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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RANDY E. PERKINS,

CASE NO. 1:08-cv-01282-GSA PC

Plaintiff,

ORDER DENYING MOTION FOR LEAVE TO
FILE SUPPLEMENTAL COMPLAINT AS
MOOT, AND DENYING MOTION FOR
COUNSEL

v.

JAMES A. YATES, et al.,

(Docs. 16 and 17)

Defendants.

ORDER DISMISSING STATE LAW CLAIMS
WITHOUT PREJUDICE FOR LACK OF
JURISDICTION, DISMISSING ACTION WITH
PREJUDICE FOR FAILURE TO STATE A
CLAIM UNDER SECTION 1983, AND
DIRECTING CLERK OF COURT TO ENTER
JUDGMENT

(Doc. 17)

Screening Order

I. Motion for Leave to File Supplemental Complaint

Plaintiff Randy E. Perkins, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 and California law on August 29, 2008. On February 6, 2009, the Court dismissed Plaintiff’s complaint, with leave to amend, for failure to state any claims under section 1983. On May 12, 2009, after Plaintiff failed to comply with the order, this action was dismissed. Upon receipt of Plaintiff’s motion for an extension of time on May 12, 2009, the Court vacated the dismissal order on May 14, 2009, and granted Plaintiff sixty days within which

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1 to file an amended complaint. On July 17, 2009, Plaintiff filed an amended complaint and a motion
2 seeking leave to file a supplemental complaint.

3 Plaintiff was granted leave to amend and his amended complaint was timely filed. Plaintiff's
4 motion for leave to file a supplemental complaint is denied. Fed. Civ. P. 15(d). Because leave to
5 file a supplemental complaint generally contemplates the filing of a separate pleading setting forth
6 newly accrued claims, Plaintiff's motion is denied as moot given that Plaintiff's amended complaint
7 filed on July 17, 2009, incorporates all of his claims.

8 **II. Motion for Counsel**

9 In his amended complaint, Plaintiff seeks the appointment of counsel. Plaintiff does not have
10 a constitutional right to appointed counsel in this action, Rand v. Rowland, 113 F.3d 1520, 1525 (9th
11 Cir. 1997), and the Court cannot require an attorney to represent Plaintiff pursuant to 28 U.S.C. §
12 1915(e)(1). Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296,
13 298, 109 S.Ct. 1814, 1816 (1989). However, in certain exceptional circumstances the Court may
14 request the voluntary assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at 1525.

15 Without a reasonable method of securing and compensating counsel, the Court will seek
16 volunteer counsel only in the most serious and exceptional cases. In determining whether
17 "exceptional circumstances exist, the district court must evaluate both the likelihood of success of
18 the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity
19 of the legal issues involved." Id. (internal quotation marks and citations omitted).

20 In the present case, the Court does not find the required exceptional circumstances. Even if
21 it is assumed that Plaintiff is not well versed in the law and that he has made serious allegations
22 which, if proved, would entitle him to relief, his case is not exceptional. The Court is faced with
23 similar cases almost daily. Further, based on a review of the record in this case, the Court does not
24 find that Plaintiff cannot adequately articulate his claims, and the Court finds, as set forth below, that
25 Plaintiff's federal claims lack merit. Id. Accordingly, Plaintiff's motion for counsel, set forth in his
26 amended complaint, is denied.

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1 **III. Screening Requirement**

2 The Court is required to screen complaints brought by prisoners seeking relief against a
3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
4 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
5 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
6 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
7 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
8 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
9 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

10 A complaint must contain “a short and plain statement of the claim showing that the pleader
11 is entitled to relief . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
12 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
13 do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v.
14 Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). “[P]laintiffs [now] face a higher
15 burden of pleadings facts . . .,” Al-Kidd v. Ashcroft, 580 F.3d 949, 977 (9th Cir. 2009), and while a
16 plaintiff’s allegations are taken as true, courts “are not required to indulge unwarranted inferences,”
17 Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and
18 citation omitted).

19 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations
20 sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret
21 Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of
22 meeting this plausibility standard. Id.

23 **IV. Plaintiff’s Amended Complaint**

24 **A. Summary of Bases for Claims**

25 Plaintiff is incarcerated at Pleasant Valley State Prison (PVSP) in Coalinga, California.
26 Plaintiff, who was transferred to PVSP on July 7, 2005, alleges that Warden James A. Yates, Chief
27 Medical Officer F. Igbinsosa, and Does 1-5 have a duty to protect medically vulnerable prisoners from

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1 placement and/or retention in facilities where Valley Fever is endemic, such as PVSP, and in failing
2 to transfer Plaintiff due to his medical needs, acted with deliberate indifference to his health.

3 At the time of Plaintiff's transfer to PVSP, he was not on any prescription medications. In
4 October of 2005, Plaintiff had a tumor removed from the frontal lobe of his brain at an outside
5 hospital. Shortly after the operation, Plaintiff began experiencing increasing migraine headaches,
6 loss of vision, and equilibrium imbalance. In November of 2005, Plaintiff began to suffer from
7 symptoms associated with Valley Fever. Plaintiff began complaining to prison officials and was
8 finally diagnosed with Valley Fever based on a blood test conducted on February 6, 2006. In March
9 2006, Plaintiff was placed on Diflucan therapy and remained on the medication until September
10 2007, at which time he was taken off the medication based on the determination that he had been
11 cured.

12 Plaintiff's health problems continued, however, despite a serology report indicating that
13 while Plaintiff was positive for coccidioidal antibodies, his titer was "very favorably low." (Doc.
14 17, Amend. Comp., court record p. 17, ¶11.) Plaintiff alleges that the health problems that originated
15 during the time he was ill with Valley Fever never subsided and continued to increase in severity
16 until Plaintiff became dependent upon multiple medications, most of which were to aid his breathing.
17 Plaintiff alleges the damage to his respiratory system caused by his long bout with Valley Fever
18 persists and continues to worsen, leaving him susceptible to reinfection with Valley Fever and
19 problems due to poor air quality.

20 In late 2008 or early 2009, Plaintiff alleges that he became reinfected with Valley Fever.
21 Plaintiff was again placed on Diflucan therapy, which was expected to last into August 2009 or later.
22 Plaintiff alleges that if he is not moved to another prison in a different geographical area, he will
23 continue to be at risk of again contracting Valley Fever and his life is in danger.

24 **B. Eighth Amendment Claims**

25 The Eighth Amendment protects prisoners from inhumane methods of punishment and from
26 inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006).
27 Extreme deprivations are required to make out a conditions of confinement claim, and only those
28 deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form

1 the basis of an Eighth Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct. 995
2 (1992) (citations and quotations omitted). In order to state a claim for violation of the Eighth
3 Amendment, the plaintiff must allege facts sufficient to support a claim that prison officials knew
4 of and disregarded a substantial risk of serious harm to the plaintiff. E.g., Farmer v. Brennan, 511
5 U.S. 825, 847, 114 S.Ct. 1970 (1994); Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

6 **1. Transfer to and Retention at PVSP**

7 Plaintiff alleges an Eighth Amendment claim premised on basis that, given his medical
8 condition rendering him vulnerable to Valley Fever, his transfer to and continued retention at PVSP
9 is a constitutional violation because the location of the prison is in an area where Valley Fever is
10 endemic and constitutes a substantial risk of harm to Plaintiff. Plaintiff alleges that in failing to
11 transfer him despite his numerous requests and his medical condition, Defendants are acting with
12 deliberate indifference.

13 Assuming that the risk of contracting Valley Fever is higher at PVSP than in other areas of
14 the state and that the disease is fatal in some cases, as alleged, the Court declines to find that the
15 prison itself, due to its location, constitutes a substantial risk of harm to inmates. There is no support
16 for such a sweeping proposition and the Court finds that Plaintiff's Eighth Amendment claim arising
17 from the mere fact that he is being housed at PVSP and prison officials will not transfer him
18 elsewhere, to the extent one is alleged, is not cognizable under section 1983. E.g., Dorsey v. Tilton,
19 No. 08cv0919-JAH (JMA), 2009 WL 5030642, at *9 (E.D. Cal. Dec. 16, 2009); King v. Martell, No.
20 1:07-cv-01283-AWI-GSA (PC), 2009 WL 546212, at *4 (E.D. Cal. Mar. 4, 2009). To the extent
21 that Plaintiff suffered or is suffering from serious medical needs which are not being addressed by
22 prison officials, that claim is addressed in the following section. Plaintiff's Eighth Amendment
23 claim that PVSP itself presents a substantial risk of harm to Plaintiff's health and that the failure of
24 prison officials to transfer him violates the Eighth Amendment is dismissed, with prejudice.

25 **2. Disregard of Medical Needs**

26 **a. Defendant Igbinsosa**

27 Defendant Igbinsosa, as Chief Medical Officer, reviewed Plaintiff's inmate appeal at the
28 second level of review, at which time Plaintiff was seeking, in part, a medical transfer out of PVSP.

1 (Amend. Comp., court record pp. 46-48, & 52-53.) Defendant Igbinsosa denied the request for a
2 transfer on the grounds that there was no indication Plaintiff's primary care provider was
3 recommending a transfer, and that it was not medically necessary for Plaintiff to be transferred at that
4 time. (Id., p. 53.)

5 Under section 1983, Plaintiff must demonstrate that the defendants holding supervisory
6 positions personally participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930,
7 934 (9th Cir. 2002). There is no respondeat superior liability, and each defendant is only liable for
8 his or her own misconduct. Iqbal at 1948-49.

9 In general, review of an appeal and the issuance of an adverse decision do not provide a basis
10 for the imposition of liability on the reviewer. George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007).
11 Further, the existence of an administrative remedy process does not create any substantive rights
12 such that dissatisfaction with the reviewer's findings and rulings supports a claim for relief for
13 violation of a constitutional right. Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003); Mann v.
14 Adams, 855 F.2d 639, 640 (9th Cir. 1988); Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001).

15 Here, there is no support for a finding that Defendant Igbinsosa was personally involved in
16 acting with deliberate indifference to Plaintiff's serious medical needs or that Igbinsosa knew
17 Plaintiff's constitutional rights were being violated by subordinate staff but failed to prevent the
18 violations. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); also Corales v. Bennett, 567 F.3d
19 554, 570 (9th Cir. 2009); Preschooler II v. Clark County School Board of Trustees, 479 F.3d 1175,
20 1182 (9th Cir. 2007); Jett v. Penner, 439 F.3d 1091, 1098 (9th Cir. 2006); Harris v. Roderick, 126
21 F.3d 1189, 1204 (9th Cir. 1997). Rather, based on his review of Plaintiff's inmate appeal, Igbinsosa
22 concluded Plaintiff was not entitled to a medical transfer. (Amend. Comp., pp. 52-53.) Plaintiff's
23 disagreement with the decision that a medical transfer was not indicated does not support a claim
24 under section 1983, Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981), and Plaintiff fails to
25 state a claim against Defendant Igbinsosa, Iqbal at 1949-50; Moss, 572 F.3d at 969.¹

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27 ¹ Plaintiff alleges that Defendant Igbinsosa overlooked his chief complaint of lung damage and difficulty
28 breathing and instead misconstrued Plaintiff's appeal as seeking a transfer from an area endemic for cocci. In filing
his appeal at the first level, Plaintiff sought, in part, a "transfer from hyperendemic area for coccidioidomycosis."
(Amend. Comp., p. 46.) At the second level of review, Plaintiff stated that he is in the small percentage of people

1 **b. Defendant Yates**

2 Plaintiff alleges that Defendant Igbinsosa’s response to his inmate appeal was made on behalf
3 of Defendant Warden Yates and “with [Yates’] knowledge and tacit approval.” (Amend. Comp.,
4 p. 21, ¶18.) In support of his assertion that Igbinsosa acted on behalf of Yates, Plaintiff cites to Cal.
5 Code Regs., tit. 15 § 3084.5, which provides that the second level review of an inmate appeal be
6 conducted by the institution head or his designee.

7 Defendant Yates may not be held liable under section 1983 for the actions Igbinsosa took in
8 reviewing and deciding Plaintiff’s appeal, Iqbal at 1948-49, and no other basis for liability is
9 presented, Jett, 439 F.3d at 1098; Taylor, 880 F.2d at 1045. Accordingly, Plaintiff fails to state a
10 claim against Defendant Yates under section 1983.

11 **c. Doe Defendants 1-5**

12 Doe Defendants 1-4 are staff physicians, and Doe 5 is an infectious disease specialist.
13 Plaintiff alleges that, given their knowledge that Plaintiff was susceptible to contracting the disease,
14 Does 1-5 violated his constitutional rights by failing to ensure that Plaintiff was transferred from
15 PVSP and out of the area known to them to be endemic for Valley Fever. (Amend. Comp., pp. 23-
16 25, ¶¶26-29.)

17 Plaintiff’s disagreement with the medical treatment he received from staff physicians at
18 PVSP and the infectious disease specialist, including either their decision that a medical transfer was
19 not necessary or their failure to suggest a medical transfer, does not support a claim under section
20 1983. Franklin, 662 F.2d at 1344. The Court finds that Plaintiff has not alleged facts supporting a
21 claim that Does 1-5 violated his rights under the Eighth Amendment.

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25 who do not recover from cocci and that he was left with lung damage. (Id., p. 48.) Plaintiff stated that the treatment
26 he was receiving was not working, it was becoming difficult to breathe, and he wanted a transfer before any
27 recurrence caused his condition to become irreversible. (Id.) Plaintiff’s request constituted one for a medical
28 transfer, and Igbinsosa found no indication that Plaintiff’s doctor had recommended one and stated that a transfer was
not medically necessary. Based on the allegations and exhibits, there is no support for the position that Igbinsosa
misconstrued or ignored the appeal issues to the extent that he knowingly disregarded a substantial risk of harm to
Plaintiff. Farmer, 511 U.S. at 837.

1 **V. Conclusion and Order**

2 Plaintiff's amended complaint does not state any cognizable claims for relief under section
3 1983. Plaintiff was previously given leave to amend to cure the deficiencies in his claims, and the
4 Court finds that further leave to amend is not warranted. Noll v. Carlson, 809 F.2d 1446, 1448-49
5 (9th Cir. 1987). The Court does not reach Plaintiff's state law claims because absent the existence
6 of a viable federal claim, the Court lacks jurisdiction over the state claims. 28 U.S.C. § 1367(a);
7 Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 805 (9th Cir. 2001). The state claims
8 shall be dismissed, without prejudice, and this action shall be dismissed, with prejudice, for failure
9 to state a claim under section 1983.

10 Accordingly, it is HEREBY ORDERED that:

- 11 1. Plaintiff's motion for leave to file a supplemental complaint, filed July 17, 2009, is
12 denied as moot;
- 13 2. Plaintiff's motion for counsel, set forth in his amended complaint, is denied;
- 14 3. Plaintiff's state law tort claims are dismissed, without prejudice, for lack of subject
15 matter jurisdiction;
- 16 4. This action is dismissed, with prejudice, for failure to state a claim under section
17 1983; and
- 18 5. The Clerk of the Court shall enter judgment.

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21 IT IS SO ORDERED.

22 **Dated: January 11, 2010**

/s/ Gary S. Austin
23 UNITED STATES MAGISTRATE JUDGE
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