex. 5, VA Denial Letter at 1. In its letter, the VA advised Bourke that FTCA claims are governed by a combination of state and federal laws, and that "[s]ome state laws may limit or bar a claim or lawsuit." *Id.* at 2. The VA advised Bourke that he had the option of seeking reconsideration and that, if the VA had not acted on his reconsideration request after six months, he could then file suit in federal court. *Id.* at 1. Bourke filed a reconsideration request but then waited until after the VA denied his reconsideration request on January 31, 2020, to file suit. *See* Ex. 6, VA Request for Reconsideration Decision.

Argument

Bourke's complaint should be dismissed for lack of subject matter jurisdiction because the Department of Labor has exclusive jurisdiction over his claim that the medical care providers at Hines were negligent in treating his workplace injuries. Furthermore, even if FECA did not divest this court of subject matter jurisdiction, Bourke's medical malpractice claims under the FTCA would be barred under Illinois's four-year statute of repose. Therefore, in the alternative, the complaint should be dismissed with prejudice for failure to state a claim.

I. Legal Standard

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter

jurisdiction. In evaluating a Rule 12(b)(1) motion, the court must "accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." *Evers v. Astrue*, 536 F.3d 651, 656 (7th Cir. 2008). However, when considering a factual challenge to the court's jurisdiction, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.* at 656–57. The party asserting that the court has subject matter jurisdiction bears the burden of proving the court's jurisdiction. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint. To survive a Rule 12(b)(6) motion, a complaint must allege "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) (quotation omitted). "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.* This standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* While "detailed factual allegations" are not required, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). Well-pled facts are taken as true and viewed in the light most favorable to the plaintiff. *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 743 (7th Cir. 2010). However, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

II. Lack of Subject Matter Jurisdiction

Bourke is seeking compensation for allegedly negligent treatment of his workplace injuries. As such, his complaint is barred by FECA, 5 U.S.C. § 8101, *et seq.*, which makes the

Secretary of the Department of Labor the exclusive arbiter of issues related to federal workers' compensation benefits, and specifically precludes judicial review of the Secretary's decisions. Bourke's complaint should therefore be dismissed pursuant to Rule 12(b)(1).

"Federal employees who are injured on the job can apply to the Office of Workers' Compensation Programs in the Department of Labor for workers' compensation benefits." *Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1437 (7th Cir. 1996). FECA governs that program and expressly precludes any judicial review of agency action. The statute provides:

> (a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may—
>
> (1) end, decrease, or increase the compensation previously awarded; or
>
> (2) award compensation previously refused or discontinued.
>
> (b) The action of the Secretary [of Labor] or her designee in allowing or denying a payment under this subchapter is:
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and,
>
> (2) *not subject to review* by another official of the United States or *by a Court* by mandamus or otherwise.

5 U.S.C. § 8128 (emphasis added). The Supreme Court has described § 8128(b) as "an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary's determination of FECA coverage." *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 90 (1991) (quoting *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 780 n. 13 (1985)).

Having pursued and obtained a decision on his FECA claim for workplace-related injuries from the Department of Labor, Bourke cannot now maintain an FTCA action against the United States in district court. *Fuqua v. United States Postal Serv.*, 956 F.3d 961, 964 (7th Cir. 2020) ("courts have no jurisdiction over FTCA claims where the Secretary determines that FECA applies") (quoting *Sw. Marine*, 502 U.S. at 90). As the Seventh Circuit explained in *Fuqua*: "When

a federal employee's injury falls within the scope of the FECA, its administrative process controls and the employee may not sue the government under the Federal Tort Claims Act . . . seeking damages for the injuries." *Id.* at 964. Furthermore, because the Secretary of the Department of Labor has sole authority to administer FECA, federal courts' jurisdiction over FECA claims "is limited to considering whether a 'substantial question' of coverage exists under the FECA." *Id.* If the Secretary determines that FECA *does* apply, there is no "substantial question" of coverage and a federal court does not have jurisdiction over the plaintiff's FTCA claim. *Id.* at 964-65. This is true even if the Secretary *denied* a plaintiff's claim for workplace compensation because of lack of supporting evidence. *Id.* Here, because no substantial question exists whether the FECA applies to Bourke's claims, FECA governs, and the court should dismiss Bourke's complaint for lack of jurisdiction. *Lance v. United States*, 70 F.3d 1093, 1095 (9th Cir. 1995) ("when Congress gave federal employees the right to recover for an injury under FECA, it took away their right to sue the government in tort for medical malpractice arising out of the injury, as well as for the injury itself"); *Soltysiak v. United States*, No. 90 C 6775, 1991 WL 55750 (N.D. Ill. Apr. 8, 1991) (dismissing FTCA claim for alleged medical malpractice that occurred during the course of federal employee's required annual medical examination).[1]

III. Illinois Statute of Repose

Even if there were jurisdiction over Bourke's claims, they should be dismissed as time-barred. Under the FTCA, the court applies the substantive law of the place where the alleged

[1] *See also, e.g.*, *Wideman v. United States*, Case No. 19-cv-00717, 2019 WL 9355844, at *6 (D. Colo. May 8, 2019); *Johle v. United States*, Case No. CIV 13-0137, 2016 WL 9021836, at *15 (D. N.M. Dec. 7, 2016); *McCall v. United States*, 901 F.2d 548, 550-51 (6th Cir. 1990); *Wilder v. United States*, 873 F.2d 285, 288 (11th Cir. 1989); *Gold v. United States*, 387 F.2d 378, 379 (3d Cir. 1967); *Balancio v. United States*, 267 F.2d 135, 137-38 (2d Cir. 1959).

medical malpractice occurred, in this case, Illinois. *See* 28 U.S.C. § 1346(b)(1). Illinois's four year statute of repose for medical malpractice claims provides:

> [N]o action for damages for injury or death against any physician or hospital . . . shall be brought more than 2 years after the date on which the claimant knew . . . of the existence of the injury . . . *but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death*.

735 Ill. Comp. Stat. § 5/13-212(a) (emphasis added). The Illinois statute of repose is a substantive limit on liability and therefore applies in FTCA cases against the United States. *Augutis v. United States*, 732 F.3d 749, 753 (7th Cir. 2013). Filing an administrative FTCA claim does not toll the statute of repose, and the fact that a plaintiff exhausted his administrative remedies will not excuse the failure to file suit within the statute's four year period. *Id.* at 754 (holding that plaintiff's FTCA action was barred where it was filed five years after the allegedly negligent act or omission, notwithstanding plaintiff's exhaustion of his administrative remedies).

Bourke alleges in his complaint that his healthcare providers at the Hines VA Hospital breached the standard of care "in 2015." Compl. ¶¶ 9, 10.[2] Bourke did not file this suit until July of 2020—five years after the alleged negligence at issue and one year outside Illinois's statute of repose period. Therefore Bourke's suit for medical malpractice is time-barred and the complaint should be dismissed with prejudice.

[2] This allegation is consistent with Bourke's representations to the Department of Labor during litigation of his FECA claim.

Conclusion

For the foregoing reasons, the complaint should be dismissed with prejudice.[3]

Respectfully submitted,

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[3] If the United States' motion to dismiss is not granted, the United States also intends to file an early motion for summary judgment with its answer based on Bourke's failure to attach the physician's certification statement required by 735 Ill. Comp. Stat. § 5/2-622 to his complaint. *See Young v. United States*, 942 F.3d 349, 350-51 (7th Cir. 2019).