APPENDICES TO THE PETITION

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

ESTATE OF JASON ALLEN SMALLWOOD,
Plaintiff-Appellant
v.
UNITED STATES,
Defendant-Appellee

2017-1915

Appeal from the United States Court of Federal Claims in No. 1:16-cv-00700-CFL, Judge Charles F. Lettow.

JUDGMENT

JONATHAN BRYAN KELLY, Jonathan Kelly & Associates, Raleigh, NC, argued for plaintiff-appellant.

NATHANAEL YALE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., MARTIN F. HOCKEY, JR.; SHESSY DAVIS, Litigation Division, United States Army Judge Advocate General's Corps, Ft. Belvoir, VA; WILLIAM KLOTZBUCHER, Office of Counsel, United States Department of Veterans Affairs, Washington, DC.

THIS CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM (DYK, WALLACH, and CHEN, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

April 5, 2018	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

In the United States Court of Federal Claims

No. 16-700C
(Filed: February 2, 2017)

**********	)
THE ESTATE OF JASON ALLEN SMALLWOOD,	) Suit for breach of) contract by estate of) military serviceman
Plaintiff,	) wounded on active
v.	) duty who later died by
UNITED STATES,	) his own hand;
Defendant.	) motion to dismiss for
**********	) lack of subject matter) jurisdiction
	)

Jonathan B. Kelly, Jonathan Kelly & Associates, PLLC, New York, New York, for plaintiff.

Nathanael B. Yale, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, and Robert E. Kirschman, Jr., Director, and Martin F. Hockey, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C. Of counsel were Christopher J. Koschnitzky, Captain, United States Army, United States Army Legal Service Agency, and Bill Klotzbucher and Eric Raun, Department of Veterans Affairs, Office of General Counsel.

OPINION AND ORDER

LETTOW, Judge.

Plaintiff, the Estate of Jason Allen Smallwood ("the Estate"), brings this action on behalf of Mr. Smallwood, a former member of the United States Army, for alleged breaches of an express and implied-in-fact contract by the United States ("the government"). Mr. Smallwood served in Afghanistan from 2011 to 2012, was wounded while serving, and received a post-deployment healthcare assessment before his discharge in 2012. Mr. Smallwood subsequently took his own life. The Estate alleges that the Army breached an express service contract in making its healthcare assessment of Mr. Smallwood because it failed to ensure that Mr. Smallwood was referred for further healthcare. Additionally, the Estate alleges that the United States Department of Veterans Affairs ("VA") breached an implied-in-fact contract by failing to provide Mr. Smallwood with healthcare for which he had allegedly applied.

Pending before the court is the government's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the Court of FederalClaims ("RCFC"). Def.'s Mot. to Dismiss ("Def.'s Mot."), ECF No. 7. For the reasons stated, the government's motion is granted.

BACKGROUND

While serving in the North Carolina National Guard, Mr. Smallwood was ordered to active duty in the Army on approximately September 2, 2011, and subsequently was deployed to Afghanistan. Compl. ¶¶ 5-7. In Afghanistan, Mr. Smallwood was exposed to three "improvised explosive device . . . blasts" on June 16 and 17, 2012. Compl. ¶¶ 8-11. Mr. Smallwood

received a concussion evaluation on June 19, 2012 and then "returned to active duty the following day without limitations." Compl. ¶¶ 12, 15. In September 2012, Mr. Smallwood was ordered to return to the United States "for further medical care and discharge from service." Compl. ¶ 16.

On approximately September 8, 2012, prior to his discharge, Mr. Smallwood received a "Post-Deployment Health Assessment." Compl. ¶ 17, Ex. D. In that assessment, a healthcare provider determined that Mr. Smallwood did not need a referral for further medical care. Compl. Ex. D at 7. The Estate alleges that Mr. Smallwood completed an online application for healthcare through the VA on the same day. Compl. ¶ 17. On approximately September 12, 2012, Mr. Smallwood was released from active duty. Compl. ¶ 18. Less than two months later, on November 5, 2012, Mr. Smallwood fatally shot himself. Compl. ¶ 20.

The Estate of Jason Allen Smallwood brought this suit on June 16, 2016 for alleged breaches of contract. See generally Compl. In Count I, the Estate alleges that the "United States Army breached the active duty service contract with Mr. Smallwood by not ensuring that he was referred for healthcare." Compl. ¶ 22. Specifically, the Estate alleges that deficiencies in Mr. Smallwood's post-deployment healthcare assessment violated the Army's healthcare obligations under 10 U.S.C. § 1145, which allegedly provides the authority for an "active duty service contract" with Mr. Smallwood that "impose[s] a duty upon the Secretary of the Army." Compl. ¶¶ 22-24. In Count II, the Estate alleges that the VA "breached an implied-in-fact contract for healthcare with Mr. Smallwood." Compl. ¶ 28. Mr. Smallwood allegedly applied for, but never received, healthcare benefits from the VA. Compl. ¶¶ 33, 35. As a result, the Estate

seeks "damages in an amount to be determined." Compl. at 7.

The government responded with a motion to dismiss due to lack of subject matter jurisdiction pursuant to RCFC 12(b)(1). Def.'s Mot. The motion has been fully briefed and a hearing was held on January 12, 2017.

STANDARDS FOR DECISION

As plaintiff, the Estate has the burden of establishing jurisdiction. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). Pursuant to the Tucker Act, this court has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act waives sovereign immunity and thus allows a plaintiff to sue the United States for money damages. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Nonetheless, it does not provide a plaintiff with any substantive rights. *United States v. Testan*, 424 U.S. 392, 398 (1976). To establish jurisdiction, "a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part) (citing *Mitchell*, 463 U.S. at 216; *Testan*, 424 U.S. at 398).

ANALYSIS

A. Count I: Express Contract with the Army

In Count I, the Estate alleges that the government breached its "active duty service contract" with Mr. Smallwood for healthcare. Compl. ¶ 22. As the source

of that contract, the Estate relies on 10 U.S.C. § 1145, which entitles members of the armed forces who have been separated from active duty in specified circumstances to receive transitional health benefits. See Compl. ¶¶ 23-24 (referring to 10 U.S.C. § 1145(a)). Regarding transitional healthcare, Subsection 1145(a) provides in pertinent part that "a member of the armed forces scheduled to be separated from active duty" is required "to undergo a physical examination immediately before that separation." 10 U.S.C. § 1145(a)(5)(A). If a member of the armed forces "receives an indication for a referral for follow up treatment from the health care provider who performs the examination," the government must "ensure that appropriate actions are taken to assist" that individual. 10 U.S.C. § 1145(a)(6)(A). The Estate alleges that Mr. Smallwood failed to receive proper care during his post-deployment healthcare assessment because his healthcare provider relied on self-reporting and a computer error, and failed to evaluate a computerized tomography ("CT") scan. Compl. ¶¶ 24-27.

The salient question raised is whether Section 1145 engenders a contractual obligation. In a case heard by the Federal Circuit en banc, the court of appeals addressed whether an implied-in-fact contract arose when military recruiters promised free lifetime medical care to recruits who served on active duty for 20 years or more. *Schism v. United States*, 316 F.3d 1259, 1262 (Fed. Cir. 2002) (en banc). The Federal Circuit rejected plaintiffs' contract claim, stating:

> Congress' authority and the various courts' (i.e., the Supreme Court, our court, and our predecessor court) consistent interpretation thereof demonstrate that military health care benefits as a form of compensation have long

> been exclusively a creature of statute, not contract. Consequently, the discussions with recruiters could not have formed binding contracts with the government at the time [plaintiffs] joined the Air Force. Their claim for breach of an implied-in-fact contract that would give them both an entitlement to lifetime free medical care at military facilities and an entitlement to civilian health insurance for any insufficiency in those military facilities must fail as a matter of law.

Id. at 1276. Here, similarly, Mr. Smallwood's post-deployment healthcare assessment is governed exclusively by Section 1145, not by contract.

The Estate supports its alleged contract claim by citing *DeCrane v. United States*, 231 Ct. Cl. 951 (1982). See Compl. ¶ 22.[1]

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[1] The Estate also relies on *Bowen v. Massachusetts*, 487 U.S. 879 (1988) and *Pines Residential Treatment Ctr., Inc. v. United States,* 444 F.3d 1379 (Fed. Cir. 2006) as a basis for the court's jurisdiction over its contractual claim. See Pl.'s Resp. to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") at 4-5, ECF No. 8. Neither decision supports the Estate's position. In *Bowen*, the Supreme Court addressed "whether a federal district court has jurisdiction to review a final order of the Secretary of Health and Human Services refusing to reimburse a State for a category of expenditures under its Medicaid program." 487 U.S. at 882. The jurisdictional dispute centered on "the meaning of the Administrative Procedure Act" and whether the Court of Federal Claims had exclusive jurisdiction over the claim, which it did not. Id. at 891, 904-08. Although the Court drew a distinction between monetary relief and money damages, id. at 893-94, the Court simply did not address alleged military contracts and healthcare. And in *Pines*, the Federal Circuit determined that

In *DeCrane*, the Court of Claims ruled that it had jurisdiction over plaintiffs' breach of contract claim regarding reenlistment agreements that plaintiffs signed while serving in the Army, 231 Ct. Cl. at 952-53, but it also granted summary judgment in favor of the government on the ground that plaintiffs had not stated a valid claim for relief, id. at 953. Subsequently, in *Schism*, the Federal Circuit held en banc that Congress had not delegated to secretaries of military departments the authority to contract with recruits for health benefits. 316 F.3d at 1268-71. In doing so, the court of appeals explicitly distinguished the facts in *Schism* from those in *DeCrane*. See id. at 1275 (citing *DeCrane*, 231 Ct. Cl. 951; *Grulke v. United States,* 228 Ct. Cl. 720 (1981)). Unlike the benefits promised to plaintiffs in *DeCrane*, which originated from written reenlistment agreements, the healthcare benefits at issue in *Schism* were "exclusively a creature of statute." Id. at 1275-76. Accordingly, the Federal Circuit in *Schism* determined that *DeCrane* was "not in conflict with established Supreme Court case law that military pay and pay-related benefits cannot ever be a matter of contract, but must be governed exclusively by statutes and regulations." Id. at 1275. Here, unlike *DeCrane* and similar to *Schism*, the Estate does not point to any written agreement between Mr. Smallwood and the Army; it instead relies solely on 10 U.S.C. § 1145.

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this court did not have jurisdiction over petitioner's claim for Medicare reimbursement, rejecting petitioner's attempt to style the claim as a breach of contract. 444 F.3d at 1381. Here, similarly, the Estate is unsuccessful in denominating its claim of entitlement to military healthcare as a claim for breach of contract.

The Estate's claim is based on statute, and its attempt to label such a claim as a "contract" is unavailing. *See Jackson v. United States,* __ Fed. Appx. __, __, No. 2016-2253, 2016 WL 6518563, at *3 (Fed. Cir. Nov. 3, 2016) (ruling that "military pay is governed by statute and not by common law rules concerning private contracts") (citing *Schism*, 316 F.3d at 1272); *Pines Residential Treatment Ctr.*, 444 F.3d at 1380 ("Regardless of a party's characterization of its claim, '[the court] look[s] to the true nature of the action in determining the existence or not of jurisdiction.'") (quoting *Katz v. Cisneros*, 16 F.3d 1204, 1207 (Fed. Cir. 1994)). The court thus lacks jurisdiction over the Estate's contract claim in Count I.[2]

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[2] As the government notes, even if the court construed the Estate's claim as a statutory claim, the court would still lack jurisdiction. Def.'s Mot. at 7-8. Section 1145 provides for certain healthcare benefits to members of the armed forces, such as the provision relied upon by the Estate that entitles members to physical examinations before separation from active duty and transitional assistance with health care. See 10 U.S.C. §§ 1145(a)(5)(A), (a)(6)(A). Nonetheless, it does not mandate compensation and does not specify any right to monetary payment. See generally 10 U.S.C. § 1145. Section 1145 thus arguably cannot "fairly be interpreted as mandating compensation" from the government. *See United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472 (2003) (citing *Mitchell*, 463 U.S. at 217). The Estate cannot circumvent the money-mandating jurisdictional requirement by characterizing the government's statutory obligations as contractual obligations. *See Boston v. United States*, 43 Fed. Cl. 220, 226-27 (1999) ("Where, as here, the underlying laws and regulations allegedly violated do not mandate the payment of money, this jurisdictional flaw cannot be sidestepped by transforming the complaint into one based on breach of an implied contract.") (citing *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728,

B. Count II: Implied Contract with the VA

In Count II, the Estate alleges that the VA "breached an implied-in-fact contract for healthcare with Mr. Smallwood" because Mr. Smallwood applied for healthcare benefits from the VA but never received them. Compl. ¶¶ 28, 31-35. This court lacks jurisdiction over allegations regarding the wrongful denial of benefits by the VA. *See, e.g., Prestidge v. United States,* 611 Fed. Appx. 979, 982-83 (Fed. Cir. 2015); *Lewis v. United States*, 124 Fed. Cl. 754, 756-57 (2016); *Kalick v. United States*, 109 Fed. Cl. 551, 556-57 (2013), aff'd, 541 Fed. Appx. 1000 (Fed. Cir. 2013). A provision of the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 2(a), 105 Stat. 378, 388 (1991) (codified at 38 U.S.C. § 511), provides that "[t]he Secretary [of the VA] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a). If an individual receives an adverse decision

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739 (1982)), superseded by regulation as stated in *Roberts v. United States,* 104 Fed. Cl. 598 (2012).

Additionally, to the extent that the Estate's claim is based on negligence or intentional wrongdoing due to the alleged deficiencies in Mr. Smallwood's healthcare assessment, the court does not have jurisdiction over such allegations because they would be based in tort. *See Rick's Mushroom Serv., Inc. v. United States,* 521 F.3d 1338, 1343 (Fed. Cir. 2008). In that regard, the Estate has brought a wrongful death claim before the Army that remains pending. See Hr'g Tr. 12:21 to 13:12 (Jan. 12, 2017).

from the Secretary, the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. §§ 7251-99), provides the statutory route that the individual must follow in appealing the decision. This includes an appeal to the Board of Veterans Appeals, 38 U.S.C. § 7104, the Court of Appeals for Veterans Claims, 38 U.S.C. § 7252(a), and finally the Federal Circuit, 38 U.S.C. § 7292(c). The Court of Federal Claims is not part of this statutory regime. Therefore, because the Estate's claim is based upon the VA's alleged failure to provide Mr. Smallwood with healthcare benefits, the court does not have jurisdiction over Count II.

CONCLUSION

The circumstances of Mr. Smallwood's Army service and wounding in Afghanistan and of his subsequent demise are tragic. Nonetheless, for the reasons stated, the government's motion to dismiss pursuant to RCFC 12(b)(1) is GRANTED. The clerk shall enter judgment in accord with this disposition.

No costs.

It is so ORDERED.

/s/ Charles F. Lettow
Charles F. Lettow
Judge

ORIGINAL Receipt number 9998-3381477

IN THE
UNITED STATES COURT OF FEDERAL CLAIMS

The Estate of JASON ALLEN SMALLWOOD,	)	
Plaintiff,	)	No.16-700C
V.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

COMPLAINT

Plaintiff, The Estate of Jason Allen Smallwood, by its undersigned counsel, complains of Defendant, United States of America, as follows:

NATURE OF ACTION

1. This action seeks damages for breach of contract by Defendant.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the claims asserted herein because the United States of America is the Defendant, pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(l).

FACTS

3. Plaintiff is a United States citizen and legal resident of the State of North Carolina.

4. Plaintiff, Mr. Smallwood, was a former member of the United States Army.

5. Prior to active duty with the Army, Mr. Smallwood served in the North Carolina National Guard.

6. Mr. Smallwood was ordered to active duty by Defendant on or about September 2, 2011, for an enlistment period not to exceed 400 days, and was released from active duty on or around October 24, 2012.

7. Mr. Smallwood was activated for purposes of Operation Enduring Freedom and deployed to Afghanistan.

8. On or about June 16 and 17, 2012, while on mounted patrol, Mr. Smallwood was exposed to three (3) improvised explosive device ("IED") blasts within a 24-hour period.

9. The IED blast on June 16, 2012 was within 25 meters of Mr. Smallwood's vehicle.

10. The first IED blast on June 17, 2012 was a direct hit to Mr. Smallwood's vehicle.

11. The second IED blast on June 17, 2012, approximately 1 hour later, was approximately 40 meters from Mr. Smallwood's vehicle.

12. On or about June 19, 2012 and pursuant to Directive-Type Memorandum (DTM) 09-033, Mr. Smallwood was given a Military Acute Concussion Evaluation (MACE) and received a score of 27/30. Exhibit A.

13. In a sworn statement Mr. Smallwood described the effects of the second blast:

"SPC Withrow did some watch his finger test then said five words and told me to say them back to him. I ended up saying 4 words back. He asked me 5 minutes later and I said 3." Exhibit B.

14. Service Medical Records, AHLTA-T Clinic, on June 19, 2012, written by Teresa Shelton, document the events thusly:

"PT was on route clearance when he experienced 3 mounted IED blasts. The first was about 25 meters away... The second occurred while he was in the gunners turret. His truck received a direct blast and he remembers being lifted out of the turret and states that his next memory was lying in the bottom of the truck. He continued on the mission and then a third blast occurred about 40 meters away from him." Exhibit C.

15. Mr. Smallwood was given an exertion test and returned to active duty the following day without limitations.

16. Following his hospitalization, Mr. Smallwood was unable to perform to the satisfaction of his commander and ordered back to Fort Bliss, Texas in or around September 2012 for further medical care and discharge from service.

17. On or about September 8, 2012, Mr. Smallwood was given a Post-Deployment Health Assessment (PDHA), Exhibit D, which determined that he would not be referred for additional services. The same day Mr. Smallwood completed an online application for

VA Healthcare, and was furnished confirmation in the form of a Submission ID, for medical services at the Hampton, Virginia VA Hospital. Exhibit E.

18. On or about September 12, 2012, Mr. Smallwood was released from active duty and afforded Transitional Health Care under 10 U.S.C. 1145, effective October 24, 2012.

19. On or about September 15, 2012, Mr. Smallwood was sent back home to North Carolina from Fort Bliss, Texas.

20. On November 5, 2012 Mr. Smallwood fatally shot himself in the chest.

21. The Department of Veterans Affairs determined that the cause of death was due to mental unsoundness, as the result of Traumatic Brain Injury (TBI) and connected to service.

COUNT 1 - BREACH OF CONTRACT

22. The United States Army breached the active duty service contract with Mr. Smallwood by not ensuring that he was referred for healthcare. *DeCrane v. United States*, 231 Ct.Cl. 951(1982).

23. The service contract imposed a duty upon the Secretary of the Army pursuant to 10 U.S.C. § 1145 and, specifically, subsections 5 and 6.

24. The authority of § 1145 was undermined by Mr. Smallwood's PDHA, which:
(a) Relied on self-reporting,
(b) Did not evaluate a CT scan, and

(c) Generated a computer error, further ensuring no referral would be made.

25. Self-reporting- Recommendations and potential referrals for additional medical care relied heavily on the statements of Mr. Smallwood. As opposed to the objective medical evidence and reports available to the Army, the decision to not refer Mr. Smallwood for additional care was based largely on reports from the same individual, Mr. Smallwood, already known to have suffered trauma to the brain.

26. CT Scan - The PDHA for Mr. Smallwood indicates that the recommendation for no addition medical care was made without review of, or attempt to retrieve, a recently conducted CT scan.

27. Computer Error - On May 31, 2013, after the death of Mr. Smallwood, AHLTA System Administrator made record of a system error which frustrated Mr. Smallwood's attempt to receive treatment. The note states:

> This record may have required correction in accordance with MODS (Medical Operational Data System) Help Desk Incident #748489. Providers are advised to double check referrals listed below ... no matter what block the Health Care Provider checked on the DD 2796 ... the copy and paste feature for the SF 600 in the Military Health Application forced a return of four additional answers. Providers may have copied and pasted this erroneous information into their AHLTA note ... The extraneous answers inserted on the DD 2796 are: SM declined referral for services; SM declined to complete interview/assessment ...
> Exhibit F.

COUNT 2 - BREACH OF CONTRACT

28. The Department of Veterans Affairs (VA) breached an implied-in-fact contract for healthcare with Mr. Smallwood.

29. A contract implied-in-fact is one "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of surrounding circumstances, their tacit understanding." *Schism v. United States*, 316 F.3d 1259 at 1301 (2002) citing *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597, 58 Ct.Cl. 709, 43 S.Ct. 425, 67 L.Ed. 816 (1923).

30. A binding implied-in-fact contract arises between a private party and the government upon proof by the person of:

(a) Mutuality of intent to contract,
(b) Consideration,
(c) Lack of ambiguity in offer and acceptance,
(d) Government representative whose conduct is relied upon must have actual authority to bind the government in contract.

31. Mutuality of Intent to Contract - The VA, a department of the United States government, obligated to further national security by providing benefits to service members upon the fulfillment of specific criterion, must intend to be contractually bound in order to effect the overall objective of sustaining a capable, national military. Mr. Smallwood showed his intent by completing his deployment and applying for VA medical care.

32. Consideration - Consideration of the implied-in-fact contract is present: Mr. Smallwood completed his deployment and received entitlement to VA and/or other healthcare through individual eligibility and 10 U.S.C. § 1145.

33. Lack of Ambiguity in Offer and Acceptance - By its very creation the VA provides services to eligible service members and veterans. Mr. Smallwood accepted the VA' s offer for care by meeting all eligibility requirements and completing online form 10-l0EZ on September 8, 2012.

34. Authority to Bind Government - The authority to bind the government comes expressly through 5 U.S.C. § 301 and 10 U.S.C. § 1145.

35. A breach in this implied-in-fact contract is clearly evidenced by the VA's lack of response, treatment, and record regarding Mr. Smallwood.

36. In a statement signed by Army Investigating Officer, Major Mark S. McMahan documents his investigation. It states, in pertinent part:

> "Both Marie and Julian stated that their son Jason did call the VA Center in Hampton, VA to make an appointment, but could not confirm if Jason ever received one. I contacted Ms. Jennifer Lamb at the VA Medical Center in Hampton, VA and she stated that Jason Smallwood was not registered there and she had no records with his name whatsoever." Exhibit G.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court:

1. Enter judgment against Defendant on Count 1 and award damages in an amount to be determined;
2. Enter judgment against Defendant on Count 2 and award damages in an amount to be determined;
3. Punitive damages;
4. Costs and attorney's fees associated with this action;
5. An amount equal to the taxes on any award; and
6. All other such relief consistent with justice and equity.

Date: June 16, 2016
Year of The Lord,
/s/ Jonathan B. Kelly

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IN THE
UNITED STATES COURT OF FEDERAL CLAIMS

The Estate of JASON ALLEN SMALLWOOD,	)	
Plaintiff,	)	
v.	)	No. 16-700C (Judge Lettow)
UNITED STATES OF AMERICA	)	
Defendant,	)	

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

The Court certainly possesses jurisdiction to decide this matter. *Suburban Mortgage Associates, Inc. v. United States Department of Housing and Urban Development*, 480 F.3d 1116, 1118 (Fed. Cir. 2007) ("At bottom it is a suit for money for which the Court of Federal Claims can provide an adequate remedy, and it therefore belongs in that court.").

STATEMENT OF THE ISSUE

Whether the complaint contains non-frivolous allegations of contracts with the government and seeks money damages.

STATEMENT OF THE CASE

The Estate of Jason Allen Smallwood (Estate) complains of United States of America (Defendant) for breaches of contracts. The Defendant would like the Court to adopt a creative mischaracterization of the

claim, which inaccurately seeks to anchor allegations in statute. However, the Estate disagrees because the motion considers only health care eligibility created by statute and not the requisite performance protected by contract law.

FACTS

Jason Smallwood was ordered to active duty by the United States Army on September 2, 2011, for an enlistment period not to exceed 400 days, and was released from active duty on October 24, 2012. Plaintiff Complaint at 2.[1] Mr. Smallwood was activated for purposes of Operation Enduring Freedom. Id. In June 2012, he was exposed to three (3) improvised explosive device (IED) blasts within a 24-hour period. Id. Following hospitalization, Mr. Smallwood was unable to return to active duty and released from active duty with Transitional Health Care. Id. at 3. On November 5, 2012 Mr. Smallwood fatally shot himself in the chest. Id.

ARGUMENT

STANDARD OF REVIEW

The Tucker Act grants the United States Court of Federal Claims the power "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a).

"When a federal court reviews the sufficiency of a complaint… its task is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Yes, the

[1] Hereinafter "Comp___."

court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Id.* at 236-37. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Id.* Whether recover is "very unlikely" or "remote" is not the test. *Id.* at 236. "The general rule is that so long as the plaintiffs have made a non-frivolous claim that they are 'entitled to money from the United States' . . . because they have a contract right, this court has jurisdiction to settle the dispute." *Anchor Tank Lines, LLC v. United States*, 127 Fed.Cl. 484, 493 (2016) (quoting *Adarbe v. United States*, 58 Fed. Cl. 707, 714 (2003); quoting *Ralston Steel Corp. v. United States,* 340 F.2d 663, 667 (Ct. Cl. 1965); see also *Engage Learning, Inc., v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011) ("[J]urisdiction under (the Tucker Act] requires no more than a non-frivolous allegation of a contract with the government.") (emphasis in original) (citing *Lewis v. United States,* 70 F.3d 597, 602, 604 (Fed. Cir. 1995); *Gould v. United States*, 67 F.3d 925, 929-30 (Fed. Cir. 1995); *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (holding that "a non-frivolous assertion of an implied contract with the United States" is sufficient to establish subject matter jurisdiction in this court)). The Estate has alleged the existence of contracts, breaches therefrom, and money damages. It seems unthinkable, given the standard of review and the factual allegations presented in the complaint, that this motion be granted.

ANALYSIS

CONTRACT CLAIMS

The Defendant urges the Court to adopt a mischaracterization of the complaint as being one based in statute, but for incomplete reasoning. Defendant Motion at 1-2.[2] Federal common law of contracts should be the source of substantive law here. *Seaboard Lumber Co. v. United States*, 15 Cl. Ct. 366, 369 (1988), aff 'd, 903 F.2d 1560 (Fed. Cir. 1990) ("The federal law applied in breach of contract claims is not, however, created by statute but rather for the most part has been developed by the Court of Appeals for the Federal Circuit and the Court of Claims…").

Moreover, the Supreme Court has previously distinguished the nuanced requirement between a money mandating statute and a suit for damages. In Bowen[3] v. Massachusetts, a case involving a dispute related to Medicaid services and programs, the Court determined that jurisdiction remained with the district courts and not the Claims Court. However in reaching its decision, Claims Court jurisdiction was denied because the plaintiff was "seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be…" 487 U.S. 879, 895 (1988).

> "The State's suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary shall pay certain amounts for appropriate Medicaid

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[2] Hereinafter "Def.Mot. ___"

[3] Justice Scalia dissenting, "Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law." Bowen at 929.

> services, is not a suit seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money."

Id. at 900 (internal quotations omitted).

By motion, the Defendant only contends that "entitlement" to healthcare benefits are governed by statute. Def. Mot. 1. However, the Estate does not contend from where entitlement arose, but instead complains that acts of the Defendant made it so the agreement would never reach performance. It is an issue of entitlement versus performance; a determining factor being the actual damage(s) sought.

DAMAGES

The Estate seeks money damages, not statutory remedy. Comp. 7. While a particular statute stands as evidence of breach, to conclude that the true nature of the claim be statutory would be to ignore the complaint itself. Comp. 3-7. To be clear, the Federal Circuit has shown no preemption of Tucker Act jurisdiction here, as with other cases. *See Pines Residential Treatment Ctr., Inc. v. United States*, 444 F.3d 1379 (Fed.Cir. 2006). "Courts have consistently found preemption of Tucker Act jurisdiction where Congress has enacted a precisely drawn, comprehensive and detailed scheme of review in another forum …." *Id*. at 1380; quoting *St. Vincent's Med. Ctr. v. United States,* 32 F.3d 548, 550 (Fed.Cir.1994) (comprehensive administrative and district court review procedures give rise to such preemption) (internal quotations omitted).

There, Pine's claim was "one for reimbursement" and sought a remedy that required agency intervention and ongoing overlapping relationships. *Id.* Further, review was "precluded by the Medicare Act." *Id*. That is certainly not so here. *The Estate of Jason Allen Smallwood v. United States of America* is a claim for damages resulting from the breaches of contracts and, certainly, the Estate does not seek healthcare benefits under 10 U.S.C. §1145(a)(5).

Further, the Estate has not alleged any ongoing entitlement to healthcare benefits. Mr. Smallwood is deceased. Rather, his Estate seeks damages from the breaches of contracts, while specifying certain performance ignored but due Mr. Smallwood. Comp. 3-6. In that regard, facts to which the Defendant offered to support negligence, Def. Mot. 4, 8-10, were included in the complaint, not as evidence of negligence, but were included to evidence the breaches and unlikeliness or impossibility of performance by Defendant. Quite essential to the ruling of this motion, the Estate has not alleged any acts of negligence nor is it seeking statutory remedy.

CONCLUSION

WHEREFORE, for the foregone reasons, and with careful consideration of the standard of review, the complaint, and allegations contained therein, the Estate prays that the motion to dismiss be denied.

Electronically submitted: October 24, 2016
Year of The Lord,

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