

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

JAMES M. ELY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendants.

CV 12-63-BU-DLC

ORDER

United States Magistrate Judge Carolyn S. Ostby entered Findings and Recommendations on August 19, 2013, recommending that the United States' motion for summary judgment be granted. Ely failed to timely object to the Findings and Recommendations, and so waived the right to *de novo* review of the record. 28 U.S.C. § 636(b)(1). Ordinarily, the Court would therefore review the record for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Ely is proceeding *pro se*. Although not

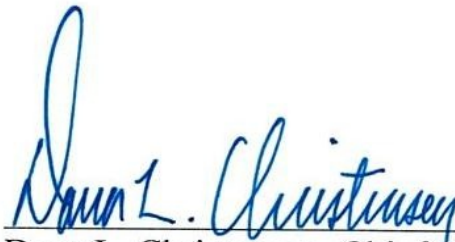
required to do so, this Court will review *de novo* the specified findings and recommendations to which Ely objects. Because the parties are familiar with the facts of the case, they will only be discussed as necessary to explain the Court's ruling. The Court adopts Judge Ostby's findings and recommendations in full.

In his objections, Ely again asserts that no medical expert testimony is required for his medical malpractice claim. He argues that he can prove medical malpractice on the part of the Veteran Affairs doctor who determined that Ely was not a good candidate for surgery by offering only his own lay witness testimony that his shoulder injury improved after another doctor decided to perform surgery on his shoulder. For precisely the reasons explained by Judge Ostby, however, Ely's claim requires expert medical testimony in order to survive the United States' motion for summary judgment. In this case, expert medical testimony is required to (1) establish the applicable standard of care owed Ely, and (2) establish a deviation from that standard of care. *Montana Deaconess Hosp. v. Gratton*, 545 P.2d 670, 672 (Mont. 1976). Because Ely has failed to identify any expert who will so testify, his claims fail as a matter of law.

Accordingly, IT IS ORDERED that Judge Ostby's Findings and Recommendations (doc. 26) are ADOPTED in full. The United States' motion for summary judgment (Doc. 16) is GRANTED. Ely's motion for summary judgment

(Doc. 17) is DENIED. All of Plaintiff's claims are DISMISSED and this case is CLOSED.

Dated this 9th day of October 2013.



Dana L. Christensen, Chief District Judge
United States District Court