IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

LEMUEL CLAYTON BRAY Plaintiff, vs. THE UNITED STATES GOVERNMENT, DEFENDANT	Case No.: 17-CV-206-F MOTION TO AMEND COMPLAINT.

<u>COMPLAINT AS AMENDED</u>

CAUSES OF ACTION

Pursuant to the Courts Order Granting Motion to Dismiss page 11: "Plaintiffs' remaining claims are DISMISSED WITHOUT PREJUDICE."

"IT IS FURTHER ORDERED that the Plaintiffs shall have until May 4, 2018 to file an amended complaint in this matter, properly asserting a timely claim."

This action arises under the 14th Amendment of the Constitution, article 4 the "shall not be questioned" guarantee of public debt "authorized by law" and the 5th Amendment guarantee of "due process." [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 & Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 175 L. Ed. 2d 753, 558 U.S. 310, 78 USLW 4078 (2010)] (cases involving erosion of constitutional rights and guarantees) And including Federal Torts Claims Act, 28 U.S.C. § 2671, et seq. [Laskowski v. U.S. Dep't of Veteran Affairs, 918 F. Supp 2nd 301(M.D. Pa., 2013)] (mirroring much of this case)

The Plaintiff also cites the 8th Amendment as outlined in the Courts citation of Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam); Failure to treat that leads to suicide ideation and suicides are indeed the results of mental torture including the torture of the Plaintiff being unable to find relief in discovery of his belief that the Government (Defendant), in order to curtail entitlements, has orchestrated predetermined outcome studies, ignored the diagnosis of anosognosia subtly presented but to the degree it leads to suicide ideation and suicide, failed to treat temporal lobe seizures and prescribed a contra-indicated drug for the diagnosis and as a policy, minimized organic brain syndrome potential residuals in Narrative Summaries of inpatient hospitalizations. While it may not have been the

intent in some cases to torture it has been the un-intervened effect because of failure of those who knew and should have intervened.

The Plaintiff withdraws his concession to renaming the Defendant "The United States" instead to the United States Government. The Preamble, Articles I, II, III and the Amendments repeatedly separate the "Government" and its "Powers" from the "rights and guarantees of the People." The "People" ratified The Bill of Rights without which the Constitution would not have been ratified, and Section 4 of the 14th. The People reserved "sovereignty" over items not specifically spelled out in the "Powers" of Government to themselves. So far as the Plaintiff has found, Sovereignty of the United States is only asserted over The States (governments); and limited sovereignty over the People; and in dealing with foreign powers. Creation of "sovereigns" or titles of nobility is specifically denied to the government and the state governments and, implicitly, the overreaching of sovereignty to agencies of government. The people of the United States, in their government "of the people, by the people and for the people" hold themselves sovereign with rights, privileges and guarantees benefitting the people as defined by their Constitution subject to laws enacted within the limits of the Constitution. The Declaration of Independents has the clause "Inalienable Rights." The People have not yielded that sovereignty to the "government" by Amendment to the

Constitution which must be done to claim a "sovereignty against being sued" (denied due process) to achieve the guarantees of the Constitution and applicable Constitutional laws, sovereign in their application. U.S.C. to the contrary is unconstitutional and must be invalidated.

Article. VI. - Debts, Supremacy, Oaths

> All Debts contracted, and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

The guarantee of Debts of the United States twice appears in the Constitution. The Article VI was apparently insufficient and had to be clarified with the words, **"shall not be questioned",** in Section 4 of the 14th and with the further spelling out of the guarantees to veterans. Yet, we find the Courts supporting the ability of the "Government" to deceive in order to cut entitlements to veterans and enabling "look nice laws" never intended to be put into effect by

the appropriation of funds. (Such as the recent extension of the VA Choice Act which has necessitated the Plaintiff's filing an additional SF-95 administrative claim, to be joined to this action if denied, for $2,150.00 in authorized but unpaid VA Choice care.)

The Plaintiff holds the "National Debt Ceiling" is unconstitutional unless accompanied by a means of increasing revenue to offset the "unquestioned" public debt entitlements. Dishonoring contracts of employment is prohibited by the phrase "All Debts contracted, and Engagements entered into" cannot be a means of decreasing expenditure without passing and implementing a law to do so. If Article VI applied to debts of the Confederation, it goes without saying it also applies to the government's current "debts contracted, and engagements entered into." Dismissal without cause is prohibited in the contracts duly authorized by law. It is the intention of the People that their "Government" should be an honest, debt paying, contract obligation honoring institution of the people and that the burden should be shared through revenue collection equitably (not equally) via the 16th Amendment and the authorization in Article I, Section 8, paragraph 2 to borrow money.

It is clear the Bill of Rights Amendments as well as other Amendments modify the laws of the United States and the Constitution as it was prior to the ratification of the Amendments. To self-declare "supremacy" denying citizens the right to sue to obtain from the Treasury guaranteed payment of debts created by law, whether appropriation has been made or not been made, is unconstitutional under Section 4 of the 14th and the 5th Amendment. The phrase "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Cannot be the only phrase that isn't held to task by the Amendments except as applied to Treaties and is likely the cause of the Bill of Rights being added before the Constitution itself was ratified. The 7th, 9th and 10th must be seen as specifically modifying this phrase and were it otherwise neither Bivens nor Citizens United could have been decided in the way they were by the Supreme Court.

It is clear both the Administrative and Legislative division of the Government, contrary to Section 4 of the 14th, the Peoples Amendment guaranteeing the public fiduciary debt and duty debt to veterans, specifically detailed in Section 4 of the 14th has repeatedly reneged upon that obligation. The appropriation power of the House has been limited by Section 4 of the 14th to not

passing laws with future obligations and the debt created by duly passed laws which "shall not be questioned."

Absolute sovereignty belongs to the Constitution and to no other party, whether a person or an institution or a bureau, except as specifically granted by the Constitution, which includes Treaties, and is limited or expanded by the Amendments.

COMPLAINT

Trial by Jury is demanded as is guaranteed by the 7th Amendment. Any law or rule of the Courts to the contrary is unconstitutional.

The Plaintiff holds that the "Feres Doctrine" is inoperable in this case because of the Military's abuse of the Doctrine, committing 5th Amendment, 8th Amendment and 14th Amendment Section 4, abridgements and abuses, hiding under the Feres Doctrine through deceptions intended to deny the Plaintiff and other veterans compensation and causing the failure to treat a condition that could have been treated to the point that only minimal compensation would have been necessary for many years. And causing the organic brain residuals of traumatic brain injuries to not be recognized by the Military and the VA until 2008 though organic brain syndromes were recognized as exhibiting symptoms which limit

performance in Medical Text Books such as the Merc Manual going back to well before the 1960s. (See also the references of the Kastl, etal Cerebral Malaria study of 1966) The Plaintiff alleges and will prove with preponderance of being more likely than not, in discovery, that the Military and the VA engaged in predetermined outcome medical research to change medical text books to further the goal of denying compensation to walking and talking veterans who had diminished employability or were unable to maintain substantially gainful employment because of "service connected" organic brain syndromes.

The Plaintiff admits to having been deceived by the medical reports, refusals to provide evidence, assertions of authority to do so, denial of a right to counsel by limiting payment to counsel to $25.00, assertion of the Feres Doctrine as permitting such deceptions, assertions of VA authority to demand adherence to and acceptance of the Administrative Decisions because of his organic brain syndrome and the Navy and VA's use of his diminished capacity, during exacerbations, against the Plaintiff for the period from 1969 up to January 1, 2016.

Even with the frequent exacerbation periods of diminished capacity the Plaintiff did pursue an FTCA claim, though not specifically identified as such in Bray v. Derwinski, DCCDC, pursued under various titles and case numbers from 1988 to 1994 and the extra ordinary denial of representation due to

unconstitutional laws in effect at that time. Certified Archive copies are being presented to the Clerk on May 1, 2018. A docket report is available on PACER by searching the Party, Lemuel Clayton Bray.

The certified seals will not be broken to copy and serve to the Defendant. We leave it for the Clerk to note the certified seals, when delivered were unbroken. If Ordered by the Court, on request of the Defendant, the Plaintiff will print from the record and serve to the various required government offices, recognizing recovery of the unnecessary costs may be ordered by the Court on application by the Plaintiff at the conclusion of this case. There is already a cost of $272.20 in just obtaining the certified copies from National Archives. The statement in the Courts Order Granting Motion to Dismiss (page 10), that "These allegations contradict Mr. Bray's claims that he was too disabled too disabled to file a FTCA claim until 2016." Is contradicted by his diminished effort to file an FTCA claim and appeal it. Should the Plaintiff have been up to the task it would have been completed and the Plaintiff appeals for deference under the ADA. Veterans with less ability have been denied their Constitutional rights to their guaranteed benefits for these reasons and because they never had or recovered the innate ability to bring their complaints to Court under the FTCA and were not assisted in doing so by the VSO representatives which are the only representatives

recognized by the VA in the Administrative Process which do not take a cut of the veteran's compensation and often unwarrantedly do not provide full prosecution of a veteran's claim as can be seen by the RBA of the Plaintiff's claims.

It was not for lack of the Plaintiff's effort, but because exacerbation periods of the diminished organizational capacity from the Plaintiff's organic brain syndrome that also caused his losses of employment. And it was the inability to get representation because of the limit of $25.00 for a fee and in the words of one medical malpractice attorney, "though it is a well written start, the 9th won't give a veteran s**t." (Which the Plaintiff now recognizes should have been appealed to the CAFC) as his reason for not taking the case. And because of the unconstitutional application of the Feres Doctrine causing potential legal representatives to find reasons to excuse themselves.

In addition, the Plaintiff filed Bray v Shinseki at the CAFC No. 2012-7005 after mistakenly filing it to the CAVA which didn't have jurisdiction. And the Plaintiff was prevented from saving veterans from suicide, an ideation he has experienced hospitalization for on locked wards multiple times. The Plaintiff knows major side temporal lobe lesions from an inside experience not an outside observational experience. The Plaintiff loathes that he has been unable to bring evidence to reduce the 29 per 100,000 suicides among veterans down to at least the

19 per 100,000 for blue collar workers. Veterans have every reason, without untreated and mistreated organic brain syndromes, to have a suicide rate of the overall population of 12 per 100,000 or even the 6 per 100,000 for white collar workers.

If for no other reason than in the interest of Justice and prevention of early loss of life, this case should move forward.

Further extra ordinary circumstances are the denials by the VA Medical Division to provide evidence (EEG tracings and radiographic films), not just reports, through most of the 1990s repeated efforts to obtain the evidence for a second opinion and an etiology opinion on the same evidence which was omitted though required by 38 CFR Chapter 4. The catch 22 is of without the evidence you cannot get a Court to certify the case and without a certified case you cannot get the evidence through discovery.

FAILURES UNDER GENERALLY ACCPTED PRACTICES AND PROCEDURES

An additional extra ordinary circumstance of unconstitutionally denying a hearing and closing an appeal to the BVA through deception in 1995 is evidenced in the RBA by the AOJ Denver VARO.

The Kastl, etal study on cerebral malaria and the Yale Medical School study (Steele) on psychogenic seizures aka pseudo seizures presented formerly as temporal lobe seizures will be proved by preponderance to be more likely than not, predetermined outcome studies with the goal of reducing veteran compensation entitlements. The Kastl, etal study of 1966 was negated in December of 2016 by showing the precise physiology of the brain damage from p. falciparum malaria, proving Pathology Text Books conclusions going back before the 1940s. The Yale Medical School study was negated by further study reported in 2010 by NIH returning the standard to that which was in place before the alleged predetermined outcome Yale Medical School study on temporal lobe seizures was initiated. The Yale study was a "cutting edge theory" when the Plaintiff was diagnosed with "pseudo seizures" also known as psychogenic seizures, should not have been applied during his previous attempts to litigate his claim administratively and via the courts.

Tolling of the SOL is sought and is appropriate for this case including holding SOL for veterans' benefits is unconstitutional under the Section 4 of the 14th, "shall not be questioned," and given the AOJ's can take as much as the 31 years in the Plaintiff's case to process a particular claim to the point that a remand

for processing was necessary by the BVA and now almost a year later, no progress has been made in spite of the BVA Order of "expedited handling.

The overall Generally Accepted Medical Standard of Clinical Practices is *"To Cause No Harm"*. The following demonstrates failures by Navy Medical, VA Medical and VA Adjudication that *"caused harm"* to the Plaintiff and to his wife.

1. The Department of The Navy's Naval Hospital in Oakland, CA had the duty to treat and record in the October 20, 1969 Narrative Summary the September 23, 1969 admission diagnosis of "post-concussion syndrome" and insure follow-ups with a neurologist for the following 6 months were done in following the severe concussion variously reported in the inpatient record as 36 hours and 3 days. Ascertained to be 50 hours of unconsciousness followed by 30 hours of amnesia from other available documents in the Record Before the Agency (RBA) maintained by the Defendant and to be provided in discovery to the Court in application by the Plaintiff to the Defendant for certified copies for the Court.
2. The Defendant can't claim the Feres Doctrine for claiming unconstitutional abridgements of debt due to veterans. The debt for duty to treat and compensate began with the residuals of the disease or injury

leading to the need to treat and compensate or the initiation of the law leading to compensation. Since there are general regulations under the law for the compensation of disabilities from injury or disease incurred in the service of the Defendant later enumeration of specifics cannot deter the veteran from collecting the debt from the time it became evidenced under laws created specific to Section 4 and Section 5 of the 14th Amendment.

3. The Department of the Veterans Administration Adjudicator at Hawaii VARO abdicated his responsibility to examine the record and order the appropriate examinations for the Plaintiff's 7/30/1974 claim for "residuals, fractures, left malar, left zygoma."

    a. 38 CFR 3.304 (b) (1) "…Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with due regard to accepted medical principles pertaining to the

history, manifestations, clinical course, and character of the **<u>particular injury</u>** or disease or residuals thereof."

b. "38 CFR § 4.42 Complete medical examination of injury cases.

i. The importance of complete medical examination of injury cases at the time of first medical examination by the Veterans Administration cannot be overemphasized. When possible, this should include complete neurological and psychiatric examination, and other special examinations indicated by the physical condition, in addition to the required general and orthopedic or surgical examinations. When complete examinations are not conducted covering all systems of the body affected by disease or injury, it is impossible to visualize the nature and extent of the service connected disability. Incomplete examination is a common cause of incorrect diagnosis, especially in the neurological and psychiatric fields, and frequently leaves the Veterans Administration in doubt as to the presence or absence of disabling conditions at the time of the examination."

ii. No examination of the claim was done except for hearing. And the audiologist examiner failed to note tinnitus complained about during the audiogram. The adjudicator failed to review the evidence in the record, determine if tinnitus was in remission or the examiner had failed to note tinnitus. While the rating for noise trauma induced tinnitus as of the date of the rating decision would have been 0%, by March 16, 1976 it would have been raised to 10% and the Plaintiff would not have had to wait until 1989 to receive the compensation rating of 10%. And as stated above, Section 4 of the 14th and 38 CFR 4.1 through 4.16 require the compensation to be from the date of the disability, the date the Plaintiff was denied a forklift operator's permit because of the tinnitus or the date of his release from active duty whichever is later. Release from active servicer was 9 years later.

4. VA Medical failed to diagnose and treat effectively when treatments were available the Plaintiff's organic brain syndrome from his first approach to the VA with his injury claim on 7/30/1974 and even after

"careful clinical evaluation" recommendations were entered into the record in 1985 and 1986.

a. The VA physicians failed to diagnose "anosognosia" as defined in medical dictionaries and reported through objective testing in the Neuropsychological Test Report of 8/30/1985 causing harm by miss directed mental health therapy assuming an adjustment disorder of psychological denial instead of organic denial of disabilities. (Meaning the Plaintiff was unaware of his deficits and the therapy should have been directed at bringing awareness to the Plaintiff instead of some unknown coping adjustment.) It is a generally accepted clinical practice to make diagnosis defined by objective tests. The failure to make the indicated diagnosis caused continuing and exacerbating harm.

    i. In considering the problem faced by anosognosic persons think of a right handed pro-basketball player having a left temporal lobe injury causing anosognosia and a right occipital lobe injury causing a visual spatial deficit. The player will still feel like a pro. He will blame everything and everyone but himself when the ball repeatedly just

doesn't go through the hoop. His adjustment needs to be to the occipital lobe injury not some misdirected unfocused general adjustment disorder. He must adjust to the fact he is no longer a pro quality basketball player. The same as if he had physically injured both hands to the point he obviously could no longer control the ball to the level before the injury.

b. In 1990 a VA physician diagnosed the Plaintiff's organic brain syndrome as atonic, partial and complex partial temporal lobe seizures (including atypical absence seizures) but treated the Plaintiff with Tegretol which was contra-indicated for the conditions diagnosed because it was known to make the conditions diagnosed worse in many individuals. The physician ignored the Plaintiff's complaints that Tegretol was making his condition worse. The Plaintiff, under the duress and harm being experienced with the medication self-weaned off and discontinued taking Tegretol.

c. Subsequently a different VA physician changed the diagnosis to "pseudo seizures" or otherwise known as malingering causing

further harm from failure to treat and continuing exacerbation because of the lack of treatment. Both physicians should have been aware of the contra-indications of Tegretol.

5. The Defendant's VA Medical division did not provide an accurate etiology of the Plaintiff's spinal disc disease as secondary to his organic brain syndrome and did not provide adequate hydrotherapy treatment that could have been provided causing an extreme delay in healing.
6. The Plaintiff has an ongoing request to the CAVA to correct the RBA by recovering from the Medical Division the hard copy file pages that have been removed and again the VA General Counsel is not fully responding to the CAVA Clerk's Order. The follow up, that was required by Naval Standards of Care, would probably have provided an earlier required treatment of the diagnosed "post-concussion syndrome" that progressively worsened over the next 47 years before appropriate treatment began.
7. The Plaintiff with his wife suffered years of poverty and borderline poverty from the lack of compensation and effective rehabilitation because of missed diagnosis directly resulting from the Naval Hospital Oakland's Narrative Summary being incomplete.

8. The Plaintiff's wife suffered loss of consortium, mental health anguish treated at the Los Angeles Downtown VA Clinic, and an income level which caused her husband to be afraid to bring a child into the world because of the inability to provide. Is the Court arguing it is untrue that women were paid less than men doing the same job? The Plaintiff's wife did her best to keep us going on the education and training she could obtain.
9. The Plaintiff alleges minimalization of recordings of potential organic brain syndromes from, but not limited to, traumatic injuries, and p. falciparum malaria was orchestrated by the military to reduce veterans' entitlements in competition for U S Budget funds for military hardware and tax breaks and can be proven by comparing the end of inpatient Narrative Summaries with inpatient records until October 31, 2008 when Congress addressed the TBI issue. We have not heeded President Eisenhower's "Beware of the Military Industrial Complex."
10. Other organic brain syndromes such as from p. falciparum malaria are still being miss treated as "adjustment disorders" as witnessed by the Plaintiff in group mental health therapy.

11. That minimalization of the Narrative Summary that went into the Plaintiff's military health record misled VA physicians into believing the condition was minor and therefore the presentation was of an "adjustment disorder" without organicity unconstitutionally denying many veterans service connection and compensation for the disabling effects guaranteed by Section 4 of the 14th in the authorized laws, specifically 38 CFR 4.1 through 4.16 and 3.154.
12. The Plaintiff suffered incomplete hydro-therapy leading to delayed healing of his spinal disc disease.

Although the Plaintiff suspected he was being miss treated by the VA he had no other options due to lack of funds to seek other treatment and could not have known for sure because he is not an MD though if he had been he would not have been treated this carelessly.

This complaint is complex, multi-district and includes many deceptions by the Navy and the Department of Veterans' Affairs, as listed below, intended to deny veterans' benefits, "authorized by law" and guaranteed by Section 4 of the 14th Amendment while abridging the Plaintiff's right to "Due Process" under the 5th Amendment.

As the result of denial of due process claimed under the 5th Amendment by denial of evidence under the FOIA and because of additional deceptions, denials of evidence, failure to certify claims of clear and unmistakable errors (CUE) and negligent errors listed below the Plaintiff had over 40 years of diminished income, including 28 years of unemployment with only minimal SSDI and VA compensation, suffered years of physical and mental pain and suffering as well as physical pain and suffering as a result of an MVA secondary to the Plaintiff's organic brain syndrome, seeing his spouse suffer the indignity of repeatedly requesting funds from her parents, while attempting to process the Plaintiff's claims through the Navy Board for Correction of Military Records (NBCMR) and the VA's 38 CFR 3.154 administrative processes provided by law and referenced in the Fere's doctrine for the Navy. Because of a clear and unmistakable error by the NBCMR's denial of the existence in the record of "anosognosia." The VA failed in its requirement to assist in processing and referring the Plaintiff's case to the NBCMR.

The VA's failure to follow "Generally Accepted Clinical Practices" and recognize, based upon objective evidence consistent with subjective complaints, the presentation of the Plaintiff's severe employment problem caused by a failure to correctly diagnose and treat his seizures.

The Plaintiff is therefore demanding the sum of $3,750,000.00 plus costs from the Navy plus $3,750,000.00 from the VA plus costs totaling $7,500,000.00 plus costs (including attorney's fees if applicable) from this action.

The Plaintiff filed SF -95 claims with the Department of the Navy and the Department of Veterans' Affairs on April 26, 2016. Denial was issued by the Department of Veterans' Affairs on behalf of the Navy and the VA on September 8, 2016. A timely request for reconsideration citing errors in the denial was submitted on February 23, 2017. In further denial of Due Process, the VA General Counsel failed to respond to the request for consideration within the allotted 6 months and only finally denied reconsideration after the December 15th, 2017 initial complaint filing by certified letter on February 6, 2018. The required administrative actions have been met and civil action is now warranted.

The Feres Doctrine is not applicable to this case because the Navy did not act in good faith, denying due process, when the application for correction of the Plaintiff's military record was denied falsely stating "no indication of anosognosia evidenced" in a clear and unmistakable error in the decision.

The Plaintiff's only gaps in prosecuting his claim were in the deterioration of his condition, recognized by others, but denied due to anosognosia,

and during severe depressive states requiring maximum doses of antidepressants which included a 20-year stint of being mostly overseas. It is appropriate to toll the SOL in this case falling within the 6-year statute of limitations of California after returning to the U S, where most of the instances occurred.

The Plaintiff claims a Statute of Limitations date per Title 28, Section 2401 (a) of 3 years from January 1, 2016 instead of (b) and further claims a "Misrepresentation of Facts" under the citation of Title 41 in Title 28, Section 2401 (a); Section §7101 (9) definitions of Title 41 as referenced in Title 28 Section 2401 (a) as part of the basis for tolling the Statute of Limitations.

1. The Plaintiff could not have demonstrated there was a treatment available until the adequate treatment was initiated leading to the 1/1/2016 recognition.
2. The Plaintiff was denied the evidence requested from the VA Medical Division that might have enabled the Plaintiff to develop an earlier case, a denial of due process under the 5th Amendment.
3. The Plaintiff was not informed by the pharmacist at the West LA VAMC that Tegretol was known to have made his diagnosed condition worse in other cases.

4. The pharmacist obviously did not confer with the physician regarding the use of Tegretol in the diagnosis of atypical absence, atonic, partial and complex partial seizures as is the generally accepted clinical common practice.

The Plaintiff sought compensation through the Military and VA administrative processes and was denied through deceptions, withholding of evidence and failure to address claimed issues (of CUE and Malpractice and TDIU) substituting minimal compensation issues instead for certification to the BVA. And is continuing to deny the Plaintiff certification of those issues to the BVA making this complaint current and continuing.

The BVA made clear and unmistakable errors in addressing rating decisions in its October 17, 1990 Decision (RBA pages 3206 thru 3211).

1. Representation by the American Legion VSO Representative at the BVA hearing was clearly inadequate and unprepared. The BVA failed to insure the Plaintiff was properly represented by the American Legion VSO during the 5-15-90 BVA Hearing in Washington, DC as is evidenced by the transcript on RBA pages 3212 thru 3213 and 3536 thru 3554.

a. No brief of the issues was prepared for the BVA review leading to missed evidence, particularly page 2 of the 1990 Employer's Statement and the objective RBA page 3889, date 8/30/85, Neurobehavioral Assessment.

b. The decision falsely relied upon the psychiatric examination of March 1989 which stated "organicity was more constant." While it is true the physical signs of organicity, such as the numbness on the posterior left forearm are constant, mental signs are not constant as indicated by the objective and "valid" Neuropsychological Assessment, RBA pages 3872 thru 3874; Neuropsychological Test Report dated 8/30/1985 for tests between 7/17 and 8/27; pg. 3873 "Moderate to severe levels of anxiety and tension <u>make simple routine life tasks difficult for this man</u>. <u>Mr. Bray's use of repression and denial is either ineffective, or at best wards of psychological discomfort at the cost of considerable psychic energy and resultant rigidity</u>." (subtle anosognosia defined here) pg. 3874 "Brain involvement and reduced efficiency due to head trauma cannot, however, be ruled out based on the patient's history, the Neuro-psychological testing presented above, and the

similarity of patient's complaints to those presented by individuals with subtle frontal brain impairment." Taken with RBA pg. 3574, EEG showing, "Abnormal record indicating a disturbance of function in the left hemisphere anteriorly. Such changes may be seen in post- traumatic cases with or without seizures." Organicity is established.

c. The October 17, 1990 BVA Decision ignores the EEGs indicating possible seizures, the recommendations for careful clinical evaluation, and the known element that untreated epilepsy of any nature more often than not becomes progressively worse without treatment. The claim of "Total Disability Due to Unemployability" (TDIU) filed in 1987 had not been developed and was not addressed until the BVA decision of May 11, 2017 and then only with a remand for development.

2. Because of the Plaintiff's untreated organic brain syndrome, he was inadequate to the process of representing himself though he made a continuous effort following realization that the VSO representatives were inadequate and because of the "Feres Doctrine," limitations on attorney fees, and complexity of the presentation of organic brain syndromes

made private attorney representation impossible to obtain, denying the Plaintiff due process.

3. There was a buildup of past due compensation and a slam dunk case on TDIU allowing an attorney to obtain a reasonable compensation for her effort. Even then, the VA did not provide requested evidence by the attorney on behalf of the Plaintiff completely and in a reasonably organized fashion nor did the VA provide a complete RBA in a reasonably organized fashion to the Plaintiff on his Notice of Appeal to the CAVC.
4. And the VA has not fully responded to the CAVC Clerk's Order of December 1, 2017 in any of its 9 responses, covering 152 days, omitting the requirement underlined in the following quote from the order: "The Secretary shall advise the Court, within 15 days after the date of this order, and every 15 days thereafter, <u>what action the Department - including the responsible VA regional office(s) - has taken to resolve the dispute.</u>" (Copies of the form filing responses are attached.)

One cannot fault that attorney for not wanting to continue or other attorneys for not wanting to represent given the difficulties and costs involved, and uncertainty in bringing the case to fruition. And the VA General Counsel's

practice of not responding to Court Orders or providing requested evidence in a timely and adequate manner.

FACTS SPECIFIC TO INJURY AND TOLLING OF THE SOL FROM THE RECORD BEFORE THE AGENCY DATED OCTOBER 31, 2017 PROVIDED BY THE VA GENERAL COUNSEL ON A CD:

1. On September 17, 1990, Record Before the Agency (RBA) page 3289, "altered states of consciousness" seizures were confirmed because of earlier EEGs and an MVA from a lapse of consciousness. Tegretol was started as a therapy, which is not indicated for the diagnosis and the Plaintiff's complaints according to the Physician's Desk Reference, (PDR). Tegretol, exacerbated Plaintiff Mr. Bray's symptoms, as indicated by the PDR that it would, and led the Plaintiff to wean off and quit the Tegretol because the VA Seizure Clinic at the West Los Angeles VA Regional Medical and Research Center wouldn't change medications. Subsequently, it is alleged the VA physicians to which Plaintiff Mr. Bray entrusted his health care to would not start seizure therapy instead diagnosing pseudo seizures as a cover-up of the error. The Plaintiff couldn't understand the insistence on continuation of Tegretol after 5 months of getting worse.

a. **The PDR of 1990 indicates: "Precautions—General: …Tegretol should be used with caution in patients with a mixed seizure disorder that includes <u>atypical absence seizures</u> since in those patients Tegretol has been associated with increased frequency of generalized convulsions (see INDICATIONS AND USEAGE)"**

   i. **"INDICATIONS AND USEAGE—Epilepsy: …Absence seizures do not appear to be controlled by Tegretol (see PRECAUTIONS General)."**

   ii. **The Plaintiff's complaints were of "atypical absences seizures" including complex partial seizures but not grand mall seizures. Given the above it should not have taken 5 months for a precautionary change of seizure medication which never happened. Instead the Plaintiff had his diagnosis changed after he self-weaned off and discontinued the use of Tegretol. And he is lucky that he did. Otherwise he would probably have developed and continued to have grand mall seizures.**

b. **The Plaintiff questions whether he was an unknowing subject of a medical study on the use of Tegretol and a lobbying effort for the**

study with a predetermined outcome other than the finale conclusion that Tegretol exacerbates atonic, partial and complex partial seizures. The Plaintiff will seek discovery of the medical research studies that were ongoing at the VAMC in West Los Angeles CA during the 5-month period of refusal to address the Plaintiff's complaint of exacerbation of the symptoms while under Tegretol therapy. The VAMC in West Los Angeles along with the UCLA Medical Center lost their accreditation for doing research because of abuses involving veterans in 1995 according to a report in the Washington Post at the time.

2. On August 24, 2015 treatment was started by Dr. Roy Alan Kanter of the Cheyenne VA Medical Center with Keppra and by January 1, 2016 it was determined by the Plaintiff to have obtained sufficient control of his symptoms. Documentation is not in the RBA but is available in the Medical Division treatment records.

    a. Had the Plaintiff been treated in 1985 or on the first indications of complex partial seizures in the Plaintiff's Navy Personnel record in 1970 as recommended by Dr. Thompson, in 1985, with an appropriate

seizure medication Plaintiff Bray would have more likely than not have been employable and able to finish a career to retirement.

3. RBA page 3778, The Naval Hospital Oakland, CA, Narrative Summary, dated Oct 20, 1969, had DECEPTIVELY minimized the head injury leading to a failure in neurological follow up that was indicated by immediate severe diminishment in performance per Enlisted Evaluation Reports; diminished performance denied by the Plaintiff as a result of the medical condition of anosognosia, which continued to affect the Plaintiff's judgement about the effect of the injury and his atonic, partial and complex partial seizures until pointed out to him by friends in conjunction with working environments in the mid-1980s. The Plaintiff, because of the medical condition of anosognosia, remained frequently in a state of denial until 3 months after being medicated with the drug Keppra.

    a. The Plaintiff will more likely than not, be able to show the deceptiveness has been a military medical policy and VA policy since the inception of disability compensation laws and that with discovery Plaintiff can prove to reasonable persons this to be more likely than not the truth.

4. The minimization of potential organic brain syndrome residuals is further indicated to be a military policy of deception, probably by interference from lobbyists, causing harm, not only to the Plaintiff, but to many other veterans and the use of predetermined outcome studies that even affect the civilian population as well, all to yield to the corporate lobby effort to garner budget dollars for contracts instead of the budget dollars going to the veterans to compensate and treat conditions that are a result of service to the United States.

    a. The Phoenix/Cheyenne 2012 VA Crisis is an example of lobbyist intervention to further corporate goals in obtaining two contracts for Choice totaling over 25 billion dollars. The lobbyist's fee, a Lexus and a trip to Disneyland were minimal known marketing costs. And who landed the top 5 executive positions that garnered 25 plus million dollars in salaries with over 12.5 million going to the top executive of Health Net, one of the two initial VA Choice providers.

    b. The minimization of organic brain syndromes is additionally found in the use of the rehabilitation phase Narrative Summary, with its minimal symptoms and laboratory results, of treatment for p. falciparum (cerebral) malaria of other veterans without stipulating it

as such and no acute phase Narrative Summary of the treatment was entered in the health record that followed the victims to their VA record unless inpatient treatment records were specifically requested.

c. Because of the Plaintiff's case and the cases witnessed by the Plaintiff, of veteran's minimalized hospital summaries which do not reflect the inpatient records of the hospitalization, the Plaintiff believes he can prove the deceptions were a policy not simple errors or neglect by the preponderance of such Narrative Summaries.

d. During the period immediately following WWII and Korea Wars being able to walk and talk was sufficient to find minimal employment but with the mechanization since the 1950s, safety concerns, and the move to mental jobs with mental stress, jobs for persons with organic brain syndromes have dried up which in prior decades were available. A "drifty" vet became an unacceptable employee.

5. Partial and complex partial seizures began to be suspected by the Department of Veterans' Affairs treating physicians by the Plaintiff's complaints after the physician doing a Compensation and Pension Examination of Plaintiff on May 13, 1985, decided the Plaintiff's loss of

sensation on the left side of his face and left posterior forearm coupled with his mental complaints and history of a head injury with 50 hours of unconsciousness and an additional 30 hours of amnesic semi-consciousness warranted neurological follow up. An EEG was performed that showed a lesion in the left anterior temporal region, with or without seizures, warranting the follow up by Neurobehavioral Testing.

6. RBA page 3889, date 8/30/85, The Neurobehavioral Testing had shown "deficits consistent with brain damage" "… exhibits visual spatial skill deficits consistent with head injury involving the posterior right cortex…" "Testing suggests both depressive and hysterical features in his behavior that are manifested in complaints of loss of efficiency, periods of confusion, and inability to concentrate. These features may also account for any unusual complaints the patient presents. This adjustment is likely to be chronic and resistant to change with patterns of withdrawal, unrealistic feelings of guilt, anxiety and agitation…" "… Moderate to severe levels of anxiety and tension make simple routine life tasks difficult for this man. <u>Mr. bray's use of repression and denial is either ineffective, or at best, wards off psychological discomfort at the</u>

cost of considerable psychic energy…" (**definition of anosognosia**) "…and resultant rigidity." "… Brain involvement and reduced efficiency due to head trauma cannot, however, be ruled out based on the patient's history, the neuro-psychological testing presented above, and the similarity of patient's complaints to those presented by individuals **with subtle frontal brain impairment." Which was confirmed by numerous EEGs.** An indication of absence seizures is recorded as "His performance in solving problems was characterized by an overall good to excellent performance that would sometimes abruptly become poor and took more than average time to improve to an efficient level once again. A similar difficulty occurred in remembering complex memory passages."

7. The testing above and the EEG report recommended "A careful clinical history would be necessary to shed further light…" which was delayed 7 years until 1992 because the VA's telemetry units, unknown to the Plaintiff, were in use by the Yale University Medical School Neurology, in a trade, allowing research for brain cauterization as a treatment for status epileptus and Parkinson's Tremors, for research on a cutting edge theory that sharp wave temporal lobe EEG tracings were not epileptiform

but were psychogenic in nature. This theory has since been disproven by an NIH study published in 2010 and the neurologists again consider sharp wave anterior temporal lobe EEG tracings as indicative of possible absence, atonic, partial, complex partial, and myoclonic seizures.

8. The above is not the total of the deceptions and negligent errors, just the most obvious from the record as analyzed to date.
9. MRS. Bray is expected to file an SF-95 claim citing similar conditions to Laskowski v. U.S. Dep't of Veteran Affairs referenced on page 1. Notice of Intent to File Motions to join two additionally filed SF-95s to this case on completion of the administrative processes accompanies this filing.

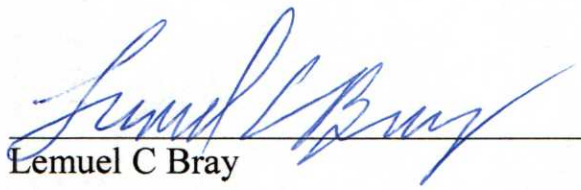
DENIAL OF DUE PROCESS

The Plaintiff was repeatedly denied evidence under FOIA requests in the RBA by the Defendant's VA Medical Division through non-denial denials of repeatedly providing reports instead of the requested EEG tracings and radiographic films.

On notification that the Plaintiff would be unavailable for particular periods of time the Defendant's Denver VARO repeatedly notified the Plaintiff, after receipt of the Plaintiff's notification, during his notified absence, the scheduling of the requested hearing and then closed the Plaintiff's claim on that

basis alone without reviewing the documents, the requested evidence, without following the duty to assist the Plaintiff in obtaining the requested evidence maintained by the Defendant's VA Medical Division.

Dated this Thirtieth Day of April 2018.



Lemuel C Bray

In Pro Se
2833 Main Street
Torrington, WY 82240-1929
lembray@gmail.com
Ph 307 316 8568
Fax 307 316 0936

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on May 2, 2018, a copy of the *Motion to Amend the Complaint pursuant to the Courts the Defense Motion to Dismiss of the Plaintiffs and Brief* was served upon Defendant by mailing copies via certified mail, return receipt requested to the following:

MARK A. KLAASSEN
United States Attorney: Certified Mail Receipt no: 7017 3040 0000 6029 9640
NICHOLAS VASSALLO (WY Bar #5-2443)
Assistant United States Attorney
P.O. Box 668
Cheyenne, WY 82003-0668

CLERK
U S DISTRICT COURT: Express Mail Receipt no: EK 622663918 US
2120 Capitol Avenue, Room 2131
Cheyenne, WY 82001

ATTORNEY GENERAL: Certified Mail Receipt no: 7017 3040 0000 6029 9657
U S DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVE., N W
WASHINGTON, D C 20530-0001

OFFICE OF GENERAL COUNSEL (021B)
DEPARTMENT OF VETERANS AFFAIRS
810 VERMONT AVE., N W: Certified Mail Receipt no: 7017 3040 0000 6029 9664
WASHINGTON, D C 20420

Dated this Thirtieth Day of April 2018.

Lemuel C Bray

In Pro Se
2833 Main Street
Torrington, WY 82240-1929
lembray@gmail.com
Ph 307 316 8568
Fax 307 316 0936