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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 BOBBY LAYTHEN BINFORD,

10 Plaintiff,

11 v.

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13 MEDICAL DIRECTOR KENNEY,
14 NURSE ALAN BAILEY, and DOCTOR
15 JOHN SMITH,

16 Defendants.

NO. 4:14-cv-5103-SAB

17
18 **ORDER GRANTING**
19 **DEFENDANTS' MOTION FOR**
20 **SUMMARY JUDGMENT**
21

22 Plaintiff Bobby Laythen Binford is currently serving a life sentence at the
23 Washington State Penitentiary. Binford filed a pro se civil rights complaint on
24 September 30, 2014 alleging violations of 42 U.S.C. § 1983 arising from a failure
25 to provide treatment for Hepatitis C. ECF No. 1. Binford was granted in forma
26 pauperis status, ECF No. 6, and was ordered to amend or voluntarily dismiss his
27 complaint. ECF No. 8. He filed a First Amended Complaint on December 29,
28 2014. On August, 18, 2015, all defendants filed a Motion for Summary Judgment,
ECF No. 33, which is now before the Court. The motion was heard without oral
argument.

Binford has had Hepatitis C since at least the early 1990s. He underwent
treatment in 1993 but did not complete the regimen. In 2008, he again underwent a

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1 treatment regimen—it was considered unsuccessful. A liver biopsy performed in
2 2008 produced a METAVIR score of A2/F2.¹ In late 2012, Binford again sought
3 treatment for Hepatitis C. Defendant Alan Bailey informed Binford that to receive
4 treatment his case would need to be presented to the Hepatitis C Care Review
5 Committee. Binford's initial appointment had to be delayed because he was placed
6 in the Intensive Management Unit. Dr. Rodriguez's vacation again delayed
7 Binford's appointment, and then the doctor's transfer to another facility pushed it
8 back further. Although Defendant Dr. John Smith replaced Dr. Rodriguez, he did
9 not begin seeing Hepatitis C patients immediately so that he could familiarize
10 himself with the treatment protocols. In the meantime, Binford saw a nurse at least
11 once, and again requested treatment for his Hepatitis C.

12 On December 14, 2013, Binford met with Dr. Smith regarding his request
13 for treatment. Dr. Smith recommended they present his case to the Review
14 Committee in March 2014. He also began treating Binford for hypertension at that
15 time. On February 12, 2014, the two met again and discussed the process for
16 obtaining approval for Hepatitis C treatment. The next week, Dr. Smith presented
17 Binford's treatment request to the Review Committee. The Review Committee
18 approved Binford for a liver biopsy. Binford was told if his biopsy came back with
19 a score of F3 or higher, he would qualify for further Hepatitis C treatment. The
20 biopsy came back with a METAVIR score of A2/F2. Because the fibrosis score
21 remained below F3, Binford was denied treatment for Hepatitis C. Because

22
23 ¹ A METAVIR score is a method of grading conditions observed in the liver. The
24 METAVIR score consists of two parts, a fibrosis score which measures the
25 scarring of tissue—rated from F0 (no scarring) to F4 (cirrhosis)—and an activity
26 score—from A0 (no activity) to A3 (severe activity). Plaintiff appears to conflate
27 other indications regarding fibrosis with his METAVIR score. The fibrosis
28 METAVIR score goes by stages and only consists of whole numbers (F0, F1, F2,
F3 or F4). Additionally, one chart completed by a physician's assistant likewise
conflates a fibrosis indication of two to three out of four, as 2¾. As noted, the liver
biopsy was found to be a METAVIR F2. See ECF No. 35-2 at 38.

1 Binford has failed to present any evidence that would enable a jury to find the
2 defendants liable, Defendants' motion to dismiss must be granted.

3 **MOTION STANDARD**

4 Summary judgment is appropriate if the "pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with the affidavits, if any, show
6 that there is no genuine issue as to any material fact and that the moving party is
7 entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317,
8 323 (1986) (citing Fed. R. Civ. P. 56(c)). There is no genuine issue for trial unless
9 there is sufficient evidence favoring the nonmoving party for a jury to return a
10 verdict in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250
11 (1986). The moving party has the burden of showing the absence of a genuine
12 issue of fact for trial. Celotex, 477 U.S. at 325.

13 In addition to showing that there are no questions of material fact, the
14 moving party must show that it is entitled to judgment as a matter of law. Smith v.
15 Univ. of Wash. Law Sch., 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party
16 is entitled to judgment as a matter of law if the non-moving party has failed to
17 make a sufficient showing on an essential element of a claim on which the non-
18 moving party has the burden of proof. Celotex, 477 U.S. at 323. The non-moving
19 party cannot rely on conclusory allegations alone to create an issue of material
20 fact. Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993).

21 When considering a motion for summary judgment, a court may neither
22 weigh the evidence nor assess credibility; instead, "[t]he evidence of the non-
23 movant is to be believed, and all justifiable inferences are to be drawn in his
24 favor." Anderson, 477 U.S. at 255.

25 **ANALYSIS**

26 The Government's failure to meet its obligation to provide medical care for
27 "those whom it is punishing by incarceration" may constitute an Eighth
28 Amendment violation cognizable under 42 U.S.C. § 1983. Estelle v. Gamble, 429

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1 U.S. 97, 103-05 (1976). For a plaintiff to prevail on a constitutional claim for
2 inadequate medical care, he must show “deliberate indifference” to a “serious
3 medical need.” *Id.* at 104. Deliberate indifference includes “both an objective
4 standard—that the deprivation was serious enough to constitute cruel and unusual
5 punishment—and a subjective standard—deliberate indifference.” *Snow v.*
6 *McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012).

7 The objective prong requires a plaintiff to demonstrate the existence of a
8 “serious medical need.” *Estelle*, 429 U.S. at 104. A medical need is serious if
9 failure to treat the condition “could result in further significant injury [or cause]
10 the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,
11 1096 (9th Cir. 2006) (internal citations omitted). Considerations include whether a
12 “reasonable doctor or patient would find [the condition] worthy of comment or
13 treatment; the presence of a medical condition that significantly affects an
14 individual’s daily activities; or the existence of chronic and substantial
15 pain.” *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992) overruled in
16 part on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.
17 1997) (*en banc*).

18 A prisoner official meets the subjective element of deliberate indifference
19 only if the official “knows of and disregards an excessive risk to inmate health and
20 safety.” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (internal citations
21 omitted). To be deliberately indifferent, the official must not only “be aware of
22 facts from which the inference could be drawn that a substantial harm exists” but
23 also actually draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
24 When a prison official denies, delays, or intentionally interferes with medical
25 treatment deliberate indifference may exist. *Hutchinson v. United States*, 883 F.2d
26 390, 394 (9th Cir. 1988). A mere difference of medical opinion between medical
27 personnel regarding treatment options does not, however, raise a valid deliberate
28 indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). A court

1 does not need to defer to the judgment of prison doctors or administrators in
2 evaluating a deliberate indifference claim. *Hunt v. Dental Dep't*, 865 F.2d 198,
3 200 (9th Cir. 1989).

4 Defendants assert that because Binford did not qualify for further Hepatitis
5 C treatment under the Washington Department of Corrections (“DOC”) policy and
6 protocol he was not suffering from a serious medical need. Binford cites to the
7 seriousness of Hepatitis C generally and to his various symptoms and maladies
8 which he links to the disease.

9 Simply because Plaintiff does not warrant treatment under DOC policy does
10 not necessarily indicate Plaintiff does not suffer from a serious medical need. If
11 that were the case, DOC could avoid otherwise constitutionally mandated
12 treatment by simply writing it out of their policy. See *Johnson v. California*, 543
13 U.S. 499, 508-511 (2005) (finding Eighth Amendment claims are not subject to a
14 deference to institutional policy standard); *Hunt*, 865 F.2d at 200 (stating courts
15 need not differ to judgment of prison doctors in evaluating a deliberate
16 indifference claim). Defendants also provide several declarations explaining the
17 justifications for denying Plaintiff the treatment he sought.

18 Hepatitis C certainly may qualify as a serious medical need. See *Erickson v.*
19 *Pardus*, 551 U.S. 89 (2007) (reversing an order to dismiss an Eighth Amendment
20 claim based on removal from a Hepatitis C treatment program); *Tatum v. Winslow*,
21 122 Fed. Appx. 309 (9th Cir. 2005) (affirming denial of motion to dismiss Eighth
22 Amendment claim regarding Hepatitis C treatment). However, infection with the
23 Hepatitis C virus by itself may not always present a serious medical need due to
24 the nature of the virus. See Andrew Brundsen, *Hepatitis C in Prisons: Evolving*
25 *Toward Decency Through Adequate Medical Care and Public Health Reform*, 54
26 *UCLA L. REV.* 465, 473 (2006).

27 Viewing the evidence in the light most favorable to Plaintiff—the non-
28 moving party—a jury could conclude that Plaintiff’s Hepatitis C condition

1 constitutes a serious medical need. A jury could credit Plaintiff's statements
2 regarding his symptoms and could interpret the evidence of Plaintiff's liver biopsy
3 to determine his condition is serious.

4 Defendants also argue Binford has failed to present evidence of disputed
5 material fact regarding the subjective component necessary under the deliberate
6 indifference standard as to any defendant. Although Binford alleges Defendant
7 Bailey "slow-walked" his request for treatment, he provides no evidence of Bailey
8 intentionally delaying the process for applying for treatment. Instead, evidence
9 indicates any delays were caused by Binford being placed in the Intensive
10 Management Unit, a doctor's vacation and subsequent transfer to a different
11 facility, a waiting list, and the need for a newly hired doctor to familiarize himself
12 with the Hepatitis C treatment protocol. Binford does not present any evidence to
13 refute this. Binford fails to present any evidence regarding any Defendants'
14 subjective state of mind. The uncontested evidence in the record suggests
15 Defendants followed DOC protocol for the treatment of Hepatitis C. Although, as
16 previously noted, adherence to a DOC policy does not, on its own, mean the
17 Eighth Amendment has been satisfied, see *Johnson*, 543 U.S. 499, it certainly
18 militates against finding that these specific defendants acted with deliberate
19 indifference.

20 Binford's primary complaint is that the DOC's Hepatitis C protocol is based
21 solely on cost rather than medical necessity. Binford is correct in asserting that
22 lack of resources alone cannot justify a failure to treat when the Eighth
23 Amendment otherwise mandates it—at least when injunctive relief alone is sought.
24 See *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014). When damages are
25 sought, however, an individual defendant may consider resources in determining a
26 course of action. *Id.* Binford's challenge to the policy must fail for several reasons.

27 First, Binford has presented no evidence—nor has he even alleged—that
28 any of the named defendants had any role in the creation of the policy to which he

1 objects. Second, an inmate is not entitled to the best or most expensive cutting-
2 edge medical treatment. Instead, inmates must be provided medically acceptable
3 treatment under the circumstances. See *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th
4 Cir. 1996) (stating when officials select one of two medically acceptable courses
5 of treatment available there is no deliberate indifference). Third, Binford's only
6 purported evidence of finite resources being a driving factor in the creation of the
7 policy is a news article that quotes a DOC official discussing how new and
8 effective medication—which costs up to \$90,000 for treatment—is unlikely to be a
9 solution to the Hepatitis C epidemic throughout the prison system. This statement,
10 which did not address how the DOC's current Hepatitis C policy was created, is
11 insufficient even at the summary judgment stage.

12 This is not a case where a plaintiff has been denied any medical treatment in
13 light of his complaints. Instead, Binford has had his Hepatitis C monitored, he has
14 been treated with medication in the past, and a recent biopsy was performed on his
15 liver to determine if his condition had deteriorated to the point where further
16 treatment was advisable. This is not a case where any treating physician has
17 determined treatment was necessary despite a policy which dictates otherwise.
18 Instead, Binford has been unsuccessfully treated in the past. He complained anew
19 and additional tests were ordered. It was found that Binford's liver condition had
20 not substantially changed and that treatment was not medically advisable given his
21 current condition. Binford disagrees with the medical assessment and wants
22 treatment nonetheless. He believes that he is being denied treatment based solely
23 on the cost of treatment and that any policy that denies him this treatment is
24 unacceptably based solely on cost. He has no evidence to back up these
25 allegations. Binford cannot be blamed for desiring the newest and best Hepatitis C
26 treatment but he is not constitutionally entitled to it. In short, Binford has failed to
27 make the requisite showing to survive Defendants' motion for summary judgment.
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1 In Plaintiff's responsive briefing he includes a request that this Court allow
2 additional discovery prior to deciding the motion on summary judgment. Plaintiff
3 does not present a compelling argument to delay this order. Additionally, because
4 the Court finds that summary judgment is warranted on the merits, it does not
5 address Defendants' affirmative qualified immunity defense.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. Defendants' Motion for Summary Judgment, ECF No. 33, is

8 **GRANTED.**

9 2. Defendants' Motion for Extension of Scheduling Order Deadlines, ECF

10 No. 45, is **dismissed as moot.**

11 3. Judgment shall be entered in favor of all defendants.

12 4. All previously set court dates, including the trial date, are **STRICKEN.**

13 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
14 enter this Order, enter judgment, provide copies to counsel and Plaintiff, and **close**
15 **the file.**

16 **DATED** this 2nd day of November 2015.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

22 Stanley A. Bastian

23 United States District Judge
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