No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

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LEMUEL CLAYTON BRAY - **PETITIONER**
(Your Name)

VS.

UNITED STATES (GOVERNMENT) -

APPENDIX A THROUGH APPENDIX I

FOR PETITION FOR A WRIT OF CERTORARI

SUBMITTED on May 31, 2019

LEMUEL C BRAY

APPENDIX A, 10th Circuit Decision

FILED
United States Court of Appeals
Tenth Circuit

March 7, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LEMUEL CLAYTON BRAY,

Plaintiff - Appellant,

and

KAZUKO HAYASHI BRAY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 18-8051
(2:17-CV-00206-NDF)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This appeal involves claims against the federal government for negligent medical treatment at the Veterans Administration Hospital in

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* Oral argument would not materially aid our consideration of the appeal, so we have decided the appeal based on the briefs. *See* Fed. R. App. P. 34(a)(2); Tenth Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But our order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); Tenth Cir. R. 32.1(A).

1969, 1990, and 1992. The claims were brought by Mr. Bray (who is a military veteran) and his spouse. The district court dismissed the original complaint for lack of subject-matter jurisdiction. But in an amended complaint, Mr. Bray's spouse was dropped as a plaintiff. The district court again ordered dismissal, relying this time on the Feres Doctrine, failure to state a valid claim under California law, and timeliness. We affirm.

Ms. Bray's Claims

In their notice of appeal, the plaintiffs include Ms. Bray as an appellant. She was a party to the original complaint, but not the amended complaint. So we assume that Ms. Bray is appealing the dismissal of her claims in the original complaint.

That dismissal was based on a lack of subject-matter jurisdiction over Ms. Bray's claims. Because the claims were brought against the federal government, the district court found that the Federal Tort Claims Act applied. 28 U.S.C. § 2674. This statute permits jurisdiction only if the plaintiff exhausts available administrative remedies. 28 U.S.C. § 2675(a); *see Lopez v. United States*, 823 F.3d 970, 976 (10th Cir. 2017) (stating that the exhaustion requirement in 28 U.S.C. § 2675(a) is jurisdictional).

The district court concluded that Ms. Bray had failed to exhaust available remedies and relied on this jurisdictional requirement to dismiss her claims. We engage in de novo review. *U.S. West, Inc. v. Tristani*, 182 F.3d 1202, 1206 (10th Cir. 1999).

Ms. Bray has supplied us with no reason to question the district court's conclusion that she failed to administratively exhaust her claims. *See Haceesa v. United States*, 309 F.3d 722, 734 (10th Cir. 2002) (stating that each claimant must individually satisfy the Federal Tort Claims Act's jurisdictional requirements). We thus affirm the dismissal of Ms. Bray's claims for lack of subject-matter jurisdiction.

Mr. Bray's Claims

The district court also dismissed Mr. Bray's claims in the amended complaint based on the application of the Feres Doctrine, the failure to allege a cognizable claim under California law, and the expiration of the statute of limitations. Mr. Bray challenges these grounds for the decision, but we agree with the district court's reasoning.

The "Feres Doctrine" is the name given to a holding by the Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950). There the Court held that the federal government does not incur liability under the Federal Tort Claims Act for a serviceman's injuries that arise out of his military service. 340 U.S. at 146.

The Feres Doctrine applies to the claims involving Mr. Bray's 1969 injuries because these claims arose out of his military service. Mr. Bray argues that the Feres Doctrine is unconstitutional "because Section 8 of Article I is modified by the 5th Amendment, 7th Amendment, and 14th

Amendment." Appellant's Opening Br. at 20. But he does not explain this contention.[1]

The Feres Doctrine is based on a Supreme Court decision, which binds us and requires us to reject Mr. Bray's constitutional challenge. *See Labash v. U.S. Dep't of the Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) ("Although many courts have expressed reservations about the continuing validity of the broad Feres Doctrine, only the United States Supreme Court can overrule or modify Feres."), *quoted with approval in Ortiz v. United States ex rel Evans Army Comm. Hospital*, 786 F.3d 817, 823 (10th Cir. 2015).

In dismissing Mr. Bray's claims, the district court relied not only on the Feres Doctrine but also on California law. California law applies because (1) the underlying act occurred in California and (2) the Federal Tort Claims Act determines liability according to the law where the act or omission occurred. 28 U.S.C. § 1346(b)(1).

Applying California law, the district court concluded that Mr. Bray had failed to identify the applicable standard of care or state how the VA Hospital had failed to comply with that standard of care. For this conclusion, we engage in de novo review, *Slater v. A.G. Edwards & Sons,*

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[1] Because Mr. Bray appears pro se, we liberally construe his appeal brief. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008). But we cannot act as his advocate or construct arguments for him. *Id.*

Inc., 719 F.3d 1190, 1196 (10th Cir. 2013), and agree with the district court's reasoning.

Mr. Bray also claimed that VA personnel had covered up their wrongdoing by entering a false diagnosis in 1992. But the district court reasoned that Mr. Bray had failed to state how he was injured by the false diagnosis or why the diagnosis had fallen below the applicable standard of care.

In his appeal brief, Mr. Bray again fails to state how the district court erred in rejecting his argument involving a false diagnosis. Though he proceeds pro se, we cannot serve as Mr. Bray's advocate or create arguments for him. *See* note 1, above. And Mr. Bray has given us no reason to question the district court's reasoning.

The district court also concluded that the claims were untimely. For this part of the ruling, we again engage in de novo review. *See id.*

After the alleged wrongdoing occurred, Mr. Bray had two years to bring an administrative claim and six years to sue. 28 U.S.C. § 2401(a)–(b). The wrongdoing allegedly took place in 1969, 1990, and 1992. But Mr. Bray waited

- until 2016 to bring an administrative claim and
- until 2017 to sue.

The district court concluded that Mr. Bray's claims had accrued by 1990 or 1991 at the latest. But even if we were to base accrual on later

events, Mr. Bray has not provided a reason to justify delay until 2016 (for his administrative claim) or 2017 (for his filing of a lawsuit).

To avoid a time-bar, Mr. Bray urges equitable tolling. To prevail on this theory, Mr. Bray needed to prove that he had acted diligently and was unable to file in a timely fashion because of extraordinary circumstance. *Barnes v. United States*, 776 F.3d 1134, 1150 (10th Cir. 2015). He has not satisfied this burden. By 1990 or 1991, Mr. Bray had come to believe that the VA had mistreated him. But he waited until 2016 to submit an administrative claim. Waiting until 2016 was far too late, so we agree with the district court that the claims were untimely.

According to Mr. Bray, he suffers from a legal disability. But he has not submitted any evidence of legal incompetency. Indeed, he identifies seven other lawsuits that he filed between 1988 and 2011. We thus conclude that this theory was properly rejected in district court.[2]

Mr. Bray also states that the Federal Tort Claims Act is unconstitutional under limitations on sovereignty contained in the Constitution's Article I and Amendments Seven, Nine, Ten, and Fourteen. But he does not explain how these constitutional provisions would have rendered the Federal Tort Claims Act unconstitutional.

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[2] Mr. Bray also challenges the constitutionality of the congressional ceiling on debt. But he does not explain how the debt ceiling affected himself or the district court's ruling.

Though Mr. Bray appears pro se, we cannot construct arguments for him (*see* note 1, above), and these constitutional provisions do not invalidate the Federal Tort Claims Act. They could not do so because the government (as a sovereign) has the absolute authority to restrict its liability. *Lynch v. United States*, 292 U.S. 571, 581-82 (1934).

Affirmed.

* * *

Mr. Bray also filed two motions.

In the first motion, he seeks to obtain his records of treatment and adjudication of benefits. But these records would not affect the reasons for our disposition, so we deny this motion.

Mr. Bray's second motion is to amend his petition for review, seeking to add unrelated matters to this appeal. Our jurisdiction, however, is limited by the rulings in the Brays' notice of appeal. We thus deny this motion.

Entered for the Court

Robert E. Bacharach
Circuit Judge

APPENDIX B, DCWD Decision

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

LEMUEL CLAYTON BRAY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No: 17-CV-206-F

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

This matter is before the Court on Defendant's Motion to Dismiss Plaintiff's Amended Complaint. Plaintiff failed to file a response. The Court has reviewed the motion and is fully informed in the premises.

DISCUSSION

Bray, along with his wife, Karuko Haysahi Bray, previously filed a Complaint seeking relief under the Federal Tort Claims Act (FTCA) for negligent medical treatment. (Doc. 1). In that Complaint, Bray claimed he 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). Ms. Bray claimed damages based on Bray's "inability to be a 'good provider'" (Doc. 1 at 2).

Defendant filed a motion to dismiss and the Court granted the motion, finding Ms. Bray failed to exhaust her administrative remedies for her claim, that Mr. Bray's claims related to his original injury were barred by the *Feres* doctrine, and that his remaining

claims failed to identify the applicable standard of care and how it was violated. Additionally, the Court found Bray was not entitled to equitable tolling. The Court allowed Bray an opportunity to amend his complaint. Bray filed his Amended Complaint on May 1, 2018.[1] The Amended Complaint does not contain any claims on Ms. Bray's behalf.

The Government filed its motion to dismiss on May 15, 2018, asserting Bray's Amended Complaint suffered from the same defects as his prior complaint. Bray failed to respond to the motion to dismiss.

Bray is acting pro se. Therefore, the Court construes his 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. Failure to Assert a Proper Party

Defendant asserts Bray has only brought his Complaint against the United States Government, rather than the United States. In response to Defendant's prior motion to dismiss on this issue, Bray agreed to naming the proper Defendant. However, in his most recent filing Bray persists on naming only the United States Government and "withdraws his concession to renaming the Defendant." (Doc. 15 at 3). While the Court recognizes

[1] In additional to his claims under the FTCA, Bray appears to assert Constitutional claims, however these claims are futile because United States "has not waived its sovereign immunity for constitutional tort claims." *Sheridan v. U.S.*, 214 Fed.Appx. 857, 859 (10th Cir.2007).

Bray named the wrong party, the Court will not dismiss Bray's Amended Complaint on this basis.

2. Bray's claim related to active service

The Court previously dismissed Bray's claim related to the initial injury he received in 1969, while he was on active service, with prejudice. The Court found the *Feres* Doctrine barred that claim. (Doc. 14 at 11). Bray attempts to reassert his claim and to argue why the *Feres* Doctrine does not apply in this case. Even if the Court considered this portion of the Amended Complaint as a motion to reconsider, Bray's claim still fails. Generally, in determining whether to reconsider a prior ruling, the basic analysis is whether new evidence or legal authority has emerged or whether a prior ruling was clearly in error. See *Innovatier, Inc., v. CardXX Inc.*, 2011 WL 93720 (D. Colo. January 11, 2011). "Grounds for a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000)).

In this case, none of these factors are present. Bray makes new arguments regarding Defendant's bad faith. However, he fails to provide new facts or new law. Additionally, the Court does not need to correct clear error or prevent manifest injustice. As a result, Bray's claims related to initial injury and treatment in 1969 are barred by the *Feres* Doctrine.

3. Failure to State a Claim

Defendant argues that Bray still fails to state 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.*

While Bray has many allegations, there are only a few allegations related to his medical treatment. Bray claims he should not have been prescribed Tegretol in 1990. (Doc. 29-30). He claims this drug was not appropriate treatment. (Doc. 15 at 30). He also claims that he was only on the medication for five months, because he felt himself getting worse. (*Id.*). Bray also specifically claims he should have been treated with appropriate seizure medication in 1985 for complex partial seizures. (Doc. 15 at 32). The rest of his Amended Complaint contains general, unsupported, conclusory allegations against the Department of Veterans Affairs. Finally Bray claims that in 1985 he should have been provided additional testing, he did not receive until 1992.

Bray's FTCA claims are all for medical malpractice. The only place that Bray indicates he received medical care was in California. "[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).

Bray's allegations in his Amended Complaint fail to meet this standard. Bray fails to state the applicable standard of care (for the relevant time period, the standards of care in 1969 and 1990 were not the same as the standard of care in 2017). Additionally, 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, Bray's Amended Complaint does not state a plausible claim for medical malpractice.

4. Time Bar

In addition to failing to state a claim on which relief can be granted, the Court also finds Bray's claims are untimely. While Bray's Amended Complaint is difficult to understand and to parse out factual allegations from conclusory allegations, Bray's claims all relate to actions taken in 1969, 1985, 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).

Bray's claims in his Amended Complaint suffer from the same deficiencies as original complaint. The Court finds it is difficult to understand if 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. Medical treatment for traumatic brain injury has become significantly more advanced in the last few decades. Additionally, probably because of the timing, 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 incidents occurring between 1969 and 1990. Bray asserts that he "suspected he was being [mistreated] by the VA" but 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 . . . . " (Doc. 15 at 21). Additionally, Bray claims that in 1990 he was mistreated with the drug Tegretol. (*Id.* at 18). Bray thought at that time Tegretol caused his symptoms to worsen and fter five months of getting worse he

weened himself of the medication. (*Id.*). Based on Bray's allegations, he believed he was being mistreated and misdiagnosed by at least 1990-1991, which is the latest his claim accrued. Additionally, between 1984 and 1992, Bray was involved in numerous proceedings and activities related to his medical claims. (Doc. 15 at 25-28). Bray's allegations indicated that he was aware of his ongoing medical problems, that those problems were 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 the 1990s. At a minimum his injuries accrued in 1991-1992, which is when the statute of limitations began to run.

The claims in Bray's Amended Complaint are barred by the statute of limitations.

5. Equitable tolling

Bray also claims equitable tolling. As the Court previously noted, 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).

The analysis from the Court's April 16, 2018 Order Granting Motion to Dismiss is equally applicable to Bray's Amended Complaint. Bray has diligently pursued his rights against the Navy and the VA over the years. Bray states in his Amended Complaint that filed a case in 2012, although it was filed in a court without jurisdiction. (Doc. 15 at 10). 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. Rather, during much of this time, Bray was actively engaged in administrative

proceedings before the VA. The allegations in his Amended Complaint contradict 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 the statute of limitations should be tolled in this case. For all these reasons, the Court finds Bray's claims are time barred.

The Court previously provided Bray an opportunity to amend his complaint to state a claim that would not be time barred. Bray failed to assert a proper claim for medical malpractice in his Amended Complaint. As a result, the Court finds that it is appropriate to dismiss Bray's claims with prejudice as this time.

CONCLUSION

For all the above stated reasons, Bray failed to assert a medical malpractice claim and Bray's conclusory allegations of medical malpractice are time barred and equitable tolling does not apply.

IT IS ORDERED that Defendant's Motion to Dismiss is GRANTED. Bray's claims in his Amended Complaint are DISMISSED WITH PREJUDICE.

Dated this 2nd day of July, 2018.

Nancy D Freudenthal

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.