FILED
United States Court of Appeals
Tenth Circuit

April 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SUSAN M. SMITH,

Plaintiff - Appellant,

v.

COMMISSIONER, SSA; ALLAN D. BERGER; CHRISTINA J. VALERIO,

Defendants - Appellees.

No. 22-6115
(D.C. No. 5:22-CV-00282-SLP)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **PHILLIPS**, Circuit Judges.

Susan M. Smith appeals from a district court order that dismissed her civil-rights lawsuit arising from the Commissioner's denial of her application for disability-insurance benefits (DIB). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm for substantially the same reasons given by the district court.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

Ms. Smith has repeatedly sought to litigate the Commissioner's denial of her DIB application. First, in April 2019, she sought review in the district court from the Commissioner's determination that she was not disabled. Special Assistant U.S. Attorneys Allan D. Berger and Christina J. Valerio represented the Commissioner and defended the denial of DIB. The district court affirmed the Commissioner's decision, and Ms. Smith voluntarily dismissed her subsequent appeal to this court. *See* Memorandum Opinion & Order, *Smith v. Comm'r*, No. 5:19-cv-00300-SM (W.D. Okla. Dec. 26, 2019), ECF No. 39; Order, *Smith v. Comm'r*, No. 20-6008 (10th Cir. Jan. 29, 2020).

Next, in February 2020, Ms. Smith returned to the district court, again seeking review of the Commissioner's decision. A magistrate judge recommended dismissing the case on the basis of res judicata. The district court adopted that recommendation and dismissed the case after Ms. Smith failed to object. *See* Order, *Smith v. Comm'r*, No. 5:20-cv-00124-SM (W.D. Okla. Sept. 1, 2020), ECF No. 20. This court applied the firm waiver rule and dismissed her appeal. *See Smith v. Comm'r*, 846 F. App'x 737, 739 (2021).

Now, Ms. Smith has brought another round of litigation. This time, while she still complains about the denial of DIB, she also seeks monetary relief under 42 U.S.C. § 1983 against the Commissioner, Berger, and Valerio. In particular, she alleges that the "Commissioner . . . acted in conceit [sic] with the other defendants in a wrongful taking of [her] entitlement to social security benefits." R. at 4. She also claims that Berger and

Valerio "delayed and refused to perform their duty as a gatekeeper for other medical personnel capable of treating plaintiff's condition, . . . caus[ing] mental setbacks[], frequent psychologist appointments and dosage increase of medication." R. at 5.

The district court dismissed Ms. Smith's complaint under Fed. R. Civ. P. 12(b)(6) sua sponte and with prejudice. In doing so, the court relied on (1) res judicata as a bar to relitigating the disability determination, and (2) the lack of state action and the exclusivity of the Social Security Act as foreclosing § 1983 relief.

DISCUSSION

Under Rule 12(b)(6), a district "court may dismiss sua sponte when it is patently obvious that the plaintiff could not prevail on the facts alleged, and allowing [her] an opportunity to amend [the] complaint would be futile." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (internal quotation marks omitted). Similarly, "[a] dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile." *Knight v. Mooring Cap. Fund, LLC*, 749 F.3d 1180, 1190 (10th Cir. 2014).

Our review of a Rule 12(b)(6) dismissal is de novo. *Sagome, Inc. v. Cincinnati Ins. Co.*, 56 F.4th 931, 934 (10th Cir. 2023). "To survive, a complaint must allege facts that, if true, state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted).

Ms. Smith provides no cogent argument that the district court erred. Although we liberally construe a pro se plaintiff's filings, we "cannot take on the responsibility of

serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

To the extent Ms. Smith continues to litigate her entitlement to DIB, the district court aptly applied res judicata. *See MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005) ("The doctrine of res judicata, or claim preclusion, will prevent a party from relitigating a legal claim that was or could have been the subject of a previously issued final judgment."). We note that Ms. Smith's opportunity to contest the determination that she was not disabled ended in 2020 when she dismissed her appeal to this court. *See* Restatement (Second) of Judgments § 19 cmt. a (1982) (stating that "fairness to the defendant[] and sound judicial administration[] require that at some point litigation over the particular controversy come to an end," and thus, "errors underlying a judgment [must] be corrected on appeal or other available proceedings to modify the judgment or to set it aside, and not made the basis for a second action on the same claim").

As for Ms. Smith's § 1983 damages claim, the district court correctly ruled that there was no state action. *See McCarty v. Gilchrist*, 646 F.3d 1281, 1285 (10th Cir. 2011) ("Section 1983 provides a federal civil remedy for the deprivation of any rights, privileges, or immunities secured by the Constitution by any person acting under color of state law.").[1] The district court was also correct that the Social Security Act provides the

[1] The district court properly declined to construe Ms. Smith's complaint as asserting a *Bivens* claim against federal officials acting in their individual capacities. *See Egbert v. Boule*, 142 S. Ct. 1793, 1802-03 (2022) (observing that *Bivens* actions have been recognized in only limited circumstances under the Fourth, Fifth, and

exclusive remedy for the denial of social security benefits. *See Mathews v. Eldridge*, 424 U.S. 319, 327 (1976) (stating that "[t]he only avenue for judicial review [of the Commissioner's final decision] is 42 U.S.C. § 405(g)"); *Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988) (declining to imply a cause of action "for remedies in money damages against [Social Security] officials responsible for [allegedly] unconstitutional conduct that leads to the wrongful denial of benefits").

Thus, the district court did not err in sua sponte dismissing Ms. Smith's complaint with prejudice, because it is patently obvious she cannot prevail on the facts alleged and allowing her an opportunity to amend the complaint would be futile.

CONCLUSION

We affirm the district court's judgment for substantially the same reasons the district court gave in its June 16, 2022, order.

Entered for the Court

Bobby R. Baldock
Circuit Judge

Eighth Amendments, and "emphasiz[ing] that recognizing a [new] cause of action under *Bivens* is a disfavored judicial activity" (internal quotation marks omitted)).

Insofar as Ms. Smith stated she was pursuing "two state law claims" against the defendants, R. at 4, the district court accurately noted that she pled no state law claims.