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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CARLOS HERRERA,

Plaintiff,

v.

C. HALL, et al.,

Defendants.

CASE NO. 1:08-cv-01882-LJO-SMS PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING GRANTING DEFENDANTS
GRANNIS, HALL, MOONGA, AND ZAMORA’S
MOTION FOR SUMMARY JUDGMENT

(ECF Nos. 68, 70, 71, 72, 73, 75, 76)

/ OBJECTIONS DUE WITHIN THIRTY DAYS

I. Procedural History

Plaintiff Carlos Herrera (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on the first amended complaint, filed June 19, 2009, against Defendants Lopez, Hall, Grannis, Turella, Penner, Zamora, and Moonga for deliberate indifference to serious medical needs.¹ On October 27, 2010, Defendant Turella filed a motion for summary judgment. (ECF No. 67.) On October 29, 2010, Defendants Grannis, Hall, Moonga, and Zamora filed a motion for summary judgment. (ECF No. 68.) Plaintiff filed oppositions to both motions, a statement of disputed facts, a motion to deny Defendants Grannis, Hall, Moonga, and Zamora’s motion for summary judgment, and a declaration on November 29, 2010.² (ECF Nos. 69, 70, 71, 72, 73.) Defendant Turella filed a reply on

¹Defendants Dill and Bluford were dismissed from the action for Plaintiff’s failure to effect service of process on August 30, 2010. (ECF No. 65.)

² Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment by the Court in an order filed on August 14, 2009. Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

1 December 2, 2010. (ECF No. 74.) Defendants Grannis, Hall, Moonga, and Zamora filed a reply on
2 December 3, 2010. (ECF No. 75.) Plaintiff filed a surreply on December 16, 2010. (ECF No. 76.)
3 On May 11, 2011, the parties were directed to file supplemental briefs on Defendant Turella's
4 motion for summary judgment. (ECF No. 78.)

5 **II. Motion for Summary Judgment**

6 **A. Legal Standard**

7 Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate when
8 it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party
9 is entitled to judgment as a matter of law. Summary judgment must be entered, "after adequate time
10 for discovery and upon motion, against a party who fails to make a showing sufficient to establish
11 the existence of an element essential to that party's case, and on which that party will bear the burden
12 of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). However, the court is to
13 liberally construe the filings and motions of pro se litigants. Thomas v. Ponder, 611 F.3d 1144, 1150
14 (9th Cir. 2010.) The "party seeking summary judgment bears the initial responsibility of informing
15 the district court of the basis for its motion, and identifying those portions of the 'pleadings,
16 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'
17 which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S.
18 at 323 (quoting Rule 56(c) of the Federal Rules of Civil Procedure).

19 If the moving party meets its initial responsibility, the burden then shifts to the opposing
20 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.
21 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence
22 of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is
23 required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery
24 material, in support of its contention that the dispute exists. Fed. R. Civ. P. 56(e); Matsushita, 475
25 U.S. at 586 n.11. If the non-moving party fails to establish that a genuine issue for trial exists "the
26 moving party is entitled to judgment as a matter of law." Long v. County of Los Angeles, 442 F.3d
27 1178, 1185 (9th Cir. 2006) (quoting Celotex, 477 U.S. at 323).

28 The parties bear the burden of supporting their motions and oppositions with the papers they

1 wish the Court to consider and/or by specifically referencing any other portions of the record for
2 consideration. Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001).
3 The Court will not undertake to mine the record for triable issues of fact. Simmons v. Navajo
4 County, Arizona, 609 F.3d 1011, 1017 (9th Cir. 2010).

5 **B. Summary of Plaintiff's Allegations**

6 In February 2003, Plaintiff was diagnosed with Hepatitis C. Plaintiff alleges that he was
7 eligible for treatment pursuant to the prison medical protocol that was in place from May 2004
8 through January 2009. Beginning May 5, 2004, Plaintiff requested that he receive a combination
9 therapy as treatment for his Hepatitis C from Defendants Turella, Lopez, and Penner. Additionally,
10 from May 5, 2004 through October 25, 2008, Plaintiff requested that a liver biopsy be performed.
11 Plaintiff's requests were denied based on his age and false reports that were placed in his medical
12 file.

13 In October 2006, Plaintiff requested combination therapy from Defendant Lopez. Defendant
14 Lopez informed Plaintiff that he did not qualify for treatment due to his drug history and mental
15 health history. Since Plaintiff did not have a history of drug use or mental health issues he requested
16 his medical records. A review of his medical records found that another inmate's records were
17 placed in his medical file. These records did indicate a pattern of mental illness and drug history.

18 In April 2007, Plaintiff filed an administrative appeal claiming that he was being wrongfully
19 denied treatment based upon another inmate's medical records being in his medical file. In July
20 2007, Plaintiff informed Defendant Lopez about the false reports, but Defendant Lopez still refused
21 to provide the requested treatment. Plaintiff's administrative appeal was denied by Defendants
22 Grannis, Hall, Moonga, and Zamora.

23 **C. Undisputed Facts**³

- 24 1. Defendant Moonga has been licensed as a Registered Nurse in California since 2005
25 and has been working as a Registered Nurse for the California Department of
26

27 ³Plaintiff submits a document titled "Plaintiff's Statement of Disputed Facts." (ECF No. 71.) The facts will
28 not be replicated here as the facts listed in the document are not in dispute. The document argues that he submitted
his appeal because of false reports in his medical file and each defendant reviewed his medical file and was aware of
the false reports.

1 Corrections and Rehabilitation (CDCR) at Kern Valley State Prison (KVSP) since
2 2007.

3 2. Defendant Zamora was the acting Health Care Manager at KVSP from May 2006 to
4 September 2008.

5 3. Defendant Hall was an Appeals Examiner and Facility Captain for the CDCR'S
6 Inmate Appeals Branch in 2008.

7 4. Defendant Grannis was the Chief of the CDCR'S Inmate Appeals Branch in 2008.

8 5. There is an inmate appeal system within the CDCR and at KVSP.

9 6. Plaintiff submitted an appeal, dated April 25, 2007, which claimed that he had been
10 diagnosed with Hepatitis C and that he was not receiving appropriate treatment.

11 7. Plaintiff requested treatment with the medication Interferon or, if he did not receive
12 the requested treatment, then an explanation why.

13 8. Plaintiff then appealed to the second level of review, at which point Defendant
14 Moonga became involved in the review of Plaintiff's appeal.

15 9. In responding to inmate appeals, the community standard for a nurse is to review the
16 patient's appeal, conduct an interview with the inmate if one has not yet been
17 conducted, review pertinent portions of the patient's medical record, and, if
18 medically appropriate, ensure that he is being seen clinically regarding his medical
19 issues.

20 10. In preparing a response to Plaintiff's appeal, Defendant Moonga conducted an
21 interview with Plaintiff on August 19, 2007, during which time Plaintiff largely re-
22 stated the contents of his inmate appeal.

23 11. Plaintiff's medical records showed that Plaintiff was seen by Defendant Lopez on
24 July 25, 2007, for a regular follow-up regarding his Hepatitis C.

25 12. Defendant Lopez ordered a liver panel and a follow-up.

26 13. On August 22, 2007, Plaintiff was seen for another follow-up with Defendant Lopez
27 and another liver panel and a follow-up were ordered.

28 14. Since Plaintiff was scheduled to be seen for another regular follow-up, Defendant

1 Moonga told him to speak with his doctor during that examination about why
2 Interferon therapy was not medically appropriate at that time.

3 15. Following the second level decision on his appeal, Plaintiff then appealed to the third
4 level of review.

5 16. In signing the amended second level response, Defendant Zamora reviewed the
6 responses that had previously been provided.

7 17. In reviewing Plaintiff's appeal, Defendant Hall noted that Plaintiff was under the
8 clinical management of Defendant Lopez who had been monitoring Plaintiff's
9 condition on a monthly basis.

10 18. Finally, Defendant Hall noted that Plaintiff had been encouraged to address his
11 questions regarding Interferon treatment to Defendant Lopez during his next
12 examination.

13 19. As Chief of the Inmate Appeals Branch, Defendant Grannis then reviewed Plaintiff's
14 appeal on approximately April 29, 2008.

15 20. In reviewing Plaintiff's appeal, Defendant Grannis noted that Plaintiff was under the
16 clinical management of Defendant Lopez who had been monitoring Plaintiff's
17 condition on a monthly basis.

18 21. Finally, Defendant Grannis noted that Plaintiff had been encouraged to address his
19 questions regarding Interferon treatment to Defendant Lopez during his next
20 examination.

21 **D. Deliberate Indifference to Serious Medical Needs**

22 Liability under section 1983 exists where a defendant "acting under the color of law" has
23 deprived the plaintiff "of a right secured by the Constitution or laws of the United States." Jensen
24 v. Lane County, 222 F.3d 570, 574 (9th Cir. 2000). In order to be held liable each defendant must
25 have personally participated in the deprivation of the plaintiff's rights. Ashcroft v. Iqbal, 129 S. Ct.
26 1937, 1949 (2009); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

27 A prisoner's claim of inadequate medical care does not constitute cruel and unusual
28 punishment unless the mistreatment rises to the level of "deliberate indifference to serious medical

1 needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S.
2 97, 104 (1976)). The "deliberate indifference" standard involves an objective and a subjective
3 prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious." Farmer v.
4 Brennan, 511 U.S. 825, 834 (1994) (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Second, the
5 prison official must act with a "sufficiently culpable state of mind," which entails more than mere
6 negligence, but less than conduct undertaken for the very purpose of causing harm. Farmer, 511 U.S.
7 at 837.

8 The two part test for deliberate indifference requires the plaintiff to show (1) "a 'serious
9 medical need' by demonstrating that failure to treat a prisoner's condition could result in further
10 significant injury or the 'unnecessary and wanton infliction of pain,'" and (2) "the defendant's
11 response to the need was deliberately indifferent." Conn v. City of Reno, 591 F.3d 1081, 1095 (9th
12 Cir. 2010) (quoting Jett, 439 F.3d at 1096). A prison official does not act in a deliberately indifferent
13 manner unless the official "knows of and disregards an excessive risk to inmate health or safety."
14 Farmer, 511 U.S. at 837. "Deliberate indifference is a high legal standard," Simmons v. Navajo
15 County, Arizona, 609 F.3d 1011, 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th
16 Cir. 2004), and is shown where there was "a purposeful act or failure to respond to a prisoner's pain
17 or possible medical need" and the indifference caused harm, Conn, 591 F.3d at 1095 (quoting Jett,
18 439 F.3d at 1096).

19 In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's
20 civil rights have been abridged, "the indifference to his medical needs must be substantial. Mere
21 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." Broughton
22 v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980), citing Estelle, 429 U.S. at 105-06. "[A]
23 complaint that a physician has been negligent in diagnosing or treating a medical condition does not
24 state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does
25 not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at
26 106; see also Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995); McGuckin v. Smith,
27 974 F.2d 1050, 1050 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104
28 F.3d 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish

1 deliberate indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334
2 (9th Cir. 1990). A prisoner’s mere disagreement with diagnosis or treatment does not support a
3 claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).

4 **1. Defendants’ Arguments**

5 Defendants Grannis, Hall, Zamora, and Moonga argue that they are entitled to summary
6 judgment and dismissal from this action on the grounds there is no evidence to support the claims
7 asserted against them, alternately they are entitled to qualified immunity. On April 25, 2007,
8 Plaintiff submitted an appeal claiming that he was not receiving appropriate medical treatment after
9 being diagnosed with Hepatitis C. (Undisputed Fact (“UF”) 6.) Plaintiff requested that he be treated
10 with the medication Interferon or, if treatment was denied, an explanation of why the treatment was
11 denied. (UF 7.)

12 Defendant Moonga reviewed Plaintiff’s appeal at the second level of review. (UF 8.) As a
13 registered nurse Defendant Moonga is not qualified or permitted to order medical care to a patient
14 that his physician has determined is not appropriate. (Declaration of Defendant Moonga, ¶ 3.) The
15 community standard for a nurse responding to Plaintiff’s appeal was to review the inmate appeal,
16 conduct an interview with the inmate if he had not previously been interviewed, review the medical
17 records, and if medically appropriate, ensure that he is being seen clinically regarding his medical
18 issues. (UF 9.)

19 Defendant Moonga received and reviewed Plaintiff’s inmate appeal. (Declaration of
20 Defendant Moonga, ¶ 4.) At the first level of review Plaintiff was informed that his most recent liver
21 function test, which was normal, did not qualify him for the treatment he was requesting. (Id., Exh.
22 A.) On August 19, 2007, Defendant Moonga interviewed Plaintiff at which time Plaintiff essentially
23 restated the contents of his inmate appeal. (UF 10.)

24 Defendant Moonga reviewed Plaintiff’s medical records which revealed that Plaintiff was
25 seen by Defendant Lopez for a regular follow-up regarding his Hepatitis C on November 30, 2006,
26 and a liver panel was ordered. Plaintiff was seen by Defendant Lopez for a regular follow-up
27 appointment on July 25, 2007, and a liver panel was ordered. Plaintiff was scheduled for another
28 follow-up appointment with Defendant Lopez on August 22, 2007. During these appointments

1 Defendant Lopez had determined that the therapy Plaintiff was requesting was not medically
2 appropriate. (Declaration of Defendant Moonga, ¶ 7.)

3 Based upon the review of Plaintiff's medical records, Defendant Moonga determined that
4 Plaintiff was being closely and regularly monitored for his medical condition and the treating
5 physician had determined that the requested treatment was not medically indicated. Plaintiff had a
6 follow-up appointment scheduled and Defendant Moonga advised him to speak with his doctor about
7 why the requested treatment was not medically appropriate. (Id., ¶ 8.) Plaintiff's appeal indicated
8 that another inmate's medical record had been mistakenly placed into his medical chart, however a
9 review of Plaintiff's records did not give any indication that the decision to deny the requested
10 treatment was based upon another inmate's medical records. (Id., ¶ 10.)

11 Defendant Zamora was acting Health Care Manager from May 2006 to September 2008. (UF
12 2.) Defendant Zamora's duties are entirely administrative and she is not medically trained. She does
13 not have the authority to recommend or order medical treatment. (Declaration of Defendant Zamora,
14 ¶ 3.) Because the second level response to Plaintiff's inmate appeal had been signed by Defendant
15 Moonga and not the Health Care Manager, it was given to Defendant Zamora to sign. (Id., ¶ 9.)
16 Defendant Zamora reviewed the appeal and saw that Defendant Moonga had interviewed Plaintiff
17 and reviewed the pertinent portions of his medical file. Additionally, she noted that Plaintiff was
18 being regularly seen by Defendant Lopez and that Defendant Lopez had determined that the
19 treatment Plaintiff was requesting was not medically appropriate. Plaintiff had a follow-up
20 appointment three days prior to Defendant Zamora's review of the appeal and she noted that
21 Defendant Lopez had again found the requested treatment was not medically necessary. Based upon
22 this review of the appeal Defendant Zamora concluded that Plaintiff was being regularly seen by the
23 appropriate medical staff regarding his medical condition. (Id., ¶ 10.)

24 Defendant Hall was an Appeals Examiner and Facility Captain for the Inmate Appeals
25 Branch. (UF 3.) As an Appeals Examiner Defendant Hall does not make treatment decisions, but
26 after reviewing the relevant data and information, either confirms or rejects the institutions treatment
27 decisions. (Declaration of Matthew Ross, Exhibit B, p. 3.) In reviewing Plaintiff's inmate appeal
28 Defendant Hall noted that Plaintiff was under the clinical management of Defendant Lopez, his

1 medical condition was being monitored on a monthly basis, and Plaintiff had been encouraged to
2 address his questions regarding treatment to Defendant Lopez at his next medical appointment. (UF
3 17, 18.) Defendant Hall reviewed the facts, data, and information associated with Plaintiff's appeal
4 and confirmed the institutions decision. (Declaration of Matthew Ross, Exhibit B, p. 5.) The denial
5 of Plaintiff's inmate appeal on April 29, 2008, was based upon the treating physician's
6 recommendations. (Id., Exhibit B, p. 2, 4.)

7 Defendant Grannis reviewed Plaintiff's appeal on approximately April 29, 2008. (UF 19.)
8 California Code of Regulations, Title 15 section 3354 establishes that only qualified medical
9 personnel shall be permitted to diagnose and treat medical conditions. (Declaration of Matthew
10 Ross, Exhibit A, p. 5.) In reviewing Plaintiff's inmate appeal Defendant Grannis also noted that
11 Plaintiff was under the clinical management of Defendant Lopez, his medical condition was being
12 monitored on a monthly basis, and Plaintiff had been encouraged to address his questions regarding
13 treatment to Defendant Lopez at his next medical appointment. (UF 20.) The evidence reviewed
14 by Defendant Grannis revealed that Plaintiff was receiving appropriate care for his medical condition
15 and the treatment Plaintiff was requesting had been determined to be medically unnecessary.
16 (Declaration of Matthew Ross, Exhibit A, p. 7.) As Chief of the Inmate Appeals Branch, Defendant
17 Grannis reviewed the appeal response and decision of Defendant Hall and gave final approval. (Id.,
18 Exhibit A, p. 2.)

19 Defendants argue that it is clear that the defendants were not deliberately indifferent to
20 Plaintiff's medical needs. Defendant Moonga's response to the appeal was appropriate. Defendant
21 Moonga interviewed Plaintiff, reviewed his medical records, and found that Plaintiff was being
22 regularly examined by his physician who had determined the treatment requested by Plaintiff was
23 not medically indicated. Defendant Moonga could not have ordered the treatment Plaintiff was
24 seeking and is entitled to summary judgment.

25 Defendants Zamora, Hall and Grannis were only involved in reviewing Plaintiff's inmate
26 appeal. Each of them reviewed Plaintiff's appeal and determined that Plaintiff was being regularly
27 examined by his physician who had determined that the treatment he was requesting was not
28 medically appropriate. Defendants Zamora, Hall, and Grannis are not medically trained and could

1 not grant Plaintiff's request that he receive the treatment he was seeking. None of these defendants
2 were qualified to pass clinical judgment on the care Plaintiff was receiving and are entitled to
3 summary judgment.

4 Alternately, Defendants are entitled to qualified immunity. No official in the position of
5 these defendants would reasonably believe that reviewing a medical appeal for an inmate requesting
6 he be treated with Interferon, and denying that appeal because it was determined that the inmate was
7 being regularly treated by a physician who had determined the treatment was not medically indicated,
8 would have violated a clearly established right of the inmate.

9 **2. Plaintiff's Opposition**

10 Plaintiff makes the same argument for all defendants, that they were deliberately indifferent
11 to his serious medical need because they were aware that he was denied treatment based upon
12 another inmate's medical records being included in his medical file and continued to deny him
13 treatment. Defendants Hall, Zamora, Grannis, and Moonga are not entitled to qualified immunity
14 because they realized there were false medical records in his medical file and that he was denied
15 treatment because of those records. This shows they were "plainly incompetent and knowingly
16 violated the law." (Mot. To Deny Summary Judgment Motion 4, ECF No. 72.)

17 Plaintiff argues that Defendants could have granted his appeal and he would have received
18 the treatment that he was requesting. The results of his liver panel tests from November 16, 2005
19 through January 10, 2006, qualified him for the treatment he requested. (Opp. 3, ECF No. 70.)
20 Additionally, Plaintiff argues that Defendant Moonga could have granted Plaintiff's appeal thereby
21 permitting him to receive the requested treatment. Although Defendants state that the treatment was
22 not medically indicated, the determination of whether or not the treatment was medically indicated
23 is not stated in the records. The records just reflect that the treatment was not ordered.

24 Since Defendant Lopez' findings that the treatment was not medically indicated are in
25 dispute, the Court should deny Defendants' motion for summary judgment. (Id. at 4.) Plaintiff
26 submits his liver panel results for July, August, and November of 2007, and argues that the test
27 results show that the treatment was appropriate. (Id. at 5.) Defendants reviewed Plaintiff's file and
28 knew that two treating physicians had recommended the treatment. (Declaration 2, ECF No. 73.)

1 **3. Defendants' Reply**

2 Defendants reply that in responding to the appeal they did not have authority to grant
3 Plaintiff's request for treatment. Defendant Moonga could not authorize treatment that was not
4 found to be appropriate by the treating physician. Although Plaintiff argues that Defendants were
5 aware that another inmate's medical records were in his medical file, the medical records reviewed
6 by Defendants did not give any indication that the clinical decisions were being made based on
7 another inmate's records.⁴

8 **4. Discussion**

9 Plaintiff alleges that Defendants exhibited deliberate indifference by denying his
10 administrative appeals. Defendant Moonga is a registered nurse and Defendants Zamora, Hall, and
11 Grannis are not medical personnel. Defendants were only involved in Plaintiff's case as officials that
12 denied Plaintiff's grievances at different levels of appeal. The prison grievance procedure does not
13 confer any substantive rights upon inmates and actions in reviewing and denying inmate appeals
14 cannot serve as a basis for liability under section 1983. Ramirez v. Galaza, 334 F.3d 850, 860 (9th
15 Cir. 2003); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988); Buckley v. Barlow, 997 F.2d 494,
16 495 (8th Cir. 1993). Plaintiff has established that he has a serious medical condition that required
17 he receive medical treatment. To establish liability for defendants involved in the denial of medical
18 grievances, Plaintiff must set forth evidence that the medical care he requested was medically
19 necessary and the denial therefore constituted deliberate indifference to his medical needs. See
20 Toguchi, 391 F.3d at 1058-1060. While Plaintiff claims that he was eligible to receive treatment
21 with Interferon, he has submitted no evidence to show that Defendants Moonga, Zamora, Hall, or
22 Grannis were aware that the treatment he was receiving was inappropriate and were deliberately
23

24
25 ⁴Defendants include a footnote stating that Plaintiff's opposition was due on November 18, 2010, and the
26 document was served on November 21, 2010. Defendants' request that the Court disregard Plaintiff's opposition.
27 (ECF No. 75.) Plaintiff filed a surreply requesting that the Court not disregard his opposition. Due to the prison
28 mail system, Plaintiff received the motion with only fifteen days to file his opposition. During the time Plaintiff was
to respond the prison was on lockdown and he was limited in his access to the law library. Plaintiff was not given
access to the law library until November 20, 2011. (ECF No. 76.) Defendants' motion was served on October 29,
2010. Plaintiff had twenty one days, plus three days for mailing, to respond. Fed. R. Civ. Proc. 6(d). Plaintiff's
opposition was due November 22, 2010. Since Plaintiff served the motion on November 21, 2010, the Court finds
his opposition was timely.

1 indifferent by failing to grant his appeal.

2 Although Plaintiff argues that he was denied treatment due to the inclusion of another
3 inmate's record in his medical file, he has submitted no evidence that this other inmate's record was
4 the basis of the decision to deny the treatment. Even if Defendant Lopez had indicated to Plaintiff
5 that he was not eligible for treatment with Interferon because of the inclusion of another inmate's
6 medical records in his medical file, the record reflects that this was not the reason that Plaintiff was
7 not receiving the treatment during the time period at issue in this action.

8 In the first level appeal response Plaintiff was informed that he did not qualify for the
9 treatment that he was requesting because his test results were normal. (Declaration of Defendant
10 Moonga, Exhibit A; Compl. 35, ECF No. 1.) Defendants reviewed Plaintiff's medical records and
11 found that Plaintiff was being regularly seen by Defendant Lopez who had determined that the
12 treatment Plaintiff was requesting was not medically indicated.

13 Plaintiff argues that Defendants were aware that the treatment with Interferon had been
14 ordered by two physicians, however, this is not supported by the record. A review of the exhibits
15 attached to Plaintiff's declaration shows that on July 24, 2006, Plaintiff was referred to the HCV
16 clinic as a new patient. (ECF No. 73 at 83.) An undated record states that treatment was
17 recommended. (*Id.* at 84.) When Plaintiff was seen on September 24, 2007, the results of his tests
18 were the same as his July and August results which indicated a possibility of performing a biopsy
19 and Plaintiff was referred to Defendant Lopez. (*Id.* at 89.) On October 25, 2007, Plaintiff's test
20 results were found to not be high enough for a biopsy. (*Id.* at 86.) The Court declines to find that
21 being referred to the clinic indicates that the physician found treatment with Interferon to be the
22 recommended course of treatment. Nor do any of the medical records supplied by Plaintiff and
23 reviewed by the Court recommend that Plaintiff receive Interferon as treatment for his Hepatitis.
24 While the records indicate that treatment of Plaintiff's disease was recommended, they do not specify
25 the type of treatment. Even if a physician had recommended the specific treatment Plaintiff desired
26 this would not establish that another physician was deliberately indifferent for deciding on a different
27 treatment option. *Sanchez*, 891 F.2d at 242.

28 While Plaintiff argues that he was denied Interferon because of this other inmate's medical

1 records showing a history of drug use and mental illness, this is not supported by the record. The
2 fact that records were misfiled in Plaintiff's medical file does not establish that they were the reason
3 for Defendant Lopez' treatment decisions where the medical records reflect a different reason.

4 Plaintiff argues that since Defendant Lopez' decision to deny him treatment with Interferon
5 is in dispute the motion for summary judgment should be denied. Plaintiff submits portions of the
6 medical protocol for the treatment of Hepatitis C and the results of his medical tests to support his
7 position that he was eligible for the therapy he was requesting under the medical protocol. Plaintiff's
8 disagreement with the treatment decisions made by Defendant Lopez are not sufficient to establish
9 a triable issue of fact. Fleming v. LeFevere, 423 F.Supp.2d 1064, 1070 (C.D. Cal. 2006) ("Plaintiff's
10 own opinion as to the appropriate course of care does not create a triable issue of fact because he has
11 not shown that he has any medical training or expertise upon which to base such an opinion.")

12 Defendants Grannis, Hall, and Zamora are not medical personnel and their involvement in
13 reviewing and evaluating Plaintiff's appeal would be to determine if he was receiving medical
14 treatment for his serious medical condition, not to determine the type of treatment Plaintiff should
15 be receiving. See Green v. Daley, 414 F.3d 645, 656 (7th Cir. 2005) (quoting Spruill v. Gillis, 372
16 F.3d 218, 236 (3rd Cir. 2004) ("If a prisoner is under the care of medical experts . . . a non-medical
17 prison official will generally be justified in believing that the prisoner is in capable hands").

18 Defendant Moonga reviewed Plaintiff's appeal, conducted an interview with Plaintiff,
19 reviewed the medical records, and verified that Plaintiff was being seen clinically regarding his
20 medical issues. Plaintiff's appeal was denied because his treatment request had been determined by
21 his treating physician to be medically unnecessary. While Plaintiff argues that Defendant Moonga
22 could have granted his appeal and he would have received the treatment he was requesting, he has
23 submitted no evidence to suggest that Defendant Moonga would have been able to override a treating
24 physician's medical decision regarding appropriate treatment for a patient.

25 The evidence presented by Defendants indicates that they denied Plaintiff's grievance based
26 upon the medical opinion of his treating physician that he was receiving treatment that was medically
27 appropriate. Defendants were aware that Plaintiff was being regularly seen by his physician and tests
28 were ordered to evaluate the progression of his disease. Although Plaintiff was of the opinion that

1 he should have received different medical treatment, a difference of opinion between an inmate and
2 prison medical officials regarding treatment does not give rise to a claim under § 1983. Plaintiff has
3 submitted no evidence to refute Defendants claims that during the review of Plaintiff's inmate
4 appeal, they reviewed the records and Plaintiff's appeal was denied because it was determined that
5 he was receiving regular medical care from his treating physician who had determined that the
6 treatment he was requesting was not medically necessary. Accordingly, Defendants motion for
7 summary judgment shall be granted.

8 **E. Qualified Immunity**

9 Defendants' final argument is that they are entitled to qualified immunity. Because the Court
10 recommends granting Defendants' motion based on the foregoing analysis, the Court does not reach
11 Defendants' argument that they are entitled to qualified immunity.

12 **III. Conclusion and Recommendation**

13 The Court finds that Defendant Grannis, Hall, Moonga, and Zamora are entitled to judgment
14 as a matter of law on Plaintiff's claims that they violated the Eighth Amendment by acting with
15 deliberate indifference to Plaintiff's medical needs. Accordingly, it is HEREBY RECOMMENDED
16 that Defendants Grannis, Hall, Moonga, and Zamora's motion for summary judgment, filed October
17 29, 2010, be GRANTED.

18 These findings and recommendations will be submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30)
20 days after being served with these findings and recommendations, the parties may file written
21 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
22 Findings and Recommendations." The parties are advised that failure to file objections within the
23 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
24 1153 (9th Cir. 1991).

25 IT IS SO ORDERED.

26 **Dated: May 16, 2011**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE