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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KENNETH SCHULTZ,
Plaintiff,
v.
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
et al.,
Defendants.

Case No. 1: 11-cv-00988-LJO-MJS (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS TO:

- 1) DENY PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT (ECF No. 51.)
- 2) DENY DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT (ECF No. 71.)
- 3) GRANT PLAINTIFF'S MOTION FOR
CORRECTION (ECF No. 77.)

Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action brought pursuant to 42 U.S.C. § 1983. (ECF Nos. 1 & 6.) The action proceeds against Defendant Kim on Plaintiff's Eighth Amendment inadequate medical care claim. (ECF Nos. 9 & 22.) The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 of the United States District Court for the Eastern District of California.

On September 14, 2015, the Magistrate Judge issued Findings and Recommendations to deny Plaintiff's motion for summary judgment (ECF No. 51.), deny Defendant's motion for summary judgment (ECF No. 71.), and grant Plaintiff's motion

1 for correction (ECF No. 77.). On September 17, 2015, Defendant filed objections to the
2 Findings and Recommendations. (ECF No. 80.) Plaintiff filed objections and a
3 response to Defendant's objections. (ECF Nos. 81, 82, 83.)

4 In accordance with the provisions of 28 U.S.C. § 636(b)(1), the Court has
5 conducted a de novo review of this case. Having carefully reviewed the entire file, the
6 Court finds the Findings and Recommendations to be supported by the record and by
7 proper analysis.

8 Defendant contends that although the Magistrate Judge accurately laid out the
9 case law for a medical indifference claim, the Judge failed to properly analyze the
10 undisputed facts under that authority. Defendant disputes the finding that Plaintiff's
11 medical records contradict Dr. Barnett's declaration, that he failed to provide treatment
12 for Plaintiff's chronic fatigue syndrome and depression, that he acted with medical
13 indifference by not prescribing Plaintiff any pain medication, and that any factual
14 disputes exist foreclosing a ruling on qualified immunity.

15 In response, Plaintiff contends that Defendant never told him to diet and exercise
16 in order to treat his chronic fatigue syndrome and depression; Plaintiff has always been
17 underweight and could not exercise at the time.

18 The Court has reviewed the parties' cross-motions for summary judgment and
19 will address Defendant's objections in turn.

20 Dr. Barnett opined that Dr. Kim's advice to Plaintiff on July 22, 2009 to "live with
21 the pain" was reasonable given Plaintiff "was jogging daily." (ECF No. 71-3 at 6.) The
22 Magistrate Judge's finding that during that time, Plaintiff complained of having difficulty
23 walking and not being able to jog is supported by the record. Plaintiff's medical records
24 indicate that: on July 12, 2009 Plaintiff complained it was "often hard to pick things up
25 off the floor or just to walk" (ECF No. 51 at 38.); on August 2, 2009, Plaintiff complained
26 "muscle pain getting worse. Getting hard to walk now." (ECF No. 51 at 42.); and on
27 August 4, 2009, Plaintiff reported "I can't jog anymore." (ECF No. 51 at 43.) Plaintiff's
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1 report several months later that he was able to jog if he took ibuprofen does not change
2 the contradiction in Dr. Barnett's declaration about Plaintiff's ability to jog daily when Dr.
3 Kim saw him in July 2009.

4 Defendant argues he treated Plaintiff by recommending that he diet and exercise.
5 Defendant's progress notes lists "diet, exercise" under the section for "education
6 provided." (ECF No. 71-3 at 23.) It does not state whether this was the treatment
7 available and/or provided for Plaintiff's pain nor does Dr. Kim's declaration shed light on
8 the treatment available and provided to Plaintiff. (ECF No. 71-2 at 1-3.) In his
9 opposition, Plaintiff avers that Defendant never told him to diet and exercise, that he
10 was already underweight, and his medical records indicate he was unable to exercise at
11 the time. These factual disputes support the Magistrate Judge's finding that the record
12 was not clear on what treatment was available and provided to Plaintiff.

13 The Magistrate Judge did not recommend that Defendant's motion be denied
14 because he did not provide Plaintiff with a pain medication other than Naproxen. The
15 Magistrate Judge simply noted another ambiguity in the record regarding Defendant's
16 argument that Plaintiff was already taking Naproxen for his pain.

17 Because of the above factual disputes and ambiguities in the record, the
18 Magistrate Judge correctly recommended that Defendant is not entitled to summary
19 judgment on qualified immunity grounds

20 In Plaintiff's objections, he essentially rehashes his arguments raised in his
21 motion for summary judgment. He argues that his administrative appeal and medical
22 records clearly demonstrate that Defendant acted with deliberate indifference. Plaintiff's
23 objections also do not raise an issue of law or fact under the Findings and
24 Recommendations.

25 Accordingly, it is HEREBY ORDERED that:

- 26 1. The Court adopts the Findings and Recommendations (ECF No. 79.) filed
27 on September 14, 2015 in full;

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2. Plaintiff's motion for summary judgment (ECF No. 51.) is DENIED;
 3. Defendant's motion for summary judgment (ECF No. 71.) is DENIED; and
 4. Plaintiff's motion for correction (ECF No. 77.) is GRANTED.

IT IS SO ORDERED.

Dated: November 17, 2015

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE