

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DANNY NAIL,

Plaintiff,

v.

Case No. 6:17-cv-1462-Orl-37GJK

U.S. OFFICE OF PERSONNEL
MANAGEMENT,

Defendant.

ORDER

This matter is before the Court on the following matters: (1) Defendant's Motion to Dismiss or, Alternatively, Motion for Summary Judgment (Doc. 44 ("**MTD**")); (2) Plaintiff's Response to Defendant's Motion to Dismiss or, Alternatively, Motion for Summary Judgment (Doc. 48); (3) Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss or, Alternatively, Motion for Summary Judgment (Doc. 54); (4) Plaintiff's Motion to Strike All or Part of Defendant, U.S. Office of Personnel Management's Reply to Plaintiff's Response to Motion to Dismiss, or Alternatively, Motion for Summary Judgment (Doc. 55); (5) Defendant's Response to Plaintiff's Motion to Strike (Doc. 56); and (6) the Report and Recommendation of U.S. Magistrate Judge Gregory J. Kelly (Doc. 57 ("**Report**")).

DISCUSSION

This action concerns Plaintiff Danny Nail's claim that the prostate ablation treatment he underwent was covered under health insurance policy number

424466822TA (“**Policy**”), which was issued to Plaintiff by the Government Employees Health Association, Inc. (See Doc. 32, ¶¶3–8; Doc. 32-1.) The operative complaint includes two counts against the U.S. Office of Personnel Management (“**OPM**”) – “**Count I**” for entry of a declaratory judgment pursuant to 28 U.S.C. § 2201 (Doc. 32, ¶¶39–41), and “**Count II**” for breach of the Policy (*id.* ¶¶42–44). On **January 4, 2018**, OPM filed the MTD (Doc. 44), Plaintiff responded (Doc. 48), and OPM replied (Doc. 54 (“**Reply**”)). On **April 5, 2018**, Plaintiff moved to strike the Reply (Doc. 55 (“**MTS**”)), and OPM responded (Doc. 56).

On referral, U.S. Magistrate Judge Gregory J. Kelly (“**Judge Kelly**”) issued the Report on **April 23, 2018** (Doc. 57), which recommends that the Court: (1) grant the MTD in part based on preemption; (2) allow repleader; and (3) and deny the MTS as moot. Neither of the parties filed objections to the Report, and the deadline to do so has passed. See 28 U.S.C. § 636; Fed. R. Civ. P. 72; Local Rule 6.02(a). In the absence of objections, the Court has reviewed Judge Kelly’s thoughtful and thorough Report for clear error and has found none.¹ As such, the Report is due to be adopted in its entirety.

CONCLUSION

Upon consideration, **IT IS ORDERED** that:

¹ When written objections to the proposed findings and recommendations in a magistrate judge’s report and recommendation are filed, the district court must make a de novo determination of the portions of the report to which an objection is made. 28 U.S.C. § 636(b)(1). But when the litigants fail to file specific objections to the magistrate’s factual findings, the district court reviews the report and recommendation for clear error. See *Garvey v. Vaughn*, 993 F.2d 776, 779 n.9 (11th Cir. 1993).

- (1) The Report and Recommendation of U.S. Magistrate Judge Gregory J. Kelly (Doc. 57) is **ADOPTED, CONFIRMED**, and made part of this Order.
- (2) Defendant's Motion to Dismiss or, Alternatively, Motion for Summary Judgment (Doc. 44) is **GRANTED IN PART AND DENIED IN PART**.
- (3) Plaintiff's Motion to Strike All or Part of Defendant, U.S. Office of Personnel Management's Reply to Plaintiff's Response to Motion to Dismiss, or Alternatively, Motion for Summary Judgment (Doc. 55) is **DENIED AS MOOT**.
- (4) Plaintiff's Third Amended Complaint (Doc. 32) is **DISMISSED WITHOUT PREJUDICE**.
- (5) On or before **May 29, 2018**, Plaintiff may file a Fourth Amended Complaint.
- (6) If Plaintiff fails to timely file a Fourth Amended Complaint, the Court will direct the Clerk of Court to close this action without further notice.

DONE AND ORDERED in Orlando, Florida, this 10th day of May, 2018.




ROY B. DALTON JR.
United States District Judge

Copies to:

Counsel of Record