UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

EZEKIEL DAVIS,

Plaintiff - Appellant,

v.

SHADID ANSARI, GEO/LCF Medical Director, individually and in his official capacity; GEO GROUP CORRECTIONS, INC.; AMBER MARTIN, Vice President of GEO Group, Inc., individually and in her official capacity; HECTOR RIOS, JR., Warden, individually and in his official capacity; CHRISTINA THOMAS, Medical Supervisor, individually and in her official capacity; LT. FNU DURANT, Grievance Coordinator, individually and in his/her official capacity; DAN RONAY, Supervisor-Correct Care Solutions, individually and in his official capacity; SHERYL DENTON, Nurse Practitioner, individually and in her official capacity; LT. FNU DAWSON, Grievance Coordinator; MARGO SALDANA, Law Library C.O.; FNU CLARK, C.O. assigned to Law Library; SGT. FNU ADAMS, Correctional Officer; FNU CARLISLIE, Chaplin; MARK KNUTSON, Director Designee; FNU COLLINS, Warden, Law Library Supervisor; JOHN DOE, Podiatrist, Lawton Foot Clinic, in his individual and official capacity,

Defendants - Appellees.

No. 23-6040
(D.C. No. 5:16-CV-00462-PRW)
(W.D. Okla.)

ORDER

Appendix - H

On October 27, 2023, this court entered an order denying Mr. Davis's motion to proceed without prepayment of costs or fees. The court gave Mr. Davis until November 27 to pay the full filing fee, and the court later extended that deadline to December 18. Mr. Davis has not paid the full filing fee. This case is therefore dismissed pursuant to the court's October 27 order and 10th Cir. R. 42.1. A copy of this order shall stand as and for the mandate of this court.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix-K

2 of 2 Dist. Jud.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EZEKIEL DAVIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-16-462-PRW**
	)	
GEO GROUP CORRECTIONS, INC. (AMBER MARTIN, V.P.), et al.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Plaintiff Ezekiel Davis ("Plaintiff"), a state prisoner appearing *pro se*,[1] filed this action under 42 U.S.C. § 1983, alleging civil rights violations. (Doc. 20).[2] It has been referred to the undersigned Magistrate Judge. (Doc. 242).

Before the court are the Motions for Summary Judgment of Defendants Lawton Correctional Facility ("LCF") Medical Supervisor Christina Thomas (Doc. 237); LCF Nurse Practitioner Sheryl Denton (Doc. 238); Correct Care Solutions ("CCS") Supervisor Dan Ronay (Doc. 239); and GEO Group Corrections, Inc. (Amber Martin, V.P.) (hereinafter "GEO/Martin"), LCF Warden Hector A. Rios, LCF Grievance Coordinator Lt.

[1] The court construes Plaintiff's *pro se* filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

[2] Citations to the parties' pleadings and attached exhibits will refer to this court's CM/ECF pagination.

Durant, LCF Correctional Officer Lt. Dawson, and LCF Correctional Officer Sgt. Adams (Doc. 235).

Plaintiff has responded to each Motion (Docs. 246, 247, 248, 249, 250, 251, 265), and the Defendants have replied (Docs. 254, 255, 256, 257). For the reasons discussed below, the undersigned recommends that Defendants' Motions For Summary Judgment be **GRANTED**. As a result, the undersigned recommends that the remaining motions pending in this case (Docs. 317, 320, 321, 322, 324) be **DENIED AS MOOT.**

I. Procedural History and the Instant Motions

Plaintiff filed a Complaint asserting four claims against 16 defendants related to conduct at the Lawton Correctional Facility ("LCF"), a private prison owned and operated by GEO Group, Inc., under contract with the Oklahoma Department of Corrections ("ODOC"). (Doc. 20; *see also* Doc. 101, at 4). Following a series of rulings by this Court, (*see* Docs. 60, 64, 153, 186, 271), two claims[3] seeking monetary relief[4] from seven defendants[5] remain. They can be summarized as follows:

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[3] The Court dismissed Plaintiff's Claim Two, a First Amendment claim, for failure to state a claim. (Doc. 60, at 6). The Court likewise dismissed Plaintiff's Claim Three, a conspiracy claim, for failure to state a claim. (Doc. 163, at 21-23, *adopted*, Doc. 186, at 5).

[4] Plaintiff is no longer incarcerated at LCF, and his requests for injunctive relief are therefore moot. (Doc. 64, at 2-3).

[5] The Court dismissed all claims against the other nine Defendants: Dr. Gonzaga (Doc. 271, at 6); Dr. Musallam (*id.*); LCF Grievance Coordinator Lt. Durant (Doc. 163, at 17, 26, *adopted*, Doc. 186, at 5); LCF Chief Medical Officer Ansari (*id.*); ODOC Medical Services Administrator Honaker (Doc. 55, at 18, *adopted*, Doc. 60, at 7); ODOC Director Allbaugh (*id.*); ODOC Contract Monitor Minyard (*id.*); ODOC Medical Services Administrator McGee (*id.*); and Podiatrist and Director of the Lawton Foot Clinic Cain (Doc. 153, at 1).

- **Claim One:** A "violation of [Plaintiff's] Eighth Amendment right to adequate medical services" while housed at LCF. (Doc. 20, at 10-12). Proceeding chronologically through his requests for health services and related grievance filings, Plaintiff recounts instances of alleged knowing and deliberate failures by prison medical staff and officials to adequately respond to and treat his medical conditions, which include a plantar wart on his right foot, high arches, and his pre-existing, chronic back and neck pain. (*Id.* at 12-18). Plaintiff brings Claim One against Defendants Rios, Thomas, Denton, Ronay, and GEO/Martin. (*Id.* at 10).

- **Claim Four:** Defendants Adams, Dawson, and Rios "used excessive force against [Plaintiff] in retaliation for exercising [his] constitutional rights" on two occasions in June or July of 2016. (*Id.* at 41, 44).

II. Standard for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is proper "if the movant 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Universal Underwriters Ins. Co. v. Winton*, 818 F. 3d 1103, 1105 (10th Cir. 2016). "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way" and "[a]n issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986)). If the movant carries the burden of demonstrating an absence of a dispute as to material fact, "the nonmovant must then go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence and that show a genuine issue for trial." *Martin v. City of Oklahoma City*, 180 F. Supp. 3d 978, 983 (W.D. Okla. 2016) (citing *Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324; *Adler*, 144 F.3d at 671).

The Court's inquiry must be whether the evidence, when viewed "through the prism of the substantive evidentiary burden," *Anderson*, 477 U.S. at 254, "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. Although the Court views all facts in the light most favorable to the non-moving party at the summary judgment stage, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249 (citations omitted).

"[I]n opposing a motion for summary judgment, the non-moving party 'cannot rest on ignorance of facts, on speculation, or on suspicion.'" *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) (quoting *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988)). The non-moving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257.

III. The Court Should Grant Summary Judgment For Defendants On Claim One, Alleging Deliberate Indifference To Plaintiff's Serious Medical Needs.

In his Amended Complaint, Plaintiff alleges knowing and deliberate failures by Defendants Rios, Thomas, Denton, Ronay, and GEO/Martin to adequately respond to and treat his medical conditions, which include a plantar wart on his right foot, high arches, and his pre-existing, chronic back pain. (Doc. 20 at 12-18). Defendants have countered, arguing a lack of evidence in support of this claim and presenting, by contrast, evidence which reflects Defendants' *lack* of deliberate indifference to Plaintiff's medical needs.

(Doc. 101, at Ex. 1, at 1-45). Once Defendants did so, Plaintiff could avoid summary judgment only by submission of admissible evidence that would create an inference of deliberate indifference. The Plaintiff did not provide any such evidence, and thus Defendants are entitled to summary judgment on Claim One.

A. Legal Standard

"A prison official's deliberate indifference to an inmate's serious medical needs is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment." *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

> The test for constitutional liability of prison officials involves both an objective and a subjective component.
>
> The prisoner must first produce objective evidence that the deprivation at issue was in fact sufficiently serious. . . . [A] medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. . . .
>
> The subjective prong of the deliberate indifference test requires the plaintiff to present evidence of the prison official's culpable state of mind. The subjective component is satisfied if the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [s]he must also draw the inference.

Mata, 427 F.3d at 751 (internal citations and quotation marks omitted).

B. Factual Background

Plaintiff was incarcerated at LCF during the events at issue, until he was transferred to the Davis Correctional Facility on May 30, 2017. (Doc. 101, at 1-2). The undisputed

evidence regarding Plaintiff's medical care and requests for medical care during his time at LCF have been summarized below:[6]

- **October 22, 2015**: Plaintiff submitted a Request for Health Services, noting "pain in [his] feet due to high arches" and "a corn under the bottom of [his] right foot which cause[d] [him] pain." (Doc. 21, at Ex. 3, at 1). Plaintiff noted that he is "indigent and cannot afford to purchase shoes off the canteen." (*Id.*) In response, Plaintiff was directed to discuss his concern at his next scheduled chronic clinic visit. (*Id.*) On this same day, Plaintiff submitted a Request to Staff to Defendant Rios noting his high arches and indigency and asking for medical boots. (Doc. 21, at Ex. 5, at 1). Defendant Rios denied his request. (*Id.*)

- **November 10, 2015**: Defendant Denton saw Plaintiff for a routine chronic clinic examination during which Plaintiff complained of low back pain, high arches, and a plantar wart. (Doc. 101, at Ex. 1, at 42-45). Defendant Denton increased Plaintiff's Neurontin dose "for better pain control." (*Id.* at 44). Defendant Denton informed Plaintiff that LCF did not have cryotherapy necessary to remove Plaintiff's plantar wart and sent a "[t]ext order . . . to [Defendant] Thomas to request insoles for [Plaintiff's] shoes" to address his high arches and resulting foot pain. (*Id.*) Although Plaintiff claims the insoles were too small and therefore ineffective in treating his pain (Doc. 20, at 16), Defendant Denton attests that she did not deliberately order the wrong size insoles for Plaintiff. (Doc. 238, at Ex. 1, at 1).

- **November 11, 2015**: Plaintiff submitted a Request for Health Services asking to see a doctor due to his high arches, foot pain, and plantar wart. (Doc. 21, at Ex. 6, at 1). He also requested orthopedic shoes. (*Id.*) Defendant Thomas responded, noting that he was seen by a provider the day before. (*Id.*)

- **November 14, 2015**: Plaintiff submitted a Request to Staff to Defendant Rios again asking for medical boots due to his medical condition of having high arches. (Doc. 21, at Ex. 7, at 1). Defendant Rios directed Plaintiff to "go through medical." (*Id.*)

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[6] The relevant facts are derived from the summary judgment evidence submitted by the parties. The Special Report (Doc. 101) has been treated as an affidavit. *See Hall*, 935 F.2d at 1111 (explaining the role of a Special Report in summary judgment proceedings). Finding the Special Report incomplete, *see footnote* 7, the undersigned has considered the evidence submitted by Plaintiff in his Objection to the Special Report (Doc. 114). The sworn declarations Plaintiff attached to his Responses (Docs. 250, 251) have also been considered. Additionally, the Amended Complaint has been treated as an affidavit, to the extent the allegations within it are based upon facts within Plaintiff's personal knowledge, because they are accompanied by a sworn statement made under penalty of perjury. *See Hall*, 935 F.2d at 1111.

- **December 8, 2015**: Plaintiff saw Dr. Gonzaga regarding his "painful plantar wart of 2 years duration." (Doc. 101, at Ex. 1, at 41). Dr. Gonzaga charted a referral for orthopedic shoes with cushion. (*Id.*)

- **December 17, 2015**: Plaintiff submitted a Request for Health Services asking to see the doctor concerning a knot on his back and requesting a MRI. (Doc. 21, at Ex. 8, at 1). The comment in response notes that Plaintiff was "seen on medical and referred to provider." (*Id.*)

- **December 28, 2015**: Plaintiff submitted a Request to Staff stating that he is indigent and asking for the orthopedic shoes requested by Dr. Gonzaga or transfer to a DOC facility where his medical needs will be provided. (Doc. 21, at Ex. 3, at 6). In response, Defendant Thomas stated that his "order for orthopedic shoes was cancelled as a plantar's wart is not a condition requiring this." (*Id.*) Plaintiff submitted Grievance 16-026 requesting to be seen by an outside specialist to have his plantar's wart removed, and his request was denied by Defendant Thomas because "[n]o orders or referrals for outside provider evaluation have been entered by the medical provider." (*Id.* at 5). His appeal of this grievance was returned unanswered as improperly submitted. (*Id.* at 2-4).

- **January 4, 2016**: Dr. Gonzaga treated Plaintiff for his "[c]hronic back pain." (Doc. 101, at Ex. 1, at 40). Dr. Gonzaga submitted a referral for orthopedic shoes for Plaintiff which was denied by Michael Sands, MD, Medical Director, in favor of treating Plaintiff's plantar wart. (Doc. 237, at Ex. 2, at 40).

- **January 11, 2016**: Plaintiff submitted a Request to Staff to Defendant Thomas requesting an explanation for why she cancelled his order for orthopedic shoes. (Doc. 21, at Ex. 17, at 5). In response, Defendant Thomas stated that "[o]rthopedic shoes must be approved by the chief medical officer." (*Id.*) Plaintiff submitted Grievance 16-055 requesting to see an orthopedic/foot specialist. (*Id.* at 4). His grievance was denied, noting that "medical referral requests must be initiated by the facility medical provider" and "submitted to the chief medical officer for review and approval." (*Id.*) The denial also noted that "[t]he request for orthopedic shoes in [his] case, was deferred by the chief medical officer." (*Id.*) His appeal of this grievance was returned unanswered as improperly submitted. (*Id.* at 1-3).

- **February 2, 2016**: Plaintiff submitted a Request for Health Services asking for removal of his plantar wart and provision of shoes with arch support. (Doc. 21, at Ex. 9, at 1). In response, Defendant Thomas told Plaintiff that "there is no order for removal" and that "[a]rch supports can be purchased on canteen." (*Id.*)

- **February 8, 2016**: Plaintiff submitted a Request for Health Services asking for "adequate medical treatment and a solution to his medical needs" regarding his high arches and plantar wart. (Doc. 21, at Ex. 10, at 1). In response, Defendant Thomas told Plaintiff he "will be scheduled to be seen." (*Id.*)

- **February 26, 2016**: Dr. Gonzaga treated Plaintiff for various foot complaints and charted a referral for Plaintiff to see a podiatrist. (Doc. 101, at Ex. 1, at 39). The referral was "denied by corporate." (*Id.* at 38).

- **February 29, 2016**: Plaintiff submitted a Request to Staff to Defendant Thomas requesting, in part, an explanation for why the referral to an outside specialist had been denied. (Doc. 21, at Ex. 20, at 6-7). In response, Defendant Thomas told Plaintiff that the "referral was deferred by the corporate CMO." (*Id.* at 6). Plaintiff submitted Grievance 16-145 requesting "transfer[] to a ODOC facility where [he] can get medical treatment." (*Id.* at 4-5). His grievance was returned unanswered as improperly submitted, he appealed, and his appeal was returned unanswered as improperly submitted. (*Id.* at 1-3).

- **March 3, 2016**: Defendant Denton treated Plaintiff for "ongoing [care of] plantar wart pain" and a fecal occult blood test. (Doc. 101, at Ex. 1, at 38).

- **March 17, 2016**: Plaintiff submitted a Request for Health Services asking to see an outside specialist regarding his high arches, need for medical boots, and plantar wart removal. (Doc. 21, at Ex. 11, at 1). In response, Defendant Thomas told Plaintiff that the referral was being resubmitted and, if approved, he would be scheduled to be seen by the podiatrist. (*Id.*)

- **March 24, 2016**: Plaintiff submitted a Request for Health Services asking to see a doctor about obtaining medical boots. (Doc. 21, at Ex. 12, at 1). In response, Defendant Thomas told Plaintiff that his "request has been denied multiple times." (*Id.*)

- **April 1, 2016**: Dr. Gonzaga gave Plaintiff silver nitrate sticks to treat his plantar wart and submitted a request for medical boots. (Doc. 101, at Ex. 1, at 32).

- **April 7, 2016**: Plaintiff was scheduled for an outside referral to see a podiatrist. (Doc. 101, at Ex. 1, at 31).

- **April 10, 2016**: Plaintiff submitted a Request for Health Services asking to see an outside specialist regarding his lower back pain. (Doc. 21, at Ex. 13, at 1). In response, Plaintiff was told that he had a podiatry appointment scheduled. (*Id.*)

- **April 12, 2016**: Plaintiff refused treatment of silver nitrate for his plantar wart. (Doc. 101, at Ex. 1, at 30). That same day, Plaintiff was examined by Dr. Cain, a podiatrist, at Southwest Foot and Ankle Clinic. (*Id.* at 34-36). In the treatment notes, Dr. Cain records "lesion debrided," that Plaintiff "was advised on shoe gear in detail," and was "given written order for new shoes." (*Id.* at 36).

- **April 13, 2016**: Plaintiff again refused treatment of silver nitrate for his plantar wart. (Doc. 101, at Ex. 1, at 29).

- **May 4, 2016**: Defendant Denton saw Plaintiff for a routine chronic clinic examination, and he was noted to be in "no acute distress," walking with a "slow & steady" gait, and not limping. (Doc. 101, at Ex. 1, at 28).

- **May 10, 2016**: Dr. Gonzaga saw Plaintiff for "chronic back pain since 2012" and charted a referral for a neurologist. (Doc. 101, at Ex. 1, at 27).

- **May 16, 2016**: Plaintiff submitted a Request to Staff to Defendant Rios requesting purchase of athletic shoes. (Doc. 114, at Ex. 9, at 1-2). Defendant Rios responded that "medical must document your need medically." (*Id.*)

- **June 1, 2016**: Defendant Denton saw Plaintiff for his "ongoing chronic back pain." (Doc. 101, at Ex. 1, at 26). Plaintiff asked to see a back specialist. (*Id.*) Defendant Denton noted that Plaintiff was in no acute distress, able to mount and dismount the exam room table without difficulty or distress, and he walked without a limp. (*Id.*) Defendant Denton increased Plaintiff's Neurontin dose. (*Id.*)

- **June 2, 2016**: Noting that Plaintiff had "chronic back pain since 2012" and was "[not] responding to Neurontin and Indocin," Dr. Gonzaga submitted a referral for Plaintiff to see a neurologist. (Doc. 101, at Ex. 1, at 25). Defendant Denton submitted a similar referral, also requesting a MRI. (*Id.* at 24). The referrals were deferred by Dr. Ansari in favor of trying muscle relaxants and physical therapy. (*Id.* at 24-25).

- **June 3, 2016**: Plaintiff submitted a Request for Health Services asking to see either Dr. Gonzaga or an outside specialist regarding his back issue. (Doc. 250, at Ex. 11, at 1). He was informed that "[t]he referral for an outside provider was deferred." (*Id.*)

- **June 13, 2016**: Plaintiff submitted a Request to Staff to Defendant Rios requesting that his family be allowed to send him athletic shoes. (Doc. 114, at Ex. 13, at 1-2). On July 11, 2016, Plaintiff submitted Grievance 16-496, requesting a response to

this Request to Staff. (*Id.*, at Ex. 12, at 1-2). Plaintiff was granted partial relief, noting that he received medical boots on July 13, 2016. (*Id.* at 1).

- **June 23, 2016**: Plaintiff submitted a Request for Health Services, asking "to see the Doctor concerning the plantar wart was never removed from the bottom of [his] right foot" and asking medical to pay for his athletic shoes. (Doc. 101, at Ex. 1, at 23). Plaintiff was advised that he would be scheduled to be seen but that medical would not purchase his shoes because "[t]he facility advised medical that [he is] not indigent." (*Id.*)

- **July 7, 2016**: Dr. Gonzaga saw Plaintiff and recommended electrocautery to remove his plantar wart, but Plaintiff refused treatment and requested referral to a podiatrist. (Doc. 101, at Ex. 1, at 20). Dr. Gonzaga submitted a referral for Plaintiff to see a podiatrist which was denied by Dr. Ansari, noting that Dr. Gonzaga could provide treatment and had offered the "perfect Rx." (*Id.* at 22).

- **July 11, 2016**: Plaintiff submitted Grievance 16-496 regarding his earlier request to allow his family "to send in athletic shoes for medical reasons." (Doc. 114, at Ex. 12, at 1-2). Plaintiff was granted partial relief, noting that he received medical boots on July 13, 2016. (*Id.* at 1).

- **July 12, 2016**: Defendant Denton, "per [Defendant] Thomas," submitted a referral for Plaintiff for the purchase of athletic shoes. (Doc. 101, at Ex. 1, at 21). The request was deferred by Kristina Lindenmeier, RN, UM Nurse, noting "[w]e do not pay for athletic shoes" and asking that "[i]f medical shoes are required, please provide a medical reason." (*Id.*)

- **July 13, 2016**: LCF provided Plaintiff medical boots. (Doc. 114, at Ex. 12, at 1).

- **September 6, 2016**: Plaintiff submitted Grievance 16-642, requesting "to be seen by an outside back specialist" or "transferred to another ODOC facility where [he] can receive adequate medical treatment by someone qualified to assess [his] medical need." (Doc. 114, at Ex. 5, at 1-2). His grievance was denied, appealed, and denied by the Medical AMA. (*Id.* at 3-6; Doc. 21, at Ex. 26, at 1-4).[7]

[7] The undersigned finds the Special Report to be alarmingly incomplete with regard to Plaintiff's grievances related to Claim One, including but not limited to those listed here, and including at least one exhausted grievance. In their Motions for Summary Judgment, Defendants have failed to address these obvious omissions. The undersigned therefore declines to consider Defendants' affirmative defenses regarding exhaustion of administrative remedies on Claim One.

- **September 13, 2016**: Dr. Gonzaga saw Plaintiff for his "chronic low back pai[n] with numbness at both legs for 2 years." (Doc. 101, at Ex. 1, at 19). Dr. Gonzaga charted that Plaintiff had no crepitation or limitation in his range of movement, diagnosed Plaintiff with "lumbar disc disease with radiculopathy," and prescribed an elastic back brace for Plaintiff. (*Id.*)

- **September 26, 2016**: Plaintiff submitted a Request to Staff requesting "a back brace with lumbar support and a therapy pack that [he] could heat up." (Doc. 114, at Ex. 15, at 1-2). Defendant Thomas responded that he was ordered a back brace with lumbar support and it will be provided to him, but a therapy pack was neither ordered nor available. (*Id.* at 1).

- **October 5, 2016**: Defendant Rios approved Plaintiff's request for athletic shoes and "[s]hoes will be ordered from a vendor." (Doc. 114, at Ex. 14, at 1).

- **October 12, 2016**: Plaintiff submitted a Request for Health Services requesting his "back brace with lumbar support and a hot/cold therapy pack." (Doc. 114, at Ex. 16, at 1-2). Defendant Thomas responded that he was "issued an elastic brace w/lumbar support per order." (*Id.* at 1).

- **October 24, 2016**: Plaintiff was seen for a routine chronic clinic examination where he reported "chronic back pain for years." (Doc. 101, at Ex. 1, at 17). His chronic pain medications were renewed. (*Id.* at 18).

- **November 29, 2016**: Dr. Musallam saw Plaintiff for his "back pain/neck pain" and diagnosed Plaintiff with "[l]umbar and [c]ervical degenerative disk disease with probable spinal stenosis, and radiculopathy." (Doc. 101, at Ex. 1, at 15). He ordered X-rays and prescribed Topamax, Trazadone, Motrin, and Prilosec because Plaintiff stated that the Motrin burns his stomach. (*Id.*)

- **November 30, 2016**: Plaintiff submitted a Request to Staff to Dr. Musallam asking for the name of his spinal condition and "why you refused to put in a referral for me to see a neurologist." (Doc. 21, at Ex. 27, at 1-2). In response, Defendant Thomas informed Plaintiff of his diagnosis and told him that "[o]utside referrals are initatied by the facility health care provider based on their professional, clinical judgment." (*Id.* at 1). Plaintiff submitted Grievance 16-898 requesting to see a neurologist. (Doc. 114, at Ex. 6, at 2-3). His grievance was returned unanswered, he appealed, and his appeal was returned unanswered as improperly submitted. (*Id.* at 1, 8-10).

- **December 27, 2016**: Plaintiff submitted a Request to Staff to Defendant Thomas accusing her of "interfere[ing] with [his] medical treatment" "by tell[ing] Dr. Musallam not to make referrals for [him] to see a neurologist" and threatening,

among other things, legal action. (Doc. 21, at Ex. 28, at 1-2). In response, Defendant Thomas stated that "[t]hreats to staff will not be entertained or addressed." (*Id.* at 1).

- **January 10, 2017**: Plaintiff received an X-Ray on his back showing "[m]ild osteoarthritis of the lumbar spine" and "[m]odest degenerative changes of the cervical spine." (Doc. 101, at Ex. 1, at 14).

- **January 30, 2017**: Dr. Musallam saw Plaintiff for "[b]ack pain and numbness and tingling of his right leg." (Doc. 101, at Ex. 1, at 12). Dr. Musallam noted that Plaintiff "does not walk with a limp" and "has good flexion from his waist." (*Id.*) He further noted that Plaintiff was "demanding a neurology consult to better diagnosis his disease" and "wants an MRI so that his diagnosis can be better diagnosed." (*Id.*) Dr. Musallam increased Plaintiff's Topamax and ordered an MRI. (*Id.*) Dr. Ansari deferred an outside referral. (*Id.* at 13).

- **March 3, 2017**: Plaintiff was seen for chronic pain management. (Doc. 101, at Ex. 1, at 11).

- **March 20, 2017**: Plaintiff submitted a Request to Staff to Defendant Thomas asking for "the name and position of the person that denied MRI referral, and their reason(s) for doing so." (Doc. 101, at Ex. 6, at 11). Defendant Thomas responded that "[o]utside referrals must be approved by the corporate chief medical officer" and "[y]our referral was deferred." (*Id.*) Plaintiff submitted Grievance 17-243 asking for "the name of the Chief Medical Officer that denied the referral for [a] MRI" and the "reason(s) for denying [him] to be seen by an outside specialist." (*Id.* at 9). The Reviewing Authority granted this grievance by providing Plaintiff with the name of Dr. Ansari. (*Id.* at 8).

- **April 12, 2017**: Plaintiff was seen and provided treatment for athlete's foot. (Doc. 101, at Ex. 1, at 10).

- **April 28, 2017**: Plaintiff was seen for a routine chronic clinic examination regarding his back pain. (Doc. 101, at Ex. 1, at 9).

C. Analysis

1. The Undisputed Facts Show That Defendant Denton Was Not Deliberately Indifferent To Plaintiff's Serious Medical Needs.

Plaintiff claims that his treating healthcare providers, including Defendant Denton, the only remaining defendant healthcare provider (*see* footnote 5), were deliberately indifferent to his serious medical needs. Plaintiff arrived at LCF with pre-existing conditions of chronic back pain, a plantar wart, and foot pain, which Plaintiff attributed in part to having high arches. (*See* Doc. 237, at Ex. 2, at 47; *id.* at Ex. 3, at 1-4). The uncontroverted evidence shows that, throughout his incarceration at LCF, Plaintiff requested and received frequent, regular visits with licensed and qualified medical professionals, including Defendant Denton, who physically examined and X-rayed him, and that he also received care from an outside podiatrist. (*See* Doc. 101, at Ex. 1; Doc. 237, at Ex. 5, at 1-3). The uncontroverted evidence shows that Plaintiff received a consistent course of pain medications and anti-inflammatory medications for his various complaints of pain, as well as medical boots, a back brace, and offers of treatment for the plantar wart (silver nitrate sticks and electrocautery). (*Id.*)

This uncontroverted evidence satisfies the objective component of Plaintiff's Eighth Amendment claim. *Mata*, 427 F.3d at 751 ("[A] medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.") (internal citation and quotation marks omitted). However, with regard to the subjective component of the analysis, the fact that Plaintiff disagrees with his medical

providers' course of treatment is not evidence of deliberate indifference. "[A] mere difference of opinion between the prison's medical staff and the inmate . . . does not support a claim of cruel and unusual punishment." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980). "[T]he subjective component is not satisfied, absent an extraordinary degree of neglect, where a doctor merely exercises his considered medical judgment. Matters that traditionally fall within the scope of medical judgment are such decisions as whether to consult a specialist or undertake additional medical testing." *Self v. Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006). "So long as a medical professional provides a level of care consistent with the symptoms presented by the inmate, absent evidence of actual knowledge or recklessness, the requisite state of mind cannot be met." *Id.* at 1233. Indeed, even "[a] prison doctor's negligent diagnosis or treatment of a medical condition does not constitute a medical wrong under the Eighth Amendment, as medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008) (citation and quotation omitted).

The evidence shows that Defendant Denton increased Plaintiff's Neurontin dose for pain control (Doc. 101, at Ex. 1, at 26, 42-45); requested insoles to treat his foot pain (*id.*); treated Plaintiff's plantar wart pain (*id.* at 38); examined him for issues with his gait (*id.* at 26, 28); made a referral for Plaintiff to see a neurologist and for a MRI (*id.* at 24); and referred Plaintiff for the purchase of athletic shoes (*id.* at 21). These actions are a level of care consistent with the symptoms presented by Plaintiff and, even if negligent, do not evidence deliberate indifference.

Plaintiff's chief complaint, upon review of the evidence, appears to be the denial of his repeated requests to see outside medical specialists, including a back specialist and neurologist. It is uncontroverted that on June 2, 2016, Defendant Denton made a referral for Plaintiff to see a neurologist, which was deferred by the Medical Director. (Doc. 101, at Ex. 1, at 24). As discussed above, this fact alone cuts against the argument as to Denton's deliberate indifference. Even if Plaintiff contends that Defendant Denton somehow remained responsible for making more or other referrals to outside specialists,

> the contention that [a prisoner] was denied treatment by a specialist is . . . insufficient to establish a constitutional violation. The decision that a patient's condition requires a specialist is a decision about the patient's course of treatment, and negligent diagnosis or treatment of a medical condition do[es] not constitute a medical wrong under the Eighth Amendment.

Duffield, 545 F.3d at 1239 (plaintiff-inmate with lower back pain alleged that prison officials had exhibited deliberate indifference through the failure to send him to an outside specialist; affirming district court's grant of summary judgment for the defendants based on the absence of deliberate indifference). *See also Duncan v. Cody*, No. CIV-07-1250-HE, 2009 WL 762393, at *3-4 (W.D. Okla. Mar. 23, 2009) (granting summary judgment to defendant when "Plaintiff's insistence on the need for a specialist reflects only a difference of opinion. Even if prison officials should have pursued this course of treatment, the failure to do so would not have violated the Eighth Amendment.").

Plaintiff has also alleged that his treating healthcare providers, including Defendant Denton, were deliberately indifferent because they did not physically examine him during his medical visits. (Doc. 20, at 12-13). However, the treatment notes in Plaintiff's medical

records reflect that his treating healthcare providers, including Defendant Denton, routinely assessed his physical condition, adjusted his medications, ordered specialty medical equipment to lessen his pain, and sought referrals for Plaintiff to see outside specialists. (*See generally* Doc. 101, at Ex. 1).

Moreover, "his allegation that [an] examination was cursory does not sufficiently allege deliberate indifference rather than mere medical malpractice." *Duffield*, 545 F.3d at 1239. Plaintiff specifically claims that Defendant Denton's "cursory" exam on November 10, 2015, led her to order arch supports too small for his feet, and upon being informed of her error, she declined to order new inserts. (Doc. 20, at 12; Doc. 250, at Ex. 18, at 1). However, Defendant Denton has attested that she did not intentionally order the wrong size inserts (Doc. 238, at 2); the undisputed evidence shows that she increased Plaintiff's pain medication at this same visit (Doc. 101, at Ex. 1, at 44); and she provided Plaintiff additional care on subsequent visits, including a referral for athletic shoes (*id.* at 21, 24, 26, 28, and 38). Plaintiff has not "present[ed] evidence of [Defendant Denton's] culpable state of mind," *Farmer v. Brennan,* 511 U.S. 825, 834 (1994), and her failure to order the correct size insoles for Plaintiff's shoes therefore does not rise to the level of a constitutional violation.[8]

Finally, Plaintiff has alleged that the five-month delay in receiving medical boots and the delay in treatment of his plantar wart with silver nitrate constitute deliberate

[8] During his deposition, upon review of his medical records, Plaintiff concedes that Defendants Denton and Thomas "wouldn't have been named as defendants" had Plaintiff known they were "putting in these referrals." (Doc. 283, at Ex. 3, at 5-7).

indifference. (Doc. 21, at Ex. 2, at 4). However, a delay in medical care violates the Eighth Amendment only if the passage of time has resulted in "substantial harm." *Oxendine v. Kaplan,* 241 F.3d 1272, 1276 (10th Cir. 2001). "[T]he substantial harm requirement may be satisfied by lifelong handicap, permanent loss, or considerable pain." *Garrett v. Stratman,* 254 F.3d 946, 950 (10th Cir. 2001) (citations omitted); *see also Martin v. Tulsa County Board of Commissioners*, 99 F.3d 1150, 1996 WL 603270, at *1 (10th Cir. Oct. 22, 1996) (unpublished op.) ("Postponing surgery for an extended period, even until the prisoner's release from prison, does not provide a cause of action for deliberate indifference to serious medical needs if the delay would not cause further damage.") (citation omitted). Plaintiff has presented no evidence that the delay in treatment of these pre-existing, chronic issues caused substantial harm.

The undisputed facts show that Defendant Denton's actions or omissions do not meet the standard for deliberate indifference to Plaintiff's serious medical needs. Accordingly, summary judgment in Defendant Denton's favor is appropriate on Claim One.

2. Plaintiff Has Failed To Establish Deliberate Indifference By Defendant Thomas.

Plaintiff claims Defendant Thomas was deliberately indifferent to his serious medical needs by delaying and/or preventing him from seeing outside specialists and obtaining athletic shoes. (Doc. 20, at 17, 22-23, 26). Defendant Thomas served as LCF Health Services Administrator during the relevant timeframe. (Doc. 101, at Ex. 2, at 1; Doc. 237, at Ex. 4, at 1). In that role, her "duties included reviewing, investigating, and

responding to Requests to Staff and Grievances submitted by LCF inmates related to medical care and treatment." (*Id.*)

It is undisputed that Defendant Thomas was not one of Plaintiff's medical providers. (Doc. 101, at Ex. 2, at 3; Doc. 237, at Ex. 4, at 3). Plaintiff's Eighth Amendment claim against Defendant Thomas thus rests on the theory that she was a "gatekeeper" that prevented him from receiving necessary medical treatment. "A prison medical professional who serves solely as a gatekeeper for other medical personnel capable of treating the condition may be held liable under the deliberate indifference standard if she delays or refuses to fulfill that gatekeeper role." *Mata*, 427 F.3d at 751 (quotation marks omitted).

Defendant Thomas has provided a sworn affidavit to the following facts:

> Pursuant to Oklahoma Department of Corrections Policy (DOC OP) 140121, absent a life-threatening emergency, only medical providers are authorized to refer an inmate for care outside of LCF. If an inmate requests such care, whether verbally or through Requests for Health Services, he must address the matter to a medical provider during an appointment.
>
> When, in his or her professional clinical judgment, a medical provider determines that an inmate requires care which is outside the scope of the care available at LCF, such as a podiatrist or neurologist, the medical provider submits a referral to the Chief Medical Officer or the Medical Director for approval. Should the outside provider then suggest a course of treatment, this suggested course of treatment is reviewed for approval by the CMO or Medical Director. This process is followed for all inmates where consultation with an outside provider is deemed medically necessary by an LCF provider.
>
> . . .
>
> I never circumvented, interfered with, manipulated, or cancelled referrals and/or orders made by anyone . . . nor did I conspire to do so.

> Providers at LCF . . . did not need my permission to submit referrals for inmate[s] to receive care from an outside provider or specialty medical equipment.
>
> I never directed any LCF provider . . . not to submit referrals for an inmate to receive care from an outside provider or specialty medical equipment.

(Doc. 101, at Ex. 2, at 2-3; Doc. 237, at Ex. 4, at 2-3). Defendant Thomas was neither the Chief Medical Officer nor the Medical Director for LCF. (*Id.*) Moreover, Plaintiff conceded in his deposition that the evidence shows that his many referrals were each deferred by someone other than Defendant Thomas. (Doc. 237, at Ex. 3, at 9). Although Plaintiff has speculated that Defendant Thomas interceded in the referral process, he has presented no admissible evidence of his claim. *See Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016). Plaintiff's allegation that Dr. Musallam told Plaintiff that he could not submit referrals without approval from Defendant Thomas is inadmissible hearsay. Fed. R. Civ. P. 56 (c)(2); Fed. R. Evid. 802. Thus, the undisputed evidence shows that Defendant Thomas was not, in fact, a "gatekeeper" preventing or delaying Plaintiff from receiving medical care, and therefore Plaintiff cannot establish her deliberate indifference to his medical needs under that theory.

Although the evidence shows that Defendant Thomas responded to and denied some of Plaintiff's grievances pursuant to her role as Health Services Administrator, "denial of the grievances alone is insufficient to establish personal participation in the alleged constitutional violations." *Larson v. Meek*, 240 F. App'x 777, 780 (10th Cir. 2007); *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) ("Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.").

Plaintiff specifically claims that Defendant Thomas was deliberately indifferent to his serious medical needs by directing him to use his trust fund savings to purchase athletic shoes, despite his indigency. (Doc. 20, at 38). Although Defendant Thomas did deny this request, the undisputed evidence shows that Defendant Thomas was informed by LCF that Plaintiff was not indigent, that she believed that athletic shoes were available for purchase, and that she also scheduled Plaintiff to be seen by a medical provider regarding this issue. (Doc. 101, at Ex. 1, at 23; *id.* at Ex. 2, at 2). Again, Plaintiff has not established deliberate indifference by Defendant Thomas. Accordingly, Defendant Thomas is entitled to summary judgment on Claim One.

3. Plaintiff Has Presented No Evidence of an Affirmative Link Between Defendants Rios, GEO/Martin, or Ronay and the Alleged Constitutional Violation.

Likewise, Plaintiff has failed to present any evidence of deliberate indifference to his serious medical needs by Defendants Rios, GEO/Martin, or Ronay. For Plaintiff's § 1983 claim to succeed against any defendant, he "must show personal involvement or participation in the incident." *Grimsley v. MacKay,* 93 F.3d 676, 679 (10th Cir. 1996); *Gallagher*, 587 F.3d at 1069; *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976) ("Personal participation is an essential allegation in a [§] 1983 claim."). Defendant Rios' role in the grievance process, outlined above, does not establish his personal participation. *Larson*, 240 F. App'x at 780. And although Plaintiff claims he sent a letter notifying Defendant Ronay of the alleged constitutional violations, (Doc. 20, at 18), he has been unable to produce a copy of this letter, Defendant Ronay attested that he did not receive a

letter from Plaintiff, and Plaintiff ultimately testified that he did not send a letter to Defendant Ronay. (Doc. 239, at Ex. 1, at 1; *id.* at Ex. 2, at 1-2).

Plaintiff appears to argue that these parties, by virtue of their roles, are liable for the constitutional violations of those they hire or supervise. (Doc. 249, at 4-5; Doc. 248, at 4). However, "supervisor status is not sufficient to create § 1983 liability." *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10th Cir. 2008) (citing *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997). Plaintiff has not alleged, much less proven, the standard for supervisor liability articulated by the Tenth Circuit. *See Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) ("A plaintiff may therefore succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.").

Regardless, as explained above, the undersigned finds that those hired and supervised by Defendants Rios, GEO/Martin, and Ronay were not deliberately indifferent to Plaintiff's medical needs. Thus, Defendants Rios, GEO/Martin, and Ronay are entitled to summary judgment on Claim One.

IV. Defendants Adams, Dawson, And Rios Are Entitled To Summary Judgment On Claim Four, Alleging Excessive Force, Based On Lack of Exhaustion.

Plaintiff claims that Defendants Adams, Dawson, and Rios "used excessive force against [him] in retaliation for exercising [his] constitutional rights" on two occasions in June or July of 2016. (Doc. 20, at 41, 44). Defendants argue that Plaintiff failed to exhaust

any grievance related to his claims pursuant to the ODOC grievance procedure. (*See* Doc. 101, at 21; Doc. 235, at 5-6; Doc. 237, at 23-24; Doc. 238, at 10; Doc. 239, at 10). The undersigned agrees that the undisputed facts show Plaintiff failed to exhaust his administrative remedies on Claim Four. For that reason, Defendants Adams, Dawson, and Rios are entitled to summary judgment on Plaintiff's Claim Four alleging retaliatory excessive force.

A. Exhaustion Requirement

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Because exhaustion of available remedies "is mandatory under the PLRA[,] . . . unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). This means a prisoner must use "all steps that the agency holds out, and do[] so *properly* (so that the agency addresses the issues on the merits)." *Id.* at 90 (internal quotation marks omitted). "An inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim[.]" *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002). Substantial compliance is insufficient; Plaintiff "had to properly complete the grievance process and cure any deficiencies." *Craft v. Null*, 543 Fed. App'x 778, 779-80 (10th Cir. 2013) (citing *Jernigan*, 304 F.3d at 1032). And even if Plaintiff

completed the grievance process, the grievance must "provide[] enough information regarding the nature of the alleged wrong to enable prison officials to investigate and address his complaint." *Pfeil v. Lampert*, 603 Fed. Appx. 665, 671 (10th Cir. 2015).

But, as noted above, the PLRA's exhaustion requirement is limited to such administrative remedies as are available to be exhausted. "Administrative remedies are deemed unavailable if, among other things, 'prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.'" *May*, 929 F.3d at 1234 (quoting *Ross v. Blake*, --- U.S. ---, 136 S. Ct. 1850, 1860 (2016)). The court liberally construes grievances filed by unrepresented inmates. *Greer v. Dowling*, 947 F.3d 1297, 1302 (10th Cir. 2020).

> Defendants . . . bear the burden of asserting and proving that the plaintiff did not utilize administrative remedies . . . . Once a defendant proves that a plaintiff failed to exhaust, however, the onus falls on the plaintiff to show that remedies were unavailable to him.

Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011) (citing *Jones*, 549 U.S. at 212).

B. The ODOC Grievance Procedure

The ODOC Operations Memorandum OP-090124 establishes the offender grievance process related to Plaintiff's complaints against defendants. (Doc. 101, at Ex. 4, at 41-61). The first step in the grievance process is "informal resolution," including submitting a "Request to Staff" ("RTS") if the complaint is not resolved. (*Id.* at 47-48). The Request to Staff "must be specific as to the complaint, dates, places, personnel involved and how the inmate/offender was affected," and "only one issue or incident is allowed per form." (*Id.* at 47).

When an issue is not resolved at the informal-resolution stage, the inmate must submit a grievance form. (*Id.* at 48). Here too, an inmate is limited to presenting only one issue or incident in a grievance. (*Id.* at 49). The policy provides that "[i]f the inmate/offender does not follow instructions as explained in this procedure and on the grievance forms, the grievance may not be answered." (*Id.* at 49). The reviewing authority screens grievances to determine, among other things, whether the inmate followed proper procedures for submitting a grievance and whether the grievance and/or RTS contained more than one issue. (*Id.* at 50-51). "The reviewing authority will notify the inmate/offender when a grievance is submitted improperly." (*Id.* at 51). "The inmate/offender will be given one opportunity to correct any errors and properly resubmit within ten (10) days of the date the inmate/offender is notified of the improper submission." (*Id.*) If the inmate fails to correct the errors or properly resubmit his claim, the grievance "will not be answered and the inmate/offender will have waived/forfeited the opportunity to proceed in the grievance process." (*Id.*)

The final step in the grievance procedure is the appeal to the Administrative Review Authority ("ARA"), which must be based on newly discovered or available evidence or probable error committed by the reviewing authority. (*Id.* at 52). Grievances related to medical care must be appealed to the Medical ARA. (*Id.* at 53). Ordinarily grievances must first be adjudicated by the reviewing authority before appealing to the ARA; however, "[i]f there has been no response by the reviewing authority within 30 days, but no later than 60 days, of submission" of a grievance, the inmate may send the grievance directly to the ARA, stating only that the grievance was not answered and submitting evidence of the

material dispute of fact regarding Plaintiff's failure to exhaust his administrative remedies on Claim Four.

Plaintiff responds to Defendants' assertion by claiming that prison officials thwarted his efforts to exhaust his administrative remedies. (Doc. 249, at 9; Doc. 250, at 2; Doc. 251, at 1-2). "When prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy 'unavailable' and a court will excuse the prisoner's failure to exhaust." *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010). Here, the undersigned finds Plaintiff's unsupported, conclusory allegations do not demonstrate that Defendants made the administrative remedies for his claims unavailable. Indeed, the record reflects that Plaintiff submitted and received responses to many grievances from his arrival at LCF until his transfer to Davis Correctional Facility, both before and after the incidents at issue, and submitted many appeals, both before and after the incidents at issue. (*See* Section III.B, *infra.*) Defendants Adams, Dawson, and Rios are entitled to judgment on Plaintiff's Claim Four for retaliatory excessive force.[9]

V. The Court Should Deny The Remaining Motions Pending In This Case As Moot.

Plaintiff additionally sought preliminary injunctive relief (Doc. 317) and asked for leave to supplement his request (Docs. 320, 321). Defendants requested permission to seal

[9] The undersigned additionally notes that Plaintiff's claim of retaliatory excessive force is grounded on the argument that he was twice handcuffed, without cause and too tightly. (Doc. 20, at 41-44; Doc. 254, at Ex. 1, at 2). "[I]n order to succeed on such a claim, a plaintiff must show some actual injury that is not *de minimis*, be it physical or emotional." *Koch v. City of Del City*, 660 F.3d 1228, 1247 (10th Cir. 2011). Plaintiff has not, and these incidents thus do not rise to the level of a constitutional violation.

certain exhibits to be submitted in response to Plaintiff's request (Doc. 322), and Plaintiff requested a copy of those sealed exhibits (Doc. 324). Based on the recommendation to grant summary judgment in favor of all Defendants, the undersigned recommends these pending motions be denied as moot.

VI. Recommendation and Notice of Right to Object

Based on the foregoing, it is recommended that the Court **GRANT** Defendants' Motions for Summary Judgment (Docs. 235, 237, 238, and 239) and **DENY** the remaining motions pending in this case (Docs. 317, 320, 321, 322, 324) as **MOOT.**

The undersigned advises Plaintiff of his right to file an objection to this Report and Recommendation with the Clerk of Court on or before February 2, 2023, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises Plaintiff that failure to file a timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge and terminates the referral unless and until the matter is re-referred.

ENTERED this 12th day of January, 2023.

Amanda Maxfield Green

AMANDA MAXFIELD GREEN
UNITED STATES MAGISTRATE JUDGE

Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EZEKIEL DAVIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-16-462-PRW**
	)	
GEO GROUP CORRECTIONS, INC. (AMBER MARTIN, V.P.), et al.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Plaintiff Ezekiel Davis ("Plaintiff"), a state prisoner appearing *pro se*,[1] filed this action under 42 U.S.C. § 1983, alleging civil rights violations. (Doc. 20).[2] It has been referred to the undersigned Magistrate Judge. (Doc. 242).

Before the court are the Motions for Summary Judgment of Defendants Lawton Correctional Facility ("LCF") Medical Supervisor Christina Thomas (Doc. 237); LCF Nurse Practitioner Sheryl Denton (Doc. 238); Correct Care Solutions ("CCS") Supervisor Dan Ronay (Doc. 239); and GEO Group Corrections, Inc. (Amber Martin, V.P.) (hereinafter "GEO/Martin"), LCF Warden Hector A. Rios, LCF Grievance Coordinator Lt.

[1] The court construes Plaintiff's *pro se* filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

[2] Citations to the parties' pleadings and attached exhibits will refer to this court's CM/ECF pagination.

Durant, LCF Correctional Officer Lt. Dawson, and LCF Correctional Officer Sgt. Adams (Doc. 235).

Plaintiff has responded to each Motion (Docs. 246, 247, 248, 249, 250, 251, 265), and the Defendants have replied (Docs. 254, 255, 256, 257). For the reasons discussed below, the undersigned recommends that Defendants' Motions For Summary Judgment be **GRANTED**. As a result, the undersigned recommends that the remaining motions pending in this case (Docs. 317, 320, 321, 322, 324) be **DENIED AS MOOT.**

I. Procedural History and the Instant Motions

Plaintiff filed a Complaint asserting four claims against 16 defendants related to conduct at the Lawton Correctional Facility ("LCF"), a private prison owned and operated by GEO Group, Inc., under contract with the Oklahoma Department of Corrections ("ODOC"). (Doc. 20; *see also* Doc. 101, at 4). Following a series of rulings by this Court, (*see* Docs. 60, 64, 153, 186, 271), two claims[3] seeking monetary relief[4] from seven defendants[5] remain. They can be summarized as follows:

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[3] The Court dismissed Plaintiff's Claim Two, a First Amendment claim, for failure to state a claim. (Doc. 60, at 6). The Court likewise dismissed Plaintiff's Claim Three, a conspiracy claim, for failure to state a claim. (Doc. 163, at 21-23, *adopted*, Doc. 186, at 5).

[4] Plaintiff is no longer incarcerated at LCF, and his requests for injunctive relief are therefore moot. (Doc. 64, at 2-3).

[5] The Court dismissed all claims against the other nine Defendants: Dr. Gonzaga (Doc. 271, at 6); Dr. Musallam (*id.*); LCF Grievance Coordinator Lt. Durant (Doc. 163, at 17, 26, *adopted*, Doc. 186, at 5); LCF Chief Medical Officer Ansari (*id.*); ODOC Medical Services Administrator Honaker (Doc. 55, at 18, *adopted*, Doc. 60, at 7); ODOC Director Allbaugh (*id.*); ODOC Contract Monitor Minyard (*id.*); ODOC Medical Services Administrator McGee (*id.*); and Podiatrist and Director of the Lawton Foot Clinic Cain (Doc. 153, at 1).

- **Claim One:** A "violation of [Plaintiff's] Eighth Amendment right to adequate medical services" while housed at LCF. (Doc. 20, at 10-12). Proceeding chronologically through his requests for health services and related grievance filings, Plaintiff recounts instances of alleged knowing and deliberate failures by prison medical staff and officials to adequately respond to and treat his medical conditions, which include a plantar wart on his right foot, high arches, and his pre-existing, chronic back and neck pain. (*Id.* at 12-18). Plaintiff brings Claim One against Defendants Rios, Thomas, Denton, Ronay, and GEO/Martin. (*Id.* at 10).

- **Claim Four:** Defendants Adams, Dawson, and Rios "used excessive force against [Plaintiff] in retaliation for exercising [his] constitutional rights" on two occasions in June or July of 2016. (*Id.* at 41, 44).

II. Standard for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is proper "if the movant 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Universal Underwriters Ins. Co. v. Winton*, 818 F. 3d 1103, 1105 (10th Cir. 2016). "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way" and "[a]n issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986)). If the movant carries the burden of demonstrating an absence of a dispute as to material fact, "the nonmovant must then go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence and that show a genuine issue for trial." *Martin v. City of Oklahoma City*, 180 F. Supp. 3d 978, 983 (W.D. Okla. 2016) (citing *Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324; *Adler*, 144 F.3d at 671).

The Court's inquiry must be whether the evidence, when viewed "through the prism of the substantive evidentiary burden," *Anderson*, 477 U.S. at 254, "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. Although the Court views all facts in the light most favorable to the non-moving party at the summary judgment stage, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249 (citations omitted).

"[I]n opposing a motion for summary judgment, the non-moving party 'cannot rest on ignorance of facts, on speculation, or on suspicion.'" *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) (quoting *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988)). The non-moving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257.

III. The Court Should Grant Summary Judgment For Defendants On Claim One, Alleging Deliberate Indifference To Plaintiff's Serious Medical Needs.

In his Amended Complaint, Plaintiff alleges knowing and deliberate failures by Defendants Rios, Thomas, Denton, Ronay, and GEO/Martin to adequately respond to and treat his medical conditions, which include a plantar wart on his right foot, high arches, and his pre-existing, chronic back pain. (Doc. 20 at 12-18). Defendants have countered, arguing a lack of evidence in support of this claim and presenting, by contrast, evidence which reflects Defendants' *lack* of deliberate indifference to Plaintiff's medical needs.

(Doc. 101, at Ex. 1, at 1-45). Once Defendants did so, Plaintiff could avoid summary judgment only by submission of admissible evidence that would create an inference of deliberate indifference. The Plaintiff did not provide any such evidence, and thus Defendants are entitled to summary judgment on Claim One.

A. Legal Standard

"A prison official's deliberate indifference to an inmate's serious medical needs is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment." *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

> The test for constitutional liability of prison officials involves both an objective and a subjective component.
>
> The prisoner must first produce objective evidence that the deprivation at issue was in fact sufficiently serious. . . . [A] medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. . . .
>
> The subjective prong of the deliberate indifference test requires the plaintiff to present evidence of the prison official's culpable state of mind. The subjective component is satisfied if the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [s]he must also draw the inference.

Mata, 427 F.3d at 751 (internal citations and quotation marks omitted).

B. Factual Background

Plaintiff was incarcerated at LCF during the events at issue, until he was transferred to the Davis Correctional Facility on May 30, 2017. (Doc. 101, at 1-2). The undisputed

evidence regarding Plaintiff's medical care and requests for medical care during his time at LCF have been summarized below:[6]

- **October 22, 2015**: Plaintiff submitted a Request for Health Services, noting "pain in [his] feet due to high arches" and "a corn under the bottom of [his] right foot which cause[d] [him] pain." (Doc. 21, at Ex. 3, at 1). Plaintiff noted that he is "indigent and cannot afford to purchase shoes off the canteen." (*Id.*) In response, Plaintiff was directed to discuss his concern at his next scheduled chronic clinic visit. (*Id.*) On this same day, Plaintiff submitted a Request to Staff to Defendant Rios noting his high arches and indigency and asking for medical boots. (Doc. 21, at Ex. 5, at 1). Defendant Rios denied his request. (*Id.*)

- **November 10, 2015**: Defendant Denton saw Plaintiff for a routine chronic clinic examination during which Plaintiff complained of low back pain, high arches, and a plantar wart. (Doc. 101, at Ex. 1, at 42-45). Defendant Denton increased Plaintiff's Neurontin dose "for better pain control." (*Id.* at 44). Defendant Denton informed Plaintiff that LCF did not have cryotherapy necessary to remove Plaintiff's plantar wart and sent a "[t]ext order . . . to [Defendant] Thomas to request insoles for [Plaintiff's] shoes" to address his high arches and resulting foot pain. (*Id.*) Although Plaintiff claims the insoles were too small and therefore ineffective in treating his pain (Doc. 20, at 16), Defendant Denton attests that she did not deliberately order the wrong size insoles for Plaintiff. (Doc. 238, at Ex. 1, at 1).

- **November 11, 2015**: Plaintiff submitted a Request for Health Services asking to see a doctor due to his high arches, foot pain, and plantar wart. (Doc. 21, at Ex. 6, at 1). He also requested orthopedic shoes. (*Id.*) Defendant Thomas responded, noting that he was seen by a provider the day before. (*Id.*)

- **November 14, 2015**: Plaintiff submitted a Request to Staff to Defendant Rios again asking for medical boots due to his medical condition of having high arches. (Doc. 21, at Ex. 7, at 1). Defendant Rios directed Plaintiff to "go through medical." (*Id.*)

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[6] The relevant facts are derived from the summary judgment evidence submitted by the parties. The Special Report (Doc. 101) has been treated as an affidavit. *See Hall*, 935 F.2d at 1111 (explaining the role of a Special Report in summary judgment proceedings). Finding the Special Report incomplete, *see footnote* 7, the undersigned has considered the evidence submitted by Plaintiff in his Objection to the Special Report (Doc. 114). The sworn declarations Plaintiff attached to his Responses (Docs. 250, 251) have also been considered. Additionally, the Amended Complaint has been treated as an affidavit, to the extent the allegations within it are based upon facts within Plaintiff's personal knowledge, because they are accompanied by a sworn statement made under penalty of perjury. *See Hall*, 935 F.2d at 1111.

- **December 8, 2015**: Plaintiff saw Dr. Gonzaga regarding his "painful plantar wart of 2 years duration." (Doc. 101, at Ex. 1, at 41). Dr. Gonzaga charted a referral for orthopedic shoes with cushion. (*Id.*)

- **December 17, 2015**: Plaintiff submitted a Request for Health Services asking to see the doctor concerning a knot on his back and requesting a MRI. (Doc. 21, at Ex. 8, at 1). The comment in response notes that Plaintiff was "seen on medical and referred to provider." (*Id.*)

- **December 28, 2015**: Plaintiff submitted a Request to Staff stating that he is indigent and asking for the orthopedic shoes requested by Dr. Gonzaga or transfer to a DOC facility where his medical needs will be provided. (Doc. 21, at Ex. 3, at 6). In response, Defendant Thomas stated that his "order for orthopedic shoes was cancelled as a plantar's wart is not a condition requiring this." (*Id.*) Plaintiff submitted Grievance 16-026 requesting to be seen by an outside specialist to have his plantar's wart removed, and his request was denied by Defendant Thomas because "[n]o orders or referrals for outside provider evaluation have been entered by the medical provider." (*Id.* at 5). His appeal of this grievance was returned unanswered as improperly submitted. (*Id.* at 2-4).

- **January 4, 2016**: Dr. Gonzaga treated Plaintiff for his "[c]hronic back pain." (Doc. 101, at Ex. 1, at 40). Dr. Gonzaga submitted a referral for orthopedic shoes for Plaintiff which was denied by Michael Sands, MD, Medical Director, in favor of treating Plaintiff's plantar wart. (Doc. 237, at Ex. 2, at 40).

- **January 11, 2016**: Plaintiff submitted a Request to Staff to Defendant Thomas requesting an explanation for why she cancelled his order for orthopedic shoes. (Doc. 21, at Ex. 17, at 5). In response, Defendant Thomas stated that "[o]rthopedic shoes must be approved by the chief medical officer." (*Id.*) Plaintiff submitted Grievance 16-055 requesting to see an orthopedic/foot specialist. (*Id.* at 4). His grievance was denied, noting that "medical referral requests must be initiated by the facility medical provider" and "submitted to the chief medical officer for review and approval." (*Id.*) The denial also noted that "[t]he request for orthopedic shoes in [his] case, was deferred by the chief medical officer." (*Id.*) His appeal of this grievance was returned unanswered as improperly submitted. (*Id.* at 1-3).

- **February 2, 2016**: Plaintiff submitted a Request for Health Services asking for removal of his plantar wart and provision of shoes with arch support. (Doc. 21, at Ex. 9, at 1). In response, Defendant Thomas told Plaintiff that "there is no order for removal" and that "[a]rch supports can be purchased on canteen." (*Id.*)

- **February 8, 2016**: Plaintiff submitted a Request for Health Services asking for "adequate medical treatment and a solution to his medical needs" regarding his high arches and plantar wart. (Doc. 21, at Ex. 10, at 1). In response, Defendant Thomas told Plaintiff he "will be scheduled to be seen." (*Id.*)

- **February 26, 2016**: Dr. Gonzaga treated Plaintiff for various foot complaints and charted a referral for Plaintiff to see a podiatrist. (Doc. 101, at Ex. 1, at 39). The referral was "denied by corporate." (*Id.* at 38).

- **February 29, 2016**: Plaintiff submitted a Request to Staff to Defendant Thomas requesting, in part, an explanation for why the referral to an outside specialist had been denied. (Doc. 21, at Ex. 20, at 6-7). In response, Defendant Thomas told Plaintiff that the "referral was deferred by the corporate CMO." (*Id.* at 6). Plaintiff submitted Grievance 16-145 requesting "transfer[] to a ODOC facility where [he] can get medical treatment." (*Id.* at 4-5). His grievance was returned unanswered as improperly submitted, he appealed, and his appeal was returned unanswered as improperly submitted. (*Id.* at 1-3).

- **March 3, 2016**: Defendant Denton treated Plaintiff for "ongoing [care of] plantar wart pain" and a fecal occult blood test. (Doc. 101, at Ex. 1, at 38).

- **March 17, 2016**: Plaintiff submitted a Request for Health Services asking to see an outside specialist regarding his high arches, need for medical boots, and plantar wart removal. (Doc. 21, at Ex. 11, at 1). In response, Defendant Thomas told Plaintiff that the referral was being resubmitted and, if approved, he would be scheduled to be seen by the podiatrist. (*Id.*)

- **March 24, 2016**: Plaintiff submitted a Request for Health Services asking to see a doctor about obtaining medical boots. (Doc. 21, at Ex. 12, at 1). In response, Defendant Thomas told Plaintiff that his "request has been denied multiple times." (*Id.*)

- **April 1, 2016**: Dr. Gonzaga gave Plaintiff silver nitrate sticks to treat his plantar wart and submitted a request for medical boots. (Doc. 101, at Ex. 1, at 32).

- **April 7, 2016**: Plaintiff was scheduled for an outside referral to see a podiatrist. (Doc. 101, at Ex. 1, at 31).

- **April 10, 2016**: Plaintiff submitted a Request for Health Services asking to see an outside specialist regarding his lower back pain. (Doc. 21, at Ex. 13, at 1). In response, Plaintiff was told that he had a podiatry appointment scheduled. (*Id.*)

- **April 12, 2016**: Plaintiff refused treatment of silver nitrate for his plantar wart. (Doc. 101, at Ex. 1, at 30). That same day, Plaintiff was examined by Dr. Cain, a podiatrist, at Southwest Foot and Ankle Clinic. (*Id.* at 34-36). In the treatment notes, Dr. Cain records "lesion debrided," that Plaintiff "was advised on shoe gear in detail," and was "given written order for new shoes." (*Id.* at 36).

- **April 13, 2016**: Plaintiff again refused treatment of silver nitrate for his plantar wart. (Doc. 101, at Ex. 1, at 29).

- **May 4, 2016**: Defendant Denton saw Plaintiff for a routine chronic clinic examination, and he was noted to be in "no acute distress," walking with a "slow & steady" gait, and not limping. (Doc. 101, at Ex. 1, at 28).

- **May 10, 2016**: Dr. Gonzaga saw Plaintiff for "chronic back pain since 2012" and charted a referral for a neurologist. (Doc. 101, at Ex. 1, at 27).

- **May 16, 2016**: Plaintiff submitted a Request to Staff to Defendant Rios requesting purchase of athletic shoes. (Doc. 114, at Ex. 9, at 1-2). Defendant Rios responded that "medical must document your need medically." (*Id.*)

- **June 1, 2016**: Defendant Denton saw Plaintiff for his "ongoing chronic back pain." (Doc. 101, at Ex. 1, at 26). Plaintiff asked to see a back specialist. (*Id.*) Defendant Denton noted that Plaintiff was in no acute distress, able to mount and dismount the exam room table without difficulty or distress, and he walked without a limp. (*Id.*) Defendant Denton increased Plaintiff's Neurontin dose. (*Id.*)

- **June 2, 2016**: Noting that Plaintiff had "chronic back pain since 2012" and was "[not] responding to Neurontin and Indocin," Dr. Gonzaga submitted a referral for Plaintiff to see a neurologist. (Doc. 101, at Ex. 1, at 25). Defendant Denton submitted a similar referral, also requesting a MRI. (*Id.* at 24). The referrals were deferred by Dr. Ansari in favor of trying muscle relaxants and physical therapy. (*Id.* at 24-25).

- **June 3, 2016**: Plaintiff submitted a Request for Health Services asking to see either Dr. Gonzaga or an outside specialist regarding his back issue. (Doc. 250, at Ex. 11, at 1). He was informed that "[t]he referral for an outside provider was deferred." (*Id.*)

- **June 13, 2016**: Plaintiff submitted a Request to Staff to Defendant Rios requesting that his family be allowed to send him athletic shoes. (Doc. 114, at Ex. 13, at 1-2). On July 11, 2016, Plaintiff submitted Grievance 16-496, requesting a response to

this Request to Staff. (*Id.*, at Ex. 12, at 1-2). Plaintiff was granted partial relief, noting that he received medical boots on July 13, 2016. (*Id.* at 1).

- **June 23, 2016**: Plaintiff submitted a Request for Health Services, asking "to see the Doctor concerning the plantar wart was never removed from the bottom of [his] right foot" and asking medical to pay for his athletic shoes. (Doc. 101, at Ex. 1, at 23). Plaintiff was advised that he would be scheduled to be seen but that medical would not purchase his shoes because "[t]he facility advised medical that [he is] not indigent." (*Id.*)

- **July 7, 2016**: Dr. Gonzaga saw Plaintiff and recommended electrocautery to remove his plantar wart, but Plaintiff refused treatment and requested referral to a podiatrist. (Doc. 101, at Ex. 1, at 20). Dr. Gonzaga submitted a referral for Plaintiff to see a podiatrist which was denied by Dr. Ansari, noting that Dr. Gonzaga could provide treatment and had offered the "perfect Rx." (*Id.* at 22).

- **July 11, 2016**: Plaintiff submitted Grievance 16-496 regarding his earlier request to allow his family "to send in athletic shoes for medical reasons." (Doc. 114, at Ex. 12, at 1-2). Plaintiff was granted partial relief, noting that he received medical boots on July 13, 2016. (*Id.* at 1).

- **July 12, 2016**: Defendant Denton, "per [Defendant] Thomas," submitted a referral for Plaintiff for the purchase of athletic shoes. (Doc. 101, at Ex. 1, at 21). The request was deferred by Kristina Lindenmeier, RN, UM Nurse, noting "[w]e do not pay for athletic shoes" and asking that "[i]f medical shoes are required, please provide a medical reason." (*Id.*)

- **July 13, 2016**: LCF provided Plaintiff medical boots. (Doc. 114, at Ex. 12, at 1).

- **September 6, 2016**: Plaintiff submitted Grievance 16-642, requesting "to be seen by an outside back specialist" or "transferred to another ODOC facility where [he] can receive adequate medical treatment by someone qualified to assess [his] medical need." (Doc. 114, at Ex. 5, at 1-2). His grievance was denied, appealed, and denied by the Medical AMA. (*Id.* at 3-6; Doc. 21, at Ex. 26, at 1-4).[7]

[7] The undersigned finds the Special Report to be alarmingly incomplete with regard to Plaintiff's grievances related to Claim One, including but not limited to those listed here, and including at least one exhausted grievance. In their Motions for Summary Judgment, Defendants have failed to address these obvious omissions. The undersigned therefore declines to consider Defendants' affirmative defenses regarding exhaustion of administrative remedies on Claim One.

- **September 13, 2016**: Dr. Gonzaga saw Plaintiff for his "chronic low back pai[n] with numbness at both legs for 2 years." (Doc. 101, at Ex. 1, at 19). Dr. Gonzaga charted that Plaintiff had no crepitation or limitation in his range of movement, diagnosed Plaintiff with "lumbar disc disease with radiculopathy," and prescribed an elastic back brace for Plaintiff. (*Id.*)

- **September 26, 2016**: Plaintiff submitted a Request to Staff requesting "a back brace with lumbar support and a therapy pack that [he] could heat up." (Doc. 114, at Ex. 15, at 1-2). Defendant Thomas responded that he was ordered a back brace with lumbar support and it will be provided to him, but a therapy pack was neither ordered nor available. (*Id.* at 1).

- **October 5, 2016**: Defendant Rios approved Plaintiff's request for athletic shoes and "[s]hoes will be ordered from a vendor." (Doc. 114, at Ex. 14, at 1).

- **October 12, 2016**: Plaintiff submitted a Request for Health Services requesting his "back brace with lumbar support and a hot/cold therapy pack." (Doc. 114, at Ex. 16, at 1-2). Defendant Thomas responded that he was "issued an elastic brace w/lumbar support per order." (*Id.* at 1).

- **October 24, 2016**: Plaintiff was seen for a routine chronic clinic examination where he reported "chronic back pain for years." (Doc. 101, at Ex. 1, at 17). His chronic pain medications were renewed. (*Id.* at 18).

- **November 29, 2016**: Dr. Musallam saw Plaintiff for his "back pain/neck pain" and diagnosed Plaintiff with "[l]umbar and [c]ervical degenerative disk disease with probable spinal stenosis, and radiculopathy." (Doc. 101, at Ex. 1, at 15). He ordered X-rays and prescribed Topamax, Trazadone, Motrin, and Prilosec because Plaintiff stated that the Motrin burns his stomach. (*Id.*)

- **November 30, 2016**: Plaintiff submitted a Request to Staff to Dr. Musallam asking for the name of his spinal condition and "why you refused to put in a referral for me to see a neurologist." (Doc. 21, at Ex. 27, at 1-2). In response, Defendant Thomas informed Plaintiff of his diagnosis and told him that "[o]utside referrals are initatied by the facility health care provider based on their professional, clinical judgment." (*Id.* at 1). Plaintiff submitted Grievance 16-898 requesting to see a neurologist. (Doc. 114, at Ex. 6, at 2-3). His grievance was returned unanswered, he appealed, and his appeal was returned unanswered as improperly submitted. (*Id.* at 1, 8-10).

- **December 27, 2016**: Plaintiff submitted a Request to Staff to Defendant Thomas accusing her of "interfere[ing] with [his] medical treatment" "by tell[ing] Dr. Musallam not to make referrals for [him] to see a neurologist" and threatening,

among other things, legal action. (Doc. 21, at Ex. 28, at 1-2). In response, Defendant Thomas stated that "[t]hreats to staff will not be entertained or addressed." (*Id.* at 1).

- **January 10, 2017**: Plaintiff received an X-Ray on his back showing "[m]ild osteoarthritis of the lumbar spine" and "[m]odest degenerative changes of the cervical spine." (Doc. 101, at Ex. 1, at 14).

- **January 30, 2017**: Dr. Musallam saw Plaintiff for "[b]ack pain and numbness and tingling of his right leg." (Doc. 101, at Ex. 1, at 12). Dr. Musallam noted that Plaintiff "does not walk with a limp" and "has good flexion from his waist." (*Id.*) He further noted that Plaintiff was "demanding a neurology consult to better diagnosis his disease" and "wants an MRI so that his diagnosis can be better diagnosed." (*Id.*) Dr. Musallam increased Plaintiff's Topamax and ordered an MRI. (*Id.*) Dr. Ansari deferred an outside referral. (*Id.* at 13).

- **March 3, 2017**: Plaintiff was seen for chronic pain management. (Doc. 101, at Ex. 1, at 11).

- **March 20, 2017**: Plaintiff submitted a Request to Staff to Defendant Thomas asking for "the name and position of the person that denied MRI referral, and their reason(s) for doing so." (Doc. 101, at Ex. 6, at 11). Defendant Thomas responded that "[o]utside referrals must be approved by the corporate chief medical officer" and "[y]our referral was deferred." (*Id.*) Plaintiff submitted Grievance 17-243 asking for "the name of the Chief Medical Officer that denied the referral for [a] MRI" and the "reason(s) for denying [him] to be seen by an outside specialist." (*Id.* at 9). The Reviewing Authority granted this grievance by providing Plaintiff with the name of Dr. Ansari. (*Id.* at 8).

- **April 12, 2017**: Plaintiff was seen and provided treatment for athlete's foot. (Doc. 101, at Ex. 1, at 10).

- **April 28, 2017**: Plaintiff was seen for a routine chronic clinic examination regarding his back pain. (Doc. 101, at Ex. 1, at 9).

C. Analysis

1. The Undisputed Facts Show That Defendant Denton Was Not Deliberately Indifferent To Plaintiff's Serious Medical Needs.

Plaintiff claims that his treating healthcare providers, including Defendant Denton, the only remaining defendant healthcare provider (*see* footnote 5), were deliberately indifferent to his serious medical needs. Plaintiff arrived at LCF with pre-existing conditions of chronic back pain, a plantar wart, and foot pain, which Plaintiff attributed in part to having high arches. (*See* Doc. 237, at Ex. 2, at 47; *id.* at Ex. 3, at 1-4). The uncontroverted evidence shows that, throughout his incarceration at LCF, Plaintiff requested and received frequent, regular visits with licensed and qualified medical professionals, including Defendant Denton, who physically examined and X-rayed him, and that he also received care from an outside podiatrist. (*See* Doc. 101, at Ex. 1; Doc. 237, at Ex. 5, at 1-3). The uncontroverted evidence shows that Plaintiff received a consistent course of pain medications and anti-inflammatory medications for his various complaints of pain, as well as medical boots, a back brace, and offers of treatment for the plantar wart (silver nitrate sticks and electrocautery). (*Id.*)

This uncontroverted evidence satisfies the objective component of Plaintiff's Eighth Amendment claim. *Mata*, 427 F.3d at 751 ("[A] medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.") (internal citation and quotation marks omitted). However, with regard to the subjective component of the analysis, the fact that Plaintiff disagrees with his medical

providers' course of treatment is not evidence of deliberate indifference. "[A] mere difference of opinion between the prison's medical staff and the inmate . . . does not support a claim of cruel and unusual punishment." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980). "[T]he subjective component is not satisfied, absent an extraordinary degree of neglect, where a doctor merely exercises his considered medical judgment. Matters that traditionally fall within the scope of medical judgment are such decisions as whether to consult a specialist or undertake additional medical testing." *Self v. Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006). "So long as a medical professional provides a level of care consistent with the symptoms presented by the inmate, absent evidence of actual knowledge or recklessness, the requisite state of mind cannot be met." *Id.* at 1233. Indeed, even "[a] prison doctor's negligent diagnosis or treatment of a medical condition does not constitute a medical wrong under the Eighth Amendment, as medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008) (citation and quotation omitted).

The evidence shows that Defendant Denton increased Plaintiff's Neurontin dose for pain control (Doc. 101, at Ex. 1, at 26, 42-45); requested insoles to treat his foot pain (*id.*); treated Plaintiff's plantar wart pain (*id.* at 38); examined him for issues with his gait (*id.* at 26, 28); made a referral for Plaintiff to see a neurologist and for a MRI (*id.* at 24); and referred Plaintiff for the purchase of athletic shoes (*id.* at 21). These actions are a level of care consistent with the symptoms presented by Plaintiff and, even if negligent, do not evidence deliberate indifference.

Plaintiff's chief complaint, upon review of the evidence, appears to be the denial of his repeated requests to see outside medical specialists, including a back specialist and neurologist. It is uncontroverted that on June 2, 2016, Defendant Denton made a referral for Plaintiff to see a neurologist, which was deferred by the Medical Director. (Doc. 101, at Ex. 1, at 24). As discussed above, this fact alone cuts against the argument as to Denton's deliberate indifference. Even if Plaintiff contends that Defendant Denton somehow remained responsible for making more or other referrals to outside specialists,

> the contention that [a prisoner] was denied treatment by a specialist is . . . insufficient to establish a constitutional violation. The decision that a patient's condition requires a specialist is a decision about the patient's course of treatment, and negligent diagnosis or treatment of a medical condition do[es] not constitute a medical wrong under the Eighth Amendment.

Duffield, 545 F.3d at 1239 (plaintiff-inmate with lower back pain alleged that prison officials had exhibited deliberate indifference through the failure to send him to an outside specialist; affirming district court's grant of summary judgment for the defendants based on the absence of deliberate indifference). *See also Duncan v. Cody*, No. CIV-07-1250-HE, 2009 WL 762393, at *3-4 (W.D. Okla. Mar. 23, 2009) (granting summary judgment to defendant when "Plaintiff's insistence on the need for a specialist reflects only a difference of opinion. Even if prison officials should have pursued this course of treatment, the failure to do so would not have violated the Eighth Amendment.").

Plaintiff has also alleged that his treating healthcare providers, including Defendant Denton, were deliberately indifferent because they did not physically examine him during his medical visits. (Doc. 20, at 12-13). However, the treatment notes in Plaintiff's medical

records reflect that his treating healthcare providers, including Defendant Denton, routinely assessed his physical condition, adjusted his medications, ordered specialty medical equipment to lessen his pain, and sought referrals for Plaintiff to see outside specialists. (*See generally* Doc. 101, at Ex. 1).

Moreover, "his allegation that [an] examination was cursory does not sufficiently allege deliberate indifference rather than mere medical malpractice." *Duffield*, 545 F.3d at 1239. Plaintiff specifically claims that Defendant Denton's "cursory" exam on November 10, 2015, led her to order arch supports too small for his feet, and upon being informed of her error, she declined to order new inserts. (Doc. 20, at 12; Doc. 250, at Ex. 18, at 1). However, Defendant Denton has attested that she did not intentionally order the wrong size inserts (Doc. 238, at 2); the undisputed evidence shows that she increased Plaintiff's pain medication at this same visit (Doc. 101, at Ex. 1, at 44); and she provided Plaintiff additional care on subsequent visits, including a referral for athletic shoes (*id.* at 21, 24, 26, 28, and 38). Plaintiff has not "present[ed] evidence of [Defendant Denton's] culpable state of mind," *Farmer v. Brennan,* 511 U.S. 825, 834 (1994), and her failure to order the correct size insoles for Plaintiff's shoes therefore does not rise to the level of a constitutional violation.[8]

Finally, Plaintiff has alleged that the five-month delay in receiving medical boots and the delay in treatment of his plantar wart with silver nitrate constitute deliberate

[8] During his deposition, upon review of his medical records, Plaintiff concedes that Defendants Denton and Thomas "wouldn't have been named as defendants" had Plaintiff known they were "putting in these referrals." (Doc. 283, at Ex. 3, at 5-7).

indifference. (Doc. 21, at Ex. 2, at 4). However, a delay in medical care violates the Eighth Amendment only if the passage of time has resulted in "substantial harm." *Oxendine v. Kaplan,* 241 F.3d 1272, 1276 (10th Cir. 2001). "[T]he substantial harm requirement may be satisfied by lifelong handicap, permanent loss, or considerable pain." *Garrett v. Stratman,* 254 F.3d 946, 950 (10th Cir. 2001) (citations omitted); *see also Martin v. Tulsa County Board of Commissioners*, 99 F.3d 1150, 1996 WL 603270, at *1 (10th Cir. Oct. 22, 1996) (unpublished op.) ("Postponing surgery for an extended period, even until the prisoner's release from prison, does not provide a cause of action for deliberate indifference to serious medical needs if the delay would not cause further damage.") (citation omitted). Plaintiff has presented no evidence that the delay in treatment of these pre-existing, chronic issues caused substantial harm.

The undisputed facts show that Defendant Denton's actions or omissions do not meet the standard for deliberate indifference to Plaintiff's serious medical needs. Accordingly, summary judgment in Defendant Denton's favor is appropriate on Claim One.

2. Plaintiff Has Failed To Establish Deliberate Indifference By Defendant Thomas.

Plaintiff claims Defendant Thomas was deliberately indifferent to his serious medical needs by delaying and/or preventing him from seeing outside specialists and obtaining athletic shoes. (Doc. 20, at 17, 22-23, 26). Defendant Thomas served as LCF Health Services Administrator during the relevant timeframe. (Doc. 101, at Ex. 2, at 1; Doc. 237, at Ex. 4, at 1). In that role, her "duties included reviewing, investigating, and

responding to Requests to Staff and Grievances submitted by LCF inmates related to medical care and treatment." (*Id.*)

It is undisputed that Defendant Thomas was not one of Plaintiff's medical providers. (Doc. 101, at Ex. 2, at 3; Doc. 237, at Ex. 4, at 3). Plaintiff's Eighth Amendment claim against Defendant Thomas thus rests on the theory that she was a "gatekeeper" that prevented him from receiving necessary medical treatment. "A prison medical professional who serves solely as a gatekeeper for other medical personnel capable of treating the condition may be held liable under the deliberate indifference standard if she delays or refuses to fulfill that gatekeeper role." *Mata*, 427 F.3d at 751 (quotation marks omitted).

Defendant Thomas has provided a sworn affidavit to the following facts:

> Pursuant to Oklahoma Department of Corrections Policy (DOC OP) 140121, absent a life-threatening emergency, only medical providers are authorized to refer an inmate for care outside of LCF. If an inmate requests such care, whether verbally or through Requests for Health Services, he must address the matter to a medical provider during an appointment.
>
> When, in his or her professional clinical judgment, a medical provider determines that an inmate requires care which is outside the scope of the care available at LCF, such as a podiatrist or neurologist, the medical provider submits a referral to the Chief Medical Officer or the Medical Director for approval. Should the outside provider then suggest a course of treatment, this suggested course of treatment is reviewed for approval by the CMO or Medical Director. This process is followed for all inmates where consultation with an outside provider is deemed medically necessary by an LCF provider.
>
> . . .
>
> I never circumvented, interfered with, manipulated, or cancelled referrals and/or orders made by anyone . . . nor did I conspire to do so.

> Providers at LCF . . . did not need my permission to submit referrals for inmate[s] to receive care from an outside provider or specialty medical equipment.
>
> I never directed any LCF provider . . . not to submit referrals for an inmate to receive care from an outside provider or specialty medical equipment.

(Doc. 101, at Ex. 2, at 2-3; Doc. 237, at Ex. 4, at 2-3). Defendant Thomas was neither the Chief Medical Officer nor the Medical Director for LCF. (*Id.*) Moreover, Plaintiff conceded in his deposition that the evidence shows that his many referrals were each deferred by someone other than Defendant Thomas. (Doc. 237, at Ex. 3, at 9). Although Plaintiff has speculated that Defendant Thomas interceded in the referral process, he has presented no admissible evidence of his claim. *See Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016). Plaintiff's allegation that Dr. Musallam told Plaintiff that he could not submit referrals without approval from Defendant Thomas is inadmissible hearsay. Fed. R. Civ. P. 56 (c)(2); Fed. R. Evid. 802. Thus, the undisputed evidence shows that Defendant Thomas was not, in fact, a "gatekeeper" preventing or delaying Plaintiff from receiving medical care, and therefore Plaintiff cannot establish her deliberate indifference to his medical needs under that theory.

Although the evidence shows that Defendant Thomas responded to and denied some of Plaintiff's grievances pursuant to her role as Health Services Administrator, "denial of the grievances alone is insufficient to establish personal participation in the alleged constitutional violations." *Larson v. Meek*, 240 F. App'x 777, 780 (10th Cir. 2007); *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) ("Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.").

Plaintiff specifically claims that Defendant Thomas was deliberately indifferent to his serious medical needs by directing him to use his trust fund savings to purchase athletic shoes, despite his indigency. (Doc. 20, at 38). Although Defendant Thomas did deny this request, the undisputed evidence shows that Defendant Thomas was informed by LCF that Plaintiff was not indigent, that she believed that athletic shoes were available for purchase, and that she also scheduled Plaintiff to be seen by a medical provider regarding this issue. (Doc. 101, at Ex. 1, at 23; *id.* at Ex. 2, at 2). Again, Plaintiff has not established deliberate indifference by Defendant Thomas. Accordingly, Defendant Thomas is entitled to summary judgment on Claim One.

3. Plaintiff Has Presented No Evidence of an Affirmative Link Between Defendants Rios, GEO/Martin, or Ronay and the Alleged Constitutional Violation.

Likewise, Plaintiff has failed to present any evidence of deliberate indifference to his serious medical needs by Defendants Rios, GEO/Martin, or Ronay. For Plaintiff's § 1983 claim to succeed against any defendant, he "must show personal involvement or participation in the incident." *Grimsley v. MacKay,* 93 F.3d 676, 679 (10th Cir. 1996); *Gallagher*, 587 F.3d at 1069; *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976) ("Personal participation is an essential allegation in a [§] 1983 claim."). Defendant Rios' role in the grievance process, outlined above, does not establish his personal participation. *Larson*, 240 F. App'x at 780. And although Plaintiff claims he sent a letter notifying Defendant Ronay of the alleged constitutional violations, (Doc. 20, at 18), he has been unable to produce a copy of this letter, Defendant Ronay attested that he did not receive a

letter from Plaintiff, and Plaintiff ultimately testified that he did not send a letter to Defendant Ronay. (Doc. 239, at Ex. 1, at 1; *id.* at Ex. 2, at 1-2).

Plaintiff appears to argue that these parties, by virtue of their roles, are liable for the constitutional violations of those they hire or supervise. (Doc. 249, at 4-5; Doc. 248, at 4). However, "supervisor status is not sufficient to create § 1983 liability." *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10th Cir. 2008) (citing *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997). Plaintiff has not alleged, much less proven, the standard for supervisor liability articulated by the Tenth Circuit. *See Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) ("A plaintiff may therefore succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.").

Regardless, as explained above, the undersigned finds that those hired and supervised by Defendants Rios, GEO/Martin, and Ronay were not deliberately indifferent to Plaintiff's medical needs. Thus, Defendants Rios, GEO/Martin, and Ronay are entitled to summary judgment on Claim One.

IV. Defendants Adams, Dawson, And Rios Are Entitled To Summary Judgment On Claim Four, Alleging Excessive Force, Based On Lack of Exhaustion.

Plaintiff claims that Defendants Adams, Dawson, and Rios "used excessive force against [him] in retaliation for exercising [his] constitutional rights" on two occasions in June or July of 2016. (Doc. 20, at 41, 44). Defendants argue that Plaintiff failed to exhaust

any grievance related to his claims pursuant to the ODOC grievance procedure. (*See* Doc. 101, at 21; Doc. 235, at 5-6; Doc. 237, at 23-24; Doc. 238, at 10; Doc. 239, at 10). The undersigned agrees that the undisputed facts show Plaintiff failed to exhaust his administrative remedies on Claim Four. For that reason, Defendants Adams, Dawson, and Rios are entitled to summary judgment on Plaintiff's Claim Four alleging retaliatory excessive force.

A. Exhaustion Requirement

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Because exhaustion of available remedies "is mandatory under the PLRA[,] . . . unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). This means a prisoner must use "all steps that the agency holds out, and do[] so *properly* (so that the agency addresses the issues on the merits)." *Id.* at 90 (internal quotation marks omitted). "An inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim[.]" *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002). Substantial compliance is insufficient; Plaintiff "had to properly complete the grievance process and cure any deficiencies." *Craft v. Null*, 543 Fed. App'x 778, 779-80 (10th Cir. 2013) (citing *Jernigan*, 304 F.3d at 1032). And even if Plaintiff

completed the grievance process, the grievance must "provide[] enough information regarding the nature of the alleged wrong to enable prison officials to investigate and address his complaint." *Pfeil v. Lampert*, 603 Fed. Appx. 665, 671 (10th Cir. 2015).

But, as noted above, the PLRA's exhaustion requirement is limited to such administrative remedies as are available to be exhausted. "Administrative remedies are deemed unavailable if, among other things, 'prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.'" *May*, 929 F.3d at 1234 (quoting *Ross v. Blake*, --- U.S. ---, 136 S. Ct. 1850, 1860 (2016)). The court liberally construes grievances filed by unrepresented inmates. *Greer v. Dowling*, 947 F.3d 1297, 1302 (10th Cir. 2020).

> Defendants . . . bear the burden of asserting and proving that the plaintiff did not utilize administrative remedies . . . . Once a defendant proves that a plaintiff failed to exhaust, however, the onus falls on the plaintiff to show that remedies were unavailable to him.

Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011) (citing *Jones*, 549 U.S. at 212).

B. The ODOC Grievance Procedure

The ODOC Operations Memorandum OP-090124 establishes the offender grievance process related to Plaintiff's complaints against defendants. (Doc. 101, at Ex. 4, at 41-61). The first step in the grievance process is "informal resolution," including submitting a "Request to Staff" ("RTS") if the complaint is not resolved. (*Id.* at 47-48). The Request to Staff "must be specific as to the complaint, dates, places, personnel involved and how the inmate/offender was affected," and "only one issue or incident is allowed per form." (*Id.* at 47).

When an issue is not resolved at the informal-resolution stage, the inmate must submit a grievance form. (*Id.* at 48). Here too, an inmate is limited to presenting only one issue or incident in a grievance. (*Id.* at 49). The policy provides that "[i]f the inmate/offender does not follow instructions as explained in this procedure and on the grievance forms, the grievance may not be answered." (*Id.* at 49). The reviewing authority screens grievances to determine, among other things, whether the inmate followed proper procedures for submitting a grievance and whether the grievance and/or RTS contained more than one issue. (*Id.* at 50-51). "The reviewing authority will notify the inmate/offender when a grievance is submitted improperly." (*Id.* at 51). "The inmate/offender will be given one opportunity to correct any errors and properly resubmit within ten (10) days of the date the inmate/offender is notified of the improper submission." (*Id.*) If the inmate fails to correct the errors or properly resubmit his claim, the grievance "will not be answered and the inmate/offender will have waived/forfeited the opportunity to proceed in the grievance process." (*Id.*)

The final step in the grievance procedure is the appeal to the Administrative Review Authority ("ARA"), which must be based on newly discovered or available evidence or probable error committed by the reviewing authority. (*Id.* at 52). Grievances related to medical care must be appealed to the Medical ARA. (*Id.* at 53). Ordinarily grievances must first be adjudicated by the reviewing authority before appealing to the ARA; however, "[i]f there has been no response by the reviewing authority within 30 days, but no later than 60 days, of submission" of a grievance, the inmate may send the grievance directly to the ARA, stating only that the grievance was not answered and submitting evidence of the

same. (*Id.* at 50). If an inmate improperly submits a grievance or grievance appeal to the ARA, they will be notified and "given one opportunity to correct any errors, which must be received by the ARA within 10 days of the time the inmate/offender is notified of improper submission." (*Id.* at 53). If the inmate fails to correct the errors and properly submit the appeal within that timeframe, "the grievance or grievance appeal will not be answered and the inmate/offender will have waived/forfeited the opportunity to proceed in the grievance process." (*Id.*) The ruling of the ARA is final and concludes the ODOC grievance procedure. (*Id.* at 54-55).

C. Plaintiff Failed To Exhaust His Administrative Remedies On Claim Four.

Upon review of the record, Plaintiff brought grievances on July 1, 2016, and July 14, 2016, relevant to his Claim Four for retaliatory excessive force. (Doc. 101, at Ex. 6, at 1-7). Defendants have attested, and Plaintiff does not dispute, that these grievances were not appealed and thus not fully exhausted. (Doc. 101, at 20-21). The uncontroverted evidence therefore establishes that Plaintiff did not exhaust his administrative remedies on his grievances in support of Claim Four because he did not properly utilize all steps of the grievance procedure such that his issues were addressed on the merits. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006). *See also Smith v. Beck*, 165 Fed. App'x. 681, 684-85 (10th Cir. Feb. 8, 2006) (unpublished op.) (holding that the lack of a response does not excuse a failure to exhaust administrative remedies because Oklahoma prisoners can "continue to appeal within the prison system even if they do not receive responses to their Requests to Staff or their grievances"). Thus, Defendants met their burden of establishing there is no

material dispute of fact regarding Plaintiff's failure to exhaust his administrative remedies on Claim Four.

Plaintiff responds to Defendants' assertion by claiming that prison officials thwarted his efforts to exhaust his administrative remedies. (Doc. 249, at 9; Doc. 250, at 2; Doc. 251, at 1-2). "When prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy 'unavailable' and a court will excuse the prisoner's failure to exhaust." *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010). Here, the undersigned finds Plaintiff's unsupported, conclusory allegations do not demonstrate that Defendants made the administrative remedies for his claims unavailable. Indeed, the record reflects that Plaintiff submitted and received responses to many grievances from his arrival at LCF until his transfer to Davis Correctional Facility, both before and after the incidents at issue, and submitted many appeals, both before and after the incidents at issue. (*See* Section III.B, *infra*.) Defendants Adams, Dawson, and Rios are entitled to judgment on Plaintiff's Claim Four for retaliatory excessive force.[9]

V. The Court Should Deny The Remaining Motions Pending In This Case As Moot.

Plaintiff additionally sought preliminary injunctive relief (Doc. 317) and asked for leave to supplement his request (Docs. 320, 321). Defendants requested permission to seal

[9] The undersigned additionally notes that Plaintiff's claim of retaliatory excessive force is grounded on the argument that he was twice handcuffed, without cause and too tightly. (Doc. 20, at 41-44; Doc. 254, at Ex. 1, at 2). "[I]n order to succeed on such a claim, a plaintiff must show some actual injury that is not *de minimis*, be it physical or emotional." *Koch v. City of Del City*, 660 F.3d 1228, 1247 (10th Cir. 2011). Plaintiff has not, and these incidents thus do not rise to the level of a constitutional violation.

certain exhibits to be submitted in response to Plaintiff's request (Doc. 322), and Plaintiff requested a copy of those sealed exhibits (Doc. 324). Based on the recommendation to grant summary judgment in favor of all Defendants, the undersigned recommends these pending motions be denied as moot.

VI. Recommendation and Notice of Right to Object

Based on the foregoing, it is recommended that the Court **GRANT** Defendants' Motions for Summary Judgment (Docs. 235, 237, 238, and 239) and **DENY** the remaining motions pending in this case (Docs. 317, 320, 321, 322, 324) as **MOOT.**

The undersigned advises Plaintiff of his right to file an objection to this Report and Recommendation with the Clerk of Court on or before February 2, 2023, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises Plaintiff that failure to file a timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge and terminates the referral unless and until the matter is re-referred.

ENTERED this 12th day of January, 2023.

Amanda Maxfield Green
AMANDA MAXFIELD GREEN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

EZEKIEL DAVIS, Plaintiff, v. GEO GROUP CORRECTIONS, INC., *et al.*, Defendants.	)	Case No. CIV-16-00462-PRW

ORDER

Before the Court is United States Magistrate Judge Amanda Maxfield Green's Report and Recommendation (Dkt. 330) and Plaintiff Davis's Objections (Dkt. 334). For the reasons given below, the Court **ADOPTS** Magistrate Judge Green's Report and Recommendation in full, **GRANTS** the defendants' pending motions for summary judgment (Dkts. 235, 237, 238, 239), and **DENIES AS MOOT** the remaining motions pending in this case (Dkts. 317, 320, 321, 322, 324).

Plaintiff Ezekiel Davis, a *pro se* state prisoner serving a life sentence for murder, filed this § 1983 action against the Lawton Correctional Facility ("LCF"), a private prison owned and operated by Defendant GEO Group. Davis's original complaint of four claims against sixteen defendants has been pared down to two remaining claims against seven remaining defendants. These remaining claims are for a "violation of [his] Eighth Amendment right to adequate medical services" and for "excessive force [used] against

[him] in retaliation for exercising [his] constitutional rights."[1] After reviewing the matter, Magistrate Judge Green recommended that the Court grant the pending motions for summary judgment and deny the remaining pending motions as moot. Davis timely filed objections to the Report and Recommendation.

The Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to."[2] An objection is "proper" if it is both timely and specific.[3] A specific objection "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute."[4] In the absence of a proper objection, the district court may review a magistrate judge's recommendation under any standard it deems appropriate.[5] The Court thus reviews the unobjected-to portions of the Report and Recommendation to confirm that there is no clear error on the face of the record.[6] And because Davis is proceeding *pro se*, the Court construes his objections and filings liberally without serving as his advocate.[7]

Davis raises just one specific objection to the Report and Recommendation. That objection concerns a letter Davis claims he sent to Defendant Daniel Ronay detailing allegations of inadequate medical care and constitutional violations. According to Davis,

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[1] R. & R. (Dkt. 330), at 3.

[2] Fed. R. Civ. P. 72(b)(3).

[3] *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996).

[4] *Id.*

[5] *Summers v. State of Utah*, 927 F.2d 1165, 1167–68 (10th Cir. 1991).

[6] *Id.*

[7] *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Magistrate Judge Green erroneously concluded that he had not sent a letter to Ronay, claiming she overlooked evidence of a letter sent on April 7, 2016.[8] But even with this potential factual dispute about whether Davis sent the letter and whether Ronay received it, the Court nevertheless finds, upon *de novo* review with respect to this issue, that the undisputed evidence shows "Ronay [was] not deliberately indifferent to Plaintiff's medical needs."[9]

Davis's remaining objections fail to meaningfully address the Report and Recommendation: He simply rehashes identical arguments previously raised in his responses to the motions for summary judgment. But "[a]n 'objection' that merely reargues the underlying motion is little different than an 'objection' that simply refers the District Court back to the original motion papers; both are insufficiently specific to preserve the issue for *de novo* review."[10] Further, in rehashing his previously raised arguments, Davis has not specifically identified any legal or factual errors committed by Magistrate Judge Green.[11] But whether reviewing for clear error or conducting *de novo*

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[8] Pl.'s Obj. (Dkt. 334), at 25.

[9] R. & R. (Dkt. 330), at 21.

[10] *Vester v. Asset Acceptance, L.L.C.*, No. 1:08-cv-01957-MSK-LTM, 2009 WL 2940218, at *8 (D. Colo. Sept. 9, 2009) (citing *United States v. One Parcel of Real Prop.: 2121 E. 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996)).

[11] *See id.* ("[I]t is necessary for a party objecting to a recommendation to identify the particular factual or legal error committed by the Magistrate Judge, allowing the District Court to focus on that issue and correct it if necessary. . . ." (citing *One Parcel of Real Prop.*, 73 F.3d at 1060)); *see also One Parcel of Real Prop.*, 73 F.3d at 1060 ("[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court . . . ."); *Paulsen v. Christner*, No. 21-1367, 2022 WL 2165858, at *1 (10th Cir. June 16, 2022) ("[The

review, the Court would reach the same conclusions as contained in the Report and Recommendation. For both his Eighth Amendment and excessive-force claims, Davis has not "present[ed] affirmative evidence . . . to defeat [Defendants'] properly supported motion[s] for summary judgment."[12] And as to the Eighth Amendment claim in particular, "[s]ummary judgment requires more than mere speculation. It requires some *evidence,* either direct or circumstantial, that [the defendants] knew about and consciously disregarded" a substantial risk of serious harm arising from Davis's symptoms.[13] Davis hasn't raised a genuine issue about whether the defendants consciously disregarded that risk or whether they had actual knowledge of his condition and refused to pursue further treatment.[14] At best, he has raised only "mere speculation" as to the defendants' culpable state of mind.[15]

For the foregoing reasons, the Court agrees with Magistrate Judge Green's analysis and conclusions. The Court thus **ADOPTS** the Report and Recommendation (Dkt. 330) in full; **GRANTS** Defendants' motions for summary judgment (Dkts. 235, 237, 238, 239);

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plaintiff's] objections did not specifically address any of the magistrate judge's conclusions. Instead, the objections merely reargued, in the most general fashion, the merits of his claims." (citing *One Parcel of Real Prop.*, 73 F.3d at 1060)).

[12] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

[13] *See Self v. Crum*, 439 F.3d 1227, 1235 (10th Cir. 2006).

[14] *See id.* at 1233 ("[A plaintiff] must surmount two obstacles to avoid summary judgment: (1) a showing of the objective seriousness of the medical risk he faced . . . and (2) a showing of [the defendant's] culpable state of mind. The latter may be demonstrated by a showing of either [the defendant's] (a) conscious disregard of a substantial risk of serious harm arising from [the plaintiff's] symptoms, or (b) actual knowledge of [the plaintiff's] . . . condition and refusal to order further treatment.").

[15] *See id.* at 1235.

and **DENIES AS MOOT** the remaining motions pending in this case (Dkts. 317, 320, 321, 322, 324).

IT IS SO ORDERED this 16th day of March 2023.

PATRICK R. WYRICK
UNITED STATES DISTRICT JUDGE