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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIM PFARR,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 2:18-cv-1710-MCE-EFB PS

ORDER AND FINDINGS AND
RECOMMENDATIONS

This matter was before the court for hearing on August 15, 2018, on defendant’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.¹ Assistant United States Attorney Philip Scarborough appeared on behalf of defendant; plaintiff failed to appear. For the reasons set forth below, the government’s motion must be granted.

I. Background

Plaintiff initiated this action against Chapa-De Indian Health (“Chapa-De”) in the Nevada County Superior Court, alleging that defendant negligently repaired his dentures. ECF No. 1-1. The United States removed this action on behalf of Chapa-De, on the grounds that that Chapa-De is deemed to be part of the Indian Health Service in the Department of Health and Human

¹ This case, in which plaintiff is proceeding pro se, is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21). See 28 U.S.C. § 636(b)(1).

1 Services pursuant to the Indian Self-Determination and Education Assistance Act of 1975. 42
2 U.S.C. § 233(g); 25 U.S.C. § 5321(d). Under that Act, the United States was substituted as the
3 defendant in this tort claim action.

4 The United States moved to dismiss for lack of subject matter jurisdiction pursuant to
5 Federal Rule of Civil Procedure 12(b)(1). ECF No. 4. Plaintiff failed to timely file an opposition
6 or statement of non-opposition to the motion and an order to show cause was issued ordering
7 plaintiff to file a response to the motion and to show cause why sanctions should not be imposed
8 for his failure to timely file an opposition or statement of non-opposition. ECF No. 6.

9 II. Order to Show Cause

10 In response to the order to show cause, plaintiff filed his opposition brief but did not
11 specifically address the reason for failure to timely do so in the first instance. However, in light
12 of plaintiff's pro se status and unfamiliarity of the rules, the order to show cause is discharged and
13 no sanctions are imposed.

14 III. Removal and Substitution of Defendant

15 As noted, plaintiff initially filed suit against Chapa-De, but the United States substituted
16 itself as defendant in this matter and removed the action to this court. That substitution was
17 proper. 28 U.S.C. § 2679(d)(2) provides that:

18 Upon certification by the Attorney General that the defendant
19 employee was acting within the scope of his office or employment at
20 the time of the incident out of which the claim arose, any civil action
21 or proceeding commenced upon such claim in a State court shall be
22 removed without bond at any time before trial by the Attorney
23 General to the district court of the United States for the district and
24 division embracing the place in which the action or proceeding is
25 pending. Such action or proceeding shall be deemed to be an action
26 or proceeding brought against the United States under the provisions
27 of this title and all references thereto, and the United States shall be
28 substituted as the party defendant.

24 "Certification by the Attorney General is prima facie evidence that a federal employee was acting
25 in the scope of [his] employment at the time of the incident and is conclusive unless challenged."
26 *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995) (citing *Green v. Hall*, 8 F.3d 695, 698
27 (9th Cir. 1993)).

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1 The notice of removal explains that during the relevant period, Chapa-De compacted with
2 the United States to provide health care services, including dental care, pursuant to the Indian
3 Self-Determination and Education Assistance Act. ECF No. 1 ¶ 2; *see also* ECF No. 4-3
4 (compact between Chapa-De and United States). 25 U.S.C. § 5321(d) provides that with respect
5 to any claim for personal injury resulting from the performance of “medical, surgical, dental, or
6 related functions, including the conduct of clinical studies or investigations,” an Indian tribe
7 carrying out a self-determination agreement “is deemed to be part of the Public Health Service in
8 the Department of Health and Human Services while carrying out any such contract or agreement
9 and its employees . . . are deemed employees of the Service while acting within the scope of their
10 employment in carrying out the contract or agreement.”

11 Along with the notice of removal, the United States filed a Certification of Scope of
12 Employment pursuant to 28 U.S.C. § 2679(d), in which David Shelledy, Chief of the Civil
13 Division of the United States Attorney’s Office for the Eastern District of California, certifies that
14 Chapa-De was acting within the scope of its employment at the time of the alleged incident
15 giving rise to the complaint. ECF No. 1-2. Accordingly, pursuant to 25 U.S.C. § 5321(d),
16 Chapa-De is deemed to be part of the Public Health Service in the U.S. Department of Health and
17 Human Services. Therefore, the United States was properly substituted as the defendant and the
18 action appropriately removed to this court. *See* 28 U.S.C. § 2679(d)(2).

19 IV. Motion to Dismiss

20 As argued by the United States, plaintiff’s exclusive remedy for these tort claims against
21 the United States is that provide by the Federal Tort Claims Act (“FTCA”). ECF No. 4-1. Any
22 claim under that Act must be presented in strict compliance with the FTCA’s requirement for
23 exhaustion of administrative remedies. Further, compliance with certain of those requirement is
24 jurisdictional. Here, as discussed below, plaintiff’s tort claim is jurisdictionally barred because he
25 failed to present an administrative prior to the filing of this civil action.

26 As a sovereign, the United States is immune from suit except according to its consent to
27 be sued. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). It necessarily follows where Congress
28 waives the immunity of the United States any terms and conditions that it places on the waiver are

1 jurisdictional and must be strictly construed. *See Block v. North Dakota ex rel. Board of Univ.*
2 *and School Lands*, 461 U.S. 273, 287 (1983); *Jerves v. United States*, 966 F.2d 517, 521 (9th Cir.
3 1992). Congress has waived the immunity of the United States for certain tort claims as provided
4 in the FTCA, but only according to the terms and conditions set out in that statute. As relevant
5 here, those conditions include the administrative tort claim requirements. 28 U.S.C. § 2675(a).
6 Thus, “[t]he requirement of an administrative claim is jurisdictional.” *Brady v. United States*, 211
7 F.3d 499, 502 (9th Cir. 2000).

8 Significant to the present matter, Congress has also provided that for purpose of
9 malpractice claims against health care entities funded and operated under a compact and
10 agreement with the Indian Health Service, pursuant to the Indian Self-Determination and
11 Education Assistance Act, Pub. L. No. 106–260, 114 Stat. 711 (2000), those entities shall be
12 “deemed to be part of the Public Health Service in the Department of Health and Human Services
13 while carrying out any such contract or agreement and its employees . . . are deemed employees
14 of the Service while acting within the scope of their employment in carrying out the contract or
15 agreement.” 25 U.S.C. § 5321(d). The effect of this provision is that the tort claim is deemed to
16 be a claim against the United States. This includes any claim for personal injury resulting from
17 the performance of “medical, surgical, dental, or related functions, including the conduct of
18 clinical studies or investigations.” *Id.* Congress further provided that the exclusive remedy for
19 claims of malpractice arising out of dental services provided by such entities and their employees
20 shall be a claim against the United States pursuant to the FTCA. 42 U.S.C. § 233(a), (g).
21 Accordingly, pursuant to 25 U.S.C. § 5321(d) Chapa-De is deemed to be part of the Public Health
22 Service in the U.S. Department of Health and Human Services and the United States was
23 substituted as the defendant. Thus, to proceed on his claim plaintiff must satisfy the jurisdictional
24 requirements of the FTCA. He has not done so.

25 Although Congress has consented to suits against the United States under the FTCA, prior
26 to litigating a tort claim against the United States, a plaintiff must first file an administrative claim
27 with the appropriate federal agency. 28 U.S.C. § 2675(a). Presentation of an FTCA claim must
28 be made within two years of the accrual of the claimant’s cause of action. 28 U.S.C. § 2401(b).

1 A claim is deemed “presented” to the federal agency upon its receipt. *See* 28 C.F.R. § 14.2(a);
2 *Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1251 (9th Cir. 2006) (mailbox rule does not apply to
3 FTCA cases). A civil action may not be instituted until an administrative claim has “been finally
4 denied by the agency in writing and sent by certified or registered mail.” 28 U.S.C. § 2675(a).
5 As noted, the administrative claim requirement under the FTCA is jurisdictional and cannot be
6 waived. *Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir. 1995). In addition, courts are
7 required to strictly construe the exhaustion requirement. *Vacek*, 447 F.3d at 1250 (where
8 exhaustion conditions not satisfied, action may not proceed “merely because dismissal would visit
9 a harsh result upon the plaintiff.”).

10 Submitted with the government’s motion to dismiss is the declaration of Meredith Torres.
11 ECF No. 4-2. Ms. Torres declares that she is a Senior Attorney in the General Law Division,
12 Office of the General Counsel, Department of Health and Human Services. *Id.* ¶ 1. She states
13 that the department maintains in a computerized database a record of administrative tort claims
14 filed with the department, including those filed with respect Public Indian Health Services
15 facilitates. *Id.* ¶ 2. She further states that if a tort claim had been filed with the department with
16 respect to Chapa-De and/or its employees, a record of that filing would be maintained in the
17 Claims Branch’s database. *Id.* ¶ 3. Ms. Torres states that she conducted a search of the Claims
18 Branch’s database and found no record of any administrative tort claim filed by the plaintiff. *Id.*
19 ¶ 4.

20 In his opposition, plaintiff appears to contend that he filed a government claim, but he
21 does not submit any documentation in support of that contention. Nor does he identify the agency
22 with which he submitted his claim nor provide the date it was submitted. ECF No. 7 at 1. This
23 conclusory and unsupported statement fails demonstrate that plaintiff exhausted his
24 administrative remedies prior to removal of this action. Furthermore, at the August 15, 2018
25 hearing, defendant’s counsel explained that a search had been conducted during the prior week
26 and no claim was found. Accordingly, plaintiff has not demonstrated that he has actually
27 presented an administrative claim prior to the commencement of this litigation and the court lacks
28 subject matter jurisdiction over plaintiff’s claim.

1 V. Conclusion

2 For the reasons set forth above, it is hereby ORDERED that the July 12, 2018 order to
3 show cause (ECF No. 6) is discharged and no sanctions are imposed.

4 Further, it is RECOMMENDED that defendant's motion to dismiss for lack of subject
5 matter jurisdiction (ECF No. 4) be granted and the Clerk be directed to close the case.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
11 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
12 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

13 DATED: February 8, 2019.

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15 EDMUND F. BRENNAN
16 UNITED STATES MAGISTRATE JUDGE
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