UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIE JAMES BUSH, JR.,
Plaintiff,

vs.

SECRETARY OF THE DEPT. OF VETERANS AFFAIRS, *et al.*,
Defendants.

Case No. 1:13-cv-76

Weber, J.
Litkovitz, M.J.

ORDER AND REPORT AND RECOMMENDATION

I. Background and Initial Matters

Plaintiff Willie James Bush, Jr., proceeding pro se, brings this action against the United States of America (defendant) seeking damages in excess of $1 million.[1] (Doc. 5). Plaintiff is seeking damages in the range of $1 million to $277.6 trillion for defendant's purported failure to adequately examine and diagnose plaintiff's injuries and hearing loss. (*Id.*). This matter is before the Court on defendant United States of America's motion to dismiss (Doc. 9), plaintiff's response in opposition (Doc. 11), and defendant's reply. (Doc. 12). Plaintiff filed a sur-reply on May 23, 2013 (Doc. 13), but failed to seek leave of Court to file the document. *See* S.D. Ohio Civ. R. 7.2(a)(2) (prohibiting filing sur-replies without leave of Court for good cause shown). Plaintiff's sur-reply has therefore not been considered in the Court's analysis of defendant's motion to dismiss.[2] Accordingly, defendant's motion to strike plaintiff's sur-reply (Doc. 14) is **DENIED** as moot.

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[1] Plaintiff names both the United States and the Department of Veterans Affairs as defendants in his complaint. *See* Doc. 5. However, plaintiff is precluded by the Federal Tort Claims Act from asserting claims against agencies of the United States, such as the Department of Veterans Affairs. *See* 28 U.S.C. § 2679(a). *See also F.D.I.C. v. Meyer*, 510 U.S. 471, 475-79 (1994) (holding that claims that are cognizable under 28 U.S.C. § 1346(b), for example, plaintiff's malpractice claim, may not be brought against federal agencies). Accordingly, the Court construes plaintiff's complaint as stating a claim against only the United States of America.

[2] While the Court acknowledges plaintiff's status as a pro se litigant, proceeding pro se does not relieve a litigant from complying with the basic procedural rules of the Court. *See In re G.A.D., Inc.*, 340 F.3d 331, 335 (6th Cir. 2003) (while pro se litigants' pleadings are held to a less stringent standard, this lessened standard does not apply to procedural rules). *See also McNeil v. U.S.*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that

Plaintiff subsequently filed a motion seeking leave to file a sur-reply on the basis that "defendant refuse to cooperate for information that I previous ask for!" (Doc. 15). The undersigned finds that plaintiff has failed to make the necessary showing of good cause for filing a sur-reply. While the Local Rules do not define "good cause" for filing a sur-reply, "this Court has consistently held that in order for a party to be given permission to file a sur-reply, the reply brief must raise new grounds that were not presented as part of the movant's initial motion." *Comtide Holdings, LLC v. Booth Creek Mgmt. Corp.*, No. 2:07-cv-1190, 2010 WL 4117552, at *4 (S.D. Ohio Oct. 19, 2010) (citing cases). Defendant does not raise new grounds in its reply memorandum such that good cause exists for granting plaintiff leave to file a sur-reply; thus, plaintiff's motion to file a sur-reply to defendant's motion to dismiss (Doc. 15) is **DENIED**. Consequently, defendant's motion to strike plaintiff's motion to file a sur-reply (Doc. 16) is **DENIED** as moot.

II. Plaintiff's complaint

Plaintiff's complaint and attachments thereto are somewhat difficult to decipher. Plaintiff appears to allege he was denied a 100% disability rating by the Veterans Administration based on his hearing loss and foot injury, and that the negligence of employees in the United States Air Force and at the Veterans Affairs Medical Center (VAMC) in Cincinnati, Ohio contributed to the denial of an upgraded disability rating:

> FILING LAWSUIT AGAINST UNITED STATES, BECAUSE US AIR FORCE AND CINCINNATI VAMC DIDN'T DO A THOROUGH JOB IN CHECKING OUT INJURIES FROM MOTORCYCLE ACCIDENT (RT FOOT), PLUS HEARING LOST DUE TO WORK ON FLIGHTLINE AND US POST OFFICE AS MECHANIC! REGIONAL OFFICE SITTING ON CLAIM AND NOT PROCESSING FOR COMPENSATION AND PENSION AND UPDATE FOR 100% DISABILITY!

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procedural rules in ordinary civil litigation be interpreted so as to excuse mistakes by those who proceed without counsel.").

(Doc. 5, ECF PAGEID 52). Plaintiff alleges:

> THE LAWSUIT DATED 01-12-2013, FIGURES WERE THE SUM OF 64 MILLION DOLLARS AND ON 02-01-2013, WILL BE THE SUM OF 277.6 TRILLION DOLLARS, THAT ON 01-10-2013, WAS A MERE ONE MILLION DOLLARS AND MR. BEDELL REFUSE TO PAID, BECAUSE OF ONGOING INVESTIGATION, THAT WAS ALREADY DONE BY MYSELF! . . . THIS CLAIM IS THIRTY THREE YEARS OLD! . . . . I WANT TO TAKE NOTE OF THE THIRD PARAGRAPH IN THIS LETTER DATING 01-14-2013, FROM DEPT OF VA, OFFICE OF REGIONAL COUNSEL, ONE VETERANS DRIVE, BLDG. 7, MINNEAPOLIS, MN 55417, YOUR REVIEW IS UNACCEPTABLE, DUE TO THE FACT, YOU WASN'T THERE! HAVING SAID THAT, ALL ARE ALLEGATIONS AND MUST BE PROVEN, WITHOUT ANY DOUBT AND YOU CAN'T DO THAT! THIS LETTER IS UNACCEPTABLE AND THE LAWSUIT STANDS! IN THE FUTURE, TO ALL VA ATTORNEYS, IF YOU WERE NOT PRESENT WHEN INCIDENTS WHEN DOWN, RECORDED, TAPED, OR VIDEO, YOUR STATEMENTS ARE ASSUMPTIONS, MEANING "MAKING AN ASS OUT OF YOU AND ME" AND I'M NOT HAVING IT! SOME MEDICAL RECORDS LIED, ESPECIALLY IN THE DEPT OF VA! THIS IS 2013, I PLAN ON SUEING THE UNITED STATES IN FEDERAL COURT, EVERY MONTH FROM NOW ON OF 2013! I ADVISE ALL, COME WITH YOUR "A" GAME, BECAUSE I'M HARDER THAN YOU THINK! TO ASSUME ALL MEDICAL PROFESSIONALS ARE WITHOUT ISSUES OR MISTAKES OR ACCIDENTS IS THE SIGN OF A FOOL, AND I CAN'T WAIT UNTIL YOU CRASH AND HIT ROCK BOTTOM TO SEE THIS! THIS IS WHY WE HAVE MALPRACTICE LAWSUITS!

(Doc. 5, ECF PAGEID 53).

III. Motion to Dismiss

Defendant moves for dismissal of the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting that this Court lacks subject matter jurisdiction and, further, that plaintiff has failed to state a claim upon which relief may be granted. Defendant asserts that plaintiff's claim involves incidents arising out of his military service and is precluded by *Feres v. U.S.*, 340 U.S. 135 (1950), where the Supreme Court enunciated the intra-military immunity doctrine and held that the Federal Tort Claims Act (FTCA) did not extend its remedy to claims arising out of military service. (Doc. 9 at 4-6). Defendant contends that, in light of *Feres*, this

Court lacks subject matter jurisdiction and that plaintiff's claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). (*Id.*). Defendant further contends that plaintiff's lawsuit must be dismissed because this Court lacks jurisdiction over veterans' benefits claims which are governed by the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, § 101, 102 Stat. 4105 (1988). (*Id.* at 6-8). Defendant maintains that the Secretary of Veterans Affairs is charged with determining all matters regarding veterans' benefits; there exists an internal administrative appeals process governing claims such as plaintiffs; and Congress expressly intended to exclude such claims from judicial review in implementing the VJRA. (*Id.* at 6-7) (citing 38 U.S.C. §§ 20.101(a), 511(a), 7104(a), 7252(a), 7292)). Defendant further contends that plaintiff's failure to comply with Rule 10(D)(2) of the Ohio Rules of Civil Procedure, which provides that complaints containing medical claims must be accompanied by an affidavit of merit, requires dismissal of plaintiff's lawsuit. (Doc. 9).

In his response in opposition, plaintiff does not address defendant's arguments and states only that the FTCA permits suits against the United States and its agencies. (Doc. 11 at 1). Plaintiff argues that defendant's motion to dismiss should be denied because he stated a claim by mentioning "227.6 trillion dollars and 150 million dollars for relief over the 33 years and the 100% disability upgrade. . . ." (*Id.*). Plaintiff states that "the audiology doctor at the Cincinnati VAMC has not upgrade[d] my hearing impairment to a 100% disability" and because plaintiff believes he is raising federal claims only, he does not understand defendant's reference to Ohio state procedural law. (*Id.* at 1-2). Plaintiff further argues that defendant owes him money in unpaid travel pay and argues that defendant is liable for causing him post-traumatic stress disorder. (*Id.* at 2).

IV. Standard for Ruling on Motion to Dismiss

Rule 12(b)(1) allows dismissal of complaints where the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss pursuant to Rule 12, the Court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236, (1974). *See also Erickson v. Pardus,* 551 U.S. 89, 93 (2007); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555-56 (2007).

Plaintiff bears the burden of proving jurisdiction in order to survive a motion to dismiss on grounds of lack of subject matter jurisdiction. *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003); *Michigan Southern R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n., Inc.*, 287 F.3d 568, 573 (6th Cir. 2002); *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 269 (6th Cir. 1990). "In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits." *Nichols*, 318 F.3d at 677, citing *Rogers v. Stratton Industries*, 798 F.2d 913, 916 (6th Cir. 1986).

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). To avoid dismissal under Rule 12(b)(6) for failure to state a claim, plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "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.* (citing *Twombly*, 550 U.S. at 556). While the Court must

accept all well-pleaded factual allegations as true, it need not "accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The complaint need not contain "detailed factual allegations," yet must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

Although plaintiff need not plead specific facts, his statement must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson,* 551 U.S. at 93 (citations omitted). Plaintiff's factual allegations must be enough to raise the claimed right to relief above the speculative level and to create a reasonable expectation that discovery will reveal evidence to support the claim. *Twombly,* 550 U.S. at 556. This inquiry as to plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" *Iqbal,* 129 S.Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

It is well-settled that a document filed pro se is "to be liberally construed" and that a pro se complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. . . ." *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble,* 429 U.S. 97, 106 (1976)). However, the Sixth Circuit has recognized the Supreme Court's "liberal construction" case law has not had the effect of "abrogat[ing] basic pleading essentials" in pro se suits. *Wells v. Brown,* 891 F.2d 591, 594 (6th Cir. 1989). Courts are not

required to devote time to a case when the nature of a pro se plaintiff's claim "defies comprehension." *Roper v. Ford Motor Co.*, No. 1:09cv427, 2010 WL 2670827, at *3 (S.D. Ohio April 6, 2010) (Report & Recommendation), *adopted*, 2010 WL 2670697 (S.D. Ohio July 1, 2010) (citing *Jones v. Ravitz*, No. 07-10128, 2007 WL 2004755, at *2 (E.D. Mich. July 6, 2007)). With these principles in mind, the Court reviews plaintiff's complaint.

V. Resolution

As stated above, defendant asserts three bases for dismissing plaintiff's complaint: (1) this Court lacks subject matter jurisdiction and the complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because plaintiff's tort claims are precluded by the intra-military doctrine, first enunciated in *Feres*, 340 U.S. 135; (2) plaintiff's claims are governed by the VJRA and, therefore, they must be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction; and (3) to the extent plaintiff raises medical malpractice claims, his lawsuit must be dismissed due to plaintiff's failure to comply with Ohio procedural law which requires such claims to be accompanied by an affidavit of merit. The Court will first address whether it has subject matter jurisdiction over plaintiff's claims.

A. In light of the VJRA, this Court lacks subject matter jurisdiction over plaintiff's claim for disability benefits.

It appears that the thrust of plaintiff's complaint is his contention that the VA must upgrade his disability to 100% for injuries allegedly occurring 33 years ago.[3] To the extent plaintiff raises claims against the United States regarding its determination as to plaintiff's disability rating,[4] this Court lacks jurisdiction over these claims. The Veterans' Judicial Review

[3] *See* Doc. 11 at 1 (plaintiff asserts that "the audiology doctor at the Cincinnati VAMC has not upgrade my hearing impairment to a 100% disability" for symptoms related to his hearing impairment which he has experienced for 33 years).

[4] *See* Doc. 5, Ex. 1 at 13 (plaintiff's complaint includes a request that he receive an "upgrade for disability to 100%.").

Act (VJRA), Pub. L. No. 100-687, Tit. III, 102 Stat. 4105, 4113-4122 (codified in sections of 38 U.S.C.), enacted by Congress in 1988, provides for:

> a multi-tiered framework for the adjudication of claims regarding veterans benefits. The process begins when a claimant files for benefits with a regional office of the Department of Veterans Affairs. The regional office of the VA 'shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans.' 38 U.S.C. § 511(a). Upon receiving a decision from the regional office, the claimant may appeal to the [Bureau of Veterans Affairs], which either issues the final decision of the Secretary or remands the claim to the regional office for further development and subsequent appeal. *See* 38 U.S.C. § 7104. The Court of Veterans Appeals ("CVA"), an Article I court established by Congress in the VJRA, has exclusive jurisdiction over appeals from the final decisions by the BVA. 38 U.S.C. § 7252(a). The Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over decisions of the CVA. 38 U.S.C. § 7292. If necessary, a claimant may petition the United States Supreme Court to review the decision of the Court of Appeals for the Federal Circuit. *See* 38 U.S.C. § 7291.

Beamon v. Brown, 125 F.3d 965, 967 (6th Cir. 1997). Section 511 "creates a broad preclusion of judicial review of VA decisions." *Id.* at 970. Because jurisdiction to review VA benefits decisions is limited by the statutory scheme, "it is clear that district courts do not have jurisdiction to hear claims concerning benefits." *Wojton v. U.S.*, 199 F. Supp.2d 722, 730 (S.D. Ohio 2002) (citing *Beamon*, 125 F.3d at 974). The Secretary of the VA "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits to veterans," 38 U.S.C. § 511(a), subject to review only pursuant to the statutory scheme. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1022 (9th Cir. 2012).

Consistent with the statutory framework, this Court lacks subject matter jurisdiction over plaintiff's claims related to his veterans' benefits. Indeed, there are only four categories of matters excluded: "(1) matters subject to section 502 of this title; (2) matters covered by sections 1975 and 1984 of this title; (3) matters arising under chapter 37 of this title; and (4) matters covered by chapter 72 of this title." *See* 38 U.S.C. § 511(b). Plaintiff's claim for a finding of

100% disability does not fall within any of the enunciated categories.[5] The VJRA provides the sole means for plaintiff to obtain the relief he seeks. *Wojton,* 199 F. Supp.2d at 731. Thus, defendant's motion to dismiss should be granted for lack of subject matter jurisdiction to the extent the complaint challenges the VA's decisions relating to the provision of veterans' benefits to plaintiff.

B. Plaintiff's malpractice claims should be dismissed.

Construing plaintiff's complaint liberally, it further appears that plaintiff alleges medical malpractice claims against the government for the alleged failure of doctors in the United States Air Force and at the VAMC in Cincinnati, Ohio to diagnose or appropriately treat injuries to plaintiff's right foot and hearing loss. (Doc. 5, Ex. 1 at 2). Plaintiff relates his purported foot injury and hearing loss back to his service in the military. *See id.* at 17 ("this hearing issue goes back to the military and US Postal Service which makes the claim thirty two years old . . . military hospital and Cincinnati VAMC didn't check my body out completely after motorcycle accident in air force. . . ."). As best the Court can discern, plaintiff's complaint alleges separate malpractice claims: one stemming from the negligence of doctors at a military facility while he was on active duty in the United States Air Force, and a second stemming from the negligence of doctors or employees at the Cincinnati VAMC.

To the extent plaintiff alleges his injuries arose from the negligence of military physicians while plaintiff was an active member of the armed forces, this Court lacks subject matter jurisdiction over plaintiff's FTCA claims.[6] The FTCA generally permits individuals to

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[5]Section 502 relates to judicial review of rules and regulations; section 1975 provides that United States district courts have original jurisdiction over claims against the United States raised under chapter 38; section 1984 regards insurance lawsuits; section 37 pertains to housing and small business loans; and section 72 provides the organizational structure for the United States Court of Appeals for Veterans Claims. *See* 38 U.S.C. §§ 502, 1975, 1984, 37, 72.

[6]Plaintiff represents his claims against defendant are brought under the FTCA. *See* Doc. 11 at 1.

file suits in tort for money damages against the United States. 28 U.S.C. § 2671 *et seq*. However, the Supreme Court has determined that military personnel may not bring claims against the government under the FTCA for injuries received incident to their service. *See Feres*, 340 U.S. at 138. The rationale for precluding these claims was enunciated in *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), where the Supreme Court explained that "[t]he special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." Even where the claimed injury is not related to combat, service members are precluded from raising claims against the government so long as the injury was received "incident to service." *See U.S. v. Stanley*, 483 U.S. 669, 682-83 (1987).[7] Under *Feres* and its progeny, the Supreme Court has developed a relatively bright-line rule prohibiting servicemen from raising tort claims against the government for injuries received "incident to service" which applies even where the tort occurs off military property and is unrelated to the service member's scope of duty as such suits require civilian courts to question military decisions or impair military discipline. *See U.S. v. Shearer*, 473 U.S. 52, 57 (1985); *U.S. v. Johnson*, 481 U.S. 681, 691 (1987). In sum, "*all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat

[7] "A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime. The 'incident to service' test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters." *Id.*

purpose of the military activity from which it arose[,]" are precluded by the intra-military doctrine. *Major v. U.S.*, 835 F.2d 641, 644-45 (6th Cir. 1987) (emphasis in original).

Plaintiff's malpractice claim against the United States which relates to injuries plaintiff sustained while he was an active member of the United States Air Force is barred. *See* Doc. 5, Ex. 1 at 17 (plaintiff states that both his hearing and foot injury relate back to his service in the military). Plaintiff alleges he was negligently treated for a foot injury and hearing loss when he was an active member of the service some thirty-three years ago. Consequently, his malpractice claim is barred under the *Feres* doctrine as plaintiff's injuries were incurred incident to his military service. *See Major*, 835 F.2d at 644-45 (citing *Feres*, 340 U.S. at 138) (injuries incurred while on "active duty" are incurred "incident to service" and thus barred by *Feres*). *See also Jones v. United States,* 112 F.3d 299, 302 (7th Cir. 1997) (medical malpractice claims arising from treatment by military doctors of active-duty personnel barred); *Jackson v. United States*, 110 F.3d 1484, 1489 (9th Cir. 1997) (same); *Cutshall v. United States*, 75 F.3d 426, 428 (8th Cir.1996) (same); *Hayes v. United States*, 44 F.3d 377, 378-79 (5th Cir. 1995) (same).[8]

To the extent plaintiff alleges claims of medical malpractice arising from his treatment by physicians or employees at the VAMC in Cincinnati after his discharge from the service, these claims are not foreclosed by the *Feres* doctrine. The Supreme Court has determined that *Feres* does not bar medical malpractice claims brought by a veteran after his discharge, even though the negligent treatment is for a service-related injury. *See U.S. v. Brown*, 348 U.S. 110 (1954). In *Brown*, a veteran brought suit following allegedly negligent treatment at a VA hospital. The

[8] The Court again notes that plaintiff's claims appear primarily concerned with his disability rating. *See* Doc. 11 at 2 ("This lawsuit is against the UNITED STATES BECAUSE the audiology clinic within the CINCINNATI VAMC hasn't done anything to CORRECT this problem of upgrading my disability towards 100% disability.") (emphasis in original). As stated above, the Court lacks subject matter jurisdiction over these matters and plaintiff must seek his remedy through the VJRA.

veteran, after his honorable discharge, underwent an operation on a pre-existing knee injury – one that had occurred while he was on active duty in the service. The Supreme Court determined that *Feres* did not bar the medical malpractice claim because the injury for which the suit was brought – nerve damage caused by the operation on his knee – "was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status." *Id.* at 112. The Supreme Court in *Brown* concluded that the negligent act giving rise to the injury was not incident to military service and not barred by *Feres*. *Id.* at 113. *See also Brown v. United States*, 451 F.3d 411, 414, 416 (6th Cir. 2006) (claims related to allegedly negligent medical examination of serviceman which occurred three years after his release from active duty were not barred by *Feres* doctrine).

In the instant case, plaintiff appears to allege that an audiologist at the Cincinnati VAMC failed to properly assess his hearing impairment, which in turn has affected his disability rating from the VA. Even though plaintiff relates the genesis of his hearing impairment back to his time in the Air Force, the injury for which he brings suit – the alleged failure to properly diagnose the severity of his hearing impairment – is an injury that occurred after his discharge from the service. His malpractice claim is therefore not barred by the *Feres* doctrine.

Nevertheless, dismissal of this portion of plaintiff's medical malpractice claim is appropriate because plaintiff has failed to comply with Ohio state law procedural requirements. Ohio law requires that medical malpractice claims must be accompanied by an affidavit of merit from an expert witness. Ohio R. Civ. P. 10(D)(2)(a). The requisite affidavit must contain:

> (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
>
> (ii) A statement that the affiant is familiar with the applicable standard of care;

> (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

Id.

Federal courts are to apply state substantive law and federal procedural law when determining issues of state law. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). State laws giving rise to "'state-created rights and obligations' or [are] otherwise 'bound up with these rights and obligations in such a way that its application to federal court is required[,]'" are considered substantive laws. *Shropshire v. Laidlaw Transit, Inc.*, 550 F.3d 570, 574 (6th Cir. 2008) (quoting *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 535 (1958)). Courts within the Sixth Circuit have reached different conclusions on whether Ohio Civil Rule 10(D) is substantive or procedural. *Compare Bennafield v. U.S.*, No. 4:23-cv-3010, 2013 WL 5173221, at *2 (N.D. Ohio Sept. 12, 2013) (joining majority opinion and finding that Rule 10(D) applies to veterans' FTCA claims) (citing cases), with *Thompson v. U.S.*, No. 1:13-cv-550, 2013 WL 3480347, at *3-5 (N.D. Ohio July 10, 2013) (finding that "Ohio Rule 10(D) creates additional burdens not required by the applicable federal rules" and thus declining to dismiss complaint for veteran's failure to include affidavit of merit). In *Daniel v. U.S.*, 716 F. Supp.2d 694, 698 (N.D. Ohio 2010), the court determined that Ohio Civil Rule 10(D) is substantive and applies to FTCA claims brought by veterans against the VA:

> Although the Sixth Circuit has not yet addressed this issue, several Courts of Appeal agree that similar state rules of procedure operate as substantive law under the FTCA. *See Cestnik v. Fed. Bureau of Prisons,* 84 F. App'x. 51, 53-54 (10th Cir. 2003) ("When a plaintiff brings suit against the United States under the FTCA, state substantive law applies. We have held Colorado's requirement of this certificate [of merit] to be a substantive, rather than procedural, rule of law. As such, it is applicable to Mr. Cestnik's FTCA claims, even though he is proceeding pro se." (internal citations omitted)); *Bramson v. Sulayman*, 251 F. App'x. 84, 87 n.2 (3d Cir. 2007) ("The affidavit of merit requirement applies to malpractice claims under New Jersey law in federal court. *See Chamberlain v.*

> *Giampapa,* 210 F.3d 154, 161 (3d Cir. 2002). *Chamberlain* was a diversity jurisdiction case, but the FTCA, under which the District Court had jurisdiction here, also requires the application of state law."). *See also Mathison v. U.S.*, 44 F. App'x 27, 29 (8th Cir. 2002) (applying a similar Minnesota statute to claims under the FTCA).
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> A number of other district courts have also examined the application of similar statutes to the FTCA and have come to the same conclusion. *See, e.g., Luckett v. United States,* No. 08–CV–13775, 2009 WL 1856417, at *5 (E.D. Mich. June 29, 2009) ("Under the FTCA, the law of the place where the alleged act or omission occurred is to be applied; therefore, Michigan law applies in the instant case. Under Michigan law, initiation of a medical malpractice action requires that the plaintiff file a complaint and an affidavit of merit." (internal citations omitted)); *Lopez v. Brady*, No. 4:CV–07–1126, 2008 WL 4415585 (M.D. Pa. Sept. 25, 2008) ("Courts within this circuit have recognized that Rule 1042.3 [which requires an affidavit of merit] is substantive law and should be applied by federal courts sitting in diversity. It has also been held that a Plaintiff pursuing an FTCA claim must comply with Pennsylvania substantive law." (internal citations omitted)); *Stanley v. U.S.*, 321 F. Supp.2d 805, 807 (N.D. W.Va. 2004) (holding that statute requiring a screening certificate of merit as a prerequisite to medical malpractice actions is substantive and applies to claims under the FTCA).

Daniel, 716 F. Supp.2d at 698-99.

The undersigned is persuaded by the above analysis and finds that Ohio Civil Rule 10(D) is a substantive rule and applies to plaintiff's instant medical malpractice claims. As plaintiff does not dispute that he did not file an affidavit of merit, defendant's motion to dismiss should be granted.

For the above reasons, the undersigned recommends that defendant's motion to dismiss plaintiff's tort claims be granted.

IV. Conclusion

For the reasons stated herein, **IT IS RECOMMENDED THAT** defendant's motion to dismiss (Doc. 9) be **GRANTED,** that plaintiff's claims against defendant be **DISMISSED** with prejudice, and this matter be closed on the docket of the Court.

IT IS ORDERED that plaintiff's motion for leave to file a sur-reply to defendant's motion to dismiss (Doc. 15) is **DENIED** and defendant's motions to strike (Docs. 14, 16) are

DENIED as moot.

Date: 1/13/14

Karen L. Litkovitz
United States Magistrate Judge

UNITED STATES DISTRICT COURT
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Weber, J.
Litkovitz, M.J.

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

SENDER: *COMPLETE THIS SECTION*

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Cinti, OH 45232

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☑ Agent
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