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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE PALACIOS, Petitioner-Appellant, v. KEVIN SMITH, Defendant-Appellee, and EVALYN HOROWITZ, Defendant.	No. 20-17233 D.C. No. 2:17-cv-02500-TLN-CKD MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted January 19, 2022**

Before: SILVERMAN, CLIFTON, and HURWITZ, Circuit Judges.

California state prisoner Jorge Palacios appeals pro se from the district

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

court's summary judgment in his 42 U.S.C. § 1983 action alleging deliberate indifference to his serious medical needs. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004). We affirm.

The district court properly granted summary judgment because Palacios failed to raise a genuine dispute of material fact as to whether Smith was deliberately indifferent to Palacios's serious medical needs by denying Palacios's requests for mobility accommodations and a medical chrono, or in scheduling Palacios's hernia surgery. *See id.* at 1057-60 (holding that deliberate indifference is a high legal standard and a prison official is deliberately indifferent only if he or she knows of and disregards an excessive risk to inmate health; medical malpractice, negligence, or a difference of opinion concerning the course of treatment does not amount to deliberate indifference).

The district court did not abuse its discretion by denying Palacios's requests for appointment of an expert under Federal Rule of Evidence 706 because such an appointment was not necessary for the court to make its determination. *See Armstrong v. Brown*, 768 F.3d 975, 987 (9th Cir. 2014) ("A Rule 706 expert typically acts as an advisor to the court on complex scientific, medical, or technical matters."); *Walker v. Am. Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1071 (9th Cir. 1999) (setting forth standard of review).

We reject as meritless Palacios's contention that the district court treated him unfairly as a pro se litigant.

We do not consider documents not filed with the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

All pending motions and requests are denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JORGE PALACIOS,

Plaintiff,

v.

KEVIN SMITH,

Defendant.

No. 2:17-cv-2500 TLN CKD P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil action pursuant to 42 U.S.C. § 1983. Currently before the court is defendants' motion for summary judgment. ECF No. 59.

I. Plaintiff's Allegations and Procedural History

In his complaint, plaintiff alleges three claims of deliberate indifference to serious medical needs against defendant Smith. (ECF No. 24 at 3-7.) In Claim One, he asserts that on April 26, 2017, Smith confiscated his cane without any reason despite his clear need for it. (Id. at 3.) Plaintiff states that without his cane, he was unable to walk to the dining room and missed regular meals from April 30, 2017 to July 14, 2017, which resulted in malnutrition. (Id.) Plaintiff states that the confiscation of his cane also led to three falls and an inguinal hernia. (Id.) Plaintiff further alleges that Smith confiscated plaintiff's mobility impaired vest, which allegedly led to the condition of his hernia worsening, and other injuries. (Id.)

In Claim Two, plaintiff alleges that on January 11, 2018, Smith denied plaintiff's requests

for the temporary use of a walker while he was waiting for surgery, as well as denied an order for alternative cuffing during transports. (Id. at 4.) Plaintiff alleges that because of the denial of alternative cuffing, he refused transport to an outside examination because the standard cuffing protocols caused too much pain. (Id.) Plaintiff alleges that his request for a walker was granted by another doctor. (Id.) Plaintiff states that because of Smith's denial, he could not safely conduct daily activities. (Id.) Moreover, plaintiff alleges that Smith failed to place an order for plaintiff's hernia surgery in an attempt to interfere with plaintiff's medical treatment and prolong his suffering.

In Claim Three, plaintiff alleges that on November 14, 2018, Smith confiscated all of plaintiff's medications, including his heart medications, in what he believes was retaliation for initiating this case. (Id.)

In a screening order, the undersigned recommended that claims one and two proceed and claim three be dismissed because plaintiff did not exhaust his administrative remedies. (ECF No. 25 at 6.) The district judge adopted this finding, (ECF No. 41), and Smith answered the complaint on June 6, 2019 (ECF No. 39). Smith filed the instant motion for summary judgment on January 17, 2020. (ECF No. 59.)

II. Legal Standards for Summary Judgment

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under summary judgment practice, "[t]he moving party initially bears the burden of proving the absence of a genuine issue of material fact." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party may accomplish this by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by showing that such materials "do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." Oracle Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325); see also Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be entered, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323. In such a circumstance, summary judgment should "be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a fact "that might affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," Anderson, 447 U.S. at 248.

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "'the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" T.W. Elec. Serv., 809 F.2d at 630 (quoting First Nat'l Bank of Ariz. V. Cities Serv. Co., 391 U.S. 253, 288-89 (1968). Thus, the "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."

Matsushita, 475 U.S. at 587 (citation and internal quotation marks omitted).

"In evaluating the evidence to determine whether there is a genuine issue of fact, [the court] draw[s] all inferences supported by the evidence in favor of the non-moving party." Walls v. Central Costa Cnty. Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586 (citations omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. at 587 (quoting First Nat'l Bank, 391 U.S. at 289).

Defendant simultaneously served plaintiff with notice of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure along with their motion for summary judgment. ECF No. 164-1; see Klingele v. Eikenberry, 849 F.2d 409, 411 (9th Cir. 1988); Rand v. Rowland, 154 F.3d 952, 960 (9th Cir. 1998) (en banc) (movant may provide notice).

III. Motion for Summary Judgment

A. Defendant's Arguments

Defendant Smith argues that plaintiff's allegations amount to nothing more than a difference of opinion regarding medical care. (ECF No. 59-1 at 6.) Specifically, Smith argues that deliberate indifference is a high legal standard, and that plaintiff has not made the requisite showing. (Id. at 18-19.) Smith further argues that decisions regarding plaintiff's access to his cane and mobility vest were similarly merely differences in medical opinion. (Id. at 19-21.) Moreover, Smith states that decisions regarding a walker and alternative handcuffs were not deliberately indifferent to plaintiff's needs. (Id. at 21-23.) Defendant also argues that Smith did not cause any delays in plaintiff's hernia surgery, and furthermore, any argument that he failed to place an order for surgery was not fully exhausted. (Id. at 23-28.) Finally, Smith argues he is entitled to qualified immunity. (Id. at 28.)

B. Plaintiff's Response

At the outset, the court notes that plaintiff has failed to comply with Federal Rule of Civil Procedure 56(c)(1)(A), which requires that "a party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record." It is well-established that the pleadings of pro se litigants are held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). Nevertheless, "[p]ro se litigants must follow the same rules of procedure that govern other litigants." King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (citations omitted), overruled on other grounds, Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012) (en banc). However, the unrepresented prisoners' choice to proceed without counsel "is less than voluntary" and they are subject to "the handicaps . . . detention necessarily imposes upon a litigant," such as "limited access to legal materials" as well as "sources of proof." Jacobsen v. Filler, 790 F.2d 1362, 1364-65 & n.4 (9th Cir. 1986) (alteration in original) (citations and internal quotation marks omitted). Inmate litigants, therefore, should not be held to a standard of "strict literalness" with respect to the requirements of the summary judgment rule. Id. at 1364 n.4 (citation omitted).

The court is mindful of the Ninth Circuit's more overarching caution in this context, as noted above, that district courts are to "construe liberally motion papers and pleadings filed by *pro se* inmates and should avoid applying summary judgment rules strictly." Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010). Accordingly, as plaintiff has largely complied with the rules of procedure, the court will consider the record before it in its entirety. However, only those assertions in the opposition which have evidentiary support in the record will be considered.

Here, plaintiff argues that Smith was deliberately indifferent to his medical needs and that his grievances were fully exhausted. (See ECF No. 66.)

IV. Facts

The court views the facts and draws inferences in the manner most favorable to plaintiff as the non-moving party. Unless otherwise noted, the following facts are expressly undisputed by the parties or the court has determined them to be undisputed based on thorough review of the

record.[1] These facts are taken from the Defendant's Statement of Undisputed Facts (DSUF), (ECF No. 59-2), Plaintiff's Opposition to Motion for Summary Judgment, (ECF No. 66), and Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, (ECF No. 69).

On June 22, 2016, plaintiff was transferred from Valley State Prison (VSP) to Mule Creek State Prison (MCSP). (DSUF ¶ 5.) At all relevant times, plaintiff was in the custody of California Department of Corrections (CDCR), at MCSP. (Id. ¶ 1.) Defendant Smith was employed by CDCR as a physician at MCSP and was assigned as plaintiff's primary care physician (PCP). (Id. ¶¶ 2-3.) Prior to Smith, plaintiff's PCP was Dr. Horowitz. (Id. ¶ 6.) Plaintiff has several specialized health issues that required numerous care providers and specialists. (Id. ¶ 7.)

A. Access to a Cane and/or Mobility Vest

On August 17, 2015, while housed at VSP, plaintiff was issued a cane. (Id. ¶ 8.) During a subsequent medical visit on August 3, 2016, while at MCSP, Dr. Horowitz determined that plaintiff was able to ambulate satisfactorily without an assistive device and ordered a change in plaintiff's disability status to reflect that plaintiff did not have a disability. (Id. ¶¶ 12-13.)

The Disability Placement Program Verification (DPPV) form (CDCR 1845), when completed, indicates an inmate's disability level. (Id. ¶ 14.) If deemed necessary, an assistive device can be prescribed to address an inmate's ambulation needs. (Id.) On August 3, 2016, Dr. Horowitz issued and signed a CDCR 1845 form reflecting Dr. Horowitz's determination that plaintiff was not disabled. (Id. ¶ 15.)

On August 9, 2016, the Reasonable Accommodation Panel considered plaintiff's request for a cane and mobility vest, and ultimately denied plaintiff's request on the basis that plaintiff could sufficiently ambulate without any durable devices. (Id. ¶ 18.) Plaintiff's mobility vest was accordingly discontinued. (Id. ¶ 20.) On September 29, 2019, Smith met with plaintiff regarding

[1] Plaintiff, in his opposition, disputed a significant portion of the facts submitted by Smith, but provided only broad conclusory statements without evidentiary support to the contrary. (See ECF No. 66.) Accordingly, the court will deem the vast majority of Smith's statement of undisputed facts as undisputed.

an appeal plaintiff filed in which plaintiff stated that he disagreed with the decision to deny his request for a mobility vest. (Id. ¶ 21.) Smith took note of plaintiff's medical history, as well as the fact that he previously had a mobility vest at VSP, and that it was discontinued at MCSP. (Id.) During the visit, Smith also noted that plaintiff had a cane, despite the prior finding that he did not have a medical need for the cane. (Id. ¶ 22.) Smith, following a musculoskeletal exam, determined that without the cane, plaintiff's gait was steady, and that there was no need for a mobility vest. (Id. ¶¶ 24-25.)

On April 7, 2017, Dr. Vaughn issued an order discontinuing plaintiff's cane and mobility vest, reflecting a determination that plaintiff did not have a disability. (Id. ¶ 26.) Following a request for a cane and mobility vest, Smith again met with plaintiff, conducted musculoskeletal exam, and concluded that plaintiff could ambulate without an assistive device and therefore neither a cane nor mobility vest were medically necessary. (Id. ¶¶ 27-31.) Because Dr. Vaughn had previously issued an order discontinuing plaintiff's cane and mobility vest, Smith did not issue an order or take any action in response to plaintiff's requests for a cane and mobility vest. (Id. ¶ 32.)

On May 17, 2017, plaintiff informed CDCR staff, for the first time, that he was having difficulty obtaining regular meals. (Id. ¶ 36.) On May 19, 2017, Dr. Horowitz met with plaintiff and conducted a medical assessment regarding a 602 appeal plaintiff filed regarding the confiscation of his cane, and reconfirmed that there was no objective evidence demonstrating that plaintiff required a mobility device or mobility vest. (Id. ¶¶ 39-40.) Dr. Horowitz further noted that correctional officers had observed plaintiff going up and down stairs, sitting calmly, watching movies, and walking without any assistive devices. (Id. ¶ 39.)

On July 14, 2017, plaintiff was seen by Dr. Bal in response to his complaint that he felt pain as a result of his hernia. (Id. ¶ 41.) Dr. Bal concluded that a cane would be beneficial and issued instructions that plaintiff be provided with a cane. (Id. ¶¶ 41-42.) Dr. Bal did not issue any notes or instructions regarding a mobility vest. (Id. ¶ 49.) During that meeting, plaintiff claimed that he had not fallen, but had *almost* fallen multiple times. (Id. ¶ 46.)

Plaintiff then had a visit with Smith on the same day, and in light of Dr. Bal's findings,

Smith issued an order providing plaintiff with a cane on a temporary basis. (Id. ¶¶ 43, 48.) Additionally, despite Dr. Bal's findings, Smith also issued an order providing a mobility vest to plaintiff on a temporary basis. (Id. ¶ 50.) In a follow up meeting on July 17, 2017, plaintiff alleged to have fallen due to not having a cane, and alleged to have missed meals due to not having a cane. (Id. ¶¶ 44-45.) Smith found no evidence of any malnutrition. (Id. ¶ 45.)

B. Access to a Walker, Hand-Restraint Devices, and Surgery

During a May 19, 2017 visit with Dr. Horowitz, plaintiff stated that he had a painful hernia since April 3, 2017, which was before the date when plaintiff's cane and mobility vest was allegedly confiscated. (Id. ¶ 52.) Plaintiff was diagnosed with an inguinal hernia, and treatment to repair the hernia required surgery. (Id. ¶ 51.) There has been no medical determination regarding the cause of the hernia or any claim that the failure to possess a mobility device caused or exacerbated the hernia. (Id. ¶¶ 53-54.)

Plaintiff has a cardiac condition that created a medical risk in proceeding with surgery to treat his hernia, and accordingly, the surgeon on plaintiff's case recommended plaintiff obtain clearance from a cardiologist before proceeding with surgery. (Id. ¶¶ 55-56.) Prior to surgery, plaintiff needed to undergo a Lexiscan stress test with satisfactory results. (Id. ¶ 58.) On multiple occasions, plaintiff refused to go to his cardiologist appointments and provided reasons such as wanting to avoid handcuffs, wanting to avoid the outside weather, and not wanting to be in chains all day. (Id. ¶ 62.) On November 22, 2017, plaintiff refused to attend his cardiology appointment and signed a refusal form stating that he understood the risks and benefits of refusing to attend the appointment. (Id. ¶ 63.) On January 11, 2018, Smith evaluated plaintiff and assessed that standard hand-restraints would not foreseeably exacerbate plaintiff's medical condition, and discomfort in the wrists is not a disability necessitating reasonable accommodation. (Id. ¶¶ 66-67.)

Physicians may issue medical notes indicating that an inmate has a disability and note when a reasonable accommodation to the default hand-restraint devices are warranted. (Id. ¶ 60.) Ultimately, custody staff determine how to reasonably accommodate inmates. (Id.) Smith, as a physician, did not have authority over hand restraints during transports, and that decision was left

to custody staff. (Id. ¶ 59.)

During the January 11, 2018 visit, plaintiff requested a walker. (Id. ¶ 69.) Smith noted plaintiff's prior evaluations and conducted a medical evaluation concluding that a walker was not medically necessary. (Id. ¶¶ 69-70.)

C. Administrative Appeals Regarding Plaintiff's Allegation that Smith Failed to Place an Order for Surgery

Since August 1, 2008, health care appeals and grievances regarding inmate medical care issues have been processed by the California Correctional Health Care Services (CCHCS). (Id. ¶ 76.) Inmates may grieve complaints regarding health care policies, decisions, actions, conditions, or omissions using a CDCR 602 HC form. (Id. ¶ 80.) These complaints are subject to two levels of review: an institutional level of review, and a headquarters level of review. (Id. ¶ 81.) Health care grievances are subject to a headquarters' disposition prior to administrative remedies are deemed exhausted. (Id. ¶ 82.)

Between January 11, 2018 and the date on which plaintiff filed his First Amended Complaint, plaintiff submitted two inmate appeals that resulted in a headquarters level decision. (Id. ¶ 83.) Plaintiff submitted health care grievance log number MCSP HC 18001085, which was received at the institutional level on February 20, 2018, and grieved that the application of the black-box handcuffs during transport were inadequate and requested a handcuff accommodation. (Id. ¶ 84.) This grievance was denied by the headquarters level on July 27, 2018. (Id.) Plaintiff submitted health care grievance log number MCSP HC 18001033, which was received at the institutional level on January 24, 2018, and grieved that Smith denied plaintiff's request for a temporary walker. (Id. ¶ 85.) This grievance was ultimately denied by the headquarters level on July 27, 2018. (Id.)

Plaintiff filed a health care grievance log number MCSP HC 18003003, in which plaintiff stated that Smith failed to place an order for surgery. (Id. ¶ 88.) This grievance was not exhausted until May 29, 2019. (Id. ¶ 89.)

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V. Discussion

A. Deliberate Indifference Standard

In order to state a §1983 claim for violation of the Eighth Amendment based on inadequate medical care, plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). To prevail, plaintiff must show both that his medical needs were objectively serious, and that defendant possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991); McKinney v. Anderson, 959 F.2d 853, 854 (9th Cir. 1992). The requisite state of mind for a medical claim is "deliberate indifference." Hudson v. McMillian, 503 U.S. 1, 5 (1992).

"A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992) (quoting Estelle, 429 U.S. at 104), overruled on other grounds WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc). Examples of a serious medical need include "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01 (9th Cir. 1989)).

In Farmer v. Brennan, 511 U.S. 825 (1994), the Supreme Court established a very demanding standard for "deliberate indifference." "While poor medical treatment will at a certain point rise to the level of constitutional violation, mere malpractice, or even gross negligence, does not suffice." Wood, 900 F.2d at 1334. Even civil recklessness (failure to act in the face of an unjustifiably high risk of harm which is so obvious that it should be known) is insufficient to establish an Eighth Amendment violation. Farmer, 511 U.S. at 837 & n.5. It is not enough that a reasonable person would have known of the risk or that a defendant should have known of the risk. Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). Rather, deliberate indifference is established only where the defendant subjectively "knows of and disregards an excessive risk to inmate health and safety." Id. (citation and internal quotation marks omitted). Deliberate

indifference can be established "by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citation omitted).

A difference of opinion between an inmate and prison medical personnel—or between medical professionals—regarding appropriate medical diagnosis and treatment are not enough to establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Toguchi, 391 F.3d at 1058. To establish a difference of opinion rises to the level of deliberate indifference, plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances." Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

B. Smith's Decisions Concerning Access to Cane and Mobility Device

Despite plaintiff's assertion that a genuine issue of material fact exists as to whether Smith was deliberately indifferent to his serious medical needs, plaintiff, at most, has raised a difference of medical opinion regarding his medical treatment, and a "difference of opinion does not amount to a deliberate inference to [plaintiff's] serious medical needs." Sanchez, 891 F.2d at 242. Plaintiff's evidence in opposition to Smith's motion fails to create a genuine dispute of material fact as to whether Smith was deliberately indifferent to plaintiff's medical need.[2]

Based on evidence submitted by plaintiff and Smith, it is clear that plaintiff had several doctors treating him. Plaintiff argues that Smith did not provide him a cane and mobility vest and was therefore deliberately indifferent to plaintiff's needs. (ECF Nos. 24, 66.) The undisputed facts and evidence show that by the time Smith met with plaintiff, a separate physician, Dr. Vaughn had already discontinued plaintiff's cane and mobility vest. (DSUF ¶ 26.) Both Dr. Vaughn *and* Dr. Horowitz similarly found that plaintiff did not have any physical disabilities warranting a cane and/or mobility vest. (Id. ¶¶ 12, 15.) Moreover, the evidence shows that Smith did not confiscate any mobility device from plaintiff. Nothing in the evidence indicates that

[2] Additionally, plaintiff is not a qualified medical expert able to provide competent testimony regarding the sufficiency of a medical examination. See Fed. R. Evid. 702; Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). Accordingly, any statements by plaintiff that Smith's examinations were inadequate are insufficient to dispute evidence submitted by Smith demonstrating that plaintiff's grievances amount to at most a difference of opinion regarding plaintiff's medical care.

Smith's treatment of plaintiff with regard to accessing a cane and/or mobility vest rises to the level of a constitutional violation. Plaintiff has not submitted evidence creating a genuine dispute of material fact. Accordingly, the court recommends that Smith's motion on this claim be granted.

C. Smith's Decision Regarding Plaintiff's Request for a Walker and Alternative Handcuffs

Plaintiff argues that Smith's decision to deny plaintiff the use of a walker amounted to a constitutional violation. (ECF No. 24 at 4.) On January 11, 2018, plaintiff requested Smith provide him with a walker. (DSUF ¶ 69.) Prior to this visit, plaintiff was evaluated multiple times by different physicians, each coming to the same conclusion that a mobility device was not medically necessary. Plaintiff has not provided any evidence creating any genuine dispute of material fact that Smith's decision was "in conscious disregard of an excessive risk to plaintiff's health," Jackson, 90 F. 3d at 332. Rather, it is clear from the submitted evidence that Smith's decision was based on a review of medical records, evaluations, and plaintiff's physical condition.

Additionally, any decision by Smith determining that alternative handcuffs were not medically necessary similarly did not raise to the level of a constitutional violation. First, plaintiff does not provide any evidence disputing that Smith had no control over what types of hand-restraints devices are provided to inmates. Second, plaintiff's assertion that an accommodation for alternative handcuffs was medically necessary is a difference of opinion, and plaintiff cannot establish that Smith's decision was otherwise "medically unacceptable under the circumstances." Jackson, 90 F. 3d at 332.

Accordingly, the court finds that plaintiff has not created a genuine dispute of material fact as to whether Smith was deliberately indifferent when refusing plaintiff's request for both a walker and an accommodation for alternative handcuffs.

D. Whether Smith Caused Undue Delays to Proceed with Hernia Surgery

Plaintiff alleges that Smith failed to place an order for surgery which was an oversight. (ECF No. 24 at 4.) The evidence shows that due to plaintiff's cardiac condition, plaintiff's surgeon recommended plaintiff undergo a Lexiscan stress test before being cleared for surgery.

(DSUF ¶ 58.) Nothing in the evidence suggests that once plaintiff was cleared for surgery, Smith personally failed to issue an order for plaintiff to have surgery. Based on the undisputed evidence, plaintiff refused to attend several appointments and himself delayed his clearance for the surgery. Accordingly, plaintiff has not established a genuine dispute of material evidence as to whether Smith delayed his surgery or failed to place an order for surgery when he was medically cleared for surgery.

E. Exhaustion Standard

The Prison Litigation Reform Act of 1995 provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). A prisoner must exhaust his administrative remedies before he commences suit. McKinney v. Carey, 311 F.3d 1198, 1199–1201 (9th Cir. 2002). Compliance with this requirement is not achieved by satisfying the exhaustion requirement during the course of a civil action. See McKinney, 311 F.3d 1198 (9th Cir. 2002). Failure to comply with the PLRA's exhaustion requirement is an affirmative defense that must be raised and proved by the defendant. Jones v. Bock, 549 U.S. 199, 216 (2007). In the Ninth Circuit, a defendant may raise the issue of administrative exhaustion in either (1) a motion to dismiss pursuant to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the face of the complaint, or (2) a motion for summary judgment. Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc). An untimely or otherwise procedurally defective appeal will not satisfy the exhaustion requirement. Woodford v. Ngo, 548 U.S. 81, 84 (2006).

In order to defeat a properly supported motion for summary judgment based on a prisoner's failure to exhaust pursuant to 42 U.S.C. § 1997e(a), plaintiff must "come forward with some evidence showing" that he has either (1) properly exhausted his administrative remedies before filing suit or (2) "there is something in his particular case that made the existing and generally available remedies unavailable to him by 'showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.'" Williams v. Paramo, 775 F.3d 1182, 1191 (9th Cir. 2015) (quoting Hilao v. Estate of Marcos, 103 F.3d 767, 778 n.5) (9th Cir. 1996)); Jones, 549 U.S. at 218. "Accordingly, an inmate is required to exhaust

those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'" Ross v. Blake, 136 S. Ct. 1850, 1859 (2016) (quoting Booth v. Churner, 532 U.S. 731, 738 (2001)). If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). If there is at least a genuine issue of material fact as to whether the administrative remedies were properly exhausted, the motion for summary judgment must be denied. See Fed. R. Civ P. 56(a).

When the district court concludes that the prisoner has not exhausted administrative remedies on a claim, "the proper remedy is dismissal of the claim without prejudice." Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (citation omitted), overruled on other grounds by Albino, 747 F.3d at 1168-69.

F. Whether Plaintiff Exhausted the Allegation that Smith Failed to Order Hernia Surgery

Additionally, the sole administrative grievance concerning whether Smith failed to order hernia surgery was log number MCSP HC 18003003, which was received at the institutional level on November 27, 2018, and decided on January 29, 2018. (DSUF ¶¶ 87-88.) Plaintiff submitted this for a headquarters level review on March 7, 2019, and a final decision was issued on May 29, 2019. Plaintiff filed his First Amended Complaint on January 4, 2019. (ECF No. 24.)

42 U.S.C. § 1997(e)(a) is clear that administrative remedies must be fully exhausted prior to bringing an action. McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002). Because this particular claim was not fully exhausted, the undersigned will recommend dismissal.

G. Qualified Immunity

Because the court finds no violation of plaintiff's Eighth Amendment rights, it need not address Smith's argument that he is entitled to qualified immunity

VI. Plain Language Summary for Pro Se Litigant

The undersigned is recommending that Smith's motion for summary judgment be granted and that all claims be dismissed. The reason for this is because you have not provided any evidence that Smith was deliberately indifferent to your medical needs. A difference in medical opinion does not amount to a constitutional violation. Additionally, the undersigned is

recommending an additional reason for dismissing your claim that Smith failed to place an order for surgery because this claim was not fully exhausted at the time you filed your First Amended Complaint.

Accordingly, **IT IS HEREBY RECOMMENDED** that:

1. Defendant's motion for summary judgment (ECF No. 59) be granted and claims against defendant Smith be dismissed.

2. Judgment be entered for defendant.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). **Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties.** Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." **Any response to the objections shall be served and filed within seven days after service of the objections. Due to exigencies in the court's calendar, there will be no extensions of time granted.** The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: September 4, 2020

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JORGE PALACIOS,

Plaintiff,

v.

KEVIN SMITH,

Defendant.

No. 2:17-cv-02500-TLN-CKD

ORDER

Plaintiff Jorge Palacios ("Plaintiff"), a state prisoner proceeding *pro se*, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 4, 2020, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen (14) days. (ECF No. 71.) Plaintiff has filed Objections to the Findings and Recommendations. (ECF No. 72.) Defendant Smith ("Defendant") filed a Response to Plaintiff's objections. (ECF No. 73.)

The Court reviews *de novo* those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982); *see also Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed

findings of fact to which no objection has been made, the Court assumes its correctness and decides the motions on the applicable law. *See Orand v. United States*, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed *de novo*. *See Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

Having carefully reviewed the entire file under the applicable legal standards, the Court finds the Findings and Recommendations to be supported by the record and by the magistrate judge's analysis.

Plaintiff's objections appear to reiterate his arguments in opposition to Defendant's Motion for Summary Judgment and the allegations of his complaint. (*See generally* ECF No. 72.) As correctly noted in the Findings and Recommendations, these arguments are conclusory and lack an evidentiary basis, as Plaintiff "is not a qualified medical expert able to provide competent testimony regarding the sufficiency of a medical examination." (*See* ECF No. 71 at 11 n. 2.) At most, Plaintiff's arguments regarding his medical needs and treatment amount to a difference of medical opinion that does not rise to the level of deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989); *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004). Accordingly, Plaintiff's objections are overruled.

To the extent Plaintiff argues a neutral medical expert would have supported his claims and — for the first time in this action — requests appointment of a neutral medical expert (*see, e.g.*, ECF No. 72 at 4), Plaintiff's objections are not well-taken. The burden to request appointment of a neutral medical expert lies with Plaintiff, and it is a burden he failed to timely meet.[1] Furthermore, Plaintiff fails to set forth a factual predicate establishing that a competent expert would agree with his medical claims, or that such medical opinion could support a claim of deliberate indifference. *Sanchez*, 891 F.2d at 242; *Toguchi*, 391 F.3d at 1058. Accordingly, these objections are overruled.

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[1] The Court is additionally mindful that Plaintiff initiated this litigation nearly three years ago and therefore had ample time to assess his need for the appointment of a neutral expert and file a request. (ECF No. 1.) Plaintiff's motion to appoint counsel, filed on June 24, 2019 (ECF No. 43), similarly demonstrates Plaintiff possessed the capacity to timely submit the instant request, though he has provided no justification for his failure to do so.

Finally, the Court addresses Plaintiff's October 13, 2020 motion requesting the testimony of a Court-appointed neutral medical expert to rebut Defendant's arguments on summary judgment. (ECF No. 74.) Plaintiff's Motion — filed nine months after Defendant's Motion for Summary Judgment was filed (ECF No. 59) and over a month after the Findings and Recommendations to grant the Motion for Summary Judgment were issued (ECF No. 72) — is untimely. Nor does Plaintiff meet his burden of establishing his claims are so complex that the trier of fact requires evidence from a Court-appointed expert. Fed. R. Evid. 706; *Pedraza v. Jones*, 71 F.3d 194, 196 (5th Cir. 1995) (purpose of a Rule 706 court-appointed expert is to assist the trier of fact, not serve as an advocate); *see also, e.g., Salcido v. Zarek*, 237 F. App'x 151, 152 (9th Cir. 2007) (requests for more pain medication, therapeutic collar, and pillow "not … a particularly complex claim"); *Honeycutt v. Snider*, No. 3:11-cv-00393-RCJ (WGC), 2011 WL 6301429 (D. Nev. Dec. 16, 2011) (expert not required to evaluate plaintiff's need for specialized orthopedic footwear); *Wilds v. Gines*, No. C 08-03348 CW (PR), 2011 WL 737616 (N.D. Cal. Feb. 23, 2011) (expert not required to evaluate plaintiff's low back pain and degenerative disc disease). For these reasons, Plaintiff's motion is DENIED.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed September 4, 2020 (ECF No. 71), are adopted in full;

2. Defendant's Motion for Summary Judgment (ECF No. 59) is GRANTED and all claims against Defendant Smith are DISMISSED;

3. Plaintiff's Motion for Expert Witness Testimony (ECF No. 74) is DENIED; and

4. The Clerk of the Court is directed to enter Judgment for Defendant and close this case.

IT IS SO ORDERED.

DATED: October 21, 2020

Troy L. Nunley
United States District Judge