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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9
10 Lonnie Sorrell,
11 Plaintiff,

12 v.

13 Department of Veterans Affairs,
14 Defendant.
15

No. CV-16-03802-PHX-DLR

ORDER

16 This action arises out of the U.S. Department of Veterans Affairs' (VA) denial of
17 Plaintiff's administrative claim for disability benefits and medical malpractice claim
18 under the Federal Tort Claims Act. Before the Court is the VA's motion to dismiss for
19 lack of subject matter jurisdiction and for a more definite statement of any remaining
20 claim. (Doc. 10.) The motion is fully briefed and neither party requested oral argument.
21 (Docs. 13, 15.) For reasons stated below, the motion is granted.

22 **I. Background**

23 Plaintiff has been diagnosed by non-VA physicians with carpal tunnel syndrome
24 and trigger fingers. A VA medical practitioner examined Plaintiff in September 2013.
25 The VA thereafter determined that his impairments were not service related and denied
26 his claim for disability benefits. In March 2015, Plaintiff filed an administrative tort
27 claim seeking \$800,000 in damages, which the VA denied six months later. Plaintiff's
28 request for reconsideration was denied in January 2017.

1 Plaintiff filed a state court action for medical malpractice against the VA in July
2 2015, which was removed to this Court several months later. *See Sorrell v. Dep't of VA*,
3 No. CV-16-00293-PHX-DLR (D. Ariz. Feb. 1, 2016). The Court dismissed the case
4 because the state court never had jurisdiction given that tort claims against the United
5 States must be brought in federal court in the first instance. *Id.* Plaintiff then
6 commenced the present suit on November 3, 2016. (Doc. 1.)

7 **II. Discussion**

8 The VA argues that the Court lacks subject matter jurisdiction over any challenge
9 to the handling and denial of Plaintiff's administrative claim for disability benefits
10 because the Veteran's Judicial Review Act of 1988 (VJRA) stripped district courts of
11 jurisdiction over such claims. (Doc. 10 at 6-8.) With respect to Plaintiff's medical
12 malpractice claim, the VA contends that it is impermissibly vague and requests a more
13 definite statement of the claim. (*Id.* at 8-10.) The VA also requests that Plaintiff be
14 ordered to comply with A.R.S. § 12-2603, which requires a preliminary expert opinion on
15 the applicable standard of care, liability, and causation. (*Id.* at 10-11.)

16 **A. Motion to Dismiss for Lack of Jurisdiction**

17 It is axiomatic that federal courts are courts of limited jurisdiction and "possess
18 only that power authorized by Constitution and statute[.]" *Kokkonen v. Guardian Life*
19 *Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause of action
20 lies outside the limited jurisdiction of the federal courts and the burden of establishing the
21 contrary rests upon the party asserting jurisdiction." *Hunter v. Phillip Morris USA*, 582
22 F.3d 1039, 1042 (9th Cir. 2009). Under Federal Rule of Civil Procedure 12(b)(1),
23 dismissal is proper when subject matter jurisdiction is lacking. *See Amfac Mortg. Corp.*
24 *v. Ariz. Mall of Tempe, Inc.*, 583 F.2d 426, 431 n.5 (9th Cir. 1978).

25 The VA is correct that the Court lacks jurisdiction over any challenge to the VA's
26 denial of benefits. The VJRA expressly provides that the Secretary of Veterans Affairs
27 "shall decide all questions of law and fact necessary to a decision by the Secretary under
28 a law that affects the provision of benefits by the Secretary to veterans or the dependents

1 or survivors of veterans.” 38 U.S.C. § 511(a). The Secretary’s decision “shall be final
2 and conclusive and may not be reviewed by any other official or by any court[.]” 38
3 U.S.C. § 511(b). Consistent with these statutory directives, this Circuit recently affirmed
4 that district courts are without authority to review the VA’s benefits decisions. *Recinto*
5 *v. U.S. Dep’t of VA*, 706 F.3d 1171, 1175 (9th Cir. 2013) (citing *Veterans for Common*
6 *Sense v. Shinseki*, 678 F.3d 1013, 1022-25 (9th Cir. 2012) (en banc)). Stated differently,
7 if reviewing the plaintiff’s claim “would require review of the circumstances of
8 individual benefits requests, jurisdiction is lacking.” *Id.*

9 The complaint in this case purports to assert a medical malpractice claim, but in
10 the request for relief Plaintiff explicitly seeks a VA disability rating of 100% and
11 retroactive benefit payments. (Doc. 1 at 7.) Plaintiff does not dispute that resolution of
12 the medical malpractice claim, as pled in the complaint, necessarily would require
13 “review of the circumstances of [his] individual benefits request.” *Recinto*, 706 F.3d at
14 1175. Indeed, Plaintiff makes clear in his response that the “tort claim is inextricably
15 intertwined with the denial of VA disability benefits” and that the alleged medical
16 malpractice relates to both the tort claim and the request for benefits. (Doc. 13 at 1.)

17 Under the VJRA, however, the Secretary “decides all issues of fact or law
18 affecting the provision of benefits to veterans, including reviewing the VA’s benefits
19 determinations.” *Sheppard v. United States*, No. CV-15-00574-PHX-DJH, 2015 WL
20 12658461, at *2 (D. Ariz. Aug. 3, 2015). The Court, therefore, cannot review the facts or
21 law upon which the VA based its decision to deny disability benefits to Plaintiff “because
22 such a review is exclusively within the province of the [Secretary].” *Id.* Plaintiff’s
23 complaint is dismissed for lack of subject matter jurisdiction to the extent it seeks review
24 of the circumstances surrounding the VA’s decision to deny disability benefits. *See id.*
25 (dismissing claim for lack of jurisdiction where the plaintiff was “alleging violations
26 committed by the VA in the handling of his benefits”); *Haas v. Oregon Health & Science*
27 *Univ.*, No. CV-13-01290-PHX-GMS, 2014 WL 900726, at *2 (D. Ariz. Mar. 7, 2014)
28 (dismissing complaint against the VA for denying an organ transplant request where it

1 “would entail the review of both the facts of [the] case and the law relating to the VA’s
2 treatment decision”); *Wright v. United States*, No. 14-cv-03008-CRB, 2015 WL 1205263,
3 at *3 (N.D. Cal. Mar. 16, 2015) (finding the absence of subject matter jurisdiction over
4 “claims regarding [the plaintiff’s] benefits and her VA medical care and records that
5 relate to her VA benefits or benefits decisions”); *Lietz v. United States*, No. 14-cv-00483-
6 EJM-REB, 2016 WL 6871284, at *4 (D. Idaho Feb. 15, 2016) (explaining that “the Ninth
7 Circuit determined in no uncertain terms that the VJRA and § 511 applied to divest
8 federal district courts of jurisdiction to consider a veteran’s claim of unreasonable delays
9 in health care and disability compensation”).

10 **B. Motion for a More Definite Statement**

11 Where the complaint is so vague or ambiguous that a response cannot reasonably
12 be prepared, “the defendant may move for an order under Rule 12(e) requiring a more
13 definite statement by pointing out ‘the defects complained of and the details
14 desired.’” *Bautista v. Cnty. of L.A.*, 216 F.3d 837, 843 n.1 (9th Cir. 2000). The VA
15 moves for a more definite statement with respect to any medical malpractice claim
16 asserted under the Federal Tort Claims Act (FTCA). Having reviewed the complaint and
17 the parties’ briefs, the Court agrees with the VA that a more definite statement of
18 Plaintiff’s claim is required.

19 Plaintiff alleges generally that VA medical practitioners did not meet the standard
20 of care by failing to make, or erroneously making, the diagnosis of his carpal tunnel
21 syndrome and trigger fingers and by failing to refer him to a specialist. (Doc. 1 at 3-4.)
22 The complaint asserts the elements of a negligence claim and alleges in conclusory
23 fashion that the negligent conduct caused Plaintiff injuries. (*Id.* at 6-7.) But the pleading
24 requirements of Rule 8 require more.

25 Under Rule 8(a)(2), the complaint must provide a statement of the claim “*showing*
26 that the pleader is entitled to relief” in order to give the defendant “fair notice of what the
27 claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
28 555 (2007) (emphasis added). This requirement is met only where the complaint alleges

1 “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. The
2 plausibility standard “asks for more than a sheer possibility that a defendant has acted
3 unlawfully,” demanding instead sufficient factual allegations to allow “the court to draw
4 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
5 *v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint – like the one in this case – that merely
6 “offers labels and conclusions, a formulaic recitation of the elements of a cause of action,
7 or naked assertions devoid of further factual enhancement will not suffice.” *Landers v.*
8 *Quality Commc’ns, Inc.*, 771 F.3d 638, 641 (9th Cir. 2014).

9 Moreover, the VA correctly notes that the complaint does not distinguish between
10 the claim for disability benefits, over which the Court has no jurisdiction, and the
11 purported tort claim for medical malpractice. It appears that Plaintiff was diagnosed with
12 carpal tunnel syndrome and trigger fingers years before his VA compensation and
13 pension exam in 2013, and that the purpose of that exam was not to diagnose the
14 conditions but to determine whether the conditions were service connected and disabling.
15 (Doc. 1-1 at 23.) The complaint does not identify any medical treatment (or lack thereof)
16 separate and apart from the compensation and pension exam he received in connection
17 with his claim for disability benefits. As explained above, however, the Court has no
18 jurisdiction over any claim that “would require review of the circumstances of individual
19 benefits requests[.]” *Recinto*, 706 F.3d at 1175.

20 Although the Court “construes pleadings liberally in their favor, [even] pro se
21 litigants are bound by the rules of procedure.” *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir.
22 1995); *see King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1986) (“Pro se litigants must
23 follow the same rules of procedure that govern other litigants.”); *Carter v. Comm’r of*
24 *Internal Revenue*, 784 F.2d 1006, 1008 (9th Cir. 1986) (“Although pro se, [plaintiff] is
25 expected to abide by the rules of the court in which he litigates.”); *Jacobsen v. Filler*, 790
26 F.2d 1362, 1364 (9th Cir. 1986) (pro se litigants “should not be treated more favorably
27 than parties with attorneys of record”). Here, Plaintiff’s complaint fails to meet the
28 pleading requirements of Rule 8. To the extent Plaintiff has a medical malpractice claim

1 that would not require review of the circumstances of his request for disability benefits,
2 he may file an amended complaint asserting such claim under the FTCA no later than
3 **April 28, 2017**. Plaintiff is warned that the case may be dismissed if he fails to file an
4 amended complaint by this deadline. *See* Fed. Rs. Civ. P. 12(e), 41(b); *Ghazali*, 46 F.3d
5 at 54 (affirming dismissal for the plaintiff’s failure to follow the rules); *Ferdik v.*
6 *Bonzelet*, 963 F.2d 1258, 1261-63 (9th Cir. 1992) (affirming dismissal where the plaintiff
7 failed to comply with a court order).

8 The VA notes, correctly, that only the United States, and not individual agencies
9 like the VA, may be sued for negligence and other torts under the FTCA. *See* 28 U.S.C.
10 §§ 1346(b), 2679(a); *Kennedy v. U.S. Postal Serv.* 145 F.3d 1077 (9th Cir. 1998) (holding
11 that “the United States is the only proper party defendant in an FTCA action”); *Allen v.*
12 *Veterans Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984) (dismissing tort claim against the
13 VA because “[i]ndividual agencies of the United States may not be sued” under the
14 FTCA); *McAllister v. United States*, No. C 11 03858-MEJ, 2013 WL 2551990, at *2
15 (N.D. Cal. June 10, 2013) (noting that “it is well-established that the FCTA only
16 authorizes lawsuits against the United States”). Plaintiff therefore is directed to name
17 only the United States as a defendant in any amended complaint.

18 **C. The Requirements of A.R.S. § 12-2603**

19 Under the FTCA, the United States may be held liable to the same extent as a
20 private party would be under the same circumstances, 28 U.S.C. §§ 1346(b) and 2674,
21 and liability for negligence is determined by the law of the state where the act
22 occurred, *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 838 (9th Cir. 1995). Thus,
23 it is clear that “Arizona’s statutory requirements regarding expert affidavits apply to
24 FTCA claims.” *Mann v. United States*, No. CV-13-1224-TUC-CKJ, 2014 WL 4230810,
25 at * 6 (D. Ariz. Aug. 27, 2014) (collecting cases holding same).

26 Plaintiff states that he will comply with the requirements of A.R.S. § 12-2603 after
27 service of initial disclosures (Doc. 13 at 2), which are due April 27, 2017 (Doc. 12 at 1).
28 The VA requests that Plaintiff be directed to comply with § 12-2603 before the Rule 16

1 scheduling conference set for May 18, 2017. (Doc. 15 at 2.) The Court finds this request
2 to be reasonable and appropriate under the circumstances.

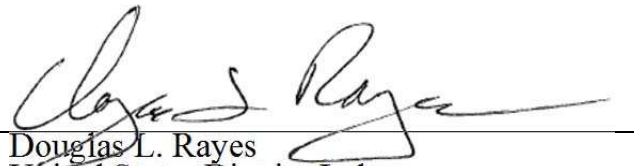
3 Plaintiff therefore is ordered to comply fully with the requirements of A.R.S. § 12-
4 2603 by **May 15, 2017**. Plaintiff initially brought his medical malpractice claim in state
5 court in October 2015, and filed the present action more than five months ago. Plaintiff
6 has had ample time to obtain the necessary expert opinion testimony under § 12-2603.

7 **IT IS ORDERED** that Defendant's motion to dismiss and for a more definite
8 statement (Doc. 10) is **GRANTED**. The complaint is dismissed for lack of subject
9 matter jurisdiction to the extent it seeks review of Defendant's administrative denial of
10 disability benefits. Plaintiff shall have until **April 28, 2017** to file an amended complaint
11 that asserts a plausible tort claim under the FTCA that is separate and apart from
12 Defendant's denial of disability benefits. The Clerk is directed to terminate this action
13 without further order if Plaintiff fails to timely file an amended complaint.

14 **IT IS FURTHER ORDERED** that Plaintiff shall comply fully with the
15 requirements of A.R.S. § 12-2603 by **May 15, 2017**.

16 Dated this 14th day of April, 2017.

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Douglas L. Rayes
United States District Judge