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**ORDER AND JUDGMENT* OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(JUNE 2, 2021)**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLAKE EDWARD HALFACRE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 20-4101
(D.C. No. 1:19-CV-00038-CW)
(D. Utah)

Before: MATHESON, BRISCOE,
and CARSON, Circuit Judges.

* 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. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Blake Edward Halfacre, appearing pro se, appeals the district court's order dismissing his complaint under the Federal Torts Claim Act ("FTCA") for lack of subject-matter jurisdiction. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Mr. Halfacre was working as an aircraft mechanic at Hill Air Force Base ("Air Force") in Utah, when, in January 2013, he injured his right shoulder in a slip and fall incident. In February, he filed a claim with the Office of Workers' Compensation Programs ("OWCP") for compensation under the Federal Employee's Compensation Act ("FECA") for a closed dislocation of the right shoulder and a closed right acromioclavicular dislocation. The OWCP accepted Mr. Halfacre's claim for his shoulder injury.

Following surgery to repair his shoulder, in May 2013, Mr. Halfacre's treating surgeon cleared him to return to light-duty work; upon his return, Mr. Halfacre was assigned to work that required no lifting whatsoever, primarily wiping off tables and countertops in the break room and filling out identification tags for parts. In early June, the Air Force received a letter from a different medical provider, who indicated that he was treating Mr. Halfacre for a back injury and to "[p]lease limit [his] bending requirements and heavy lifting between 5-10 [pounds] until we are able to evaluate his recent back injury." R., Vol. I at 223. In July, Mr. Halfacre stopped work altogether and filed for total disability.

In August 2015, while he was on total disability, Mr. Halfacre filed a second claim for compensation with the OWCP. According to Mr. Halfacre, he suffered

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several injuries, including emotional distress and depression, when: (1) he was forced to return to light-duty work; (2) his assigned duties violated the work restrictions noted by his medical providers; and (3) the Air Force falsified his work restrictions. The OWCP refused to accept the claim because Mr. Halfacre did not submit any proof that the events occurred as he described them. On appeal, the Employees' Compensation Appeals Board ("ECAB") remanded the case to the OWCP with instructions to administratively combine Mr. Halfacre's second claim with the claim for his shoulder injury.

On remand, the OWCP accepted Mr. Halfacre's first claim for his injured shoulder as including, among several conditions, major depressive disorder and adjustment disorder related to the slip and fall. However, the OWCP denied Mr. Halfacre's second claim for an emotional condition related to his return to light-duty work because there was no probative evidence that he was required to perform work beyond the limitations expressed by his medical providers or that the Air Force falsified his work restrictions. The ECAB affirmed.

In the meantime, Mr. Halfacre filed a third claim with the OWCP. This time, Mr. Halfacre sought compensation for a shoulder injury from wiping off tables during his short tenure at work in June 2013. The OWCP denied the claim because Mr. Halfacre failed to establish that he suffered an injury. The record contains no evidence of an appeal.

Dissatisfied with the resolution of his second and third claims under the FECA, Mr. Halfacre tried for a second bite at the apple and sued the United

States under the FTCA.¹ According to the allegation in the complaint, Air Force employees: (1) failed to properly document the work restrictions imposed by his treating medical providers; (2) failed to properly scrutinize work restrictions while he was on light-duty work; (3) negligently required him to perform work contrary to the orders of his treating medical providers; (4) made false statements regarding his work restrictions; (5) intentionally caused him to suffer emotional distress; and (6) acted or failed to act, which made the United States vicariously liable. In other words, Mr. Halfacre sued under the FTCA for the same claims that had been previously adjudicated under the FECA.

The district court dismissed the complaint for lack of subject-matter jurisdiction. Mr. Halfacre appeals.

II. DISCUSSION

A. Standard of Review

“We review de novo a dismissal for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).” *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2020). “We review any findings of jurisdictional fact for clear error.” *Id.* “The party invoking federal jurisdiction has the burden to establish that it is proper, and there is a presumption against its existence.” *Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014) (internal quotation marks omitted).

¹ By the time Mr. Halfacre filed suit in 2019, he had received more than \$200,000 in disability compensation under the FECA, and the OWCP had covered more than \$100,000 in medical expenses.

B. The FECA

The FECA is a comprehensive workers' compensation scheme for federal civilian employees. *See* 5 U.S.C. § 8102(a) ("The United States shall pay compensation . . . for the disability . . . of an employee resulting from personal injury sustained while in the performance of his duty . . ."). The Act provides a wide range of benefits for covered work-related injuries, including compensation for lost wages, related medical costs, and vocational rehabilitation. *See* 5 U.S.C. §§ 8103-8107. Thus, 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 FTCA seeking damages for the injuries. *See Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 192-94 (1983) (citing 5 U.S.C. § 8116(c)); *see also Tippetts v. United States*, 308 F.3d 1091, 1094 (10th Cir. 2002); *Swafford v. United States*, 998 F.2d 837, 839 (10th Cir. 1993).

Central to the FECA's statutory scheme is the role of the Secretary of Labor, who has exclusive authority to administer FECA claims and to decide questions arising under that Act, including whether a claim is covered. *See* 5 U.S.C. § 8145. *See also Tippetts*, 308 F.3d at 1094; *Swafford*, 998 F.2d at 839. The Secretary's decision to allow or to deny payment under that Act is "final and conclusive for all purposes and with respect to all questions of law and fact; and . . . not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. § 8128(b) (1)-(2); *see also Swafford*, 998 F.2d at 839.

Indeed, the FECA "contains an unambiguous and comprehensive provision barring any judicial review of the Secretary of Labor's determination of FECA

coverage. Consequently, the courts have no jurisdiction over FTCA claims where the Secretary determines that [the] FECA applies.” *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 90 (1991). This bar applies even when an employee is not entitled to any benefits, such as when the Secretary decides that an injury is not compensable under the FECA. *See Farley v. United States*, 162 F.3d 613, 616 (10th Cir. 1998); *Swafford*, 998 F.2d at 841.

Plainly, the district court here lacked subject-matter jurisdiction over the FTCA complaint, and Mr. Halfacre’s arguments to the contrary are unavailing. First, Mr. Halfacre takes issue with the strength of the evidence on which his second and third claims were resolved and asks this court to re-examine the evidence and reach a different result. But we have no authority to conduct such a review. *See* 5 U.S.C. § 8128(b)(1)-(2).

Second, Mr. Halfacre suggests that he was not a federal employee when he returned to light-duty work in May 2013 because he was not given a federal job classification or wage code. We agree with the government that this argument is baseless. Mr. Halfacre filed his claims under the FECA as a federal employee, both the OWCP and ECAB recognized the claims as having been filed by a federal employee, and at a hearing in the district court on the government’s motion to dismiss, Mr. Halfacre’s counsel acknowledged that he was a federal employee for purposes of determining FECA coverage. It is obviously too late, and inaccurate, for Mr. Halfacre to argue that he was not a federal employee.

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III. CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Joel M. Carson III
Circuit Judge

**ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF UTAH
(AUGUST 28, 2020)**

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

BLAKE EDWARD HALFACRE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 1:19-cv-038 CW

Before: Clark WADDOUPS
United States District Judge.

This matter is before the court on a Motion to Dismiss filed by the United States of America based on lack of subject-matter jurisdiction. A hearing on Defendant's motion was held before the court on August 27, 2020 via video conference. Chris L. Schmutz and Jay R. Mohlman appeared on behalf of Plaintiff Blake Edward Halfacre and Mr. Halfacre also appeared personally. Todd C. Hilbig appeared on behalf of Defendant. After due consideration of the parties' filings and oral arguments, and otherwise being fully advised,

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IT IS HEREBY ORDERED, for the reasons stated on the record, that Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction is GRANTED (ECF No. 18). This case is dismissed without prejudice with each party to bear one's own costs.

DATED this 28th day of August, 2020.

BY THE COURT:

/s/ Clark Waddoups
United States District Judge

**JUDGMENT OF THE IN A CIVIL CASE
(AUGUST 28, 2020)**

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

BLAKE EDWARD HALFACRE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 1:19-cv-038 CW

Before: Clark WADDOUPS
United States District Judge.

IT IS ORDERED AND ADJUDGED

that this case is dismissed without prejudice based
on lack of subject-matter jurisdiction. Each party to
bear one's own costs.

BY THE COURT:

/s/ Clark Waddoups
United States District Judge

**BENCH RULING GRANTING
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION
(AUGUST 27, 2020)**

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH NORTHERN DIVISION

IN RE: BLAKE HALFACRE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 1:19-CV-00038

Before: Clark WADDOUPS
United States District Judge.

[Transcript Excerpts; Pg. 38]

THE COURT: All right. After reviewing my notes and taking a moment to review the case that was cited, I am prepared to rule in this case. I am going to grant the United States motion to dismiss for lack of subject matter jurisdiction. The points that lead me to that conclusion are as follows. I believe that the arguments made by Mr. Hilbig in support of the United States' position repre-

sent a sound presentation of what the law is as I understand it.

The first point I would make is that the purpose of FECA is to pay compensation for disability of an employee resulting from personal injury sustained while in the performance of his duties. The *Swafford* case states that. I don't believe there is any dispute by any person or party to this that that is not the law.

And as we discussed during oral argument, the Secretary of Labor has consistently relied upon the fact that the premise rule which means that if an activity was taking place on the premises of the employment within the definition of the, quote, "performance of duty," that is sufficient to satisfy the requirements that there was within FECA.

The Tenth Circuit has also applied a broad definition of this definition of the performance of duty and has held that an injury occurs in the performance of duty if it, quote, "arises out of in the course of employment." That's the *Farley* decision which is found at 162 F.3d 613 which is a 1998 case.

In this case, it's beyond dispute that Mr. Halfacre was on the premises when he alleges to have been injured in claims two and three. It is also beyond dispute that this duty was what he was instructed to do even though he argues that he may have been instructed by an independent contractor he clearly was ordered to return to work, he was back at work pursuant to that direction, and admits that he was told by his supervisor to perform this conduct. In a challenge to jurisdiction, the

Plaintiff has the burden of proving subject matter jurisdiction. In this case I find that Mr. Halfacre simply failed to be able to sustain this burden.

Some of the denials support the fact that there was a question of whether or not he was in the performance of his duty. As I read the Secretary of Labor decisions and those that have been submitted in support of this motion by the United States, it seems clear that they not only accepted jurisdiction, it is also clear that they rejected the claim for claims two and three on the ground that they believed that the basis for the claims was not supported by the facts. They believed the statements of the supervisor that he had never instructed Mr. Halfacre to perform any duties that would be injurious to his shoulder.

I understand that Mr. Halfacre disputes these facts, but if this is a matter that is within the sole discretion and judgment of the Secretary and the Department of Labor and that is not a matter for which this Court has jurisdiction to review and disagree.

Mr. Halfacre was an aircraft mechanic. He was assigned to work in that but he was ordered to return to work for light duty and was working under the direction of his supervisor. Now even if he was working under the direction of an independent contractor, he was not being paid by the independent contractor, he was not hired by the independent contractor. At most he was receiving direction as to what he should have been doing. I don't believe that is sufficient to support the claim that he was not within the jurisdiction of FECA.

The Court finds that the injury that Mr. Halfacre complains about arose out of and during the course of his employment by the Air Force. That is sufficient to bring him within the jurisdiction of FECA. Mr. Halfacre argues that he was not paid during this period and the facts are somewhat inconsistent. It appears from the information presented that he was paid, but it is not clear that that payment was for work that he was doing as opposed to disability payments. Given simply the amounts that appear to have been paid during those periods, it would be reasonable to conclude that these were disability payments. But if Mr. Halfacre was not paid during this period, that would not be a claim under the Federal Torts Claim Act. That would be some other different claim that he may have had at that time to assert that he should have been paid separately for that work.

The Court would also note that the question of whether you're being paid is not definitive. There are cases that support that if a person is injured during the lunch hour, during a period when they're not paid, that still does not take the injury out of FECA and FECA compensates and the jurisdiction of FECA covers those particular cases.

When a person is injured in the performance of his duties, the Federal Employment—Employee Compensation Act contains, quote, "The—an unambiguous and comprehensive provision barring any judicial review of the Secretary's determination of FECA coverage and the Courts have no jurisdiction over FECA claims where the Secretary of Labor determines that FECA applies." That is

a paraphrase of a quote from *Southwest Marine* which is 112 Supreme Court 486, a 1991 case, that is persuasive law and governs in this case.

Based on the findings that the Court has made, that this occurred during the course and in the performance of Mr. Halfacre's duties, this Court lacks jurisdiction over Mr. Halfacre's claims.

With respect to the argument that the case should be stayed to allow this to go back to the Secretary of Labor, based on my review of the decisions issued by the Secretary of Labor I believe that that decision has already been clearly made and is unambiguously decided that the Secretary of Labor found that the claim was within FECA and rejected the claim not on the basis of a lack of jurisdiction or that Mr. Halfacre's claim was not within FECA, but on a factual basis that related to whether or not the injury was claimed. I would also note that these claims appear to have been included by amendment, perhaps not fully but at least partially, because the original claim that was recognized for the original slip and fall was amended to include anxiety and emotional and other injuries. Based on all of these facts, the Court finds that I have no jurisdiction over this matter and the motion of the United States to dismiss is granted.

Unless there is something further, we will conclude this hearing.

**ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT DENYING
PETITION FOR REHEARING
(JULY 1, 2021)**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLAKE EDWARD HALFACRE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 20-4101
(D.C. No. 1:19-CV-00038-CW)
(D. Utah)

Before: MATHESON, BRISCOE, and CARSON,
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.

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Entered for the Court

/s/ Christopher M. Wolpert
Clerk

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