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U.S. DISTRICT COURT
DISTRICT OF WYOMING
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STEPHAN HARRIS, CLERK
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

LEMUEL CLAYTON BRAY, and KAZUKO HAYASHI BRAY, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	Case No: 17-CV-206-F

ORDER GRANTING MOTION TO DISMISS

This matter is before the Court on Defendant's Motion to Dismiss. The Court has reviewed the motion and Plaintiffs' response and is fully informed in the premises.

DISCUSSION

In their Complaint, Plaintiffs bring claims against the United States seeking relief under the Federal Tort Claims Act (FTCA). Plaintiffs assert tort actions arising under the Fourteenth Amendment based on negligent medical treatment. Plaintiffs claim Plaintiff Lemuel Clayton Bray (Mr. Bray) either suffered a medical injury or his condition did not improve based on medical acts or omissions occurring in 1969, 1990, and 1992. (Doc. 1 at 1). Plaintiffs allege that on October 20, 1969, "the U.S. Navy minimalized the Narrative Summary of Treatment of Plaintiff Mr. Bray for a traumatic brain injury." (Doc. 1 at 1). Plaintiffs claim that on September 17, 1990, "mistreatment with the drug, Tegretol caused Mr. Bray's symptoms to worsen," and on February 24, 1992, "an erroneous cover-up diagnosis of pseudo seizures was entered." (*Id.*). Plaintiffs further

state the Veterans Administration "fail[ed] to follow 'Generally Accepted Clinical Practices[] and recognize, based upon objective evidence consistent with subjective complaints, the subtlety in the presentation of the Plaintiff's severe employment problem caused by a failure to correctly diagnose and treat his seizures." (*Id.* at 2).

Along with their Complaint, Plaintiffs also filed a motion to be allowed equitable tolling for the statute of limitations. (Doc. 2). The Court denied the motion as premature. (Doc. 9).

Defendant then filed its motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Defendant argues that Ms. Bray failed to exhaust her administrative remedies and that Mr. Bray's claims are barred by the *Feres* doctrine. Additionally, Defendant asserts that Plaintiffs' Complaint fails to adequately allege the elements of a medical malpractice claim and that Plaintiffs' claims are time barred.

Plaintiffs are acting pro se. Therefore, the Court construes their pleadings liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Garza v. Davis*, 596 F. 3d 1198, 1201 n.2 (10th Cir. 2010). Meaning, the Court will "make some allowances for the pro se plaintiff's . . . unfamiliarity with pleading requirements." *Garrett v. Selby Conner Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

1. Ms. Bray's failure to exhaust administrative remedies.

Defendant asserts that Ms. Bray failed to exhaust her administrative remedies because she did not file an administrative claim as required by the FTCA. Plaintiff claims that Ms. Bray's claims were stated in the July 20, 2017 letter amending Mr. Bray's offer to settle.

The letter Plaintiffs refer to is a July 28, 2017 letter amending the Brays February 23, 2017 settlement offer. The letter contains a single sentence stating: "Plus $25,000.00 per year for 36 years or $900,000.00 for pain and suffering through poverty years for Kazuko Hayashi Bray." (Doc. 13, Appendix 3 at 3).

"The FTCA constitutes a limited waiver of the federal government's sovereign immunity from private suit." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 852 (10th Cir. 2005) (citation omitted). "The prerequisite for liability under the FTCA is a 'negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" *Id* (citing 28 U.S.C. § 1346(b)). "Because the FTCA constitutes a waiver of the government's sovereign immunity, the notice requirements established by the FTCA must be strictly construed. The requirements are jurisdictional and cannot be waived." *Bradley v. United States ex rel. Veterans Admin.*, 951 F.2d 268, 270 (10th Cir.1991) (citation omitted). "Section 2675(a) requires that claims for damages against the government be presented to the appropriate federal agency by filing (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." *Id.* (citation and quotation marks omitted).

In this case, the one sentence demand for damages for Ms. Bray fails to sufficiently describe the injury to enable the agency to begin an investigation into Ms. Bray's claims. There is no statement of how Mr. Bray's injuries caused Ms. Bray's

poverty. The sentence seems to imply that Ms. Bray was somehow either totally dependent on Mr. Bray or that his condition prevented her from working in some manner. However, there is no statement of facts in the letter to support her claim for damages. The Court finds this sentence fails to satisfy the necessary claim notice requirements. Ms. Bray failed to file a proper administrative claim for her injury. As a result she has failed to exhaust her administrative remedies and her claim is DISMISSED WITHOUT PREJUDICE.

2. Mr. Bray's claims

Defendant asserts several fatal flaws to Mr. Bray's claims. Defendant argues his claim as it relates to his treatment while he was an active duty service member is jurisdictionally barred. Defendant also asserts that Mr. Bray fails to state the elements of a malpractice claim. Finally, Defendant also asserts that Mr. Bray's claims are time-barred. The Court agrees that Mr. Bray's claims are barred for all these reasons.

A. Mr. Bray's claims related to active service

Defendant argues that to the extent Mr. Bray's claims are based on injuries he sustained while on active duty, his claim is barred by the *Feres* Doctrine. In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court found:

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law.

Id. at 146. The Tenth Circuit has "consistently applied the *Feres* doctrine to bar medical malpractice claims involving commissioned members of the uniformed services." *Backman v. United States*, 153 F.3d 726 (10th Cir. 1998) (citations omitted).

It appears Mr. Bray is complaining about Defendant deceptively minimizing a brain injury he suffered on September 19, 1969, when he was on active duty. (Doc. 1 at 3; Doc. 2 at 2). Mr. Bray claims on October 20, 1969, a physician minimized the residual effects of the head injury in releasing him back to duty. (Doc. 2 at 2). Mr. Bray claims these actions led to the failure of providing him a neurological follow-up. (Doc. 2 at 3). Mr. Bray claims that the failure to provide a neurological follow-up caused immediate severe diminishment in Mr. Bray's performance. (Doc. 1 at 3). Mr. Bray alleges this injury continued to affect his judgment and caused "atonic, partial and complex partial seizures until pointed out to him by friends in conjunction with working environments in the mid-1980s." (*Id.*).

To the extent that Mr. Bray is claiming damages from negligence related to the injury received in 1969 while on active duty, this claim is barred by the *Feres* Doctrine. Mr. Bray's claim relating to malpractice that occurred when he was on active duty is DISMISSED WITH PREJUDICE.

B. Failure to State a Claim

Defendant claims that Plaintiffs have failed to assert a claim for medical malpractice. "In reviewing a Fed. R. Civ. P. 12(b)(6) dismissal, a court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Moss v. Kopp*, 559

F.3d 1155, 1159 (10th Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In this case, Mr. Bray is claiming medical malpractice. The only specific place that he mentions for his treatment is the VA Seizure Clinic in Los Angeles, California. Therefore, the Court applies California's substantive law. 28 U.S.C. §1346(b)(1). "[I]n any medical malpractice action, the plaintiff must establish: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." *Hanson v. Grode*, 76 Cal. App. 4th 601, 606, 90 Cal. Rptr. 2d 396, 400 (1999), as modified (Nov. 29, 1999) (citations and quotation marks omitted).

Mr. Bray's allegations fail to meet this standard. Bray fails to state the applicable standard of care (for the time period that was involved, the standards of care in 1969 and 1990 are not the same as the standard of care in 2017). Additionally, Mr. Bray's claims fail to assert how the VA's actions fell below the applicable standard of care. His allegations are devoid of anything other than conclusory statements and unsupported allegations of negligence and deceptive diagnosis. As a result, Plaintiffs' Complaint does not state a plausible claim for medical malpractice.

C. Time Bar

While Plaintiffs fail to state a claim upon which relief can be granted, the Court also finds Plaintiffs' claims are untimely. While Plaintiffs' Complaint is difficult to understand and follow, Mr. Bray appears to be asserting a claim for negligence for actions in 1969, 1990, and 1992.

The FTCA provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C.A. § 2401(b). "In construing the statute of limitations established by the FTCA, we should keep in mind that the FTCA waives the immunity of the United States and 'not take it upon ourselves to extend the waiver beyond that which Congress intended.'" *Bradley*, 951 F.2d at 270 (citing *United States v. Kubrick*, 444 U.S. 111, 117–18, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979)).

"[D]etermination of when a claim . . . accrues is a matter of federal, not state, law." *Kynaston v. United States*, 717 F.2d 506, 508 (10th Cir. 1983). "Under the FTCA a cause of action accrues at the time the plaintiff is injured, or, in a medical malpractice action, when the plaintiff has discovered both his injury and its cause." *Id.* "Accrual need not await awareness by the plaintiff that his injury was negligently inflicted." *Bradley*, 951 F.2d at 270 (citations and quotation marks omitted). "The injury must arise from the negligence or wrongful act or omission of a government employee, not solely from a condition that existed before the medical treatment at issue." *Harvey v. United States*, 685 F.3d 939, 947 (10th Cir. 2012) (citation omitted).

As the Court previously noted, the deficiencies in Plaintiffs' Complaint in failing to state a claim make it difficult in this case to understand exactly what Mr. Bray is claiming in terms of the medical malpractice. Additionally, it is difficult to understand if Mr. Bray is complaining that the medical providers did not meet the standard of care for treatment that existed at the time of his claims from fifty to thirty years ago (1969, 1990, or 1992), or by today's standards, which in the area of traumatic brain injury have become significantly more advanced in the last few decades. Additionally, probably because of the timing, Mr. Bray's claims are vague and do not state who was responsible for the malpractice.

However, all of Bray's claims appear to arise from a single incident in 1969. In 1974, Mr. Bray filed a claim with the DVA for residuals for his injuries. (Doc. 2 at 4). In 1983, he had an episode of "nearly going berserk". (Doc. 2 at 4). Mr. Bray states that this injury continued to affect his judgment and caused "atonic, partial and complex partial seizures until pointed out to him by friends in conjunction with working environments in the mid-1980s." (Doc. 1 at 3). In 1984, Mr. Bray filed a claim for PTSD. (Doc. 2 at 4). In 1985, Mr. Bray received neurobehavioral testing showing "deficits consistent with brain damage. . . ." (Doc. 1 at 4). Mr. Bray claims that since 1985 he has continued to pursue his claim for compensation. (Doc. 2 at 4). He also claims that the recommended follow-up was delayed to 1992. (Doc. 1 at 5). Based on these allegations, Mr. Bray was aware of his head injury by at least 1985 and that is the time his injury accrued and he was aware of any misdiagnosis or improper treatment in 1969.

Additionally, Mr. Bray claims that in 1990 he was mistreated with the drug Tegretol. Mr. Bray claims the Tegretol caused his symptoms to worsen and he could not understand why doctors continued prescribing Tegretol and after five months of getting worse he weened himself of the medication. (Doc. 1 at 2-3). Based on Mr. Bray's allegations, he believed he was being mistreated and that he was not getting better in 1990-1991, which is when this claim accrued. Additionally, between 1984 and 1992, Mr. Bray was involved in numerous proceedings and activities related to his medical claims. (Doc. 2 at 4-5). In 1991 he wrote a letter to his congressional representative, in 1992 he was involved in appealing his rating decision. (Doc. 2 at 5). While Mr. Bray claims that from 1990 to 2015 he was pretty much in a fog, he also claims that in 1995 to 1996 he demonstrated in DC at the Mall in front of the VA for better care of Veterans with organic brain injuries. (Doc. 2 at 5). He also sent a letter to the VA requesting assistance with medical records, and during 1994-1998 he appealed his ratings decision with the VA. (Doc. 2 at 8).

Mr. Bray's allegations indicated that he was aware of his injury, that it was related to his brain injury and that he was not getting better in 1991-1992 and continued to be aware of his condition through at least the 1990s. At a minimum his injuries accrued in 1991-1992, which is when the statute of limitations began to run.

He also claims that in 1992, an erroneous cover-up diagnosis of pseudo seizures was entered. (Doc. 1 at 1). However, this claim does not state a violation of professional care or provide the Court with any indication of the basis of his claim or the damages suffered based on his claim.

Mr. Bray also claims equitable tolling. Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005). Bray appears to have been diligently pursuing his rights against the Navy and the VA over the years. However, he failed to take any action to file a claim under the FTCA. Additionally, there was no extraordinary circumstance that stood in his way. Although Bray claims he had a legal disability, there are no factual allegations that he was declared legally incompetent at any time. In fact, Bray's allegations show that he was actively involved in proceedings and appeals through the 1990s and was advocating for better treatment of Veterans with organic brain injuries. (Doc. 2, 4-5, 8). These allegations contradict Mr. Bray's claims that he was too disabled to file a FTCA claim until 2016.

There is no other basis for the Court to find that statute of limitations should be tolled in this case. For all of these reasons, the Court finds that Plaintiffs' claims are time barred.

3. Opportunity to Amend

The "dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." *Oxendine v. Kaplan*, 241 F.3d 1272,1275 (10th Cir. 2001) (brackets and internal quotation marks omitted). "[T]he plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his

complaint." *Hall v Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). In this case, the Court questions whether Plaintiffs can state a claim if provided an opportunity to amend. However, in deference to Plaintiffs' pro se status, the Court will allow Plaintiffs an opportunity to amend their complaint.

CONCLUSION

For all the above stated reasons, the Court finds that Ms. Bray has failed to exhaust her administrative remedies and her claim is DISMISSED WITHOUT PREJUDICE. Additionally, Mr. Bray has failed to assert a claim medical malpractice and Mr. Bray's conclusory allegations of medical malpractice are time barred and equitable tolling does not apply. However, the Court will allow Plaintiffs an opportunity to amend their complaint to potentially assert allegations that would support a timely claim of medical malpractice.

IT IS ORDERED that Defendant's Motion to Dismiss is GRANTED. Plaintiffs' claim related to medical malpractice that occurred when he was on active duty is DISMISSED WITH PREJUDICE. Plaintiffs' remaining claims are DISMISSED WITHOUT PREJUDICE.

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

Dated this 16 day of April, 2018.

NANCY D. FREUDENTHAL
CHIEF UNITED STATES DISTRICT JUDGE