APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

June 18, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WARREN WEXLER,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 19-1436
(D.C. No. 1:18-CV-02378-CMA-STV)
(D. Colo.)

ORDER

Before **MATHESON**, **KELLY**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

April 24, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WARREN WEXLER,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 19-1436
(D.C. No. 1:18-CV-02378-CMA-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **KELLY**, and **EID**, Circuit Judges.**

Plaintiff-Appellant Warren Wexler, appearing pro se, appeals from the district court's order granting the government's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Wexler v. United States, 18-cv-02378-CMA-STV, 2019 WL 3562066, Order Adopting the Recommendation of United States Magistrate Judge Scott T. Varholak (ECF No. 50) (D. Colo. Aug. 6, 2019). The district court held that sovereign immunity barred Mr.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Wexler's claim for intentional or negligent infliction of emotional distress pursuant to the Federal Tort Claims Act (FTCA). Because the claim arose from the government's performance of a discretionary act, it fell under the FTCA's discretionary function exception. Mr. Wexler then sought reconsideration, which was denied. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.!

As the parties are familiar with the facts, they are omitted here. "We review de novo a dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and review findings of jurisdictional facts for clear error." Butler v. Kempthorne, 532 F.3d 1108, 1110 (10th Cir. 2008).

The FTCA does not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In other words, "the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." Berkovitz v. United States, 486 U.S. 531, 537 (1988). To determine whether this exception applies, we conduct a two-part inquiry. First, we must "consider whether the action is a matter of choice for the acting employee." Id. at 536. "If the action does involve such choice, we must then consider whether the type of action at issue is 'susceptible to policy analysis.'" Sydnes v. United States, 523 F.3d 1179, 1183 (10th Cir. 2008) (quoting United States v. Gaubert, 499 U.S. 315, 325 (1991)). "If both of

these conditions are met, the discretionary function exception applies and [the] sovereign immunity doctrine precludes suit." Id.

The district court correctly held that the discretionary function exception applies. The Federal Employees' Compensation Act (FECA) Procedural Manual does not prohibit a claim examiner (CE) from seeking a second opinion specialist in situations not expressly outlined in the manual. See Wexler, 2019 WL 3562066, at *5. Indeed, contrary to Mr. Wexler's position, the decision to seek a second opinion specialist is squarely within the purview of a CE. See FECA Procedural Manual, Ch. 3-0500(3)(a) ("The decision to refer a case for a second opinion examination rests with the CE."). Accordingly, the first part of the Berkovitz test is satisfied.

The second part of the Berkovitz test is satisfied because determining continued entitlement to FECA benefits, including a second opinion examination, serves "the public policies of regulating FECA claims and preventing criminal fraud against the Government." Wexler, 2019 WL 3562066, at *7 (internal quotation marks omitted). As both parts of the Berkovitz test are satisfied, the discretionary function exception applies and the district court correctly held that Mr. Wexler's claims were barred and properly dismissed the action.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 18-cv-02378-CMA-STV

WARREN WEXLER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING PLAINTIFF'S RULE 59(E) MOTION TO ALTER OR AMEND THE COURT'S JUDGMENT

This matter is before the Court on Plaintiff Warren Wexler's Rule 59(e) Motion to Alter or Amend the Court's Judgment (Doc. # 52). Plaintiff requests the Court to reconsider its Order Adopting Magistrate Judge Varholak's Recommendation to Grant Defendant United States' Motion to Dismiss (Doc. # 50). On September 23, 2019, Defendant responded. (Doc. # 56.) In addition to filing his Reply to the Response on October 3, 2019 (Doc. # 57), Plaintiff filed several supplements[1] (Doc. ## 53, 54, 55, 58) to the Motion. Having reviewed the underlying briefing, pertinent record, and applicable law, for the following reasons, the Court denies Plaintiff's Motion.

[1] The contents of these supplements contain corrections, modifications, or arguments related to the instant Motion (Doc. # 52).

I. BACKGROUND

The Court's Order Adopting Magistrate Judge Varholak's Recommendation to Grant Defendant's Motion to Dismiss (Doc. # 50) and the Recommendation (Doc. # 27) provide a thorough recitation of the applicable legal standards and factual and procedural background of this dispute and are incorporated herein by reference. Accordingly, the legal standards and facts will be presented only to the extent necessary to address the instant Motion.

A. APPLICABLE LEGAL STANDARDS

"[S]overeign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1984). As such, "[s]overeign immunity precludes federal court jurisdiction." *Garling v. United States Envtl. Prot. Agency*, 849 F.3d 1289, 1294 (10th Cir. 2017). Indeed, "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The "United States can be sued only to the extent that it has waived its immunity." *Garling*, 849 F.3d at 1294 (quoting *United States v. Orleans*, 425 U.S. 807, 814 (1976)).

The Federal Torts Claim Act "is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *Orleans*, 425 U.S. at 814; 28 U.S.C. § 1346(b)(1). However, 28 U.S.C. § 2680 provides exceptions to this waiver. *Garling*, 849 F.3d at 1294. "When an exception applies, sovereign immunity remains, and federal courts lack jurisdiction." *Id.*

Relevant for resolving the instant Motion, the discretionary function exception set forth in 28 U.S.C. § 2680(a) provides:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The "discretionary function exception 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" *Garling*, 849 F.3d at 1295 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 808 (1984)).

Courts apply a two-step test to determine whether the discretionary function exception applies to a government action. *Berkovitz v. United States*, 486 U.S. 531 (1988). First, a court must determine whether the act was discretionary, that is, whether the act was "a matter of choice" or "judgment" for the acting employee." *Sydnes v. United States*, 523 F.3d 1179, 1183 (10th Cir. 2008) (quotations omitted); *Garling*, 849 F.3d at 1295 (citing *Garcia v. Air Force*, 533 F.3d 1170, 1176 (10th Cir. 2008)). "Conduct is not discretionary if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Garcia*, 533 F.3d at 1176. If the conduct is discretionary, the court moves to the second step of the *Berkovitz* test and considers

whether the conduct required the "exercise of judgment based on considerations of public policy." *Garling*, 849 F.3d at 1295; *Berkovitz*, 486 U.S. at 536–37.

The Federal Employees' Compensation Act ("FECA") "defines the United States' exclusive liability for claims by federal employees for work-related injuries." *Wideman v. Watson*, 617 F. App'x 891, 894 (10th Cir. 2015) (citing 5 U.S.C. §§ 8102(a), 8116(c)); *Farley v. United States*, 162 F.3d 613, 615 (10th Cir. 1998)). It provides that "the United States will pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty . . . ." 5 U.S.C. § 8102(a); 20 C.F.R. § 10.1. The Secretary of Labor may also prescribe rules and regulations necessary for the administration and enforcement of the Act. 5 U.S.C. § 8149. The authority provided by 5 U.S.C. §§ 8145 and 8149 has been delegated by the Secretary to the Director of the Office of Worker's Compensation ("OWCP"). 20 C.F.R. § 10.2. The OWCP's discretion in determining how to administer FECA has been described as "virtually limitless." *See Markham v. United States*, 434 F.3d 1185, 1188 (9th Cir. 2006).

A subdivision of OWCP, the Division of Federal Employees' Compensation, drafted the FECA Procedure Manual ("FECA Manual") to "govern[] claims under [] FECA and address[] its relationship to the program's other written directives." FECA PM 0-100(3), 0-0200(1). The FECA Manual "establishes policies, guidelines and procedures for determining whether an injured employee is eligible for compensation." *Woodruff v. U.S. Dep't of Labor*, 954 F.2d 634, 641 (11th Cir. 1992). Pertinent to the instant action, the FECA Manual also governs the parameters for when a FECA claims examiner may

direct or schedule a second opinion examination of an injured employee. FECA PM 3-0500, 2-0810(9). Specifically, Chapter 3-0500, Paragraph 3 provides:

> **3. Second Opinion Examinations.** The attending physician (AP) is the primary source of medical evidence in most cases, and the AP is expected to provide a rationalized medical opinion based on a complete medical and factual background in order to resolve any pending issues in a case. **In certain circumstances**, such as where the AP's report does not meet the needs of the OWCP, OWCP **may** schedule a second opinion examination (SECOP).
>
> > a. Determining the Need for Examination. The **decision to refer a case for a second opinion examination rests with the CE**, though such an exam may be recommended by a Field Nurse (FN) or District Medical Advisor (DMA), or requested by the employing agency. A **complete discussion** of when a CE **should** refer a second opinion examination is found in PM 2-0810-9 and 2-810-10.
> >
> > Also, OWCP may send a case file for second opinion review where actual examination is not needed, or when the employee is deceased.

FECA PM 3-0500(3)(a) (emphases added).

Chapter 2-0810-9(b) provides that the claims examiner "**should** refer a claim to a second opinion specialist in the following circumstances:"

> (1) The CE has gathered all the medical information and evidence from the AP and does not have enough evidence about a diagnosis or an adequately reasoned opinion about causal relationship to accept the case, but does have sufficient evidence to suggest that the claimant might be entitled to benefits.
>
> (2) The AP's examinations and reports in occupational disease cases do not provide the specific evidence that the OWCP requires for adjudication. The primary examples include hearing loss and asbestosis claims requiring examination in compliance with the specifications outlined in FECA PM 3-0600, or an emotional injury case where a compensable factor of employment is identified.
>
> (3) Temporary total disability (TTD) has gone on longer than usual in a case, and the AP is not an appropriate specialist or has not

satisfactorily explained the reason for the continued disability or why the disability is causally related to the original work injury.

(4) The CE has reason to believe that a claimant is no longer disabled due to the accepted work injury, or no longer has objective residuals of the accepted injury, but the AP maintains that the claimant has residuals or disability from the work injury and does not submit sufficient medical rationale to support that opinion.

(5) The AP cannot or will not send an acceptable permanent impairment evaluation based on the AMA Guides. If the AP has submitted an examination report which outlines medical findings and calculates a percentage of impairment based on the appropriate version of the AMA Guides, the CE should submit the AP's report to the DMA for the schedule award calculation and forego referring the claimant to a second opinion specialist for the same purpose.

(6) Following a consult or a referral with the DMA, the DMA indicates that the file does not contain sufficient medical evidence to make a decision on the medical issue or provide a rating of impairment. In such cases, the DMA may recommend referring the case to a second opinion specialist.

FECA PM 2-0810-9(b)(1)–(6) (emphasis added).

B. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff applied for FECA benefits in 1991, and upon the Office of Worker's Compensation's ("OWCP") approval of his application, OWCP began paying Plaintiff's wage-loss benefits for this total disability. (Doc. # 10 at 4.) In July 2015, pursuant to 5 U.S.C. § 8123(a), the Denver District Office ("DDO") of the OWCP sent Plaintiff a letter providing that a second opinion examination of him was scheduled for August 17, 2015. (Doc. # 1-2 at 1; Doc. # 10-1 at 3, ¶ 16.) Although Plaintiff objected in writing to the

second opinion examination request, Plaintiff attended the examination on August 17, 2015. (Doc. # 10 at 5; Doc. # 1-2 at 21.)

On September 17, 2018, Plaintiff filed suit against Defendant and asserted an intentional infliction of emotional distress claim arising out of the OWCP's decision to schedule Plaintiff for a second opinion examination. (Doc. # 1, Doc. # 1-2 at 12–15; 21–22.) Defendant moved to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6) (Doc. # 10.) With respect to subject matter jurisdiction, Defendant argued that it was immune to Plaintiff's suit because the OWCP's decision to schedule Plaintiff for a second opinion examination was a "discretionary act," and as such, Defendant's conduct fit within an exception to the FTCA, which waives sovereign immunity over certain tort claims. (*Id.* at 7–10.) The Court referred Defendant's Motion to Dismiss to Magistrate Judge Varholak. (Doc. # 13.)

On April 24, 2019, Magistrate Judge Varholak issued his Recommendation that the Court should dismiss Plaintiff's Complaint for lack of subject matter jurisdiction. (Doc. # 27.) On May 24, 2019, Plaintiff objected to the Recommendation and argued that the discretionary function exception did not apply because, when Defendant ordered the second opinion examination, it violated mandatory regulations set forth in the FECA Manual, which purportedly provides only six situations for when a second opinion examination should be referred. (Doc. # 30 at 1–8, 10, 15–17.) After briefing

was complete, on August 6, 2019, the Court issued its Order overruling Plaintiff's objections and adopting the Recommendation. (Doc. # 50.)

Reviewing the Recommendation under a *de novo* standard, the Court agreed with Magistrate Judge Varholak that the OWCP's act of scheduling Plaintiff for a second opinion examination was discretionary pursuant to the FECA Manual. (*Id.* at 10–13.) Applying the Supreme Court's two-step test, the Court determined that (1) Defendant's act was "truly discretionary" because the plain language of the FECA Manual permits the OWCP with discretion to order a second opinion examination (*id.* at 10–13); and (2) Defendant's exercise of discretion in ordering a second opinion examination served the public policy of "regulating FECA claims and preventing criminal fraud against the Government." (*Id.* at 13–15); *Berkovitz v. United States*, 486 U.S. 531 (1988). Because the discretionary function exception applied, the Court concluded that the FTCA did not waive Defendant's immunity over Plaintiff's claim, and as a result, sovereign immunity barred Plaintiff's claim. (*Id.* at 15.) Therefore, the Court dismissed Plaintiff's Complaint without prejudice and entered judgment in favor of Defendant. (*Id.*; Doc. # 51.)

On September 3, 2019, Plaintiff filed the instant Motion (Doc. # 52) and contends that the Court erred in holding that when a second opinion examination may be ordered is not limited to the enumerated list of situations contained in the FECA Manual, Chapter 2-0810(9)(b). (*Id.* at 3–4.) Furthermore, Plaintiff asserts that if the Court refuses to reconsider its judgment, manifest injustice would result. (Doc. # 57 at 2.) Defendant filed its Response and argues that reconsideration is improper because Plaintiff's Motion sets forth arguments that Plaintiff has already made in his objections to the

Recommendation and that the Court has already addressed these issues in its Order adopting the Recommendation. (Doc. # 56 at 3.) For the following reasons, Plaintiff's arguments are insufficient to necessitate reconsideration, and as such, Plaintiff's Motion for Reconsideration is denied.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure do not explicitly authorize a motion for reconsideration for final judgments or interlocutory orders. *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991); *Mantooth v. Bavaria Inn Rest., Inc.*, 360 F. Supp. 3d 1164, 1169 (D. Colo. 2019). However, regarding a final judgment, the Rules allow a litigant who was subject to an adverse judgment to file a motion to change the judgment pursuant to Rule 59(e) or a motion seeking relief from the judgment pursuant to Rule 60(b). *Van Skiver*, 952 F.2d at 1243.

There are three major grounds justifying reconsideration of an order under Rule 59(e): "(1) an intervening change in the controlling law, (2) new evidence [that was] previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Moreover, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law, but such motions are "inappropriate vehicles to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion." *Id.* at 1012 (citing *Van Skiver*, 952 F.2d at 1243).

To that end, "[a]bsent extraordinary circumstances . . . the basis for the second motion must not have been available at the time the first motion was filed." *Servants of the Paraclete*, 204 F.3d at 1012. A motion for reconsideration is not appropriate to revisit issues already addressed. *Van Skiver*, 952 F.2d at 1243. "Rather, as a practical matter, to succeed in a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Mantooth*, 360 F. Supp. 3d at 1169 (citing *Nat'l Bus. Brokers, Ltd. v. Jim Williamson Prods., Inc.*, 115 F. Supp. 2d 1250, 1256 (D. Colo. 2000)) (internal quotations omitted). "Even under this lower standard, '[a] motion to reconsider should be denied unless it clearly demonstrates manifest error of law or fact or presents newly discovered evidence." *Id.* (citing *Sanchez v. Hartley*, No. 13-cv-1945-WJM-CBS, 2014 WL 4852251, at *2 (D. Colo. Sept. 30, 2014)).

III. ANALYSIS

Plaintiff's Motion is aimed at the third justification for warranting reconsideration—that the Court must correct clear error or prevent manifest injustice. (Doc. ## 52 at 4; 57 at 2.) The Court notes that Plaintiff tethers his argument that failure to reconsider would result in manifest injustice to his contention that there are alleged "clear errors" underlying the analysis of the Court's Order. (Doc. # 57 at 2–9.) As such, the Court addresses only whether Plaintiff has demonstrated that the Court committed any clear errors in its analysis. For the following reasons, Plaintiff failed to demonstrate that reconsideration is warranted.

As a preliminary matter, Plaintiff's Motion for Reconsideration is improper

because it is simply a rehash of arguments that Plaintiff previously asserted in his Response in Opposition to Defendant's Motion to Dismiss (Doc. # 18) and his Objection to the Recommendation (Doc. # 30). In his Motion, he argues that it is "self-evident" that the Court erred in not determining that there are only seven[2] circumstances in which a claims examiner should schedule a second opinion examination and that such scheduling is mandatory. (Doc. # 52 at 1–4.) In support of this argument, he avers that the Court quoted the FECA Manual but omitted certain language in a "misleading" way, and that such omissions mischaracterized the true, non-discretionary nature of ordering a second opinion examination. (*Id.* at 3–4.) Plaintiff asserts that, in the Court's prior analysis, it omitted the emphasized language in the phrase"[i]n certain circumstances, **such as where the AP's report does not meet the needs of the OWCP**, OWCP may schedule a second opinion examination." (Doc. # 52 at 3–4 (citing FECA PM 3-0500(3)) (emphasis added).) He contends that when an OWCP may schedule a second opinion examination is still limited only to the seven situations described in Chapter 2-0810-9(b) because the omitted language purportedly references some of the situations set forth in Chapter 2-0810-9(b). (Doc. # 52 at 4.)

Plaintiff's contentions are old, previously rejected arguments with a new gloss. The basis of his Motion for Reconsideration is predicated solely upon the fact that Chapter 3-0500(2)(a) contains the phrase "[a] complete discussion of when a [claims

[2] The Court notes that Plaintiff mentioned "seven situations" because he contends that the third of six enumerated situations in which a claims examiner "should" refer a second opinion examination provides two circumstances warranting a second opinion examination. (Doc. # 52 at 4 (citing FECA PM 2-0810-9(b)(1)–(6).)

examiner] should refer a case for a second opinion examination is found in PM 2-0810-9 . . . ." ("complete discussion" phrase). (*Id.* at 3–5.) Yet, Plaintiff's interpretation of the "complete discussion" phrase guided his response to Defendant's Motion to Dismiss (Doc. # 18 at 10–15) and his Objection to the Recommendation (Doc. # 30 at 1–4). The Court has already rejected Plaintiff's interpretation, which provides that the use of "complete discussion" to describe the situations in which a claims examiner should refer a second opinion examination forecloses any other "circumstance . . . "for which OWCP may [is permitted to] schedule a second opinion examination (SECOP)." (Doc. # 50 at 11–12 (quoting Doc. # 30 at 2) (alterations in original).)

Indeed, in the Court's Order adopting the Recommendation, it interpreted the FECA Manual to provide situations in which a claims examiner **may** and **should** refer a second opinion examination. (*Id.* at 11–13.) The use of "may" in the FECA Manual evinces a choice to permit a claims examiner with discretion to order a second opinion examination outside of the confines of when a second opinion examination **must** be ordered. (*Id.* at 12.) Given these two distinct situations, the Court observed that the "complete discussion" phrase was only a reference to situations when the claims examiner **should** refer a case for a second opinion examination as opposed to when a claims examiner **may** schedule a second opinion examination. (*Id.* at 12–13.) Although Plaintiff provides more detail about why the Court should adopt Plaintiff's interpretation of the "complete discussion" phrase, those additional details arise from neither new information nor law that was previously unavailable to Plaintiff at the Motion to Dismiss and Objection stages of this litigation. *Servants of Paraclete*, 204 F.3d at 1012.

Accordingly, Plaintiff's Motion is an improper rehash of previously rejected arguments, and as such, reconsideration is unwarranted.

Furthermore, the new gloss to Plaintiff's argument does not convince this Court that it erred in its decision. Plaintiff's contention that the "omitted phrase" in Chapter 3-0500(3) is a reference to situations set forth only in Chapter 2-0810-9(b) demonstrates that he fails to consider that the meanings of "may" and "should" are not synonymous. Failure to recognize this distinction is fatal to Plaintiff's argument because any situation in which a claims examiner "may" order a second opinion examination, "such as where the AP's report does not meet the needs of the OWCP," cannot be a reference only to those situations listed in Chapter 2-0810-9(b), where a claims examiner "should" refer a second opinion examination. Plaintiff's proffered interpretation (Doc. # 52 at 3–4) would render Chapter 3-0500(3) and the first sentence of Chapter 3-0500(3)(a) meaningless. Accordingly, the Court is unpersuaded that it erred.

Because Plaintiff failed to demonstrate that the Court erred in its decision, manifest injustice will not result. In the absence of any evidence of extraordinary circumstances warranting reconsideration, the Court declines to revisit issues that it has already thoughtfully considered and decided. Accordingly, Plaintiff's Motion for Reconsideration is denied.

IV. CONCLUSION

Based on the foregoing reasons, the Court ORDERS that Plaintiff's Motion to Reconsider (Doc. # 52) is DENIED.

DATED: November 4, 2019.

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 18-cv-02378-CMA-STV

WARREN WEXLER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER ADOPTING THE RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE SCOTT T. VARHOLAK

This matter is before the Court on review of the Recommendation by United States Magistrate Judge Scott T. Varholak (Doc. # 27), wherein he recommends that this Court grant Defendant United States' Motion to Dismiss (Doc. # 10). On May 24, 2019, Plaintiff Warren Wexler filed his Objection to the Recommendation (Doc. # 30). On June 7, 2019, Defendant files its Response to the Objection (Doc. # 32). In addition to filing his Reply to the Response on June 10, 2019 (Doc. # 33), Plaintiff filed several supplements[1] to his Objection (Doc. ## 31, 36, 38, 40–43). For the following reasons, Plaintiff's objections are overruled, and the Court adopts the Recommendation.

[1] While Plaintiff labeled these filings as "motions" (Doc. ## 31, 36, 38), the contents therein reflect corrections, modifications, or arguments related to his Objection to the Recommendation. The Defendant responded to these filings on July 18, 2019. (Doc. # 44.) Plaintiff responded to this response on July 24, 2019. (Doc. # 45.)

I. BACKGROUND

A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Magistrate Judge Varholak provided a thorough recitation of the factual and procedural background in this case. The Recommendation is incorporated herein by reference, *see* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b), and the facts will be repeated only to the extent necessary to address Plaintiff's Objection.

The Federal Employees' Compensation Act ("FECA") "defines the United States' exclusive liability for claims by federal employees for work-related injuries." *Wideman v. Watson*, 617 F. App'x 891, 894 (10th Cir. 2015) (citing 5 U.S.C. §§ 8102(a), 8116(c)); *Farley v. United States*, 162 F.3d 613, 615 (10th Cir. 1998)). It provides that "the United States will pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty . . . ." 5 U.S.C. § 8102(a), 20 C.F.R. § 10.1. The Secretary of Labor may also prescribe rules and regulations necessary for the administration and enforcement of the Act. 5 U.S.C. § 8149. The authority provided by 5 U.S.C. §§ 8145 and 8149 has been delegated by the Secretary to the Director of the Office of Worker's Compensation ("OWCP"). 20 C.F.R. § 10.2. The OWCP's discretion in determining how to administer FECA has been described as "virtually limitless." *See Markham v. United States*, 434 F.3d 1185, 1188 (9th Cir. 2006).

A subdivision of OWCP, the Division of Federal Employees' Compensation ("DFEC"), drafted the FECA Procedure Manual ("FECA Manual") to "govern[] claims under [] FECA and address[] its relationship to the program's other written directives." FECA PM 0-100(3), 0-0200(1). The FECA Manual "establishes policies, guidelines and

procedures for determining whether an injured employee is eligible for compensation." *Woodruff v. U.S. Dep't of Labor*, 954 F.2d 634, 641 (11th Cir. 1992). Pertinent to the instant action, the FECA Manual also governs the parameters for when a FECA claim examiner may direct or schedule a second opinion examination of an injured employee. FECA PM 3-0500, 2-810(9).

Plaintiff applied for FECA benefits in 1991, and upon the OWCP's approval of his application, OWCP began paying Plaintiff wage-loss benefits for his total disability. (Doc. # 10 at 4.) In July 2015, pursuant to 5 U.S.C. § 8123(a),[2] the Denver District Office ("DDO") of the OWCP sent Plaintiff a letter providing that a second opinion examination of him was scheduled for August 17, 2015. (Doc. # 1-2 at 1; Doc. # 10-1 at 3, ¶ 16,) According to the DDO, a second opinion examination was necessary "to ensure prompt handling of" Plaintiff's claim because the most recent medical report from Plaintiff's attending physician ("AP") was more than three years old and a current medical report is due every three years. (Doc. # 10-1 at 58; Doc. # 1-2 at 1, 17.)

After Plaintiff received the DDO letter, he sent approximately twelve letters to the DDO and one to the Department of Labor ("DOL"), within which he requested both entities to cancel the second opinion examination and threatened to sue the entities for intentional infliction of emotional distress ("IIED") if cancellation did not occur. (*Id.* at 1–2, 7, 12–14.) The DDO declined to cancel the second opinion examination. (*Id.* at 2.)

[2] "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required." 5 U.S.C. § 8123(a).

Both parties represent that Plaintiff attended the second opinion examination on August 17, 2015. (Doc. # 10 at 5; Doc. # 1-2 at 21.)

On September 17, 2018, Plaintiff filed suit against Defendant and asserted an IIED claim arising out of the OWCP's decision to schedule Plaintiff for a second opinion examination. (Doc. # 1, Doc. # 1-2 at 12–15, 21–22). Defendant moved to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6). (Doc. # 10.) Plaintiff responded to the Motion to Dismiss on December 31, 2018 (Doc. # 18), and he supplemented his response on July 29, 2019 (Doc. # 49). Defendant filed its Reply to the Response on February 25, 2019. (Doc. # 24.)

B. THE MAGISTRATE JUDGE'S RECOMMENDATION

Magistrate Judge Varholak issued his Recommendation that the Court should dismiss Plaintiff's Complaint for lack of subject matter jurisdiction on April 24, 2019.[3] (Doc. # 27.) The Magistrate Judge determined that sovereign immunity barred Plaintiff's claims because such claims arose from a government employee's performance of discretionary acts. (*Id.* at 12.) While the Federal Torts Claim Act ("FTCA") provides that the United States has waived its sovereign immunity over certain tort claims, the Magistrate Judge correctly observed that there are exceptions to this waiver, including one for the performance or failure to perform discretionary acts. (*Id.* at 5–6).

[3] The Magistrate Judge declined to address Defendant's other arguments pertaining to the statute of limitations and failure to state a claim under Rule 12(b)(6). (Doc. #27 at 5.) Because the Court agrees with the Recommendation, the Court too declines to consider the other grounds upon which Defendant requests to dismiss Plaintiff's Complaint.

To determine whether this exception insulated Defendant from liability, the Magistrate Judge conducted the two-step inquiry from *Berkovitz v. United States*, 486 U.S. 531 (1988). He concluded that, first, Defendant's act of scheduling a second opinion examination of Plaintiff was a discretionary act (*Id.* at 7–11), and second, that Defendant's discretionary act served public policies. (*Id.* at 12.) Because both *Berkovitz* steps were satisfied, the Magistrate Judge recommends dismissal of Plaintiff's claims without prejudice. (*Id.*)

On May 24, 2019, Plaintiff filed his objections to the Recommendation. (Doc. # 30.) Plaintiff contends that Magistrate Judge Varholak erred in determining that Defendant's act of directing the second opinion examination was discretionary. (*Id.* at 2.) Plaintiff argues that when Defendant ordered the second opinion examination, it violated mandatory regulations set forth in the FECA Manual. (Doc. # 30 at 1–8.) As such, Plaintiff asserts that the discretionary function exception does not apply (*Id.* at 10, 15–17), which dictates the conclusion that the Defendant has waived sovereign immunity under the FTCA. For the following reasons, the Court adopts the Recommendation and overrules Plaintiff's objections.

II. LEGAL STANDARDS

A. REVIEW OF A RECOMMENDATION

When a magistrate judge issues a recommendation on a dispositive matter, Rule 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommended] disposition that has been properly objected to." An objection is properly made if it is both timely and specific. *United States v. One Parcel of Real*

Property Known As 2121 East 30th Street, 73 F.3d 1057, 1059 (10th Cir. 1996). In conducting its review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

B. *PRO SE* PLAINTIFF

Plaintiff is proceeding *pro se*. The Court, therefore, reviews his pleading "liberally and hold[s] [it] to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); *see also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (a court may not "supply additional factual allegations to round out a plaintiff's complaint").

C. RULE 12(B)(1)

Rule 12(b)(1) concerns whether a court has jurisdiction to properly hear the case before it. "Federal courts are courts of limited jurisdiction and, as such, must have a statutory basis to exercise jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citing *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994)). Courts strictly construe statutes conferring subject matter jurisdiction on federal courts and

resolve doubts against federal jurisdiction. *F & S Constr. Co. v. Jensen*, 337 F.3d 160, 161–62 (10th Cir. 1964). The party asserting subject matter jurisdiction has the burden to establish jurisdiction. *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008).

Rule 12(b)(1) challenges may take two forms: a facial attack on the sufficiency of the plaintiff's allegations as to subject matter jurisdiction or a factual attack on the facts upon which subject matter jurisdiction is based. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002) (citing *Holt v. United States*, 46 F.3d 1000, 1002–03 (10th Cir. 1995)). In the instant action, Defendant raises a factual attack. (Doc. # 10 at 8.); *Holt*, 46 F.3d at 1003 (concluding that factual issue as to whether a statute conferring immunity was implicated gave rise to factual attack on subject-matter jurisdiction). Defendant may, therefore, go beyond allegations contained in Plaintiff's Complaint. *Holt*, 46 F.3d at 1003. The Court "may not presume the truthfulness of the complaint's factual allegations" and "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* (citing *Wheeler v. Hurdman*, 835 F.2d 257, 259 n.5 (10th Cir 1987)). In these circumstances, the Court's reference to evidence outside the Complaint does not convert the motion to a Rule 56 motion for summary judgment. *Id.*

D. FTCA AND SOVEREIGN IMMUNITY

"[S]overeign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1984). As such, "[s]overeign immunity precludes federal court jurisdiction." *Garling v. United States Envtl. Prot. Agency*, 849

F.3d 1289, 1294 (10th Cir. 2017). Indeed, "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The "United States can be sued only to the extent that it has waived its immunity." *Garling*, 849 F.3d at 1294 (quoting *United States v. Orleans*, 425 U.S. 807, 814 (1976)).

The FTCA "is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *Orleans*, 425 U.S. at 814; 28 U.S.C. § 1346(b)(1). However, 28 U.S.C. Section 2680 provides exceptions to this waiver. *Garling*, 849 F.3d at 1294. "When an exception applies, sovereign immunity remains, and federal courts lack jurisdiction." *Id.*

Relevant for resolving the instant Motion, the discretionary function exception set forth in 28 U.S.C. Section 2680(a) provides:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The "discretionary function exception 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" *Garling*, 849 F.3d at 1295 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 808 (1984)).

Courts apply a two-step test to determine whether the discretionary function exception applies to a government action. *Berkovitz v. United States*, 486 U.S. 531 (1988). First, a court must determine whether the act was discretionary, that is, whether the act was "a matter of choice" or "judgment" for the acting employee." *Sydnes v. United States*, 523 F.3d 1179, 1183 (10th Cir. 2008) (quotations omitted); *Garling*, 849 F.3d at 1295 (citing *Garcia v. Air Force*, 533 F.3d 1170, 1176 (10th Cir. 2008)). "Conduct is not discretionary if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Garcia*, 533 F.3d at 1176.

If the conduct is discretionary, the court moves to the second step of the *Berkovitz* test and considers whether the conduct required the "exercise of judgment based on considerations of public policy." *Garling*, 849 F.3d at 1295; *Berkovitz*, 486 U.S. at 536–37. This is so because the "basis for the discretionary function exception was Congress' desire to 'prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Berkovitz*, 486 U.S. at 536–37 (quoting *United States v. Vang Airlines*, 467 U.S. 797, 814 (1984)).

"Because the discretionary function exception is jurisdictional, the burden is on [the plaintiff] to prove that it does not apply." *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1220 (10th Cir. 2016).

III. ANALYSIS

Whether sovereign immunity bars Plaintiff's claim depends on whether the Defendant's act of scheduling a second opinion examination was within the discretion of the OWCP or was in violation of mandatory procedures imported in the FECA Manual. Thus, to resolve the instant Motion, the Court reviews whether the discretionary function exception applies, and in doing so, agrees with the Magistrate Judge that the Court must conduct the two-step analysis from *Berkovitz*. (Doc. # 27 at 5–6.)

A. STEP ONE: WHETHER THE ACT WAS DISCRETIONARY

The first *Berkovitz* step requires the Court to determine whether the challenged conduct was "discretionary," that is whether it was "a matter of judgment or choice for the acting employee." *Garling*, 849 F.3d at 1295 (quoting *Garcia*, 533 F.3d at 1176). If a federal statute, regulation, or policy "prescribes a course of action for an employee to follow," the conduct is not discretionary. *Id.* Magistrate Judge Varholak determined that while the FECA Manual prescribes certain situations in which "a claim examiner should refer a claim to a second opinion specialist[,]" the FECA Manual does not expressly prohibit a claims examiner from seeking a second opinion in any other situation. (Doc. # 27 at 8.) Yet, Plaintiff argues that the FECA Manual constitutes a policy that prohibits second opinion examinations except in six situations. (Doc. # 30 at 1–4.) The Court agrees with the Magistrate Judge.

Six of Plaintiff's ten enumerated objections are rooted in the argument that the FECA Manual establishes only six situations in which a second opinion examination may be required. (*Id.* at 1–11, 15–16.) In support of these objections, Plaintiff asserts

that four portions of the FECA Manual provide "mandatory regulations that the OWCP violated when ordering the second opinion" examination. (Doc. # 27 at 7; Doc. # 18 at 10–13.) The Court agrees with Magistrate Judge Varholak's analysis that none of these portions compel the conclusion that ordering a second opinion examination was not discretionary. (Doc. # 27 at 7–11.) However, the Court need only address FECA Manual's Chapter 3-0500 to resolve this case.

Chapter 3-0500, Paragraph 3 provides:

> **3. Second Opinion Examinations.** The attending physician (AP) is the primary source of medical evidence in most cases, and the AP is expected to provide a rationalized medical opinion based on a complete medical and factual background in order to resolve any pending issues in a case. **In certain circumstances**, such as where the AP's report does not meet the needs of the OWCP, OWCP **may** schedule a second opinion examination (SECOP).
>
> > a. Determining the Need for Examination. The **decision to refer a case for a second opinion examination rests with the CE**, though such an exam may be recommended by a Field Nurse (FN) or District Medical Advisor (DMA), or requested by the employing agency. A **complete discussion** of when a CE **should** refer a second opinion examination is found in PM2-0810-9 and 2-810-10.
> >
> > Also, OWCP may send a case file for second opinion review where actual examination is not needed, or when the employee is deceased.

FECA PM 3-0500(3)(a) (emphases added). Plaintiff argues that the phrase "complete discussion" means "full and finished" and "not lacking in any way," which indicates that the only situations in which a claim examiner can refer a case for a second opinion examination are those demarcated in FECA Manual Chapter 2-0810(9)(b). (Doc. # 30 at 1–3 (citing *Complete*, The Law Dictionary, Feat. Black's Law Dictionary Free Online Dictionary (2d ed.).) Further, Plaintiff argues that Chapter 2-0810(9)(b) read in conjunction with Chapter 3-0500(3) provides that the OWCP "does *not* have discretion

over scheduling a [Second Opinion Evaluation] and that the six situations set forth in Chapter 2-0810(9)(b) "are strictly the only situations for which OWCP should schedule a second opinion (SECOP) evaluation[.]" (*Id.* at 2 (emphasis in original).)

The plain language of Chapter 3-0500(3) contradicts Plaintiff's arguments. Chapter 3-0500(3) provides that under "certain circumstances," the OWCP "**may** schedule a second opinion examination[,]" whereas Chapter 3-0500(3)(a) provides that there are other situations "when a CE **should** refer a case for a second opinion examination[.]" FECA PM 3-0500(3), (3)(a) (emphases added). It must follow that Chapter 3-0500(3) dispels the notion that Chapter 3-0500(3)(a) presents the **only** situations in which a claim examiner can schedule a second opinion examination. Indeed, the use of "may" in Chapter 3-0500(3) and "should" in Chapter 3-0500(3)(a) incontrovertibly establishes that the FECA Manual sets forth **two** sets of situations where the claim examiner **may** and **should** arrange for a second opinion examination.

Furthermore, in conjunction with language in Chapter 3-0500(3), Chapter 3-0500(3)(a)'s provision allocates the "decision to refer a case for a second opinion examination" with a claim examiner. This provision too forecloses Plaintiff's assertion that the FECA Manual promulgates mandatory regulations governing when a second opinion examination can be scheduled.

Moreover, that Chapter 3-500(3)(a) contains the phrase "complete discussion" is of no import. Because Chapter 3-0500(3)(a) governs instances in which the claim examiner **should** refer an employee's case for a second opinion examination as opposed to when a claim examiner **may** do so, Chapter 3-0500(3)(a)'s use of "complete

discussion" should only apply to when the claim examiner **should** refer a case for a second opinion examination. Thus, even if the Court ascribed the meaning of exclusivity to "complete discussion," based on the structure of Chapter 3, that limitation would only apply to the subject matter of Chapter 3-0500(3)(a)—not Chapter 3-0500(3). As such, the alleged exclusive nature of the six situations set forth in Chapter 2-0810(9)(b) would not apply to the "certain circumstances" where a claim examiner "may schedule a second opinion examination." FECA PM 3-0500(3).

In the instant case, the FECA Manual's plain language reveals that Defendant's ability to schedule a second opinion examination of Plaintiff was a matter of choice or judgment for the OWCP. In other words, Defendant's conduct was discretionary. Thus, if the OWCP exercised its discretion to direct the second opinion evaluation, regardless of whether such exercise was in bad faith, Defendant is immune from liability arising from that conduct. 28 U.S.C. § 2680(a). Accordingly, the first *Berkovitz* step is satisfied.

B. STEP TWO: WHETHER THE ACT IMPLICATES A POLICY JUDGMENT

Because Defendant's conduct is discretionary, the court moves to the second step of the *Berkovitz* test and considers whether the conduct required the "exercise of judgment based on considerations of public policy." *Garling*, 849 F.3d at 1295; *Berkovitz*, 486 U.S. at 536–37. As Magistrate Judge Varholak observed, the Supreme Court expounded upon the second step in *United States v. Gaubert* and explained:

> When established government policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory

> regime. The focus of the inquiry is not the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

499 U.S. 315, 324–25 (1991). Construing *Gaubert*, the United States Court of Appeals for the Tenth Circuit determined that courts must ask "if the decision or nondecision implicates the exercise of a policy judgment of a social, economic, or political nature." *Duke v. Dep't of Agric.*, 131 F.3d 1407, 1411 (10th Cir. 1997).

Despite the fact that the burden rests with Plaintiff, he did not address the second *Berkovitz* step because he contends that "it was unnecessary" as the discretionary function exception does not apply. (Doc. # 27 at 11; Doc. # 30 at 16); *Hardscrabble Ranch*, 840 F.3d at 1220. As set forth above, the Court is unconvinced of that position. Setting that failure aside, the Court agrees with Magistrate Judge Varholak's conclusion that Defendant's discretionary conduct was based on considerations of public policy. (Doc. # 27 at 11–12.) Indeed, the Magistrate Judge was correct in articulating that requesting a second opinion examination served the public policies of "regulating FECA claims and preventing criminal fraud against the Government." (Doc. # 27 at 12 (citing *Mumme v. United States*, No. 00-CV-103-B, 2001 WL 80084, at *4 (D. Me. Jan. 29, 2001) (quoting *Ward v. United States*, 738 F. Supp. 129, 133 (D. Del. 1990)).).

In the instant case, when the OWCP exercised discretion to schedule a second opinion examination to investigate whether Plaintiff was still entitled to FECA benefits, such conduct advanced the FECA Manual's purpose of governing the process by which the OWCP determines whether an injured employee is eligible for compensation and ensured that fraud was not perpetrated against the Government. As such, Defendant's

discretionary conduct is grounded in the policy of FECA's regulatory regime. Accordingly, the second *Berkovitz* step is satisfied.

Because both *Berkovitz* steps have been met, the discretionary function exception applies and the FTCA does not waive Defendant's immunity over Plaintiff's claim. Therefore, because sovereign immunity bars Plaintiff's claim, the Court does not have subject matter to adjudicate that claim. Accordingly, the Court adopts the Recommendation and dismisses Plaintiff's Complaint without prejudice.[4]

IV. CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

1. Plaintiff's Objection (Doc. # 30) to the Recommendation is OVERRULED;
2. Magistrate Judge Varholak's Recommendation (Doc. # 27) is AFFIRMED and ADOPTED as an Order of this Court;
3. Defendant United States' Motion to Dismiss (Doc. # 10) is GRANTED; and
4. Plaintiff's Complaint (Doc. # 1) is DISMISSED WITHOUT PREJUDICE.

DATED: August 6, 2019

BY THE COURT:

Christine M. Arguello
CHRISTINE M. ARGUELLO
United States District Judge

[4] "[D]ismissals for lack of jurisdiction should be without prejudice because the court, having determined that it lacks jurisdiction over the action, is *incapable* of reaching a disposition on the merits of the underlying claims." *Brereton v. Bountiful City Corp.*, 434 F.2d 1213, 1218 (10th Cir. 2006) (emphasis in original).