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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID HABIG,

Plaintiff,

No. 2:09-cv-1819 KJN P

vs.

W. MCALLISTER,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. On February 9, 2010, defendants filed a motion to dismiss on the grounds that plaintiff failed to exhaust his administrative remedies prior to filing the instant action. On March 31, 2010, plaintiff filed an opposition to the motion to dismiss in which he concedes he failed to exhaust his administrative remedies prior to filing the instant action, but argues he should be allowed to proceed based on delays by prison officials in providing a third level review. Defendants filed a reply.¹

Plaintiff is proceeding on his original complaint against defendants W.

¹ Plaintiff filed an opposition to defendants' reply on June 3, 2010. On June 14, 2010, defendants filed objections to that filing. Defendants' position is well-taken. Local Rule 230(l) makes no provision for the filing of a surreply. Thus, plaintiff's June 3, 2010 filing will be disregarded.

1 McAllister, M. Sabin, J. Bick, R. L. Andreason, W. J. Sinkovich, J. Weber, K. Dickinson, and
2 Stephen Kotarek (collectively “defendants”). Plaintiff alleges defendants were deliberately
3 indifferent to his serious medical needs by failing to properly treat a boxer fracture to plaintiff’s
4 right hand, which was sustained on June 13, 2008. Plaintiff seeks declaratory and injunctive
5 relief, monetary and punitive damages. (Complt. at 25.)

6 Legal Standard

7 The Prison Litigation Reform Act of 1995 (“PLRA”) amended 42 U.S.C. § 1997e
8 to provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C.
9 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
10 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
11 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S.
12 516, 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding the conditions of
13 their confinement, whether they involve general circumstances or particular episodes, and
14 whether they allege excessive force or some other wrong. Porter, 534 U.S. at 532.

15 Exhaustion of all “available” remedies is mandatory; those remedies need not
16 meet federal standards, nor must they be “plain, speedy and effective.” Id. at 524; Booth v.
17 Churner, 532 U.S. 731, 740, n.5 (2001). Even when the prisoner seeks relief not available in
18 grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. Booth, 532
19 U.S. at 741. A prisoner “seeking only money damages must complete a prison administrative
20 process that could provide some sort of relief on the complaint stated, but no money.” Id. at
21 734.²

22 A prisoner need not exhaust further levels of review once he has either received

23 _____
24 ² The fact that the administrative procedure cannot result in the particular form of relief
25 requested by the prisoner does not excuse exhaustion because some sort of relief or responsive
26 action may result from the grievance. See Booth, 532 U.S. at 737; see also Porter, 534 U.S. at
525 (purposes of exhaustion requirement include allowing prison to take responsive action,
filtering out frivolous cases, and creating administrative records).

1 all the remedies that are “available” at an intermediate level of review, or has been reliably
2 informed by an administrator that no more remedies are available. Brown v. Valoff, 422 F.3d
3 926, 934-35 (9th Cir. 2005). Because there can be no absence of exhaustion unless some relief
4 remains available, a movant claiming lack of exhaustion must demonstrate that pertinent relief
5 remained available, whether at unexhausted levels or through awaiting the results of the relief
6 already granted as a result of that process. Brown, 422 F.3d at 936-37.

7 As noted above, the PLRA requires proper exhaustion of administrative remedies.
8 Woodford v. Ngo, 548 U.S. 81, 83-84 (2006). “Proper exhaustion demands compliance with an
9 agency's deadlines and other critical procedural rules because no adjudicative system can
10 function effectively without imposing some orderly structure on the course of its proceedings.”
11 Id. at 90-91. Thus, compliance with prison grievance procedures is required by the PLRA to
12 properly exhaust. Id. The PLRA's exhaustion requirement cannot be satisfied “by filing an
13 untimely or otherwise procedurally defective administrative grievance or appeal.” Id. at 83-84.

14 The State of California provides its prisoners the right to appeal administratively
15 “any departmental decision, action, condition or policy which they can demonstrate as having an
16 adverse effect upon their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). It also provides them
17 the right to file appeals alleging misconduct by correctional officers and officials. Id. at
18 § 3084.1(e). In order to exhaust available administrative remedies within this system, a prisoner
19 must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal
20 on a 602 inmate appeal form, (3) second level appeal to the institution head or designee, and
21 (4) third level appeal to the Director of the CDCR. Barry v. Ratelle, 985 F.Supp. 1235, 1237
22 (S.D. Cal. 1997) (citing Cal.Code Regs. tit. 15, § 3084.5). A final decision from the Director's
23 level of review satisfies the exhaustion requirement under § 1997e(a). Id. at 1237-38.

24 Non-exhaustion under § 1997e(a) is an affirmative defense which should be
25 brought by defendants in an unenumerated motion to dismiss under Federal Rule of Civil
26 Procedure 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Moreover, the court

1 may look beyond the pleadings to determine whether a plaintiff exhausted his administrative
2 remedies. Id. at 1119-20.

3 Analysis

4 Plaintiff sustained his injury on June 13, 2008. (Complt. at 4.) Plaintiff alleges
5 two different inmate grievances exhausted his administrative remedies: CMF-06-08-13200 and
6 CMF-06-09-10103. (Complt., Ex. E.) Those two grievances were the only ones submitted by
7 plaintiff between June 13, 2008, and July 1, 2009, the date the instant action was filed.
8 (McKenzie Decl. at ¶ 3.) Those grievances were not exhausted through the Director’s Level
9 Review prior to the filing of this action.³ (Walker Decl. at ¶ 5.)

10 Plaintiff concedes he failed to exhaust those remedies prior to filing the instant
11 action. However, plaintiff asks the court to apply out-of-circuit authority to find he has
12 exhausted administrative remedies based on purposeful, excessive delay at the final level of
13 review. (Opp’n at 3, 18.) Plaintiff relies on Boyd v. Corrections Corp. of America, 380 F.3d 989
14 (6th Cir. 2004):

15 [S]everal circuits have held that the exhaustion requirement is
16 satisfied where prison officials fail to timely respond to an inmate's
17 written grievance. See Jernigan v. Stuchell, 304 F.3d 1030, 1032
18 (10th Cir. 2002) (“[W]e agree that the failure to respond to a
19 grievance within the time limits contained in the grievance policy
20 renders an administrative remedy unavailable[.]”); Lewis v.
21 Washington, 300 F.3d 829, 833 (7th Cir. 2002) (“We join the
22 Eighth and Fifth circuits on this issue because we refuse to
23 interpret the PLRA ‘so narrowly as to . . . permit [prison officials]
24 to exploit the exhaustion requirement through indefinite delay in
25 responding to grievances.’”); Fouk v. Charrier, 262 F.3d 687, 698
26 (8th Cir. 2001) (“[O]nce [the prison] failed to respond to [the
prisoner's written grievance], no further administrative proceedings
were ‘available’ to him.”); Powe v. Ennis, 177 F.3d 393, 394 (5th
Cir. 1999) (per curiam) (“A prisoner's administrative remedies are
deemed exhausted when a valid grievance has been filed and the
state's time for responding thereto has expired.”). Following the
lead of the four other circuits that have considered this issue, we

25 ³ Grievance CMF-08-13200 was exhausted through the final level of review on
26 December 30, 2009, after the filing of the instant action. (Walker Decl. ¶5.) Grievance CMF-06-
09-1013 remains pending at the final level of review. (Walker Decl. ¶5.)

1 conclude that administrative remedies are exhausted when prison
2 officials fail to timely respond to a properly filed grievance.

3 Boyd, 380 F.3d at 996.

4 In Boyd, the court held that Boyd had exhausted his administrative remedies
5 because:

6 [he] specifically alleged that (1) he submitted a grievance form by
7 giving it to a corrections officer, (2) the grievance covered “the
8 events of the evening of August 11, 1998,” (3) the grievance was
9 delivered to the Grievance Chairperson, who is designated in the
10 grievance procedure as the appropriate recipient of grievances, and
11 (4) prison officials totally failed to respond to the grievance.

12 Id.

13 Grievance CMF-06-08-13200

14 Defendants contend that the instant case differs on its facts from Boyd because
15 plaintiff contributed to the delay in CMF-06-08-13200 by raising new issues and not providing
16 complete information, resulting in the grievance being screened out twice before it was accepted.
17 (Reply at 3, citing Walker Decl. ¶ 6.) Moreover, prison officials obtained plaintiff’s Unit Health
18 Records and had them reviewed by a licensed clinical staff “to provide a meaningful third level
19 response.” (Reply at 3, citing Walker Decl., Ex. 1, § IV, ¶ 2.) Defendants contend there was no
20 effort to avoid responding to the grievance, but instead defendants expended time to provide an
21 appropriate response. (Reply at 3.)

22 The Court of Appeals for the Ninth Circuit has not yet decided whether
23 exceptions to the exhaustion requirement exist. However, other circuits have held that the
24 exhaustion requirement is satisfied when prison officials prevent exhaustion from occurring
25 through misconduct, or fail to respond to a grievance within the system’s time limits. See, e.g.,
26 Boyd, 380 F.3d at 996 (reciting cases). The majority of these courts are concerned that potential
prison official defendants should not be able to avoid being sued by not responding to an inmate
appeal. See id. (“We join the Eighth and Fifth circuits on this issue because we refuse to
interpret the PLRA’ so narrowly as to . . . permit [prison officials] to exploit the exhaustion

1 requirement through indefinite delay in responding to grievances.")

2 In the instant action, prison officials did not fail to respond to plaintiff's grievance
3 CMF-06-08-13200; rather, their decision issued on December 30, 2009. Defendants have
4 provided evidence that plaintiff contributed to the delay in processing of this grievance. (Walker
5 Decl.) Moreover, plaintiff's claim involved a medical claim, which required the collection of
6 medical records and review by an appropriately licensed staff person. (Id.) Plaintiff has failed to
7 rebut this evidence. Exhaustion is mandatory and is not required to be speedy. Porter, 534 U.S.
8 at 524; Booth, 532 U.S. at 740, n.5. The Court of Appeals for the Ninth Circuit has decided that
9 exhaustion may not be completed while a lawsuit is pending. McKinney v. Carey, 311 F.3d
10 1198, 1200-01 (9th Cir. 2002). Thus, CMF-06-08-13200 does not constitute exhaustion prior to
11 the filing of the instant action, and plaintiff's claims contained therein should be dismissed
12 without prejudice.

13 Grievance CMF-06-09-10103

14 In their motion, defendants confirm grievance CMF-06-09-10103 is still pending,
15 but fail to address any alleged delays in ruling on that grievance.

16 Grievance CMF-06-09-10103 was signed on January 17, 2009 (Dkt. No. 17-4 at
17 9.) It was denied at the first level on March 5, 2009. (Dkt. No. 17-4 at 8.) It was submitted to
18 the second level review on March 11, 2009 (id.), and denied at the second level review on May
19 22, 2009. (Dkt. No. 17-4 at 2.)

20 Plaintiff does not provide the date CMF-06-09-10103 was submitted to the third
21 level review, and neither do defendants, but on February 25, 2009, plaintiff claimed it had been
22 pending ten months after its submission.⁴ (Opp'n at 5.) Given proper filing procedure, plaintiff
23 should have submitted his third level appeal no sooner than May 23, 2009, after prison officials
24

25 ⁴ Calculating ten months prior to February 25, 2010, the date plaintiff signed the
26 opposition, it would mean he submitted his third level appeal in April of 2009, prior to the
second level decision.

1 denied his appeal at the second level. Plaintiff must comply with an agency's deadlines and
2 procedures. Woodford, 548 U.S. at 83-84. While the record does not make clear whether or not
3 plaintiff submitted his third level grievance too early, the earliest proper submission date of May
4 23, 2009, makes his July 1, 2009 filing in federal court premature as he did not allow prison
5 officials at least sixty days⁵ in which to render their decision. Because plaintiff failed to properly
6 exhaust his administrative grievance CMF-06-09-10103 prior to filing the instant action, his
7 claims related to this grievance must also be dismissed.

8 In light of the above, defendants' motion to dismiss should be dismissed, without
9 prejudice, based on plaintiff's failure to exhaust his state remedies prior to filing the instant
10 action.

11 Consent

12 Plaintiff filed a consent to the jurisdiction of a United States Magistrate Judge on
13 July 13, 2009. Defendants have not responded to the court's October 15, 2009 Order re Consent.
14 Accordingly, the Clerk of Court will be directed to assign a district judge to this action.

15 Conclusion

16 In accordance with the above, IT IS HEREBY ORDERED that:

- 17 1. Plaintiff's June 3, 2010 filing is disregarded (Dkt. No. 23); and
- 18 2. The Clerk of the Court is directed to assign a district judge to this case.


19 IT IS HEREBY RECOMMENDED that defendants' February 9, 2010 motion to
20 dismiss (Dkt. No. 17) be granted and this action be dismissed without prejudice.

21 These findings and recommendations are submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
23 one days after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned

25 ⁵ "Third level responses shall be completed within 60 working days." Cal. Code Regs.
26 tit. 15, § 3084.6 (b) (4) (2009).

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
2 objections shall be filed and served within fourteen days after service of the objections. The
3 parties are advised that failure to file objections within the specified time may waive the right to
4 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: June 16, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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