

JUL 27 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL MESSER; DOROTHY
CALABRESE, M.D.,

Plaintiffs - Appellants,

v.

U.S. DEPARTMENT OF HEALTH &
HUMAN SERVICES; et al.,*

Defendants - Appellees.

No. 10-56353

D.C. No. 8:08-cv-00633-CJC-
RNB

MEMORANDUM**

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Submitted July 12, 2011***

Before: SCHROEDER, ALARCÓN, and LEAVY, Circuit Judges.

Dorothy Calabrese, M.D., and her patient Paul Messer, appeal pro se from

* Kathleen Sebelius is substituted for her predecessor, Michael O. Leavitt, as Secretary of the Department of Health and Human Services under Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

*** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

the district court's order dismissing their action alleging that Managing Administrative Law Judge Koldeway rendered a decision when she was not the judge who held the administrative hearing, in violation of plaintiffs' rights under the U.S. Constitution and federal law. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Uhm v. Humana, Inc.*, 620 F.3d 1134, 1139 (9th Cir. 2010), and we affirm.

The district court properly dismissed the action because plaintiffs' allegations concerning Judge Koldeway's decision failed to state a claim. *See* 5 U.S.C. § 554(d) ("The employee who presides at the reception of evidence . . . shall make the recommended decision or initial decision . . . unless he becomes unavailable to the agency."). Contrary to plaintiffs' contention, the outcome did not turn on credibility determinations.

Plaintiffs' remaining contentions are unpersuasive.

AFFIRMED.