IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NAOMI OLSEN AND TOM OLSEN,
Plaintiffs,

v.

MS. ALEXIS HERMAN, et al,
Defendants.
_____/

No. 00-3165 MMC

ORDER GRANTING FEDERAL DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

(Docket #s 96 & 117)

Before the Court is the motion to dismiss or, in the alternative, for summary judgment, filed February 27, 2001, by defendants Elaine Chao, Paul O'Neil, Bernard Anderson, Pat Lattimore, John Vittone, Paul Mapes, Betty Jean Hall, Harvey Solano, Carol Dedeo, Shelby Hallmark, Michael Niss, Jack Curly, Phillip Williams, Rose Stout, United States Navy and United States Department of Energy (collectively, "federal defendants").[1] Having considered the papers filed in support of and in opposition[2] to the motion, the Court rules as follows.

I. BACKGROUND

Plaintiffs Tom and Naomi Olsen, appearing pro se, filed this lawsuit on August 31, 2000. In their complaint, which is over fifty pages in length, plaintiffs name over fifty defendants and invoke myriad constitutional and statutory provisions, including the Fifth and Fourteenth Amendments, 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, as well as state law causes of action for negligence, fraud, and infliction of emotional distress. Although the complaint is largely devoid of specific factual allegations as to many of the

[1] All of the individual defendants are employees of the Department of Labor. The Court understands the motion to be made on behalf of the Department of Labor and Alexis Herman Secretary of the Department of Labor, as well.

[2] Plaintiffs filed their opposition to the Federal Defendants' motion on March 27, 2001, eleven days after opposition to the motion was due. See Civ. L. R.7-3. In their opposition, plaintiffs, appearing pro se, explain, but have not shown good cause for, their untimely submission. Nonetheless, the Court has considered the opposition.

defendants, plaintiffs' claims basically center around two separate sets of proceedings: (1) proceedings pending before the Office of Administrative Law Judge ("OALJ") of the United States Department of Labor ("DOL"), which proceedings could result in the modification or termination of benefits Tom Olsen has been receiving under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq; and (2) proceedings before the California State Board of Pharmacy and under the California Workers' Compensation Act, culminating in the revocation of Naomi Olsen's pharmacist's license and denial of workers' compensation benefits. Plaintiffs allege that various defendants engaged in conspiracies to deny Torn Olsen benefits under the LHWCA and to deprive Naomi Olsen of her "property rights." (See Compl. ¶ 81-82.) Plaintiffs seek injunctive relief (see Compl. ¶ 106-109)[3] as well as damages. (See Compl. ¶ 110 -122.)

Of the defendants named in the complaint as to whom plaintiffs have filed proof of service, forty-one have moved to dismiss, two, Tierman and Smith, Inc. and David E. Cisek, have answered, and five have not responded to the complaint.[4]

Plaintiffs' claims against the federal defendants concern Tom Olsen's benefits under the LHWCA.

A. The LHWCA

"The LHWCA is a comprehensive statutory scheme governing compensation for covered employees (e.g., longshoremen) due to loss of earning capacity caused by injuries sustained while engaged in 'maritime employment' upon the navigable waters of the United States, or upon designated lands adjoining those waters." See Williams v. Jones, 11 F.3d 247, 250 n.1 (1st Cir. 1993); 33 U.S.C. §§ 902, 903. Employers subject to the LHWCA are required, within statutory limits, to compensate their employees for job-related injuries or deaths. See 33 U.S.C. § 904. Claims are filed with the deputy

[3] Plaintiffs seek to enjoin the proceedings before the DOL. (See Compl. ¶¶ 108-109.)

[4] The five defendants are: Rex Scatina, Dennis Babcock, Mr. O'Laughlin, David Walker, Controller General, and Lawrence Sumnor, Secretary of the Treasury.

commissioner. see id. § 919(a), and any dispute requiring a hearing is referred to an Administrative Law Judge (ALJ), see id. § 919(d). The ALJ makes findings of fact and conclusions of !aw, and issues compensation orders as appropriate. See 20 C.F.R. § 702.348. The Act provides for internal appellate review to the Benefits Review Board ("BRB"), see 33 U.S.C. § 921(b). upon timely appeal, see 20 C.F.R. § 702.393. Final orders of the BRB are reviewable by the United States Courts of Appeals. See id. § 921(c).

The LHWCA provides for modification of awards "on the ground of a change in conditions or because of a mistake in a determination of fact." See id. § 922. When an employer seeks such a modification, the District Director has the authority to attempt to mediate the dispute, typically through an "informal conference." See id. § 919(c); 20 C.F.R. § 702.311 et seq. If the mediation is unsuccessful, or upon application of a party for a hearing, the District Director refers the matter to the OALJ for formal adjudication by an ALJ. See 33 U.S.C. §§ 919(c)-(d), 922. Both the District Director, upon agreement of the parties, and the ALJ are authorized to issue a new compensation order "which may terminate, continue, reinstate, increase or decrease such compensation," see id. § 922, and in doing so may redetermine the compensability, nature and extent of the injured worker's disability as well as re-adjudicate the employer's liability. See generally Metropolitan Stevedor Co. v. Rambo, 515 U.S. 291, 296-300 (1995). Following such a determination, the LHWCA further provides for an appeal to the BRB and ultimately to the United States Courts of Appeals. See id. §§ 921(b), (c).

Under the LHWCA, the Secretary of Labor has the discretion to provide legal assistance to those covered by the Act. See id. § 939(c)(1) ("The Secretary may, upon request, provide persons covered by [the LHWCA] with legal assistance in processing a claim."); 20 C.F.R. § 702.135(b). The Secretary is also required to provide, upon request, "information and assistance" regarding coverage, compensation and procedures to all persons covered. See 33 U.S.C. § 939(c)(1). "The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best

such services available." See id. 20 C.F.R. §§ 702.501-702.508. The Secretary, however, is not "the designated champion of employees within the statutory scheme." Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Harcum), 514 U.S. 122,132 (1995). Indeed. "one of her principal roles is to serve as the broker of informal settlements between employers and employees." Id.

"The role of the United States District Courts in this scheme is limited." Thompson v. Potashnick Const. Co., 812 F.2d 574, 575 (9th Cir. 1987). As the Court of Appeals has explained:

> The district court has jurisdiction to enforce an order made and served in accordance with law if the employer has failed to comply. 33 U.S.C. § 921(d). The district court cannot affirm, modify, suspend or set aside the order. Marshall v. Barnes & Tucker Co., 432 F.Supp. 935, 958 (W.D.Pa.1977). Unlike the BRB and court of appeals, the district court has no jurisdiction over the merits of the litigation. Its jurisdiction is limited to screening for procedural defects. Id. at 939.

Thompson, 812 F.2d at 575.

B. Administrative Background[5]

On August 28, 1978, Tom Olsen sustained injuries while working as a marine machinist for defendant Triple A Machine Shop, Inc. ("Triple A") aboard a vessel berthed in the Port of Oakland, California. (See Decl. of Mark A. Reinhalter (Reinhalter Decl.") Ex. 1.) After several years of litigation between Tom Olsen and Triple A, an ALJ ordered Triple A to pay to Tom Olsen under the LHWCA "compensation for permanent total disability" as well as "medical and associated benefits in connection with the subject injury,"[6] (see Reinhalter Decl. Ex.1.)

In November 1999, Triple A initiated review proceedings under the LHWCA, on

[5] The Court takes judicial notice of the following facts taken from documents filed with the Department of Labor. See Mack v. South Bay Beer Distributors. Inc., 798 F.2d 27 1279, 1282 (9th Cir. 1986) (holding court may take judicial notice or records and reports of administrative bodies), abrogated on other grounds by Astoria Federal Savings and Loan Ass'n. v. Solimino, 510 U.S. 104 (1991).

[6] In June 1986, Triple A and Tom Olsen agreed to settle Triple A's liability for Tom Olsen's past and future medical benefits for a lump sum payment in the amount of $34,300, (see Reinhalter Decl. Ex. 3.)

the grounds that Tom Olsen's physical condition and employment status had changed since the ALJ's 1982 decision by which Olsen was awarded LHWCA benefits; (See id. Exs. 4, 5, 35.) The matter was assigned OWCP # 13-56511, and an informal hearing was held by the District Director, defendant Phillip Williams ("Williams" or "District Director). (See id. Exs.6,7.)

After the hearing, Williams referred the case to the OALJ for hearing. (see id. Exs. 6, 7, 10.), where it was assigned to defendant Paul Mapes ("Mapes"), an ALJ. Olsen appealed the referral to the BRB and the Ninth Circuit Court of Appeals, both of which denied his appeals and requests for relief.[7] (See id. Exs. 11-16, 18, 21.) Olsen thereafter sought reconsideration by both the BRB and Court of Appea1s, which motions were denied as well. (See id. Exs. 19, 20. 22, 23.)

In addition to attempting to overturn the District Director's referral of Triple A's application for modification, Tom Olsen, in January 1999, filed a claim against Triple A for additional compensation under the LHWCA, alleging that Triple A's application had caused injury to his "heart, lungs, psyche, nervous system, [and] all systems of the body," as well as "stress." (See id. Exs. 17, 41-42) This claim was assigned OWCP #13-99430. On April 27, 2000, Williams held an informal conference on Torn Olsen's claim and thereafter referred the matter to the OALJ with a recommendation that the claim be denied. (See id. Exs. 43, 48.) Tom Olsen thereafter requested that ALJ Mapes consolidate OWCP #13-56511 and OWCP#13-99430. (See id. Ex. 17.) On June 15, 2000, ALJ Mapes granted this request. (See id.)

On August 8, 2000, plaintiff filed an additional claim against Triple A, alleging injury to his "immune system, psyche. nervous system, and total body," as a result of "occupational injury exposure to various agents, chemicals or nuclear materials" in the course of his employment at Hunter's Point Shipyard during 1978. (See id. Ex. 52.) This claim has been assigned OWCP # 13-99855. (See id.)

On August 9, 2000, Olsen filed a motion seeking an order to compel the owner of Triple A, defendant Albert Engel, and Triple A's LHWCA claims administrator,

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[7] Olsen also sought an order from the Ninth Circuit directing the DOL to provide him. legal representation under the LHWCA. (See id. Ex. 15.)

defendant Ann Kantor, to appear for depositions in the consolidated proceedings. (See id. Ex. 26.) On August 10, 2000, ALJ Mapes denied the motion on the grounds that Olsen had not sent deposition notices to either witness nor served them with subpoenas, that he had not specified the location of the depositions, and that the stated reasons for taking the depositions did not appear relevant to the proceedings. (See id.) On August 14. 2000, Olsen filed a motion for reconsideration, which ALJ Mapes denied on August 17. 2000. (See id. Ex. 27.) Olsen then appealed ALJ Mapes' orders to the BRB. The BRB denied this appeal on September 24, 2000, on the grounds that the appeal was interlocutory. (See id. Ex. 29.)

In September 2000, ALJ Mapes postponed to November 14, 2000 the administrative hearing date on Triple A's request for modification, in part in order to give Olsen "additional time to prepare for the trial." (See id. Ex. 30.) In response to Olsen's requests for accommodation for his claimed disabilities, ALJ Mapes also ordered that the hearing on Triple A's request for modification would be held either at Olsen's home in Mt. Shasta, California, or at a location where a continuous electronic link to Olsen's home could be established. (See id. Ex. 31.) Thereafter, the DOL's Civil Rights Center ("CRC") found the alternatives provided in ALJ Mapes order to be "reasonable accommodations." (See id. Ex. 32.) ALJ Mapes thereafter issued an order establishing the trial procedures to be used in Olsen's case. (See id. Ex. 23.) Under that order, Olsen would be allowed to participate in the hearing by teleconference from his residence in Mt. Shasta, California; videotapes of all testimony in the proceedings were to be provided to all parties; and all parties were allowed ten days to review those videotapes and determine whether they wished to further cross-examine the witnesses or offer rebuttal evidence. (See id.)

In late November 2000, Naomi Olsen filed on behalf of Tom Olsen a motion to stay the administrative proceedings on the ground that Tom Olsen had been admitted to the hospital on November 21, 2000. (See id. Ex. 38.) ALJ Mapes continued the hearing to April 23, 2001 and extended certain deadlines for pre-trial discovery. (See id. Ex. 39.) Olsen thereafter filed a motion for reconsideration seeking a further stay of the proceedings. (See id. Ex. 40.) As of January 25, 2001. ALJ Mapes had not ruled on

Olsen's motion to reconsider, (see Fed. Defs'. Mot. at 10:7), and no party has advised the Court as to subsequent proceedings.

II. LEGAL STANDARD

A. Rule 12(b)(1)

Subject matter jurisdiction is fundamental and cannot be waived. The party seeking to invoke the jurisdiction of the court has the burden of establishing that jurisdiction exists. Scott v. Breeland, 792 F2d 925, 927 (9th Cir. 1986). The court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction. Billingsley v. C.I.R. 868 F.2d 17 1081, 1085 (9th Cir. 1989).

The standards that must be applied in a Rule 12(b)(1) motion vary according to the nature of the jurisdictional challenge. If the challenge is a facial attack-one contesting jurisdiction solely on the allegations of the complaint-the factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. See Thornhill Pub. v. Gen'l Telephone & Electronics, 594 F.2d 730, 733 (9th Cir. 1979). If the challenge goes beyond a facial attack, as where the defendant contests one or more jurisdictional allegations in the pleadings by presenting evidence, the plaintiff is entitled to respond with evidence supporting jurisdiction. See Gould Electronics Inc. v. United States, 220 F. 3d 169, 177 (3rd Cir. 2000). If there is a dispute as to a material fact, the court must conduct a plenary trial prior to making a jurisdictional ruling. Id. The standard to be applied in determining whether a hearing is required is equivalent to that used in ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Commodities Export Co. v. United States Customs Service, 888 F.2d 431, 436 (6th Cir. 1989).

B. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a party may move to dismiss an action for failure to state a claim upon which relief may be granted. A motion to dismiss under Rule 12(b)(6) cannot be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conlav v. Gibson 355 U.S. 41, 45-46 (1957). Dismissal can be based on the lack

of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In analyzing whether to grant a Rule 12(b)(6) motion, the court should keep in mind that dismissal is disfavored and should be granted only in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. Hal Roach Studios. Inc. v. Richard Feiner And Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, material which is properly submitted as part of the complaint may be considered. Id. In addition, documents whose contents are alleged in a complaint, and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), Finally, the Court may take judicial notice of matters of public record. Mack v. South Bay Beer Distributors. Inc., 793 F.2d 1279, 1282 (9th Cir. 1986).

In analyzing a motion to dismiss, the Court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, factual allegations can be disregarded if contradicted by the facts established by reference to documents attached as exhibits to the complaint. Durning v. First Boston Corp. 815 F.2d 1265, 1267 (9th Cir. 1987). Conclusory allegations, unsupported by the facts alleged, need not be accepted as true. Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992).

C. Summary Judgment

Rule: 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Supreme Court's 1986 "trilogy" of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby. Inc., 477 U.S. 242 (1986), and Matsushita Electric

Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), requires that a party seeking summary judgment show the absence of a genuine issue of material fact. The moving party need not produce admissible evidence showing the absence ot a genuine issue of material fact when the nonmoving party has the burden of proof, but may discharge its burden simply by pointing out that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-25. Once the moving party has done so, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(c)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Liberty Lobby, 477 U.S. at 249-50 (citations omitted). When determining whether there is a genuine issue for trial "inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." Matsushita, 475 U.S. at 587, (citation omitted).

III. DISCUSSION

A. Claims For Injunctive Relief

1. Subject Matter Jurisdiction

Plaintiffs seek injunctive relief in connection with the following: (1) the Secretary's and/or her designee's decision not to provide legal assistance to Tom Olsen under 33 U.S.C. § 939(c)(1) during the proceedings described above; (2) the failure of District Director Williams and his superiors to adequately "supervise the medical management" of Tom Olsen in connection with further claims for benefits under the LHWCA; and (3) the failure on the part of ALJ Mapes to adequately provide accommodations for Olsen's alleged disabilities. Plaintiffs allege these actions violate their rights under the LHWCA, the Fifth and Fourteenth Amendments, the Americans With Disabilities Act ("ADA"). 42 U.S.C. § 12101 et seq. and the Rehabilitation Act of 1973, 29 U.S.C. § 794, and contend that Tom Olsen "should not be forced to attend an

Administrative hearing without the court first addressing this issue on the merits." (Compl. ¶ 102.)

As the Court previously ruled in its Order filed December 21, 2000,[8] the LHWCA provides the exclusive procedures for the determination of benefits available under the LHWCA. Courts have repeatedly held that the comprehensive nature of the LHWCA's administrative review scheme, its limited provision for district court jurisdiction, and its legislative history, purpose, and design preclude subject matter jurisdiction in district courts over claims for injunctive relief arising out of compensation proceedings under the LHWCA. See Kreshollek v. S. Stevedoring Co., 78 F.3d 868, 872 (3rd Cir. 1996) (holding "the comprehensive nature of the administrative review scheme and its limited provision for district court jurisdiction make 'fairly discernible' a Congressional intent to preclude district court jurisdiction over most claims under the Act"); Compensation Department of District Five United Mine Workers of America v. Marshal, 667 F.2d 336, 340 (3rd Cir. 1981) (holding comprehensive nature, limited district court jurisdiction, and legislative history precludes challenges to Secretary's interpretation of statute in district court). Absent a showing that the claims alleged by plaintiffs are "wholly collateral" to the Act's review provisions, see Kreshollek, 78 F.3d at 873 (quoting Thunder Basin Coal Co. v. Recih, 510 U.S. 200 (1994)), or that the review provided under the LHWCA is "palpably inadequate" to provide Tom Olsen with the full relief to which he is entitled, see Maxon Marine, 39 F.3d at 147, the Court lacks jurisdiction over plaintiffs' claims for injunctive relief.

Here, no such showing has been made. Plaintiffs' claims for injunctive relief are not "wholly collateral" to the Act's review provisions. A claim is considered "wholly collateral" where it is not "the type Congress intended to be reviewed with the Acts statutory structure." Kreshollek, 78 F.3d at 873. Plaintiffs' claims for injunctive relief,

[8] On December 1, 2000, plaintiffs filed with this Court, a motion seeking an order directing District Director Williams to provide Tom Olsen with medical treatment and to further assist him in the processing and/or filing of claims for "consequential injury" under the LHWCA. By order dated December 21, 2000, the Court denied the motion on the grounds that the Court lacked jurisdiction to grant such relief given the LHWCA's extensive provisions for review of the District Director's actions by the ALJ, the BRB, and, ultimately, the Ninth Circuit Court of Appeals.

which are essentially appeals from various rulings by the ALJ in proceedings under the LHWCA, are clearly the kind intended to be reviewed within the Act's statutory structure. As the Court has previously noted, if plaintiffs seek to challenge these rulings, they are free to do so by utilizing the procedures set forth in the LHWCA.[9] See 33 U.S.C. §§ 919(a) and 921(b). Holding plaintiffs to the statutory structure provided under the LHWCA in no way forecloses judicial review of these claims, in the event that the BRB rejects Tom Olsen's claims, that ruling may be appealed to the Ninth Circuit Court of Appeals. Indeed, courts have repeatedly held that the LHWCA statutory scheme provides sufficient due process in all respects, because it provides a full "pre-deprivation, trial-type hearing" before the ALJ where a claimant's entitlement to benefits is disputed, and also provides adequate post-deprivation procedures to parties once an award or decision has been made. See Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 315 (5th Cir.1997) ("Not only does the LHWCA as amended by the Appropriations Act afford Shell a full pre-deprivation, trial-type hearing before the ALJ, it also grants Shell a post-deprivation hearing in the Circuit Courts of Appeals."); Schmit v. ITT Federal Elect. Intern., 986 F.2d 1103, 1106 (7th Cir. 1993) (holding LHWCA statutory scheme constitutional because of availability of pre- and post-deprivation hearings); Abbott, 889 F.2d at 631 (holding LHWCA provides "full pre-deprivation hearing" and "meaningful opportunity" for review through "comprehensive scheme" of administrative review by the BRB and Courts of Appeals). Plaintiffs have failed to show how the combination of both pre- and post-deprivation hearings provided under the LHWCA would be inadequate to provide them with the process due them under the Constitution. Accordingly, the Court lacks jurisdiction over plaintiffs' claims against the federal defendants for injunctive relief and such claims are hereby DISMISSED.

2. Mandamus

Plaintiffs, in an effort to circumvent the LHWCA's statutory structure, contend that this Court has mandamus jurisdiction over their claims under 28 U.S.C. § 1361.

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[9] Plaintiffs' claims do not involve a facial challenge to the LHWCA itself, but rather, its application in this particular case. See Kreshollek, 78 F.3d at 874 (distinguishing between facial challenges to provisions of LHWCA and challenges to their application in particular cases).

Section 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Mandamus, however, is a "drastic" remedy, "to be invoked only in extraordinary situations." Kerr v. United States District Court, 426 U.S. 394, 402 (1976). In Nova Stylings v. Ladd, 695 F.2d 1179 (9th Cir. 1983), the Ninth Circuit outlined the contours of a district courts jurisdiction under §1361:

> [I]ts remedy remains extraordinary and it is appropriate only when the plaintiffs claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt. Mandamus does not lie to review the discretionary acts of officials.... The availability of an adequate alternative remedy will also preclude mandamus review.

Nova Stylings v. Ladd, 695 F.2d 1179, 1180 (9th Cir. 1983) (internal quotations and citations omitted).

There, the plaintiffs brought a mandamus action to compel the Register of Copyrights to register jewelry designs. The Ninth Circuit held that the availability of review through the Administrative Procedure Act was an adequate remedy precluding mandamus jurisdiction, noting that "mandamus review may not generally be used when a statutory mode of review has been prescribed." Id. at 1180-82; see also Fallini v. Hodel, 783 F2d 1343, 1345 (9th Cir. 1986) (noting where statute prescribes an exclusive remedy courts should be cautious in extending it). Here, the comprehensive scheme of the LHWCA provides the exclusive procedures for determining benefits under the Act, and similarly affords plaintiffs the availability of review by both the Benefits Review Board and the United States Court of Appeals as set forth above. Thus, the availability of review under the LHWCA precludes mandamus in this case and such claims against the federal defendants are hereby DISMISSED.

3. Immunity

Plaintiffs' claims against defendants John Vittone, Paul Mapes and Jean Hall, and Phillip Williams fail for the additional reason that these defendants are entitled to absolute immunity.

a. Defendants Vittone, Mapes, and Hall

Included among the over fifty defendants sued by plaintiffs are several judicial officers connected in some way with Olsen's LHWCA proceedings. John Vittone is Chief Judge of the OALJ. Paul Mapes is the ALJ assigned by Judge Vittone to conduct the formal hearing in Tom Olsen's LHWCA case and who has issued numerous pre-trial orders. Jean Hall is the Chief Administrative Appeals Judge of the BRB, who has signed various orders regarding Tom Olsen's case. As such, these defendants are entitled to absolute quasi-judicial irrimunity from suit.

ALJs and judges serving on the BRB are entitled to absolute immunity for performing judicial acts. See Butz v. Economou, 438 U.S. 478, 513-514 (1978) (holding persons performing adjudicatory functions within a federal agency are entitled to absolute immunity: the role of an administrative law judge is "functionally comparable" to that of a judge). The BRB is itself a quasi-judicial body. See Kalaris v. Donovan, 697 F. 2d 376, 382-83 n.15, 393-94 n.70 (D.C. Cir. 1983) (noting that BRB is defined as 'quasi-judicial' by regulation); 20 C.F.R. §§ 801.103-801.104. Congress, in amending the LHWCA in 1972, intended to vest in the BRB the same judicial power to rule on substantive legal questions as was previously possessed by the district courts. See Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1118 (6th Cir. 1984). The quasi-judicial immunity available to federal officers is not limited to immunity from damages, but extends to actions for declaratory, injunctive, and other equitable relief. See Moore v. Brewster, 96 F.3d 1240, 1243 (9th Cir. 1996).

Quasi-judicial immunity is overcome in only two situations. See Mireles v. Waco, 502 U.S. 9, 11 (1991). First, a judge is not immune from liability for non-judicial actions. Id. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction. Id. at 12; Tanner v. Heise, 879 F.2d. 572, 576 (9th Cir. 1989) (holding judges enjoy absolute immunity even when their actions are erroneous, malicious, or in excess of judicial authority," unless they act in the clear absence of all jurisdiction).

In the instant case, plaintiffs seek injunctive relief against Judges Vittone, Mapes, and Hall for various rulings made during the course of proceedings under the

LHWCA, acts clearly undertaken as part of their official adjudicatory duties. The complaint does not allege that these defendants acted in the complete absence of all jurisdiction. Indeed, plaintiffs allege precisely the contrary. Plaintiffs contend that the OALJ and the BRB had jurisdiction to take certain actions, specifically to hear plaintiffs repeated interlocutory appeals, and wrongfully refused to exercise that jurisdiction. (Compl. ¶ 94, 97)

As the allegations against Judges Vittone, Mapes, and Hall relate to actions taken in their quasi-judicial capacity and within their jurisdiction. these defendants are deemed absolutely immune from suit for the injunctive relief sought, and all such claims are DISMISSED for that reason as well.

b. Defendant Williams

District Director Williams is also entitled to absolute immunity when engaged in the performance of their quasi-judicial functions. Courts take a "functional approach" in analyzing whether to extend quasi-judicial immunity, examining the nature of the functions that an official has been entrusted with and the effect of exposure to liability from the exercise of those functions. Forrester v. White. 484 U.S. 219, 224 (1988). Although courts are sparing in recognizing claims of absolute immunity, id., immunity has been extended to a wide range of persons playing a role in the judicial process, including court clerks and court-appointed mediators. See Moore, 96 F.3d at 1244 (holding clerk of United States district court entitled to absolute quasi-judicial immunity); Mullis v. Bankr. Court for the Dist. of Nevada, 828 F.2d 1358, 1390 (9th Cir. 1987) (holding deputy clerks of Bankruptcy Court entitled to absolute quasi-judicial immunity); Wagsha! v. Forster, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (holding absolute quasi-judicial immunity extends to state court mediators).

Although district directors no longer have the adjudicatory authority that they had prior to the 1972 amendments to the LHWCA, see Dir. Office of Workers' Comp. Programs, Dept of Labor v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122, 138 (1995) (Ginsburg, J. concurring), their functions are a hybrid of the functions performed by judges, court clerks and mediators. Like judges, district directors are authorized to resolve disputes among private parties by evaluating and approving

settlement agreements. See 33 U.S.C. § 908(1); 20 C.F.R. §§ 702.241-702.243. Where the parties agree, district directors issue binding compensation orders. See 20 C.F.R. § 702.315. Where an employer defaults on payment, district directors issue supplementary orders. See 33 U.S.C. § 918(a). Like court mediators, district directors convene informal mediation conferences in an effort to resolve disputes that otherwise go to formal litigation. See 33 U.S.C. §919(c); 20 C.F.R. 702.311. In mediating disputes, district directors may arrange for independent medical examinations. See 33 U.S.C. § 907(e), 919(h). District directors also function in a manner analogous to court clerks in filing and serving compensation orders. See 33 U.S.C. §§ 919(e), 921(a). Similar to a court clerk's office, the Office of the District Director processes many of the documents related to a LHWCA claim. See 20 C.F.R. §§ 702.251-252, 702.261-262, 702.317.

District directors, like the Bankruptcy court clerks in Mullis, provide assistance to parties seeking to file claims. See 33 U.S.C. § 939; Ingalls Shipbuilding. Inc. v. Director, Office of Workers' Compensation Programs, Department of Labor, 519 U.S. 248,262-64 (1997). Plaintiffs' allegation that the federal defendants, including the District Director, failed to provide Tom Olsen with adequate assistance in the processing of his LHWCA claims, (see Compl. at ¶ 94), is the precise contention that the Mullis court held was barred by absolute immunity. See Mullis, 828 F.2d at 1390.

As all of the allegations brought against District Director Williams relate to his exercise of judicially-related functions, and there is no allegation that he acted in the complete absence of jurisdiction. Williams is absolutely immune from suit for the injunctive relief sought and all such claims against him are DISMISSED for that reason as well.

B. Claims for Damages

Plaintiffs seek damages against the federal defendants based on the following actions: (1) the failure to timely pay Tom Olsen's benefits at some point "within the last year;" (2) the failure to provide legal and other assistance to Tom Olsen under the LHWCA; (3) the failure to adequately "supervise the medical management" of Tom Olsen in connection with his claims for benefits under the LHWCA; and (4) the failure to

address the "merits" of Plaintiff's claims and to provide Tom Olsen with adequate accommodations for his disabilities. (see Compl. ¶ 77, 93-97.)

Plaintiffs also seek damages against the United States Navy and/or Department of Energy on the ground that, at some point, while working as a longshoreman, Tom Olsen was ordered to move toxic items "coming from" a Naval shipyard and was not warned of their "ultrahazardous" content. (Compl. ¶ 91-92.) Plaintiffs cite a number of statutes and legal theories in support of their claims for damages based on the above actions.[10] As explained below, plaintiffs' claims fail as a matter of law.

1. Immunity

As discussed above, defendants Hall, Vittone, Mapes, and Williams are entitled to absolute immunity with respect to plaintiffs' claims for damages. See Moore, 96 F.3d at 1243. Accordingly, such claims are DISMISSED as to these defendants for the reason that they are immune, as well as for the additional reasons discussed below.

2. 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988

Plaintiffs list 42 U.S.C. §§ 1981, 1983, 1985,1986, and 1988 as a basis for damages against the federal defendants, on the grounds that the federal defendants' actions violated their due process rights.

These claims fail for a variety of reasons. First, such claims against any of the Federal Defendants in such defendant's official capacity are barred by sovereign immunity. The United States is a sovereign, and immune from suit unless it has expressly waived such immunity and consented to be sued. See Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). A suit against a federal officer acting in his official capacity is deemed to be a suit against the United States. See Hawaii v. Gordon, 373 U.S. 57, 58 (1963). Sovereign immunity bars claims against the federal defendants in their official capacity under all of the above-referenced civil rights statutes. See Hahn v. United States, 782 F.2d 227, 244-245, n.45 (D.C. Cir. 1986) (noting that 42 U.S.C. §§ 1981, 1983, 1985, 1986, by their terms, do not apply to actions against the United

[10] All of the federal defendants, save defendant Stout, have been sued solely in their official capacities. Defendant Stout has been sued in both her official and individual capacities. (See Compl. at ¶ 15.)

States), vacated on other grounds, 482 U.S. 64 (1987); Gilbert, 756 F.2d at 1458 (holding that sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants) Biase v. Kaplan, 352 F. Supp. 268, 280, n.18 (D.N.J. 1994) ("[N]either section 1985 nor any other provision of the Civil Rights Act may provide the basis for an action against the United States or a Federal agency.")[11]

Second, even if plaintiffs' complaint could be construed to allege a constitutional violation as against the federal defendants in their individual capacities, plaintiffs' claims would still fail as a matter of law, because the referenced civil rights statutes are inapplicable to the facts of this case. Sections 1981 and 1983 provide a cause of action only against persons acting under color of state law. See District of Columbia v. Carter, 409 U.S. 418, 423-425 (1973) (holding that section 1983, based on the Fourteenth Amendment, is addressed only to the State or to those acting under color of its authority). Here, the federal defendants were acting under color of federal law, not state law, and thus, plaintiffs cannot state a claim under either §1981 or §1983.

Similarly, plaintiffs fail to state a claim against the federal defendants under §§ 1985(3) and 1986, as such claims must allege a conspiracy motivated by racial or class-based animus. See Griffin v. Breckenridge, 403 US. 88, 102 (1971) (holding that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action in order to bring a claim under §1985(3); accord Bretz v. Kelman, 773 F.2d 1026, 1027-1028 (9th Cir. 1985) (en banc). Here, plaintiffs have alleged no racial or other protected class-based animus on the part of the federal defendants regarding any alleged conspiracy, and thus cannot state a cause of action under section 1985(3). Since a claim for relief under section 1986 can only be stated where the complaint states a valid section 1985 claim, McCalden v. California Library, Ass'n 955 F.2d 1214, 1223 (9th Cir. 1990), plaintiffs section 1986

[11] Section 1988(a) "instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts" but does not create an independent cause of action. See Moor v. County of Alameda, 411 US. 693, 703-04, n.17 (1973); Hershey v. California State Humane Society, 1995 WL 492626 at *8 (N.D. Cal. 1995). Section 1988(b) authorizes the court to award attorney's fees to the prevailing party. Pro se litigants, however, cannot recover attorney fees under § 1988(b). See Kay v. Ehrler, 499 U.S. 432, 435 (1991); Hershey, 1995 WL 492626 at *9. Accordingly, plaintiffs fail to state claim under §1988 as well.

claim would fail as well[12]

Accordingly, plaintiffs' claims under 42 U.S.C. §§ 1981, 1983, 1985. 1986 and 1988 against the federal defendants fail as a matter of law and such claims are DISMISSED.

3. Bivens Claims

In their complaint, plaintiffs cite Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) among their grounds for damages against the Federal Defendants. Bivens and its progeny recognize implied causes of action against individual federal actors for the violation of constitutionally protected rights. See, e.g., Davis v. Passman, 442 U.S. 228 (1979) (holding plaintiff has right to bring Bivens claim for violation of the due process clause of the Fifth Amendment). Plaintiffs' claims under Bivens fail as a matter of law for a number of reasons.

As a threshold matter, the Court notes that Bivens claims may not be brought against federal agencies. See Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 486 (1994) (holding that an "extension of Bivens to agencies of the Federal Government is not supported by the logic of Bivens itself."). Second, sovereign immunity precludes plaintiffs from bringing Bivens claims against federal officers in their official capacities. See Nurse v. United States, 226 F. 3d 996, 1004 (9th Cir. 2000) (holding Bivens claims can be maintained against federal officers in their individual capacities only). For these reasons, plaintiffs' Bivens claims against the DOL, the United States Navy, the United States Department of Energy, and all of the individually named Federal Defendants, save Rose Stout, fail as a matter of law.

As to defendant Stout and any other federal defendant against whom plaintiffs might choose to bring suit in their individual capacity, plaintiffs' Bivens claims likewise are precluded based on the comprehensive remedial scheme of the LHWCA. See Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (holding Bivens actions should not be implied where Congress has provided what it considers adequate remedial

[12] As noted, § 1988 is derivative of §§ 1981, 1983, 1985 and 1986.

mechanisms for constitutional violations).[13]

The Supreme Court has not extended Bivens where "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur" in the course of administering a federal program. See Chilicky, 487 U.S. at 423; Bush v. Lucas, 462 U.S. 367, 385 (1983) (refusing to recognize a Bivens claim for a First Amendment violation where there was "an elaborate comprehensive scheme.. . by which improper action may be redressed."). This is true even where the relief provided under such a scheme may differ from that which would be available under Bivens. See Moore v. Glickman, 113 F.3d 988, 991, 994 (9th Cir. 1997) ("[W]here Congress has provided some mechanism for relief that it considers adequate to remedy constitutional violations, Bivens claims are precluded," even if relief is incomplete.); Berry v. Hollander, 925 F.2d 311, 315-16 (9th Cir. 1991) (First and Fifth Amendment claims brought by Veterans Administration physician against VA officials under Bivens precluded by comprehensive statutory scheme, even though remedies "do not guarantee full and independent compensation for constitutional violations.").

In Chilicky, recipients of Social Security disability benefits, whose benefits had been terminated, sued under Bivens, alleging due process violations. See id. at 418-420. The Court held that even though the relief available under the Social Security Act was not complete (there was no remedy provided, for example, for emotional distress or other hardships suffered because of delay in receipt of benefits) the comprehensive statutory scheme precluded a Bivens claim. Id. at 424-430.

Here, a Bivens claim against Stout, or any of the federal defendants who played a role in the administration of Tom Olsen's LHWCA benefits, is precluded by the comprehensive remedial scheme of the LHWCA. As in Chilicky, plaintiffs are precluded

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[13] Moreover, to the extent plaintiffs' claims against Stout are premised on her having accepted a "bribe" in exchange for providing plaintiffs' address to an opposing party, (see Compl. ¶ 78), plaintiffs, whose allegations in that regard are based on hearsay, (see id.) have not introduced admissible evidence to rebut Stout's direct evidence to the contrary. (see Declaration of Rose M. Stout ¶ 14.) Accordingly, plaintiffs have failed to raise a triable issue of material fact as to any such claim and Stout is entitled to summary judgment thereon.

from bringing claims under Bivens for, inter alia, purported emotional distress resulting from having to defend against a request to modify a compensation award under the LHWCA, or any harm that might result from an erroneous termination or reduction of benefits. Plaintiffs can bring any alleged violations to light within the framework of the LHWCA's comprehensive statutory scheme, which affords both a hearing before an ALJ and judicial review by the appropriate appellate court. Accordingly, plaintiffs fail to state a claim against the federal defendants under Bivens and such claims are DISMISSED.

4. ADA and Rehabilitation Act

Plaintiffs' complaint cites to both the ADA and Rehabilitation Act as a basis for their claims for damages. Neither provides a basis for damages in this case.[14]

The ADA provides, inter alia:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The ADA, however, specifically defines a public entity as (a) any state or local government; (b) any department, agency, special purpose district, or other instrumentality of a State or local government; and (c) the National Railroad Passenger Corporation, as well as "any commuter authority (as defined in section 502(8) of Title 45)." See 42 U.S.C. § 12131(1). Federal agencies and their officials cannot be held liable under the ADA because they are not "public entities" within the meaning of that act. See Zingher v. Yacovone, 30 F. Supp. 2d 446, 452 (D.Vt. 1997) (holding that the language of the statute does not include federal executive agencies as public entities), affd, Zingher v.Vermont Division of Vocational Rehabilitation, 165 F.3d 1015 (2d. Cir. 1999). Accordingly, plaintiffs' claims against the federal defendants for damages under the ADA fail as a matter of law and such claims are DISMISSED.

Similarly, plaintiffs' claims for damages under the Rehabilitation Act are barred

[14] As discussed above, plaintiffs also rely on the ADA and Rehabilitation Act as a basis for their claims for injunctive relief; as noted, the Court lacks jurisdiction over plaintiffs' claims for injunctive relief as well.

by the doctrine of sovereign immunity. See Dufresne v. Venemen, 114 F.3d 952, 954 (9th Cir. 1997) (quoting Lane v. Pena, 518 U.S. 187, 192 (1996) ("The clarity of expression necessary to establish a waiver of the Government's sovereign immunity against monetary damages for violations of § 504 is lacking in the text of the relevant provisions.").

Accordingly, plaintiffs have failed to state a claim for damages against the federal defendants under the Rehabilitation Act, and such claims are DISMISSED.

5. Federal Torts Claims Act

The Federal Tort Claims Act ("FTCA") 28 U.S.C. §1346, 2671-2680 waives the sovereign immunity of the United States for actions in tort. All suits sounding in tort against a federal agency must be brought under the FTCA. 28 U.SC. §2679(a). A suit against a federal officer acting in his official capacity is deemed to be a suit against the United States. See Hawaii v. Gordon, 373 U.S. 57, 58 (1963); see also Brown v. Armstrong, 949 F.2d 1007, 1010-13 (8th Cir. 1991) (holding FTCA is exclusive remedy for torts committed by federal employees acting within the scope of their employment).

Before filing an action in court, a tort claimant must first file an administrative claim with the federal agency whose activities gave rise to that claim. See 28 U.S.C. §2675(a); Jerves v. United States, 966 F.2d 517, 519 (9th Cir. 1992). If the plaintiff fails to comply with the procedures set forth in the FTCA, the action must be dismissed. See id.; Jerves, 966 F2d at 519. The administrative claim requirements of Section 2675(a) are jurisdictional. See Jerves, 966 F.2d at 519, 521.

Here, plaintiffs have neither pleaded exhaustion under the FTCA nor have they offered any evidence to that effect. The federal defendants, on the other hand, have offered direct evidence that plaintiffs did not submit the required administrative claim to the DOL before bringing this action. (See Declaration of Jeffrey L. Nesvet ¶ 3.) While plaintiffs assert in their opposition that a claim was filed[15] and that exhibits reflecting such filing would be provided to the Court "as soon as they are gathered for submission," (see Pl.s' Opp. at 12:6-16), plaintiffs have failed to provide such

[15] Plaintiffs do not indicate whether any such claim was filed before or after the filing of the instant action.

documentation, despite having had ample time to do so.

Accordingly, plaintiffs having neither pleaded nor presented evidence of compliance with the required procedures under the FTCA, and defendants having presented evidence that such procedures were not followed, plaintiffs' claims against the federal defendants under the FTCA are DISMISSED without prejudice for lack of jurisdiction.

CONCLUSION

For the reasons expressed above, all claims as against all of the federal defendants are hereby DISMISSED without leave to amend.

This order closes Docket #s 96 and 117.

IT IS SO ORDERED.

Dated: OCT 31 2001

MAXINE M. CHESNEY
United States District Judge